



# CAM AND SALLY'S STORY AND GETTING YOUR AFFAIRS IN ORDER

LEGAL PLANNING AND THE DEMENTIA JOURNEY

THE  LAW  
FOUNDATION  
OF BRITISH COLUMBIA

Alzheimer Society  
BRITISH COLUMBIA

# INTRODUCTION

When someone is diagnosed with Alzheimer’s disease or another dementia, life changes for them and their friends and family. Among other things, they must arrange how financial and health-care decisions will be made when the person is no longer able to do so.

## PART ONE: CAM AND SALLY’S STORY .....Page 1

This is the story of Cam and Sally, who visit a lawyer to learn about the legal tools available to them in British Columbia. We see how their arrangements work out at home, in care facilities, and within the family.

*Legal and ethical talking points*

Along the way they consider the possible legal, practical, and ethical consequences of the choices they make. Some of these “talking points” raise difficult questions that may have to be discussed with an advisor in order to resolve them.

Important terms are **coloured orange**. Click on these to find a more detailed explanation of their meaning, in Part Two. You can return to the story when you are ready.

## PART TWO: GETTING YOUR AFFAIRS IN ORDER.....Page 9

This section offers more detailed information about legal planning tools such as:

- An **enduring power of attorney**.
- A **representation agreement** (either a “section 7” or a “section 9” agreement).
- **“Committeeship”** proceedings under the *Patients Property Act*.
- An **advance directive**.

Throughout Part Two you will also find links to agencies and publications that may be helpful.

## SUMMARY OF LEGAL TOOLS: A REFERENCE CHART .....Page 24

### ACKNOWLEDGEMENTS

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# PART ONE: CAM AND SALLY'S STORY



Cam



Sally



Tom, Cam's son



Anne, Cam's daughter



Kate, Sally's daughter

## MEET CAM AND HIS FAMILY

Cam is a Chinese-Canadian man, age 75. He has two grown-up children from his first marriage: Tom and Anne. Tom has been estranged from Cam since his parents divorced.

Cam's new wife, Sally, is a Caucasian woman 15 years younger than he is. Tom disapproves of her, describing her as a "gold digger." Sally has a daughter, Kate, from a previous relationship, who was 10 years old when her mother married Cam. Kate and Cam have a close relationship.

Cam has always been a very quiet and private man, sticking carefully to a daily routine. Sally has noticed his behaviour changing over a period of months. Twice Cam became disoriented and confused while walking his dog, being led home each time by concerned neighbours. Very worried, Sally has convinced Cam to go see his family doctor, Dr. Huang, to "make sure everything's OK."

## THE DIAGNOSIS

Dr. Huang gives a diagnosis of early-stage Alzheimer’s disease. Cam and Sally are stunned, afraid, and not sure what to do next. They ask Dr. Huang what will happen, and what they should do. Dr. Huang explains that dementia progresses at different speeds for different people. Most people will have many of the symptoms, but progression isn’t easily predictable. It would be a good idea to plan for any kind of progression, Dr. Huang advises. “Should we talk to a lawyer?” Sally asks. “That would be sensible, I think,” says Dr. Huang, “or a notary may be able to help too.”

## AT THE LAWYER’S OFFICE



Cam and Sally go to their lawyer, Ms. Cone. Cam explains his visit to Dr. Huang, and his diagnosis of dementia.

Sally then asks Ms. Cone about getting an **enduring power of attorney**. It would give Sally the authority to manage Cam’s property and finances after his dementia progresses to the point that he can no longer do so himself. Ms. Cone replies yes, that would be a good

idea. The enduring power of attorney they arrange is a “springing” power, meaning that it will take effect only when Cam becomes mentally incapable. This is at Cam’s insistence. He explains, “I want to be in charge of my own money for as long as I can.”

### Legal and ethical talking points

*Cam and Sally need to consider some of the legal and ethical issues involved in the arrangements they are making.*

*Has Sally been provided with information about her duties as attorney, including the fiduciary (trust) nature of this legal relationship?*

*Does Cam understand and appreciate the full scope of the decision-making power that Sally will have over his affairs? Does Sally have the knowledge and experience required to carry out this role? Should another person assist Sally (perhaps on certain matters only), since Cam has always dealt with his own financial matters without her input?*

*If Cam wants to make a “springing” power of attorney, how will it be shown that it has “sprung” (that Cam has “lost capacity”) and who will make that decision? Cam and Ms. Cone will need to discuss this.*

Ms. Cone suggests that Cam may also wish to make a **representation agreement**. “What’s that?” Sally asks. Ms. Cone explains that a representation agreement will appoint a person (Cam’s “representative”) to make decisions about his health care when he becomes unable to make those decisions for himself. The representative will also be able to make “personal” decisions on his behalf, such as where he should live, who can have contact with him, and what kind of recreational or therapeutic activities he should do.

Ms. Cone explains that there are two different kinds of representation agreements: a standard and a non-standard agreement. “What’s the difference?” Sally asks. Ms. Cone explains that a **non-standard (section 9) representation agreement** gives the representative a wider range of decision-making powers than a standard (section 7) agreement does. For example, in a non-standard agreement, a person can give a representative the right to decide about admission to a care facility. Non-standard agreements require that the person have a higher degree of mental capacity or ability to understand, at the time the agreement is made, than a standard agreement does.

Ms. Cone explains that they are lucky they came to see her when they did, soon after the diagnosis, when Cam was still able to make an enduring power of attorney and a non-standard representation agreement. “What if we hadn’t?” asks Cam. “A **standard (section 7) representation agreement** can be a useful tool for people whose dementia has progressed,” Ms. Cone replies. “It includes routine financial management powers and can be very helpful for those who are unable to make a power of attorney.”

*Legal and ethical talking points*

*Cam and Sally feel that it makes sense to have a non-standard (section 9) representation agreement, authorizing Sally to do whatever she considers necessary for Cam’s health or personal care.*

*Cam should think about how Tom, his eldest son, will respond to Sally having final authority over Cam’s health treatment and personal decisions. Perhaps Cam, realizing the potential for family argument, is fine with it and decides to appoint Sally as his representative anyway. The important point is that he be aware of potential future difficulties for his family network and talk them over with Ms. Cone (along with possible ways to avoid or minimize the problems).*

“Before you make a decision,” adds Ms. Cone, “I should also tell you about a new alternative available in British Columbia: the **advance directive**.” She explains that an advance directive is a document in which Cam could give instructions about the kind of health care he did or did not want in the future. His future health-care providers would need to follow those directions if Cam himself was incapable of consenting to or refusing treatment.

“But we wouldn’t need an advance directive if we chose a non-standard (section 9) representation agreement, right?” asks Cam. “No, you wouldn’t,” replies Ms. Cone, “but you may want to include a similar statement of your wishes in your representation agreement. The statement would give guidance to your representative, Sally, about what health care you do or do not want to happen in the future.”

*Legal and ethical talking points*

*What are the pros and cons of an advance directive? What are the pros and cons of a representation agreement? What are the issues Cam will need to think about, and provide for?*

They then execute what they all agree is the best combination of tools for Cam's situation: an enduring power of attorney to manage financial affairs and a non-standard (section 9) representation agreement to handle his health and personal issues.

## ANOTHER VISIT TO THE LAWYER: THE WILL



Sally and Cam return to the lawyer's office the following week prepared to talk about a will. Ms. Cone asks if Cam already has one, to which Cam replies, "Yes."

"But that will was made a long time ago," Sally says, "This could be our last chance to make changes. Cam wants to be sure that Kate is taken care of – we need to make sure the will does that. Kate is his step-daughter – they're very close," she explains. Ms. Cone asks Cam if he is interested in changing his will. Cam replies that he would like to take a look at it. Sally is asked to wait in reception while Cam and the lawyer discuss his will privately. He tells Ms. Cone that he wishes to change his will to include his step-daughter as a beneficiary.

### Legal and ethical talking points

*Ms. Cone is aware of Cam's dementia diagnosis. Before making a new will for him, Ms. Cone must be satisfied that he is "mentally capable" of doing so. A will is a complicated legal document. If Cam wishes to change his will, he must do so as soon as possible, before his dementia progresses. His lawyer also needs to be sure that his desire to include Kate in his will is truly his own choice, and has not been made under the influence of Sally at a time when Cam is vulnerable.*

## AT HOME: USING THE POWER OF ATTORNEY

Some time after their visit to the lawyer, Sally feels that she can no longer cope with Cam alone. He is increasingly disoriented, becoming agitated and upset on many occasions when she tries to help him. He is also having difficulties making it to the washroom in a timely manner, and Sally finds it hard to look after him as well as doing all the household tasks that used to be shared with him.

Sally asks the Alzheimer Society of B.C. for information about her options. The Support and Education Coordinator tells Sally that she and Cam may wish to contact their health authority to see what level of support could be provided. Alternatively, they could hire a

private “nurse on call” care provider. Eventually, Sally feels she needs much more help at home than the health authority can supply. In addition to Cam’s personal-care needs, Sally feels that he requires more company and supervision than she can supply on her own, and she also needs help with non-care services such as housekeeping and meal preparation.

Sally hires a “nurse on call” service. It is expensive, but Sally, using the power of attorney, pays for it with Cam’s money (although she worries about what will happen when this runs out). However, the nursing service cannot provide one consistent caregiver, and the different helpers are unsettling to Cam. Having one stranger coming into the house is difficult enough for him, let alone several. Furthermore, some of the workers are of a different racial background to either Sally or Cam, and he is reacting very badly to them, refusing to let them touch him and making very unpleasant racist comments. Sally asks the service if they could ensure that the home-support workers are of Chinese or Caucasian origin; the service says that this is not always possible.



Sally decides to hire a private live-in housekeeper/caregiver. Her niece, Mary, has recently graduated from high school and is at loose ends so Sally decides she would be perfect, as Cam is familiar with her. Sally pays Mary’s wages and living expenses from Cam’s accounts. At the same time, Sally carries out extensive renovations to the house she co-owns with Cam, redoing the kitchen, adding a sun-

room, and creating a “granny flat” downstairs for Mary to live in. It is all paid for from Cam’s money through the power of attorney.

*Legal and ethical talking points*

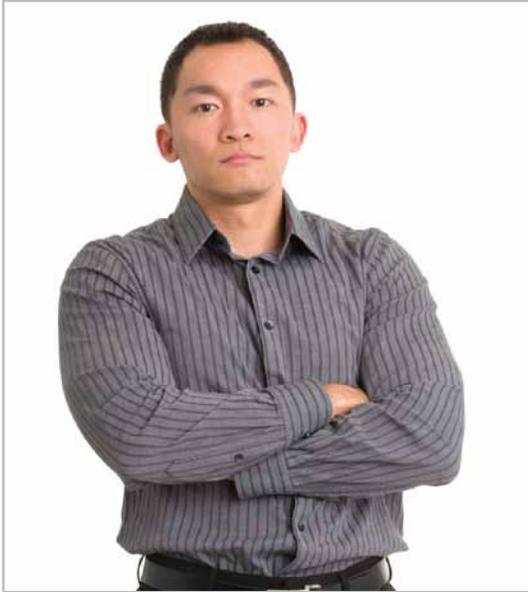
*Has the enduring power of attorney “sprung” (a springing power gives Sally authority over Cam’s financial affairs only after he has lost capacity)? How has this been determined?*

*Is it acceptable for Sally to use the power of attorney to pay for the services of her niece, Mary? How might this conflict with her fiduciary duties as an attorney?*

*Is it acceptable for Sally to use the power of attorney to pay for renovations to the home she jointly owns with Cam (full ownership will automatically go to her when he passes away)? Why or why not?*

## DISAGREEMENT IN THE FAMILY

Meanwhile, Cam's daughter, Anne, comes to visit her father once every month or so. She is surprised to see the live-in caregiver, and questions whether this is really necessary. "Who's



paying for this?" she asks. "Your father has plenty of money," Sally responds, "This is what it's for." When Anne goes home, she phones her brother, Tom, to report on what she has seen. "Dad's not doing that badly," she says, "and it must be costing a fortune. After all that Dad's done for her, Sally should be looking after him now." Tom is also disturbed. He thinks Sally is leaping at the opportunity to be "rid of the bother of dealing with Dad." Moreover, Tom feels that he, as the oldest son, should ultimately decide what arrangement would be best for his father. "If Sally doesn't want to look after Dad, I'll bring him to live here," says Tom.

He goes over to his dad's house. Cam, not having seen his son for many years, does not recognize him and is agitated by Tom's insistence that Cam come live with him. Cam becomes visibly fearful, crying out; Sally tells Tom to leave, and there is a scene. Tom finally leaves.

Sally tells the live-in caregiver, Mary, not to let Tom or Anne into the house. She says that she has the authority under the representation agreement to say who can see Cam and who can't. "They upset him too much," Sally explains. Cam's children find that they are barred from their father's house.

Cam's children have a meeting. Tom feels strongly that the situation has become intolerable; he should be Cam's legal guardian. The siblings make an appointment with a lawyer, Mr. Rod, to see what they can do. Mr. Rod tells them that they need to bring an application under the *Patients Property Act* to have Cam declared mentally incapable and Tom appointed as "**committee**" (**guardian**) of his person or finances, or both. The siblings agree to consider this. Mr. Rod points out that Sally can contest the application so he also suggests mediation, to see if the differences between the siblings and Sally can be settled without court action. Tom is dubious but Anne convinces him to give it a try, and they do seek a mediator.

### Legal and ethical talking points

*What are the potential benefits of mediation for Cam's children, for Cam, and for Sally? What are the potential drawbacks? From Cam's perspective, how would this process be preferable (or not) to a proceeding brought by his family under the Patients Property Act?*

*What are some of the ethical issues raised by mediation in this context?*

## AT THE CARE FACILITY

Sally feels that Cam can no longer live at home. Mary has said that she can no longer work as a caregiver for Cam – it is too difficult now, a demanding 24-hour job. Sally's daughter,



Kate, left for graduate school in Toronto six months ago and, given the strained relations, Sally feels she cannot ask Cam's children for help. She decides the time has come for Cam to move into a residential care facility. She tries to explain this to Cam, but it is unclear if he understands.

Sally returns to the Alzheimer Society of B.C. to find out what she needs to do. The Support and Education Coordinator explains that Sally's non-standard (section 9) representation agreement lets her make this decision on his behalf. Sally makes arrangements for him to be moved into Hearthplace Lodge.

## AT THE HOSPITAL: END OF LIFE

Cam's health is rapidly declining and he is moved to the hospital. His doctor tells Sally that Cam is nearing the end of his life. Sally tells the doctor that, following Cam's wishes, her husband should receive palliative care only, minimizing his pain to the fullest possible extent even if this has the effect of hastening death.

Sally's daughter, Kate, back from Toronto on a visit and learning of the situation, calls Cam's daughter, Anne, to let her know that her dad is very ill. Kate feels uncomfortable that her mother is excluding Cam's children in what may well be the final days of his life. Tom and Anne visit the hospital and are shocked to see their dad's condition. Tom objects loudly and demands to see "who's in charge." He is told that Sally has authorized palliative measures only. Tom responds that it is up to him, as the oldest son, to make that determination. Anne agrees, while Kate looks on uncomfortably.

## WHAT HAPPENS NEXT?

### **With Sally having a non-standard (section 9) representation agreement**

In this scenario, Cam and Sally executed a non-standard representation (section 9) agreement in Ms. Cone's office. It gave Sally the authority to make end of life decisions on Cam's behalf.

### **With a standard (section 7) representation agreement**

If they had made a standard representation (section 7) agreement (as they would have had to do if his dementia had already progressed to the point that he was unable to make a non-standard representation agreement), Sally would not be empowered to make end of life decisions on his behalf.

### **No representation agreement, but advance directive**

The instructions set out in an advance directive would need to be followed, subject to certain exceptions. There are two notable exceptions: if it can be shown that the patient's wishes, values, or beliefs changed after the advance directive was written, or if the health-care provider believes the patient might benefit from the latest improvements in medical knowledge, practices, or technology.

### **No representation agreement or advance directive**

If Cam and Sally had decided *not* to proceed with the representation agreement, she could act as his temporary substitute decision maker under the provisions of the ***Health Care (Consent) and Care Facility (Admission) Act***. The Act includes a list of people who can make health decisions on Cam's behalf if he is incapable of making them himself: his spouse, his adult children, his siblings, or other relatives. This list is called a "hierarchy" because the first person on the list (Sally, as spouse, in this case) is the one who normally makes the decisions. The next people on the list (Cam's children) get decision-making authority only if there is no spouse or the spouse is unavailable. Sometimes difficulties arise when multiple offspring or siblings are at the top of the hierarchy since they may disagree with each other about what to do.



Temporary substitute decision makers are able to make end of life decisions in the absence of previously expressed wishes or instructions from the patient, but the decision must be made in the person's best interests.

#### *Legal and ethical talking points*

*Is it right to exclude Tom and Anne from the decision-making process at this stage? Should their Chinese-Canadian culture, in which the eldest son would normally have a significant decision-making role, be taken into account?*

*Despite the legal framework, which clearly prioritizes Sally, what steps could be taken at this point, and by whom, to include Tom and Anne? Why would it be worthwhile to try?*

## PART TWO: GETTING YOUR AFFAIRS IN ORDER



### BASIC FACTS ABOUT LEGAL PLANNING AND THE DEMENTIA JOURNEY

Legal planning is unlikely to be anyone's first or even second thought after hearing a diagnosis of Alzheimer's disease or another dementia. At some point, however – maybe sooner than expected – the person with dementia will lose the ability to make certain kinds of legally valid decisions (ones that the law will recognize and enforce). There are some legal decisions, like marrying or making a will, that can only be made by the individual before that ability is lost. Other kinds of decisions – involving consent to health care or treatment, financial transactions, legal matters, or personal matters such as where to live and with whom – can be made by another person who has been properly appointed as the substitute decision maker through one of the following legal methods:

- An **enduring power of attorney**.
- A **representation agreement** (either a "section 7" or a "section 9" agreement).
- "**Committeeship**" proceedings under the *Patients Property Act*.

A person who still has the required mental capability can also consent to or refuse future health care or treatment in an **advance directive**.

Each of these legal tools is explained in more detail on the following pages.

# FIND THE INFORMATION YOU NEED

The following chapters explain these legal mechanisms in more detail, and point you to other sources for additional information.

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# AFTER THE DIAGNOSIS

## WHY YOU NEED TO THINK ABOUT LEGAL PLANNING

“Mental capability” (sometimes called “mental capacity”) is a legal term that refers to a person’s mental ability to fully understand. The law will not recognize or enforce the decision of a person who is not “mentally capable” of understanding the nature and consequences of that particular decision. There are good reasons for this rule: if I cannot fully understand the kind of decision I am making, I cannot protect my own interests. Unfortunately, there are (far too many) people who will take advantage of those who cannot protect themselves.

The effect of Alzheimer’s disease and other dementias on a person’s mental capability means that, at some point, certain decisions will need to be made on that person’s behalf by someone else (a “substitute decision maker”). There are different methods through which different kinds of substitute decision makers can be appointed. A person may also choose to create an “advance directive,” in which he or she can write down instructions about the kinds of health-care treatment he or she consents to or refuses; future health-care providers will need to follow those instructions if the person is not mentally capable of making “real time” health-treatment decisions (with some exceptions).

It is extremely important to understand that a person can *only* appoint a substitute decision maker, or write an advanced directive, while he or she *still has* the mental capability to do so. If a person’s dementia has progressed to the point that he or she cannot understand the nature and consequences of an enduring power of attorney, for example, he or she *cannot make* an enduring power of attorney. For this reason, the law also provides a method through which a substitute decision maker can be appointed *for* the person with more advanced dementia.

Depending on mental capability, your options are:

### EARLIER STAGES OF DEMENTIA

(HIGHER DEGREE OF MENTAL CAPABILITY REQUIRED)

- An enduring power of attorney (for financial and property decisions).
- A “section 9” non-standard representation agreement (giving the substitute decision maker a wider range of decision-making powers relating to health and personal care).
- An advance directive.

### MORE ADVANCED STAGES OF DEMENTIA

(LESSER DEGREE OF MENTAL CAPABILITY REQUIRED)

- A “section 7” or standard representation agreement (giving the substitute decision maker a narrower range of decision-making powers relating to health and personal care, as well as limited “routine” financial powers).

### STILL MORE ADVANCED STAGES OF DEMENTIA

(LOWER/LOWEST DEGREE OF MENTAL CAPABILITY REQUIRED)

- Appointment of a “committee” (guardian) for financial and/or personal and health-care decision-making.

# ENDURING POWER OF ATTORNEY

## Financial Decision-Making

### *What is an enduring power of attorney?*

An “enduring power of attorney” is a legal document that allows one person (called the “donor”) to appoint another person (called the “attorney”) to make financial decisions on his or her behalf after the donor becomes mentally incapable. It is called “enduring” because it will continue to be in effect when the donor is no longer mentally capable.

### *What kinds of decisions can an attorney make on behalf of a donor?*

An attorney has the authority to make decisions about the donor’s financial affairs, including businesses or property and the conduct of legal affairs. However, an attorney does not have the authority to make personal or health-care decisions on the donor’s behalf, such as where to live or with whom. (Setting up both an enduring power of attorney and a non-standard [section 9] representation agreement would cover all the bases.)

The enduring document sets out the kind of authority given to the attorney. This can be *general* (the attorney is authorized to deal with *all* financial decisions) or *limited* (the attorney can only deal with specified matters, such as particular bank accounts or properties).

A financial institution may also provide an enduring power of attorney, but it applies only at that institution and cannot be used at another bank or credit union.

### *Who should I choose as my attorney and why?*

The donor can choose anyone he or she wishes to appoint as an attorney – with certain exceptions. A paid caregiver or employee in a facility where the donor resides and receives personal or health-care services (assisted living facilities and residential care homes, for example) cannot generally be appointed as an attorney.

Choosing an attorney is a very important decision. The attorney must be someone you trust absolutely to deal with your property and finances in a way that helps you, and never for his or her own benefit. The attorney must also be a person with the time, knowledge and experience required to look after someone else’s finances and property. Do not appoint someone who has a poor track record with his or her *own* finances!

Never appoint someone for emotional reasons or just because you do not want to hurt anyone’s feelings (“My son John will feel insulted if I don’t appoint him,” even though John has a substance-abuse problem or a history of poor financial judgment).

It is possible to appoint more than one person to act as your attorney (they become “joint attorneys”).

## ***What are the duties of the attorney?***

People who agree to be attorneys must realize the duties that come with this legal role, and be prepared to carry out those duties. An enduring power of attorney creates a *fiduciary relationship* between the donor and the attorney. This means that an attorney must act in the best interests of the donor and cannot use the decision-making authority for personal benefit at the expense of the donor.

Using a power of attorney to enrich yourself at the expense of the donor (theft by power of attorney) is also a criminal offence in Canada.

## ***When should I make an enduring power of attorney?***

An enduring power of attorney is a legal document so the donor must make it while still having the mental capability to do so. Dementia develops differently in different people and no one can predict exactly when a person will lose the required capacity. For this reason, it is important to think about whether an enduring power of attorney can help you, and then set it up as soon as possible after receiving a diagnosis of dementia.



An enduring power of attorney will be invalid if it is discovered that the person who made it was incapable at the time the document was set up.

Anyone (with the necessary mental capability) who is 19 or older can make an enduring power of attorney. Nobody needs to wait until a diagnosis of dementia to make one. The diagnosis of a friend or loved one can be an important reminder to everyone of the importance of planning for the future.

## ***When does a power of attorney become effective?***

An enduring power of attorney (unless it is “springing”) will take effect upon it being “executed” (when it is properly prepared, signed and witnessed).

This means that an attorney can begin to act immediately on behalf of the donor, whether or not the person is mentally incapable. However, an attorney is not *required* to begin acting so long as the donor remains mentally capable. “Executing” a power of attorney does not take away the rights of the donor; it does mean that from then on the attorney is able to make decisions on the donor’s behalf that the law will recognize.

A “springing” enduring power of attorney, by contrast, does not take effect right away. Springing powers take effect at a future time when a “triggering” event takes place. It may seem like a good idea to specify that a power of attorney should be triggered by a donor losing mental capability. However, this kind of trigger has potential problems that need to be discussed carefully with a legal advisor before going ahead. (For example, *who*

will decide whether the person is mentally capable? On what basis? What if the donor, as dementia has progressed, now refuses to co-operate? Also, there may be costs associated with determining capability.)

### ***What happens if I don't make an enduring power of attorney while I am capable of doing so?***

If you have not appointed an attorney to make decisions about your financial affairs, your spouse (or other person with whom you hold property jointly) will not *automatically* have the authority to deal with your finances, nor will your children or other close relatives. Someone will need to be appointed for this purpose, through an application to the Court or through the Office of the Public Guardian and Trustee (a provincial agency). You will have little, if any, input in the process.

### ***What should I do next?***

Making an enduring power of attorney is a very important decision, and one that should be made with complete information. In addition, your individual circumstances and financial situation may require specific kinds of advice. The following resources can provide you with further information:

*It's Your Choice: Personal Planning Tools*, Public Guardian and Trustee

[http://www.trustee.bc.ca/pdfs/Adult%20Guardianship/It's\\_Your\\_Choice--Personal\\_Planning\\_Tools.pdf](http://www.trustee.bc.ca/pdfs/Adult%20Guardianship/It's_Your_Choice--Personal_Planning_Tools.pdf)

*How You Can Help People Manage Financial and Legal Matters When They Cannot Manage On Their Own*, Public Guardian and Trustee

<http://www.trustee.bc.ca/pdfs/STA/How%20You%20Can%20Help.pdf>

*Planning for Your Future*, Public Guardian and Trustee

<http://www.trustee.bc.ca/pdfs/STA/Planning%20for%20Your%20Future.pdf>

*Nidus Personal Planning Resource Centre and Registry*

<http://www.nidus.ca>

*The Power of Attorney Act, Part 2*, sets out the specific duties and powers of an attorney.

[http://www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_96370\\_01#section19](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96370_01#section19)

*Fact Sheet: Enduring Power of Attorney*, People's Law School

[http://www.publiclegaled.vcn.bc.ca/uploads/45/98/4598451cbef585b91f6369bd2e94dc00/English\\_FS\\_Enduring-POA\\_2011.pdf](http://www.publiclegaled.vcn.bc.ca/uploads/45/98/4598451cbef585b91f6369bd2e94dc00/English_FS_Enduring-POA_2011.pdf)

*My Voice: Expressing My Wishes for Future Health Care Treatment*, Government of B.C. Ministry of Health

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

A lawyer or notary is the best person to respond to your individual needs and concerns and provide you with detailed and specific information. Before going ahead with an enduring power of attorney, make sure that you have asked all the questions that you have about it – and that you are satisfied with the answers.

# REPRESENTATION AGREEMENTS

## Health Care, Personal Decisions, and Routine Financial Management

### *What is a representation agreement?*

A representation agreement is a legal document in which one person (the “donor”) appoints another person (the “representative”) to make health-care and “personal” decisions on his or her behalf. There are two different kinds of representation agreements: a standard and a non-standard agreement.

Which type of representation agreement is best for you depends on your needs, whether any other kind of substitute decision maker has been appointed, and your own mental ability to make a representation agreement.

A non-standard (section 9) representation agreement offers more flexibility for tailoring the terms to individual needs. However, it requires that the person be fully mentally capable at the time of signing. A standard (section 7) representation agreement, on the other hand, can be made by a person who is less mentally capable. It may be especially useful for the person whose dementia has progressed beyond the early stages and who has lost the ability to manage financial affairs or to make an enduring power of attorney.

### *What decisions can a representative make on behalf of a donor?*

The kinds of decisions that a representative can make under a standard representation agreement are different from those allowed by a non-standard agreement.

### **Standard (Section 7) Representation Agreement**

A representative appointed under a standard (section 7) agreement can make personal, routine financial and health-care decisions, including:

- Where and with whom a person is to live.
- “Routine” management of a person’s financial affairs (not including real estate).
- Minor and some major health-care decisions, including dental care (but *not* including the power to refuse life-supporting care or treatment).
- Instruction of legal counsel (in most circumstances).

However, it is not necessary that the representative be given *all* of these powers.

If a standard representation agreement gives the power to carry out routine financial management to a representative *other than the donor’s spouse*, one of the following special arrangements must be made:

- Two representatives must be appointed to carry out this responsibility jointly, or
- A “monitor” must be appointed to oversee the routine financial management carried out by a single representative.

## Non-Standard (Section 9) Representation Agreement

A representative appointed under a non-standard (section 9) agreement can make personal and health-care decisions, including “enhanced” health-care decisions such as refusing life-supporting care or treatment. A representative appointed under a non-standard agreement may also be given the authority to consent on the donor’s behalf to a specific kind of medical treatment even if the donor refuses it when the time comes.

A non-standard representation agreement differs from the standard agreement in another important way. It cannot give a representative the authority to make routine financial management and legal decisions on behalf of the donor. To cover those, the non-standard representation agreement can be supplemented by an enduring power of attorney.

### *Who should I choose as my representative and why?*

The donor can choose anyone he or she wishes to appoint as a representative – with certain exceptions. A paid caregiver or employee in a facility where the donor resides and receives personal or health-care services (assisted living facilities and residential care homes, for example) generally cannot be appointed.



Choosing a representative is a very important decision. The person must be someone that you trust and who knows, understands and respects your values, beliefs and preferences. The representative will be making decisions for you so it is important that he or she understands what is important and meaningful to you. The more detail you provide to your

representative about your wishes and values, the easier it will be for that person to make the best decisions on your behalf.

A representative with the authority to make decisions about your “personal” matters needs to have an up-to-date understanding of your chosen lifestyle (including friends and activities), and to feel comfortable with it. Never appoint someone just to avoid hurt feelings (“my daughter Joan will feel insulted if I don’t choose her,” for example), especially if that person’s beliefs and lifestyle clash with your own.

If you choose a standard representation agreement, which includes routine financial management on your behalf, your representative must also have the time, knowledge and experience required to look after someone else’s finances and property. A person with a poor track record of looking after his or her *own* finances will be unlikely to do a good job of looking after *yours*.

## ***What are the duties of the representative?***

Anyone who agrees to become a representative must realize the duties that come with this legal relationship, and be prepared to carry them out. The representative has a duty to act honestly and in good faith, not to go beyond the authority given in the representation agreement, and to follow any directions you have provided in the document (about your values and wishes, for example).

## ***When should I make a representation agreement?***



A representation agreement is a legal document so the donor must make it while having the mental capacity to do so. People with more advanced dementia are still able to make a standard agreement after they are no longer deemed capable of making a non-standard agreement, but there comes a point when a representative cannot be appointed at all.

Dementia develops differently in different people, and no one can predict exactly when they will lose the ability to make a representation agreement. Do not wait, thinking that there will always be time to make a standard agreement. There may not be. The sooner you make your agreement, the more detail you will be able to give your representative about your values, wishes and preferences (directions that the representative is obliged to follow).

Anyone (with the necessary mental capability) who is 19 or older can make a representation agreement. Nobody needs to wait until a diagnosis of dementia to make one.

## ***When does a representation agreement become effective?***

Generally, a representation agreement takes effect immediately upon it being “executed” (when it is properly prepared, signed and witnessed). This means that a representative can begin to act immediately on behalf of the donor. However, if the donor is still mentally capable of making a health-care decision, that decision cannot be over-riden by the representative *unless* specifically provided for in a non-standard agreement.

It is possible to make a representation agreement that will take effect at a later date when a “triggering” event takes place. It may seem like a good idea to specify that the trigger should be the donor losing mental capability. However, that raises questions that need to be discussed carefully with a legal advisor before going ahead. For instance, *who* decides whether the person is mentally capable? On what basis? What if the donor, as dementia has progressed, now refuses to co-operate? Also, there may be costs associated with determining capability.

## ***What happens if I don't make either a representation agreement or an enduring power of attorney while I am capable of doing so?***

When you become mentally incompetent to manage your financial affairs, if you have not made a standard (section 7) representation agreement with routine financial management powers or made an enduring power of attorney, a substitute financial decision maker will

need to be appointed for you through an application to the Court or through the Office of the Public Guardian and Trustee. You will have little, if any, input into these processes. Your spouse (or other person with whom you hold property jointly) will not automatically have the authority to deal with your financial affairs and there is no “default” list of people (spouse, children, other relatives) who will automatically become authorized to make financial decisions on your behalf.

When you become mentally incompetent to consent to health-care treatment, if you have not appointed a representative with the power to make the decision in question for you (this may include a decision that is not within the authority of your standard agreement representative) or made an advance directive, the *Health Care (Consent) and Care Facility (Admission) Act* sets out a default list of people who will be asked to make the decision on your behalf: your spouse, adult children, siblings, or other relatives.

### ***What should I do next?***

Making a representation agreement is an important decision, and one that should not be made without complete information about what it means for both the donor and the representative. Depending on your individual circumstances and needs, you may also need specific kinds of advice. The following resources can provide you with further information:

*Nidus Personal Planning Resource Centre and Registry* is a good resource for learning more about personal planning, including representation agreements, and for assistance with writing an agreement that meets your needs. They also operate a centralized Registry for personal planning documents.

<http://www.nidus.ca>

*It's Your Choice: Personal Planning Tools*, Public Guardian and Trustee

[http://www.trustee.bc.ca/pdfs/Adult%20Guardianship/It's\\_Your\\_Choice--Personal\\_Planning\\_Tools.pdf](http://www.trustee.bc.ca/pdfs/Adult%20Guardianship/It's_Your_Choice--Personal_Planning_Tools.pdf)

*Planning for Your Future*, Public Guardian and Trustee

<http://www.trustee.bc.ca/pdfs/STA/Planning%20for%20Your%20Future.pdf>

*How You Can Help People Manage Financial and Legal Matters When They Cannot Manage On Their Own*, Public Guardian and Trustee

<http://www.trustee.bc.ca/pdfs/STA/How%20You%20Can%20Help.pdf>

*It's Your Choice: A Guide to Making a Representation Agreement*,

Public Guardian and Trustee

<http://www.trustee.bc.ca/pdfs/STA/rep%20guide%20-%20nov%202002.pdf>

*Consent to Health Care*, Public Guardian and Trustee has further information about adult guardianship rules for cases when no pre-arrangements have been made and a substitute decision maker must be appointed.

[http://www.trustee.bc.ca/pdfs/STA/Consent\\_Health\\_Care\\_March\\_2005.pdf](http://www.trustee.bc.ca/pdfs/STA/Consent_Health_Care_March_2005.pdf)

A lawyer or a notary will also be able to discuss your individual needs and concerns, providing you with the detailed and specific information that you need. Before going ahead with a representation agreement, make sure that you have asked any and all questions that you have about it, and that those questions have been answered in a way that you understand and that makes sense to you.

# ADVANCE DIRECTIVES

## Health-Care Decisions

### *What is an advance directive?*

The law of health care consent sets out that a health-care provider, such as a doctor, cannot treat or provide health care without the patient's consent. A problem arises when the patient does not have the mental capability to give (or withhold) that consent. "Mental capability" and "mental capacity" are legal terms that refer to a person's ability to fully understand the decision that needs to be made; a person who is mentally incapable *cannot* consent to, or refuse, health-care treatment. The representation agreement is an important solution to this problem. The advance directive is an option new in British Columbia as of 2011.

An advance directive is a legal document in which a person sets out his or her wishes about the kind of medical treatment he or she wants and does not want in the future. Those wishes are instructions that must be followed by health-care providers. An advance directive works by allowing you to consent today (when you are still mentally capable) to medical treatment that will be provided in the future (when you are not capable of consenting). An advance directive may be useful for people without a friend or family member that they would feel comfortable appointing as a representative to make decisions on their behalf.

### *What kinds of decisions can be consented to or refused in an advance directive?*

An advance directive is only for health-treatment decisions. It cannot "direct" personal decisions, such as where one will live. It does not apply to financial decisions in any way. Nor can it *require* a physician to provide treatment that, in her or his medical opinion, should not be given. However, an advance directive can *refuse* treatment, even if the physician would otherwise provide it.

There are certain circumstances in which physicians are not required to follow an advance directive:

- If there is a "committee of the person" or representation agreement in effect (unless the representation agreement states that certain decisions are to be as set out in the advance directive and not made by a representative).
- If the "directions" in the advance directive are unclear, or do not apply to the treatment in question.
- If the wishes and values of the person change after writing the advance directive (but while the person is still mentally capable).
- If there have been significant improvements in medical treatment since the advance directive was made.
- If the instructions are illegal.

It is important that people making an advance directive educate themselves about the actual nature and effect of medical treatments, and about the progress of dementia and other illnesses. Informed directions about future medical treatment require more knowledge than the vague ideas about "heroic measures" and "being hooked up to machines" that most of us have.

## ***When should I make an advance directive?***

Since an advance directive is a legal document, the donor must make it while he or she is considered mentally competent to do so.

Anyone (with the necessary mental capability) who is 19 or older can make an advance directive; nobody needs to wait until a diagnosis of dementia or other health crisis to make one. If possible, a person should revisit his or her advance directive on a regular basis, and revise it as necessary. Health treatment practices often change quickly, and your advance directive needs to reflect those changes.

## ***What happens if I don't make an advance directive while I am capable of doing so?***

As dementia progresses, one becomes mentally incompetent to consent to health-care treatment. If you have not made an advance directive or appointed a representative with suitable authority to decide about treatments (sometimes such issues are beyond the mandate of a standard representation agreement), there will be a need for someone to serve as a temporary decision maker. The *Health Care (Consent) and Care Facility (Admission) Act* provides for a "default" list of people who will be asked to decide on your behalf: your spouse, adult children, siblings, or another relative (called upon in that order). Be aware that difficulties often arise when adult children or siblings have different opinions about the decision that should be made.

## ***What should I do next?***

Making an advance directive is a very important decision, and one that should not be made lightly or without complete information about the kinds of medical treatments you are consenting to or refusing in your "directions." The following resources can provide you with further information:

*It's Your Choice: Personal Planning Tools*, Public Guardian and Trustee  
[http://www.trustee.bc.ca/pdfs/Adult%20Guardianship/It's\\_Your\\_Choice--Personal\\_Planning\\_Tools.pdf](http://www.trustee.bc.ca/pdfs/Adult%20Guardianship/It's_Your_Choice--Personal_Planning_Tools.pdf)

*Consent to Health Care*, Public Guardian and Trustee, has further information about the *Health Care (Consent) and Care Facility (Admission) Act* process for appointing temporary decision makers.

[http://www.trustee.bc.ca/pdfs/STA/Consent\\_Health\\_Care\\_March\\_2005.pdf](http://www.trustee.bc.ca/pdfs/STA/Consent_Health_Care_March_2005.pdf)

*My Voice: Expressing My Wishes for Future Health Care Treatment*,  
Government of B.C. Ministry of Health  
<http://www.health.gov.bc.ca/library/publications/year/2012/MyVoice-AdvanceCarePlanningGuide.pdf>

For the fullest information, consult a lawyer or notary. They will be able to discuss your individual situation and concerns, and provide you with the specific information that you need. Before making an advance directive, be sure to get answers to any questions you may have, and that you thoroughly understand them.

**Back to  
Cam and  
Sally's  
Story**

## APPOINTING A "COMMITTEE"/GUARDIAN Financial and/or Personal and Health-Care Decision Making

### **What is a "committee?"**

If a person loses his or her ability to make decisions without having a power of attorney and/or a representation agreement in place, then a "committee" will need to be appointed as a substitute decision maker. "Committee" is the legal term for guardian in British Columbia; the incapable person is called the "patient."

It is also possible that someone might prefer to have a committee appointed by the Court rather than appoint an attorney or a representative. Unlike attorneys or representatives, committees are required to provide regular "accountings" of their dealings with the incapable person's money and property to the Public Guardian and Trustee, and may be required to provide an accounting to the Court. Some people may feel more comfortable with this greater level of oversight.

### **Who will be committee?**

While a person is considered mentally capable of doing so, he or she can *nominate* a person to be the committee. A nomination is a legal document but the level of understanding that is required is not high. It is therefore very likely that a person incapable of making an enduring power of attorney or representation agreement will still be capable of nominating a committee.

Committees are appointed through two different processes set out in the *Patients Property Act*. One method is for someone (usually a family member or close friend) to bring an application before the Court to have a person declared incapable and to appoint a committee (usually the applicant). This is a complex process for which most people will hire a lawyer. The Public Guardian and Trustee (a provincial agency) reviews all such applications and will provide its opinion to the Court on whether the person asking to be committee

is suitable for the role, whether the committee's powers should be limited in any way, and how often financial accounts should be submitted.

A second method of appointing a committee is called "statutory committee" or "statutory guardianship." A statutory committee is appointed on the basis of a certificate of incapacity that is issued by a medical professional (this process is set out in the *Patients Property Act*). Only the Public Guardian and Trustee itself can be appointed as a statutory committee through this process and only for financial and property matters.

### **What kinds of decisions does the committee make?**

There are two different kinds of committees. A "committee of the person" has the authority to make personal and health-care decisions on behalf of the incapable person. A "committee of the estate" makes financial, property and legal decisions. Sometimes a "committee of person and estate" is appointed to manage all these issues.



Generally, a committee “stands in the shoes” of the incapable person and has the same powers as that person did when still capable of managing their affairs. For instance, a committee may decide such “personal” matters as where the person will live, and with whom, or whether to receive home support or engage in recreational activities. There are some exceptions: a committee cannot make a will on behalf of an incapable person or decide if the person should get married, for example. The Court may also limit committee powers where it feels this is in the best interests of the incapable person, or require the committee to get the Court’s permission before making certain kinds of decisions (selling real estate, for instance).

### ***What are the duties of the committee?***

A person who asks or agrees to become a committee must realize the duties of this legal relationship, and be prepared to carry them out. Committeeship creates a fiduciary relationship between the committee and the incapable person. This means that by law a committee must act in the best interests of the person.

In particular, a committee cannot make financial decisions for personal benefit at the expense of the incapable person. A committee of estate is required to keep detailed records (“accounts”) of the person’s assets and liabilities and all money going in and out of the person’s estate. These accounts must be submitted to the Public Guardian and Trustee on a regular basis (how often is determined by the agency).

Becoming a committee is a serious commitment, so the committee of estate can request to be reimbursed at a reasonable rate from the incapable person’s assets. The size of the fee will depend on the size and complexity of the person’s estate and the amount of work that is involved in its management. Any fee will be set by the Public Guardian and Trustee. Any out-of-pocket expenses, or professional fees for tasks the committee cannot handle independently, can also be paid for out of the person’s estate.

### ***What should I do next?***

If you have a friend or relative who is not mentally capable of making decisions, and are concerned that no other substitute decision makers are in place, you should know about the possibilities available to you under the *Patients Property Act*. If you are unable or unwilling to take on the task of committeeship yourself, contact the Public Guardian and Trustee to discuss the possibility of statutory committeeship.

For more information see:

*Private Committee Handbook*, Public Guardian and Trustee explains the requirements and procedures of committeeship.

<http://www.trustee.bc.ca/pdfs/PCS/PCS%20January%202011%20layout.pdf>

*It’s Your Choice: Personal Planning Tools*, Public Guardian and Trustee

[http://www.trustee.bc.ca/pdfs/STA/It’s\\_Your\\_Choice-Personal\\_Planning\\_Tools.pdf](http://www.trustee.bc.ca/pdfs/STA/It’s_Your_Choice-Personal_Planning_Tools.pdf)

## FOR FURTHER INFORMATION

The **Alzheimer Society of B.C.** is always available to answer questions and help you find the professional assistance you need.

- Visit our website to find a Resource Centre in your area, or click on Living with Dementia for information about legal issues and personal planning: [www.alzheimerbc.org](http://www.alzheimerbc.org).
- Call the Dementia Helpline, a service for people with dementia, their caregivers, family and friends. Province-wide, toll-free: 1-800-936-6033 Lower Mainland: 604-681-8651.
- E-mail us at [info@alzheimerbc.org](mailto:info@alzheimerbc.org).

## OTHER RESOURCES

### **B.C. Centre for Elder Advocacy and Support**

<http://bcceas.ca>

**B.C. Notaries.** A notary can provide legal advice on many of these issues.

[www.notaries.bc.ca](http://www.notaries.bc.ca)

### **Government of British Columbia – Ministry of Health**

Visit [www.gov.bc.ca/health](http://www.gov.bc.ca/health) and type “advance care planning” into the Search field.

**Nidus Personal Planning Resource Centre and Registry** is a non-profit, charitable organization that provides information to British Columbians about personal planning. They also operate a centralized Registry for personal planning documents.

[www.nidus.ca](http://www.nidus.ca)

### **Office of the Public Guardian and Trustee, Financial and Personal Care Services for Adults**

[www.trustee.bc.ca/services/adult/index.html](http://www.trustee.bc.ca/services/adult/index.html)

**Mediate B.C.** offers information about mediation services and assists in finding a mediator.

[www.mediatebc.com](http://www.mediatebc.com)

**People’s Law School** is a non-profit charitable society that provides public legal education and information.

[www.publiclegaled.bc.ca](http://www.publiclegaled.bc.ca)

# SUMMARY OF LEGAL TOOLS

## A Reference Chart

Stage	Legal Tool	Issue	Comments	Page
<b>Earlier stages of dementia</b> (higher degree of mental capability required)	Non-standard (section 9) representation agreement	Health-related decisions	A legal document that appoints your chosen representative to make decisions for you regarding health and personal care when you are unable to do so. The non-standard representation agreement allows the person more scope to set terms than does the standard (section 7) version.	16
	COMBINED WITH:  Enduring Power of Attorney	Financial and property decisions	A document that appoints someone you trust to make financial decisions for you when you are unable to do so.	12
	ALTERNATIVE:  Standard (section 7) representation agreement	Health-related AND routine financial decisions	The standard document that appoints your chosen representative to make decisions for you regarding health and personal care plus limited “routine” financial powers when you are unable to do so. The representative’s powers are limited by provincial legislation.	15
	Advance directive	Health-related decisions	A legal document that records your wishes regarding future health-care treatments.	19
<b>More advanced stages of dementia</b> (lesser degree of mental capability required)	Standard (section 7) representation agreement	Health-related AND routine financial decisions	The standard document that appoints your chosen representative to make decisions for you regarding health and personal care plus limited “routine” financial powers.	15
<b>Still more advanced stages of dementia</b> (lower/ lowest degree of mental capability required)	<i>Health Care (Consent) and Care Facility (Admission) Act</i>	Health-related decisions	Creates a default list of people to serve as temporary substitute decision makers only.	18
	Appointing a Committee (guardian) under the <i>Patients Property Act</i>	Health-related AND financial decisions	A court or the Public Guardian and Trustee, a provincial agency, appoints a guardian (called a “committee”) to make decisions for the incapable person. A committee is usually a family member or trusted friend.	21