THE NEW DEFINITION(S) OF SPOUSE:

REPRESENTATION AGREEMENTS AND ADULT GUARDIANSHIP

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I. CHALLENGES AND OPPORTUNITIES CREATED BY THE NEW DEFINITIONS OF "SPOUSE"

The newly amended definitions of "spouse" in the *Adult Guardianship Act*, the *Health Care (Consent) and Care Facility (Admission) Act* and the *Representation Agreement Act* came into force July 28, 2000: "spouse" means a person who (a) is married to another person, and is not living separate and apart, within the meaning of the *Divorce Act* (Canada), from the other person, or (b) is living and cohabiting with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender. One interesting aspect of the new definition is that no minimum period of cohabitation is required for the marriage-like relationship. This differs from the property-related provisions in other statutes which have a two year minimum cohabitation period, and often require the cohabitation to endure until immediately before death.

With this expansion of the definition of spouse under adult guardianship legislation, there is more potential for a person who was not previously recognized as a legal spouse to act as representative or guardian for the patient or adult. Under section 16 of the *Health Care (Consent) and Care Facility (Admissions) Act*, there is the possibility that more disputes and reviews will arise from equally-ranked substitute decision-makers.

The expanded definition of spouse creates new entitlements to collect pension, disability and death benefits. There are more potential spouses entitled to apply to court for benefits out of the adult patient's estate or property, including one or more spouses making spousal support claims or property division claims. Section 9(1)(f)(ii) of the *Representation Agreement Act* permits an adult to name a representative to financially support people, (out of the adult's property) such as spouses who were previously cared for or supported by the adult. There are also more potential conflicts of interest given the greater potential for a finding of a spousal relationship.

Pursuant to section 29 of the *Representation Agreement Act*, Representation Agreements may be terminated or suspended by marriage breakdown, either by divorce or by termination of the marriage-like relationship. Under s.29(1)(d) it will be very important for persons in this type of marriage-like relationship to consider from time to time whether they have created or terminated a spousal relationship. "Spouse" in the *Representation Agreement Act* includes a person living with another in a marriage-like relationship, with no minimum time prescribed. Because the new

definition of spouse amendments do not require a formal event such as a marriage or a divorce to create or terminate the relationship, there is a very high potential for individuals to have a mistaken belief both in fact and in law, as to whether they actually have a spouse. For example, persons who are separated from their legal spouse and have not made a separation agreement, obtained a court order, or had a triggering event occur under the *Family Relations Act*, and are living with another person in a marriage-like relationship, may have two spouses at the same time. A person who lives with another person for a length of time may not be aware of exactly when their relationship became "marriage-like" and therefore, would not know whether or when they had a spouse. In addition, people whose companions move out temporarily or permanently may not know or appreciate when that other person ceases to be a spouse, and for what purpose (i.e. property division, spousal support, benefits under pension legislation). Marriage-like relationships can end while co-habitation continues, and factors such as physical relations, economic independence and intention must be examined.

One result of the expansion of the definition of spouse, both in adult guardianship legislation and in estate legislation generally, is that a person who holds a Power of Attorney or is a representative named in a Representation Agreement, must now be more alert to the existence of marriage-like relationships which give rise to rights or obligations for the incapacitated person. How far the representative must go to defend the incapacitated adult, or to make a claim on behalf of the incapacitated adult, may be illustrated by a review of some recent court decisions.

In *Grigg* v. *Berg Estate* (2000), 31 E.T.R. (2d) 214 (B.C.S.C.), the Court read into the *Wills Variation Act* two new definitions of spouses which includes two people who have lived and cohabited, for a period of at least two years immediately before the death of one of the persons, in a marriage-like relationship, including a marriage-like relationship between persons of the same gender. Subsequent to the *Grigg* v. *Berg* decision, the amendments of the various statutes to include a broader category of spouses has increased the number of potential claimants in wills variation actions. This means that anyone acting on behalf of an incapacitated person must consider whether that incapacitated person might, as a spouse, have a claim against the estate of a person with whom the incapacitated adult was living in a marriage-like relationship.

In *Marsh* v. *Marsh Estate* (1996), 15 E.T.R. (2d) 93, the B.C. Supreme Court dismissed an application made by a son of a deceased father whereby the son sought an order to compel the Public Trustee as committee of the deceased's wife, to withdraw its defence of the father's will in a wills variation action. The court dismissed the application because it appeared that the wife was not in financial need and, if she had capacity, would have approved the husband's will which gave the wife a life estate and left the residue to charity. Clearly there may be circumstances where a committee or representative would have a duty to commence or defend a wills variation action on behalf of the patient or adult, particularly in the case of financial need.

Representatives and committees must consider the broader definition of spouse in reviewing and coming to grips with the adult's affairs upon their appointment becoming effective. In much the same way as an executor must review the affairs of the deceased and determine which assets should be retained and which should be sold in order to avoid wasting or unnecessary risk, a representative must take stock of the adult's assets and implement adequate safeguards. An interesting review of the efforts that a committee, and presumably a representative, should consider taking regarding the financial position and estate plans of spouses is set out in *Rootman Estate* v. *British Columbia (Public Trustee)* (1998), 24 E.T.R. (2d) 287 (B.C.C.A.). Mr. and Mrs. Rootman held substantial assets jointly with a right of survivorship and when Mrs. Rootman became incapable, the Public Trustee was appointed her committee. The Public Trustee did not receive cooperation from Mr. Rootman when the Public Trustee tried to determine what assets Mrs. Rootman held in her own name. The Public Trustee decided to sever the joint account, withdraw one-half of the proceeds and place them in an account for the exclusive benefit of Mrs. Rootman. Mr. Rootman was eventually declared incapable and the Public Trustee was appointed his committee as well. Mr. Rootman died first and left a will giving Mrs. Rootman a life estate in his estate, and on her death, the residue to various charities. Mrs. Rootman died a month later, intestate. At trial the Public Trustee argued that it was necessary to sever the joint bank account for to provide a fund to pay for Mrs. Rootman's household expenses, and to reduce the risk that Mr. Rootman might withdraw the entire amount of the account, thereby leaving no money for Mrs. Rootman's expenses. The Court of Appeal reviewed its earlier decision of *Wood* v. *British Columbia (Public Trustee)* (1986), 23 E.T.R. 116, which was relied upon by the respondents as authority for the proposition that a clear case of necessity must be made out before a committee

is justified in changing the nature of a patient's assets. The Court of Appeal determined that the trial judge was in error when he concluded that there was no risk of Mr. Rootman withdrawing the funds from the joint bank account because the cheque would have to be issued in both names. The Court of Appeal held that either joint owner of the account could receive the funds in his or her own name and therefore, there was a substantial risk, which the Public Trustee was justified in addressing by a withdrawal of half the funds. The Court of Appeal also determined that the Public Trustee was justified in not waiting and seeing, so that if Mrs. Rootman needed additional funds later, the Public Trustee could apply to court for an order authorizing the severance of the joint bank account.

The Court of Appeal in *Rootman* reviewed the question of necessity, i.e. whether the Public Trustee, when presented with an uncooperative husband and knowledge that the wife's expenses were not being met, acted reasonably and out of necessity in severing the joint account, undoing the Rootman's estate planning, and creating a stand alone account for the support of Mrs. Rootman. The Court of Appeal stated in paragraph 49 (at p.299) that:

> "I do not think it would have been a reasonable or prudent course of action to fail to secure a fund to meet Mrs. Rootman's current needs or to provide for the possibility of a future and greater need should it have been necessary to admit her to care. As a matter of law, when taken together with the risk of loss that would have been run by leaving the account in the joint names of the couple, I think it is clear that the course followed by the Public Trustee conformed to the standard of care to be expected of a reasonable and prudent person, and I respectfully conclude that the learned summary trial judge erred in holding to the contrary point of view."

If a representative is given the authority to deal with the adult's financial affairs and bank accounts, the representative may, in some circumstances, have the responsibility to take unpopular action to undo the estate planning efforts of the adult and his or her spouse where it is reasonable and necessary. Some complex actions and estate planning may be permitted or required of the representative, although the preservation of the adult's property must be of primary concern to the representative.

In February 2000 the British Columbia Court of Appeal released two decisions clarifying steps which may be taken on behalf of a mental incompetent in the estate planning arena. In *O'Hagan*

v. *O'Hagan* (2000), 31 E.T.R. (2d) 1, the committee of Mr. O'Hagan's estate applied to court for approval of an estate freeze of a company of which Mr. O'Hagan was the sole shareholder. The trial court dismissed the application, however the Court of Appeal approved the estate freeze because it would not diminish the father's estate and would not threaten the ability of the estate to meet the father's future needs. The estate freeze was viewed as being consistent with the patient's intentions and autonomy and significant tax on capital gains on the death of Mr. O'Hagan would be deferred. The court considered section 18 of the *Patient's Property Act* and the requirement that the exercise of the committee's powers must be "for the benefit of the patient and the patient's family, having regard to the nature and value of the property of the patient and the circumstances and needs of the patient and the patient's family." The broader definition of spouse will bring into the definition of "patient's family" individuals in relationships who may not have been considered family prior to the amendments.

In contrast to *O'Hagan*, the Court of Appeal in *Bradley* (2000) 31 E.T.R. (2d) 16 did not believe it was reasonable or prudent to approve proposed gifts by a committee designed to reduce U.S. estate tax. The proposed plan would have reduced the incapacitated patient's estate from $2.6 million to $809,000 and would be facilitated by gifts of US$100,000 per year to the husband and US$10,000 per year to each of the wife's children, their spouses and her grandchildren. The Court of Appeal was concerned that Mrs. Bradley, who was only 65, might live many more years and that the proposed plan would dramatically reduce her estate, in contrast to the plan for Mr. O'Hagan which would not reduce his estate, and would permit Mr. O'Hagan, if he miraculously recovered from his incapacity, to regain control of his company.

The Court of Appeal in both *O'Hagan* and *Bradley* determined that necessity did not have to be proven before steps could be taken for the benefit of the patient. These two cases will provide guidance to a representative who is considering whether to undo estate planning on behalf of incapacitated adults, as in *Rootman* or to create a new estate plan for the benefit of the adult and the adult's family, as was the case in *O'Hagan*.

Another interesting issue for a representative or a committee acting on behalf of an incapacitated adult is whether to challenge transfers of property made by the adult's spouse which would delay or hinder the adult's legal or equitable claims against that spouse: *Hossay* v. *Newman* (1998), 22

E.T.R. (2d) 150 (B.C.S.C.). In *Hossay*, the court was asked whether the *Fraudulent Conveyance Act* applied to *inter vivos* dispositions made to defeat the provisions of the *Wills Variation Act*. The court answered that if the claim under the *Wills Variation Act* can be supported by a legal or equitable claim of the plaintiff against the testator prior to the testator's death, that claim may be capable of being transformed into a claim under the *Wills Variation Act* after death. For a recent example of a "fraudulent conveyance" estate plan and a good review of the authorities, see *Stone* v. *Stone* (1999) 29 E.T.R. (2d) 1 (Ont. Sup. Ct.). The diligent representative of an incapacitated adult, who is in a spousal relationship with an individual who controls a substantial portion of the couple's assets, should consider whether that other spouse should be permitted to dispose of those assets in a manner which would delay or defeat the adult's legal and equitable rights.

II. IS A REPRESENTATION AGREEMENT NECESSARY IN ALL CASES?

The short answer is no.

Section 16 of the *Healthcare (Consent) and Care Facility (Admission) Act* provides for temporary substitute decision-makers to be selected in accordance with the statutory list of priorities including spouse, children and other next of kin. If an adult is happy with the statutory priority list, a Representation Agreement may not be required.

A Representation Agreement is not necessary for general property and financial matters, assuming that the adult has made an enduring Power of Attorney under Section 8 of the *Power of Attorney Act* prior to September 5, 2001. Section 8 provides for the authority of an attorney to continue despite any mental incapacity on the part of the grantor.

An adult who has nominated, in writing, a committee of person under Section 9 of the *Patients Property Act* may not require a Representation Agreement, if the cost of a court application is acceptable and bonding, financial disclosure dealings with the Public Trustee, and other complications are acceptable. In order for the court to appoint the committee nominated by the patient, the nomination must have been signed by the patient at a time when he or she was of full age and of sound and disposing mind. As well, the nomination must be executed in accordance with the formal requirements under the *Wills Act*. If the nomination document includes generous indemnities or provides compensation, it is prudent to beware of the witnesses being the nominee or nominee's spouse.

Those individuals who have their assets held by trustees in trust, particularly pursuant to the new alter ego and joint spousal trust available for individuals over the age 65 and created under the *Income Tax Act* after 1999, may find that their assets are adequately provided for by the trustees, thereby eliminating any need for the adult to appoint someone to deal with their property and financial matters.

Beneficiaries of trusts which have been created to provide for the beneficiary in the event of mental incapacity may not need to appoint a representative under the *Representation Agreement Act*.

A Representation Agreement *is* indicated (a) if an enduring Power of Attorney is unavailable, (b) if the adult wants to grant authority in the combined areas of property and health direction in one document, or (c) if the adult wants to give a person who is not on the statutory list of temporary substitute decision-makers authority and priority over family members to act in a health care situation.

An enduring Power of Attorney may not be available if the adult lacks the capacity to make a Power of Attorney instrument. The test for capacity to make a Power of Attorney instrument is set out in the *Re K, Re F*, [1988] 1 All E.R. 358 (Ch. D.) and *Godelie* v. *Ontario Public Trustee* (1990), 39 E.T.R. 40 (Ont. Dist. Ct.) decisions. The test provides that the adult need not necessarily understand how to manage his or her own financial and property matters but must understand that by granting the Power of Attorney, authority has been given to another person by the grantor. Because of the uncertainty regarding the minimal level of capacity necessary to make a Section 7 Representation Agreement it is arguable that an adult who lacks capacity to make an enduring Power of Attorney could still have the capacity to make a Representation Agreement, provided it only has the limited powers set out in Section 7. Section 8 of the *Representation Agreement Act* provides only some guidance as to the requisite capacity needed in order for an individual to make or amend a Section 7 agreement.

After September 5, 2001, unless an extension or permanent change in legislation is made, section 8 of the *Power of Attorney Act* will be repealed and new enduring Powers of Attorney cannot be made after that date.

Some individuals will find appeal in a single document to deal with both personal and financial matters in a Representation Agreement. In a section 7 Representation Agreement, an adult may authorize a representative to make decisions regarding personal care, including where and with whom the adult is to reside; routine management of financial affairs, which consists of the payment of bills, the receipt and deposit of income, purchases for food and accommodation, the making of investments and other activities as listed in section 2(1) of the *Representation Agreement Regulations*; both major and minor health care, as defined in the *Health Care (Consent) and Care Facility (Admission) Act*; and legal services, which includes the commencement, defence and settlement of any legal proceedings. Significantly, section 7(1)(d) of the *Representation Agreement Act* expressly prohibits the representative to obtain and instruct legal counsel for the purpose of commencing divorce proceedings, which must be commenced by the other spouse if divorce is desired. Presumably, this may be authorized in a section 9 Representation Agreement, as it is already a permitted activity for committees, provided the divorce action benefits the patient.

Other individuals who may want to name an unrelated person to make health care decisions may wish to make a limited Representation Agreement dealing only with health care matters and not with property or financial matters. It may not be safe to assume that a hospital or doctor will always be willing to accept a Representation Agreement, particularly a Section 7 Representation Agreement made by an adult of limited capacity. It has been the experience of some people dealing with banks and other finance or property authorities that they will not rely on Section 7 Representation Agreements in the absence of a written legal opinion confirming the validity of the document.

III. STATUS OF PRE-2000 HEALTHCARE DIRECTIVES

Under the *Health Care (Consent) and Care Facility (Admission) Act*, the hospital, physician or other health care provider dealing with an adult who is incapable of giving consent will take directions from a substitute decision-maker, who must follow the previous known wishes of the adult. Section 19 provides that a substitute decision-maker appointed under the *Health Care (Consent) and Care Facility (Admission) Act* must comply with any instructions the adult expressed, either orally or in writing, while he or she was capable. Where the wishes of the adult are not known, the substitute decision-maker must make health care decisions based on the

adult's known values and beliefs or in the best interests of the adult. Documents such as a Representation Agreement, a living will, or a simple written instruction may be sufficient to appoint a substitute decision-maker under the provisions of the *Health Care (Consent) and Care Facility (Admission) Act.* Therefore, people preparing Representation Agreements, or persons relying on Representation Agreements, should consider whether there are any other documents or other evidence of appointments of substitute decision-makers expressions of wishes. It may be prudent to review the medical charts of the adult and consult with the family physician and family members.

An informal health care directive, letter or "living will" which has not been executed with the formalities of the *Representation Agreement Act* and is not a representation agreement or appointment of guardian, will be ineffective to name a substitute decision-maker under the provisions of the *Health Care (Consent) and Care Facility (Admission) Act.* A "substitute decision-maker" is defined as meaning a person appointed under the *Adult Guardianship Act* as a substitute decision-maker, however the relevant provisions of the *Adult Guardianship Act* did not come into force on February 28, 2000. Under section 11 if an adult is incapable of giving or refusing consent to health care, the adult substitute decision-maker, guardian or representative who has authority and is capable of giving consent can give substitute consent. In the absence of the provisions of the *Adult Guardianship Act* appointing substitute decision-makers, only a guardian or representative can be a substitute decision-maker under section 11. Section 14 of the HCCCFA provides that if major health care is required and there is no substitute decision-maker, guardian or representative, then after consulting with the adult spouse, relative or friend the health care provider must inform the adult and any spouse, relative or friend of the adult who accompanies the adult of the decision of the assessment of incapacity and the name of the person chosen under section 16 as temporary substitute decision-maker. Under section 16(1) there is a prescribed priority list of people entitled to be appointed as substitute decision-maker and the first priority is given to the adult spouse and then to the adult's child, parent, sibling or others. Under section 19(1)(b), the temporary substitute decision-maker is obligated to comply with any instructions or wishes the adult expressed while he or she was capable. The phrase "any instructions or wishes" does not require a formal living will or other document and may include verbal or written expressions made by the adult while capable. The structure of the HCCCFA

creates a potential contest and conflicts between one or more spouses and the other next of kin of an adult. A "spouse" under HCCCFA includes a person married to another person and not living separate and apart within the meaning of the *Divorce Act*, and a person who is living with another person in a marriage-like relationship including persons of the same gender. It may be difficult for a health care provider to determine whether a person is a spouse. Therefore a Representation Agreement is indicated in any situation where there may be some issue as to whether the individual appointed is a "spouse" and thereby entitled to priority to act as a temporary substitute decision-maker under section 16. A representative is not subject to the restrictions, such as the 21 days limit on authority, which apply to a temporary substitute decision-maker.

IV. THE IMPACT OF THE DEFINITION OF "SPOUSE" AMENDMENTS ON THE FUTURE USE OF POWERS OF ATTORNEY

The *Power of Attorney Act* does not require any relationship, let alone a traditional spousal relationship, between the granter/donor and the attorney. The *Power of Attorney Act* contains no provisions which would automatically revoke or terminate a Power of Attorney upon a change in martial status, whether the change were a creation of a marriage-like relationship or a cessation of a marriage-like relationship. Section 8(1)(b) of the *Power of Attorney Act* does prohibit the spouse of an attorney from being a witness to an enduring Power of Attorney instrument. Therefore, when a Power of Attorney document is executed or reviewed by a third party intending to rely upon the Power of Attorney, it is necessary to determine whether, taking into account the new broader definition of spouse, the witness is the spouse of the attorney.

V. DIFFERENCES BETWEEN POWERS OF ATTORNEY AND REPRESENTATION AGREEMENTS

DIFFERENCES	POWER OF ATTORNEY	REPRESENTATION AGREEMENT
COST	Less expensive to explain the legislation and case law to the client, to draft the document and to execute the document.	Legislation and case law will be more complex and time consuming to explain to the client because it is fairly new and a creature of statute and not common law. The document itself is more difficult to draft because there is no standard form, and there are many

DIFFERENCES	POWER OF ATTORNEY	REPRESENTATION AGREEMENT
		variables to consider because it is not a unilateral document but an agreement between the adult, the representative, the alternate representative and the monitors, and intended to be relied upon by a number of third parties. The representation agreement is much more difficult to execute properly, as section 13(3) requires two witnesses to the signatures of the adult and the representatives, as well as completed certificates of both the lawyer for the purposes of sections 9(2)(b) and 27(1)(b)and the monitor under section 12(3). There is a statutory duty upon the witnesses to review all the circumstances prior to acting as a witness and completing the certificate pursuant to section 13(6). There is also a statutory requirement on the representatives and monitor to review their statutory duties, under sections 16 and 20 respectively, by completing the prescribed certificates, before agreeing to act.
COMPLEXITY	Power of Attorney documents have been traditionally quite simple, even the laundry-list exhaustive standard forms of Powers of Attorney.	The Representation Agreement is much more complex to prepare, even if a standard form of the agreement is enacted by regulation.
THE PARTIES	The Power of Attorney involves a donor or grantor and an attorney, as well as a witness. The attorney may, for Land Title Office purposes, be required to sign a statutory declaration regarding his (her) age.	The parties to a Representation Agreement are much more complex and are subject to various restrictions depending on their personal and business relationships with the adult. Under section 13 of the Act,

DIFFERENCES	POWER OF ATTORNEY	REPRESENTATION AGREEMENT
		various people are prohibited from acting as representatives or witnesses and there are many potential conflicts of interest between the adult, the representatives, the monitor, the witnesses, the lawyer being consulted and third parties who may have to rely on the document later.
ACCEPTANCE	Power of Attorney instruments have been used for many years in British Columbia and are widely accepted by banks, the Land Title Office, and other institutions.	A representative may find it difficult to persuade a bank or other third parties to rely on a Representation Agreement, particularly where the agreement is homemade or is made pursuant to Section 7 and does not include a certificate of a consulting lawyer.
MONITOR AVAILABLE	No monitor is available for a Power of Attorney. However, it is possible to name two individuals to act as attorneys, thereby ensuring that one attorney can monitor the actions of the other attorney. It is also possible to require two attorneys to act together to ensure that no individual attorney can abuse the donor.	Under section 12, a monitor is available and is in fact required unless the representative, is the spouse or the requirement of monitor is waived and a lawyer is consulted.
STATUTORY DUTY OF CARE	An attorney acting under a Power of Attorney is generally held to have a common law fiduciary obligation to the principle (granter/donor).	Under the *Representation Agreement Act*, there is a statutory duty placed on the representatives and the monitors under sections 16 and 20 and in fact, there is a duty of care on the witnesses as well, regarding their knowledge of the circumstances at the time they witnessed the document.

DIFFERENCES	POWER OF ATTORNEY	REPRESENTATION AGREEMENT
HEALTH, MEDICAL AND PERSONAL CARE	A Power of Attorney instrument does not grant authority to make health, medical or personal care decisions although cheques can be written and facility contracts could be signed by an attorney using a Power of Attorney document.	Both section 7 and section 9 Representation Agreements can provide for health, medical and personal care decision-making.
AVAILABILITY TO PEOPLE OF LIMITED CAPACITY	The Power of Attorney is not available to a person who cannot understand the nature or effect of granting the authority to another person.	The Representation Agreement under section 7 which is limited to certain statutory powers, may be executed by a person of diminished capacity as there is no minimal capacity tests set out in the statute.
AVAILABLE AFTER SEPTEMBER 5, 2001	It appears enduring Powers of Attorney will not be available after September 5, 2001 unless legislation is changed.	A Representation Agreement will be available after September 5, 2001.
REVOKED BY MARRIAGE BREAKDOWN	A Power of Attorney appointment is not revoked by marriage breakdown or a subsequent marriage.	Under section 29 of the *Act*, a Representation Agreement is revoked or suspended by a marriage breakdown. This will be important considering the new definition of spouse. Non-traditional marriages which exist between the adult and the representative may terminate without the usual formalities of the triggering events under the *Family Relations Act*. In some cases the relationship will terminate simply by ceasing to co-habit or ceasing to be in a "marriage like state" (ie. the two individuals could continue to co-habit but not be in a "marriage like relationship" namely, no conjugal relations or sharing of expenses).