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NEW RULES FOR POWERS OF ATTORNEY AND LIVING WILLS

By Janice Mucalov, LL.B.

Every adult in BC should know about the important new rules introduced on September 1, 2011 for power of attorney documents, representation agreements and "living wills" (now called "advance directives"). These tools allow you to better plan for when you may need help making decisions about your legal or financial affairs or health care, or want to appoint a trusted person or persons to make these decisions for you. The new rules help prevent abuses sometimes perpetrated by the very people who are supposed to protect your interests, especially if you are vulnerable or elderly.

For over 10 years, BC has allowed adults concerned about potential infirmity due to age, illness or serious injury (such as dementia, stroke or a serious car accident) to appoint someone else to make personal health care decisions for them with a representation agreement. For very serious health care decisions (like refusal of life support or unconventional medical treatments), a general "section 9" representation agreement is needed. For more minor decisions (like dental care or minor surgery), a limited "section 7" agreement is enough.

Now, you can no longer appoint a paid health care provider as a substitute decision maker (unless that person is your spouse, parent or child). As well, in a general representation agreement, you must appoint a "monitor" to oversee your representative's decisions (unless it's your spouse) to ensure they're in your best interests.

The new rules also now legally recognize a properly executed "advance directive." If you don't want to appoint a representative, you can specify your end-of-life decisions (such as refusal of life support) and other health care wishes in an advance directive, in case you're incapacitated. Your wishes must now be followed in most cases, and hospitals and medical professionals can rely on this document. (But you can't ask for something illegal, for example, to be compassionately put out of your misery.)

Important rule changes have also been made to powers of attorney and enduring powers of attorney.

With a power of attorney, you can appoint someone you trust as your agent or "attorney" to act for you in relation to business, financial or certain legal matters (for example, if you're going to be away for an extended time period). But a power of attorney ends if you become mentally incapable. Not so for enduring powers of attorney, which specifically state that your attorney's power is to continue despite such mental incapacity. This makes enduring powers of attorney very useful. It allows your attorney to make legal or financial decisions for you – without someone (perhaps not who you would pick) having to go to court to be appointed a "committee" (an expensive and time-consuming process), which would otherwise have to be done. (A representation agreement for health decisions also avoids the committee court process.)

The new rules for enduring powers of attorney are extensive and specific. For example, there are strict new signing formalities, like signing and dating the document in front of two eligible adult witnesses at the same time, who must also sign at the same time, though there are some exceptions for lawyer and other witnesses. (Strict formalities also apply to general "section 9" representation agreements and advance directives.) And your attorney can't be paid for taking on this responsibility unless the document says so.

These planning tools deal with complex issues and must be executed properly to be valid. You should therefore consult a lawyer about putting them in place, alongside a will.

This column has been written with the assistance of the law firm of FABRIS McIVER HORNQUIST & RADCLIFFE. The column provides information only and must not be relied on for legal advice. Please contact FABRIS McIVER HORNQUIST & RADCLIFFE for legal advice concerning your particular case.



NICK IAIN RICHARD CHARLES
FABRIS McIVER HORNQUIST RADCLIFFE



FABRIS McIVER HORNQUIST & RADCLIFFE

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40 Cavan St. • Nanaimo

www.fabris-law.com

250-753-6661