

# PATHWAYS TO INDEPENDENCE

**JUNE 30TH, 2021, 1:30PM TO 3:30PM**

**ZOOM VIRTUAL PEER GROUP MEETING NOTES**

**Hosted By:**

**Paul Gauthier,**

Executive Director

Individualized Funding Resource Centre Society

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Executive Director

Technology For Living

**Guest Speakers:**

Ken Kramer Q.C., TEP

More than ever, people with disabilities must come together as a unified group in society. How we support and help each other through crisis and every day hurdles will strengthen us as a community and as individuals. Living independently is a choice and comes with additional challenges. Through unification people with disabilities make a difference; each voice is important.

The goal of Pathways To Independence meetings are for peers to come together and share information and updates on current issues facing people with disabilities.

The June 2021 meeting was attended by approximately 72 people.

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## Accessibility Nature Wellness Program with Kari Krogh and Ean Price

The Accessible Nature Wellness Program brings together, evidence-based practices that are mindfulness. You may have heard of Forest Bathing and Nature Therapy and research shows that feeling calm in nature makes a positive impact on the mind and body.

This is a way we can help ourselves and others, in times of stress, which includes the Pandemic. The session following Pathways was held on Saturday, the 17th of July. We received a grant so there is no expense at all, and you can go ahead and register for future sessions as they are announced.

### Ean Price

If you are interested in registering, please send me an email, or call me directly and I will walk you through the process, it is very simple.

Email: [eprice@technologyforliving.org](mailto:eprice@technologyforliving.org)

## Climate and Equity Working Group with Hilary Currie

Disability Alliance BC (DABC) asked if we would pass along this request from the City of Vancouver to the disability community to see if there is anyone interested in participating in a Climate, and Equity Working Group.

If you are interested in Climate Change Issues you may have an opportunity to participate.

Members of the Client and Equity Working Group will advise the City Staff on Climate Related Policies, Programs and Engagement efforts from an equity perspective. This will help shape the developments of what is called a Climate Justice Charter, which will impact Climate Policy.

A Climate Justice Charter calls for Climate Justice by transforming work environments, communities, and political power structures. For an equitable plan, Vancouver is striving to respond to the climate crisis with ambitious Carbon Reduction Policies and the equitable implementation of those policies to ensure that everyone has the ability to live and work in zero emissions buildings, and be able to benefit from comfort, quiet, healthy air, and the lower energy costs they offer.

I recall a peer in a previous pathways meeting, saying that she really struggled with the emissions in condo buildings; it really made her suffer. That is what Vancouver is striving to get away from.

What does a more equitable Vancouver look like if they are successful with the Climate Emergency Action Plan over the coming decades?

Main issues:

- One is that collectively their actions would include making low cost sustainable transportation options, which would be easy, safe, and reliable.
- Secondly is Reliable Transportation for people with disabilities; this is a real must!
- We have discussed this before where it is an ongoing challenge between buses, SkyTrain, Handydart

If you are interested, please send me an email with your contact information. Anyone who does send me an email I will forward it on to Disability Alliance, and they will forward your interest to the City of Vancouver Staff.

**Hilary Email:** [hilary@ifrcsociety.org](mailto:hilary@ifrcsociety.org)

Update: Thank you to those who were interested in participating. Your names and contact information were forwarded to the appropriate parties.

## Representative Agreements, Powers of Attorney & Personal Planning with Ken Kramer, Q.C.,TEP

Ken Kramer joined us today to discuss Representation Agreements, Power of Attorney and Personal Planning. Ken comes with a wealth of knowledge and experience in the area of estates, serving families, and people with disabilities.

He is a CSIL Employer and is on the Executive for the Association of CSIL Employers (ACE) and has been able to successfully negotiate significant changes within the CSIL Program. Ken sits on the Board of Directors for Technology For Living and has served on numerous Boards and Committees over the past 30 years, with a focus on Disability and Seniors Issues.

### Ken Kramer QC., TEP

For KMK Law Corporation Website [Click Here!](#)

It is a real pleasure to be here. Thank you and your team at the IFRC as well as Ruth, and her team at TFL. I am excited about the opportunity to present today.

When I first presented to the staff at TFL, it was a new policy developed for the clients of TFL, and specifically PROP. Thinking about the future, trying to emphasize the need for people to continue to be able to make decisions, and when they are not able to make decisions. Determining methods to ensure there is a continuity of decision making, will enable you to continue to function in the community, even when you may not have the ability to make decisions, because we are all aging.

**Ken Kramer's PowerPoint** [Click Here!](#)

I am going to begin with some learning outcomes and will start with differentiating between:

1. Representation Agreements versus Powers of Attorney,
2. Representation Agreement Section 7 versus Section 9,
3. Private Committeeship, to further emphasize why it is important to take some of these steps today in order to avoid this unnecessary possibility in the future.

Fundamental to all of these documents is understanding the relevance and importance of capacity to develop them.

We will focus on Personal Planning. We are not talking about Estate Planning; Personal Planning is about planning for the time when you are alive. Again, we are all living long lives, and we want to ensure that

we continue to live those lives with mechanisms in place with these personal planning documents. The documents die with you when you pass away; they become irrelevant.

We will focus on these types of documents, predominantly Representation Agreements and Enduring Power of Attorneys.

1. Advanced Directives and some other like documents.,
2. Estate Planning is planning for after death.
  - This is when you pass away, and the Will that you might have developed will be needed.
3. Estate Planning in the context of CSIL Funding, and some issues that perhaps, everyone should be aware of.

One of the fundamental tools around Supportive Decision Making is this *'Presumption of Capability.'*

In Presumption in the Law, it says that at the age of 19, we always have capability. As we know, that may not always be the case. There may be numerous reasons why capacity is not in place. Remembering that capacity is transaction specific, and it is general to the nature and effect tests, and that means people can have different levels of capacity at different parts of the day or year. It is about assessing capacity at that given moment.

### *Power of Attorney*

Some individuals may never have the ability to have capability, and others may lose capability over time due to aging, disease and or accident. We are very fortunate in BC that we have a number of tools to plan for incapacity, end of life and our overall support needs.

Power of Attorney, or an Enduring Power of Attorney, are documents which are effective only while you are alive. They die when you die, and it permits you to appoint a person or persons to be your attorney, and to make legal and financial decisions for you. There is a very high test for mental capacity, and you need to understand the nature and consequences of developing one of these documents.

Within each category of Power of Attorney, there are a number of different types of Powers of Attorneys: General Power of Attorney, which is a very broad sort of spectrum of powers to handle financial and legal affairs, will end if you become incapable.

For our purposes, the type of Power of Attorney which is a much broader document is what we commonly refer to as an Enduring Power of Attorney.

One of the big distinctions between an Enduring and a General Power of Attorney is that the Enduring Power of Attorney will have all the same Powers of the General Power of Attorney, but it does not end if the adult becomes mentally incapable, due to illness, disease, or accident.

Not only is the Power of Attorney effective while you have capacity, it will endure to the point where you have lost capacity, and up until the point of death, when it will no longer be valid.

The Enduring Power of Attorney is generally the recommended type of Power of Attorney. Naturally, we want to ensure that individuals have the ability to direct their Attorney to make financial, legal decisions, where an individual loses capacity.

***Why do we need an Enduring Power of Attorney?***

As an example; When an individual, or individuals (typically spouses) own real estate, they own their own principal residence. If one spouse became incapable and there was not a Power of Attorney in place, the other spouse would have no ability to sell or refinance that house. They would be stuck with that property, because it will be frozen because the other spouse has lost capacity.

The Enduring Power of Attorney will permit the continuity of management for that asset. It will avoid, the need to apply to the court to be appointed as a Private Committee, and that will be discussed later.

***Who can you appoint?***

Anyone who is 19 years of age or older. Generally, it is a spouse, children, friends or relatives, depending on your financial situation.

You may want to consider the appointment of a Trust Company or a Financial Institution or professionals such as Lawyers to facilitate on your behalf. Obviously, there are fees associated with that and you need to consider what is the cost benefit of having that Individual Corporate entity potentially in that role.

The duties of an Attorney are outlining the Legislation, and while I am not going to run through this in great detail today, the Power of Attorney Act and Section 9 of the Legislation outlines the duties. An Attorney has a high fiduciary of responsibility. They are charged with the responsibility of managing your financial and legal affairs, and must be very diligent, acting with honesty, in good faith, and exercise our care with diligence.

They must act in the best interest of that adult, understanding what their beliefs and values are while following the directions in the Enduring Power of Attorney. It is a very significant role and with that role comes great potential for liability if you make an error or if you do not act as a prudent individual should.

***Representation Agreements***

This is the key to this presentation. Within the category of Representation Agreements I will differentiate between the different types of documents that are available. Much like the Power of Attorney it is intended for adults, you need to be 19, or older.

Within the category of Representation Agreements, there are two types of agreements permitted by Legislation.

1. Section 9 Representation Agreement, commonly known as an RA 9.
2. Section 7 Representation Agreement, commonly known as an RA 7.

With respect to the Section 9, I am paralleling the Power of Attorney. The big distinction here is that the Section 9 Agreement allows you to appoint a representative to help you make decisions regarding health care, and personal care. It is limited to those areas.

Like the Power of Attorney, there must be the requisite mental capacity to understand the nature and effect of creating one of these documents.

Section 7 Representation Agreement similarly allows you to make the Appointment of a Representative to help you make decisions, but is different in that it has a broad reach of:

1. Financial affairs: paying the adult's bills, opening bank accounts in the adult's name, setting up an RDSP.
2. Legal Affairs: instructing a lawyer to begin a proceeding (not including divorce), or to defend a legal proceeding.
3. Health Care: Dental Care, Physiotherapy, decisions about medications, tests and surgeries.
4. Personal Care: Deciding about living arrangements, e.g. Home Share, hiring and supervising staff for CSIL.

The RA 7 is intended for individuals who have a diminished level of capacity. It is not intended for individuals who only need to create a Section 9 Agreement for Health Care, because of the Capacity Requirements.

The RA 7 will also facilitate requirements within the Health Authority, and specifically, CSIL and/or CLBC Related Funding.

Additional information in terms of distinction, of what these documents do:

The Section 9 Agreement is intended to provide broad Personal Planning around Health Care, and Personal Care. Its' intention is to be utilized with a Power of Attorney, so that you then have all of your Health Care decision making, and all of your financial and legal affairs, within those two documents on the health care front.

Not only does it provide the RA 7 powers that are related to Health Care, it will also permit additional Health Care decision making. The powers within that Section 9 Agreement are very broad, to the point of life or death.

Examples:

1. Refusing care for life saving treatment or care.
2. Some specialized medical procedures
3. Temporary care and education of your minor children

RA 9 deals with more routine related matters and your representative is there to help you make decisions, or to make decisions on your behalf regarding almost all matters of:

1. Health care
2. Personal care

There are defined limitations. Legislation specifically outlines what a Representative within an RA 7 can do; it is Legislative. It is a lengthy document that I would encourage you to consider.

### **Medical Assistance In Dying (MAID)**

*Is this something that is permissible within a Section 9 Agreement?*

The answer is not at this point. It cannot be used to authorize MAID.

I realize this is a difficult topic for a lot of persons in the disability community and there is a lot of good debate around it, but if MAID is something that you may be looking at and wanting to delegate there may be the ability to make some presumptions that if Legislation should change in the future then you can potentially articulate in your RA 9, the opportunity to permit MAID.

- Assuming that Legislation permits that, but at this very moment, an RA 9 cannot be used for authorizing MAID.

The Section 9 Agreement cannot be used for financial or legal affairs. It is intended to be where the Enduring Power of Attorney comes into place.

Section 7 will not permit major financial decisions such as:

1. Purchasing or disposing of real property.
2. It will not authorize specific types of health care and/ or personal care

With RA 7, you will not be able to give or refuse consent to;

1. Life supporting care
2. Abortion
3. Psychosurgery
4. Experimental Health Care involving a foreseeable risk that is not outweighed by the expected therapeutic benefit.

Much like the Power of Attorney Legislation, the duties of a Representative are also very expansive, as outlined in Section 16 of the Representation Agreement Legislation. I would say that there are some commonalities, to the Power of Attorney Legislation, in terms of the important fiduciary duty.

Remember that the attention of a Representation Agreement is that initially, it is a supporting tool. It is there to permit you to appoint a Representative to support you in making decisions.

As long as you, the individual, has capacity to make decisions, you will always be looked to for making those decisions. No one is going to be able to oversee or bypass you. Whether it is the Representative or whether it is the Medical Care Provider, or the Financial Institution if it's an RA 7.

There is always a duty, to recognize that supportive tool, and that '*Presumption of Capability*'. The Representation Agreement only converts to a substitute decision making tool when you lose capacity; if you become incapable of making decisions, and at that point, there are some real clarities that you are not able to make decisions.

I want to emphasize that that this is a supportive tool because sometimes there is a presumption that the moment you sign this document, you have somehow now given up authority to make decisions about your affairs. The answer to that is clearly, *that is not correct!*

The intention here is that you will always have capability to make decisions, as long as you have that capability. At the point of losing capability, those documents now turn into a more of a substitute tool.

Representation Agreements, and the development process of these documents is outlined in Section 13 of the Legislation. One of the great things about developing one of these documents is that they become a little bit easier to execute.

In the past they used to be cumbersome, but are a lot simpler now in terms of developing these documents. It is important to note is that there is no need for a lawyer to be involved in signing these documents.



- They can be completed with witnesses, and this is very important if lawyer fees do not fit within your budget.

There is opportunity where an individual may not be able to sign on their own.

- If you do not have physical capability, there are provisions within the Legislation to permit you to use your delegate for that responsibility.

### *Advanced Care Directives*

The option of Advanced Care Directives (or Advanced Directives) comes up frequently. I will outline how these documents interrelate with Representation Agreements.

An Advance Care Directive is a written document where you give or refuse consent to specific health care matters. Generally, it is limited as to the instructions that have been articulated in the document and will apply to a specific healthcare situation that arises at the time of that consent.

Sample for Advance Care Directive: DNR, Do Not Resuscitate order, *'I do not wish to be kept alive. Do Not Resuscitate me under any circumstance.'*

You can see it is very specific. The challenge is that we do not know what the future holds in terms of the technology might then exist for medical lifesaving, but this would be a very specific form of direction, and it would not be given by an individual.

It would effectively be you, giving this direction to the Health Care Provider in an emergency situation. If that DNR order is in place, there is a legal duty that the Health Care Provider must follow.

**Please note** that a Representation Agreement will supersede an Advanced Care Directive, if the adult has made both. The Representation Agreement may provide that the Health Care Provider may act in accordance with any instructions that you may have given in an Advanced Directive, without the consent of the Representative.

The utilization of these documents needs to be really carefully considered to ensure that your wishes are ultimately fulfilled in terms of your health directives, whether that is:

1. Advanced Care Directive
2. Ensuring that your Representative understands your wishes and desires around Health Care.

### *Organ or Body Donation*

Organ or body donation is when you provide consent for your body to be donated at the time when you pass. You need to register those wishes with the BC Transplants Organ Donor Registry.

For the BC Transplant Donor Registry [Click Here!](#)

### *Medical Assistance in Dying (MAID)*

I have spoken a bit about Medical Assistance in Dying which permits individuals over the age of 18 to receive medical assistance in dying, and there was an extensive eligibility to go through when considering assistance.

### *Committeeship*

Typically, a last resort option, with respect to Incapacity is Committeeship. This is where we run into a lot of challenges, and we unfortunately could face a significant cost.

#### *“What is the Committeeship?”*

A Committeeship is a Court Appointed Personal or Property Guardian, with the powers to make Personal Financial, and legal decisions for an incapable adult. The Government Legislation is the patient's Property Act, and this Legislation has been in place for many, many years.

It is very black and white in terms of the triggering mechanisms. The Public Guardian and Trustee may also be a Committee of Estate by a Certificate of Incapability that would be potentially issued under the Adult Guardianship Act. This is more so when there may not be individuals available to assume that role.

If within your network, you did not have a family member or a friend who could take on the role, the Public Guardian may do that.

If Committeeship is a last resort measure, it should be carefully considered and there must be some assurances in your mind that other options are not available.

Like the Representation Agreement and the Power of Attorney, a Private Committee can be a family member or friend. They can all apply for it.

On the cost side, this is where it gets really expensive. It is not unusual for a Private Committeeship Application to the Supreme Court of British Columbia to begin at \$7500 and will continue to increase from the point of application significantly. It will depend on the type of file, whether it is consented to whether there is any opposition to the appointment of the Committee.

With the medical evidence and due process it can get very expensive. If there is no one willing or able to act, the Public Guardian can apply or be appointed.

#### *What is involved with a Committeeship or an application?*

Generally, it begins with two Medical Affidavits from two Physicians; people who are versed in the assessment of ‘capability’.

Whether it is a Geriatric Specialist, or a specialist well versed in Brain Injury, for example, these affidavits would be from Physicians sharing their opinion about the capability of that adult in managing either their person, or their Health Care, Personal Planning, and/or their Estate which is more financial, legal related.

The fees that Physicians charge for this service range anywhere from \$300 to \$2,000 and up. It can get really expensive.

The person who is applying to be your Committee will need to swear an affidavit providing information about the adult:

- Their circumstances
- Their income
- Their financial situation
- Then also potentially their plan for the care of that adult.

The Public Guardian and Trustee will also be involved in that review, and they charge about \$525 inclusive of GST. Then there is also that need to provide notice to those that might have any rights or those who may have already been appointed as Power of Attorney or Representative.

It can get complex, and it is not unusual for these applications to take three to four months so if there is an urgent need for a decision, Committeeship may not work for you.

In terms of the duties and responsibilities of the Committeeship the Legislation, under the patient's Property Act, does not give us a lot of direction on those duties and responsibilities. However, within certain elements of the Legislation, we can see that there are some similarities to both the Power of Attorney Act, and the Representation Agreement Act in terms of the duties of an Attorney, and/or a Representative.

You have a similar financial or fiduciary responsibility to manage the affairs of that individual, as a prudent individual would do.

The court also has discretion to place limits on those rights and privileges and Powers of that Committee, and even to the point of requiring the written consent of the Public Guardian Trustee, and to find any of those rights of Power Privilege. You can definitely be restricted, and there is always that oversight.

A Committeeship will generally terminate all Powers of Attorneys and Representation Agreements, typically in situations where the Attorney and/or Representatives are not acting prudently. They have been appointed, but there may be some indication that they are acting without due diligence or there may be evidence of fraud.

There is an ability under the Legislation to permit certain portions of the Representation Agreement to remain in place. Notwithstanding that Committeeship, there is that '*Ability gap combined Committeeship*', possibly with a Representative Agreement. There are some limitations there as well.

### **Pros of Committeeship**

There is protection of the adult. This is useful if they are concerned about the safety and financial security of the adult. It serves a purpose, if those individuals have not been able to develop their Planning tools such as a Power of Attorney or Representation Agreement in an event of an oversight with Public Guardian.

### **Cons of Committeeship**

1. Once you have Committeeship your autonomy is removed forever, generally. It is hard to remove the Committeeship; you would need to be able to demonstrate with some pretty significant evidence that capacity is back in place.
2. It is very expensive, and it takes time.
3. Privacy is no longer in place.
  - a. Any court process is now a public process.
  - b. Your affairs are now open to the public, and anyone can search the Registry at the Supreme Court House (and their internet site) and view the evidence that has been put forward.

4. The oversight of the Public Guardian Trustee can be a negative as well because now you have this third party that is always there to provide input and guidance.
  - a. That can be problematic as the Public Guardian Trustee may not know you as well as your Committee.
  - b. It could be a little bit intrusive.

We are always contemplating whether the Committeeship is necessary, focusing on the concept that this is a last resort option. Are there less restrictive options that may be available?

There is an ability again to avoid Committeeship and permit the appointment of the Public Guardian Trustee if there is a need for decisions about financial affairs, and that individual is incapable of making those decisions, but we would benefit from that assistance and protection. There are no other alternative means to bypass the wishes of the individual, and they have not developed a Power of Attorney to manage financial affairs.

It is important to recognize that Committeeship is not required for items such as PWD Benefits, Federal Pensions, Choice in Supports for Independent Living funding (CSIL), Community Living BC (CLBC) funding or to make certain health care decisions, and there are other more and less intrusive ways to do that. The RA 7 would be a more appropriate choice in terms of routine financial and health care decision making.

### **The hierarchy of Health Services and what you should be thinking about**

As long as you have capability, you make decisions about your health care, and then as a last resort, a Committee can make an application to the court and determine that you are incapable.

Those are two fundamental extremes, and within that category, if the Health Care Provider has found you incapable, then the next question is:

1. Do you have a Representation Agreement with a legal Representative?
2. Do you have an Advance Care Directive, and does it apply to that situation?

Following that, we also have Legislation in BC which permits a *Temporary Substitute Decision Maker* to be appointed by Legislation.

1. It follows a family tree: your spouse, your adult child, parent, sibling, grandparent, etc.
2. There are some requirements that needs to be fulfilled for this Legislation to be enacted. The adult must have been in contact with you for at least 12 past months, then there will be no dispute.

You are not going to have authority for Personal Care decisions and no authority for emergency situations. It is intended for General Health Care, and there is no authority to refuse Life Supporting Health Care.

Relying on a Temporary Substitute Decision Maker as a last resort will have restrictions.

### ***How do we avoid Committeeship, or a Temporary Substitute Decision maker?***





If possible, make a Section 9 Rep Agreement and an Enduring Power of Attorney. That is going to give you the broadest protection around Health Care, Personal Planning and Financial Decision Making and Legal instructions.

If capability is in question and there is a diminishing level of capacity, then the Section 7 Agreement may be available to empower that Representative to support you in making health and financial decisions and outline specifically what those decisions are that your Representative can and cannot make.


Representation Agreements definitely provide comfort in knowing that you have a Representative who is there to follow your wishes and your beliefs.

It avoids expense and the intrusiveness and the lack of privacy of Committeeship and it provides you with that authority to make decisions or to appoint individuals to make decisions rather than having yourself to rely on if you are not capable or if you just generally feel that you need some support in making decisions.

The chart below, which can also be found in the PowerPoint Presentation on the IFRC Website, may be helpful in understanding the differences between all of these documents in terms of dollars, legal, health and support. The check boxes will provide you with a little bit of an overview of what each of these documents do and do not do.

4 Types of Affairs: Financial, Legal, Health Care, Personal Care				
				
Enduring Power of Attorney	✓	✓		
Section 9 Representation Agreement			✓	✓
Section 7 Representation Agreement	✓*	✓*	✓*	✓*
Advance Directive			✓*	
Temporary Substitute Decision Maker			✓*	
Committeeship	✓	✓	✓	✓

\* = Limited



In conclusion, I would like to refer to some resources that are available on my website and my blog. I have a lot of information on this topic, and other Estate related topics. I would encourage you to watch.

I know that we have published an article in the last month or so in the Balance newsletter on this topic. I would encourage you all to review that, it is on both my website as well as the TFL website.

For KMK Law Corporation Website [Click Here!](#)

**Nidus Personal Planning Resource Centre and Registry** is a great resource to consider as they have a lot of information on their website. There are also some legal documents and precedents there as well, that will assist you in developing these documents without a Lawyer.

**For the Nidus Personal Planning Resource Centre and Registry Website [Click Here!](#)**

The Provincial Government of BC also has reference to the Standard Documents for both a Representation Agreement as well as Power of Attorneys, so that people who might not have funding to support having a Lawyer assistance maybe able to do that on their own without Legal Representation.

**Province of British Columbia Incapacity Planning [Click Here!](#)  
Public Guardian and Trustee with Committee Handbook [Click Here!](#)**

The focus today has been on living not dying and I think that it is important that maybe on a later date we can have another more elaborate presentation on Estate Planning.

I know that for a lot of people understanding death and CSIL is important, and I know there is a lot of confusion in not only the community but also within the Health Authorities themselves around death and CSIL accounts.

If you have a CSIL account and you are the employer, that account that you hold within the financial institution and is typically managed by you to pay your caregivers, is in the eyes of the financial institution, your bank account. You set up the bank account and the bank is not aware that those funds come from a Health Authority.

If you die and you are the *Sole Legal Owner* of that financial account the bank will freeze that account, and there will no longer be access to that account, because the financial institution needs to protect themselves from liability. They will generally not permit any further disbursements.

If you have wages owing to staff for example that could be fairly problematic. Now your staff do not have an ability to receive their final wages.

The Health Authorities encourage Power of Attorneys so that after a death, final wages and remittances can be issued. They say you can have a Power of Attorney in place, so that your Attorney can sign cheques and manage your account, even though you are the Employer.

That is great while you are alive but the one challenge with that is the **Power of Attorney is no longer effective, when you die.** I think that the Health Authorities misunderstand the legalities with Power of Attorney, because after you, the owner of the account, passes away you are again the only signatory to that bank account.

Another possibility that I have heard, is that the Health Authorities are permitting accounts to be held jointly and I believe Fraser Health is permitting a Joint Holder of the account. What that means is that even if you pass away then the other Joint Tenants of that account could conceivably facilitate payment of staff's outstanding salary and wind up the account.

The vision is that they are going to have this ability to manage the account even if you pass away. However, the challenges with that is that you are still the Employer, and my understanding is that the Health Authorities has not made the other joint holder a part of the CSIL Agreement.

One question arises:

What obligation does the other joint holder have to fulfill those duties and responsibilities, and simply take the money as their surviving attendant and walk away and say, I don't owe the Health Authorities anything? I have not signed an agreement.

There are real problems there. The other thing that has been done on many occasions, is that there is some recognition that while you may be the legal owner of that account, and your name is on that account, beneficially those funds are held in trust for the Health Authority, and this is a bit of a complex argument.

Effectively what it involves is satisfying the financial institution, that it is okay for them to release the monies even though the person has passed, and there has been no probate of a will, which will take several months of course.

Individually, every financial institution has their own process, but there may be an ability to have funds released before a grant of probate, upon death. If the Financial Institution, and the Health Authorities can work collaboratively, and then the onus is now on the Representative of the Estate of the deceased CSIL Employer to facilitate payment with the Health Authority, and whether the Health Authority will release money until there is a Legal Authority to manage that.

What I am suggesting to you is that these are just some issues that we should all be aware of, and discussion on this with the Health Authorities is important to ensure they have awareness of the complexity. The challenge is that many Health Authorities are frustrated that they may have to wait several months to get those funds back. You, as the Employer, want to ensure that your staff are being paid, they receive their accrued vacation and employer remittances are submitted.

When you have a passing of a CSIL Employer and there is a will, there is a need for a process where that will is permitted through the Court, and generally it can take anywhere from three to nine months before somebody might have the Legal Authority to manage the financial affairs of that individual.

I think those are important issues to be aware of. I am not providing any magic answers at this point but the intention here is to get you thinking about the relevance of life after death.

### **Question and Answer period**

**Q.** With the two different documents of Power of Attorney, with the second document being the Enduring Power of Attorney. If there are two different documents, how do we know we are filling out the correct one?

**A.** I think the key point is to remember the distinction between the documents.

The General Power of Attorney is only intended to permit the Attorney to make decisions, while you have capacity. If you lose capacity that General of Power of Attorney will be no longer be effective.

The Enduring Power of Attorney provides a much fuller broader Power of the Attorney. That's why 99% of the time, individuals are developing an Enduring Power of Attorney, because not only does it provide the powers within the General Power of Attorney, which are also the abilities to allow the attorney to manage financial and legal decisions while there is capacity.

It now endures further to the point where you as the adult now lose capacity and up until the point of death. You have broader coverage.

I guess if you think about this logically, and I realize there are reasons why folks might want one or the other, but if you are truly wanting to have Personal Planning in place, it would be natural to think that you would also want that document to be valid.

Even when you lose capacity and that is why the Enduring Power of Attorney is the document of choice, it is important for people to understand that you have choice. You do not necessarily need to have the delegation of Power to an Attorney when you lose capacity.

Now that leaves you in a vulnerable position, because now if you have lost capacity that document which is the General Power of Attorney, is no longer valid, then you are now left with Private Committeeship. You are back to square one, it is in terms of what your options are. It is about choice and understanding the distinction of what is best for you.

**Q.** In regard to the Enduring Power of Attorney. As a family, you choose someone you trust in this capacity. What happens if all of a sudden that trust breaks and that Enduring Power of Attorney is able to do pretty much anything he/she feels like? What is our protection around that? What is your take on this issue?

**A.** That is why I talked about some of the duties and responsibilities. It has a significant role. There needs to be trust and confidence in that person. There are circumstances where that trust and confidence, may dwindle over time.

As a starting point, as long as you have capacity to make decisions you are always going to be in a position to revoke that Power of Attorney and remove that individual and create a new document if you wish. You need to give them notice that you are doing that.

What about if you have lost capacity? You have lost that ability to remove and or appoint that individual and if that individual is now not acting prudently, there are mechanisms to have them removed. It is a little bit more challenging but there are Legislative requirements that the attorney must fulfill as a prudent Attorney and if they are not acting prudently, any third party can report that individual to the Public Guardian and Trustee.

Necessity may require that the Public Guardian Trustee take over responsibility of that individual through a statutory means. Especially where there may be some suspicions of inaction and or even fraud, if that individual is helping themselves to a bank account. That is very serious matter and may cause the Public Guardian to not only step in, but to take steps to have that Attorney prosecuted.

Then finally, again as a last resort, where you do not have capacity and there are concerns about the actions of that Attorney by other parties, there is that ability to then appoint through Committeeship, which would effectively revoke the Power of Attorney. That is an expensive mechanism.

The other thing that I think I would also encourage is that you may want to have more than one attorney appointed. Maybe it is two or maybe it is one individual assuming financial circumstance. Maybe it is a Corporate Attorney as well.



There are some mechanisms, you may even have three attorneys, it becomes a little bit cumbersome to have that many attorneys, but then you may have sort of the checks and balances in place which avoids that uncertainty, where you might be concerned that you are giving too much power to one individual which may be a little bit expensive.

**Comment:** I have an Advance Directive, which is signed by my GP, and it is therefore on record with Vancouver Coastal Health on my medical file. I thought I was taken care of, even if I ended up in hospital on my own without a caregiver, or my spouse. A few years ago, I travelled to the Interior Health region, and I was speaking with another Specialist about our plans. She looked at me and she said, *do you have an Advance Directive?* I said, yes and she said, to make sure to carry it with you when you are going to a different Health Region because while they are making efforts to make sure the electronic records are shared, but they are not shared yet.

Your Advance Care Directives will not be honored in the Interior [or in other health regions in the province] if they are not able to access your file. If anybody's traveling outside for their own Health Region now that we are allowed to. I am not sure whether that is still relevant, that was as of a few years ago.

**A.** The other comment I would make, and why you really hit a hot topic for me. I spend a lot of time discussing the whole concept of Advanced Directives to the Province of BC, and the Health Authorities. They do not understand the legality of that document. When I heard you say, my doctor has signed it, from a legal perspective, my response is, so what? The doctor is not you. You are the individual that provides that direction. The first argument I have is about the validity of that document, knowing that it has been signed by a doctor, not by you.

**Commenter Response:** It is signed by me as well, it is co-signed. Just to be clear, we are talking about the Advanced Care Directive.

**A.** Yes, it has to be signed by you, but in terms of awareness there is not a mechanism. Unfortunately, the Nidus Registry which was intended to be a Registry that Medical Providers would access has never taken off. You, as well as many folks in the Health Care world, do not even know about Representation Agreements. They do not even know what they do, and they automatically look to Advanced Directives as some prominent document.

The Legislation hierarchy is clear that a Representative in a Representation Agreement will take precedence over that Advanced Care Directive. Unless it has been made known in that document that, that wish should be fulfilled or that you have taken steps to make sure your Representative is aware of your wish be fulfilled. Unfortunately, technology is not there yet.

You are absolutely right, having that document with you and on your person, and available in your home is absolutely vital. I know that long ago I oversaw ambulances and paramedics in BC, and I recall that it was a really challenging for Paramedics who are typically the first responders, arriving at the scene and if they do not have that awareness, their job is to fulfill treatment. Awareness is fundamental to the ability to execute on that document.

**Commenter Response:** It was news to me when I found out that your Advanced Care Directive needs to be in an envelope on your refrigerator. That says, '*Paramedics*' and that is where they will go first when they arrive at your house.

**A.** You may want to have several originals available and placed:

1. With family member and/or friends.
2. On your chair.
3. In the cupboard.
4. In your vehicle.
5. In your office.

It is very cumbersome and obviously technology could avoid this.

**Q.** Would recommending at this point, that an Enduring Power of Attorney be used instead of a Representation Agreement for the CSIL Program and/or CLBC Contract.

**A.** Remember that the Power of Attorney is going to be focused on financial and legal decision making.

1. It will permit your attorney to manage financial accounts.
2. It will permit your financial institution to allow that attorney to manage an account.

If you were incapable and could not make decisions, the Attorney could continue to manage that account. It deals with CSIL related obligations, but it is not going to permit your attorney to make any decisions related to Health Care.

**Q.** Who decides capability? You mentioned that it takes two doctor's letters to prove capability. Would it also take two doctor's letters to prove incapacity?

**A.** Let me broaden that a little bit. The reference to Physicians was in context of an application for Private Committeeship.

1. The court order deems you incapable.
2. Capacity is one of two minds, there is a legal side to it and there is a medical side.
3. I.e., as a Legal Professional, when I am developing a Power of Attorney or a will for a client my job is to assess, *does the individual have Legal Capacity to develop this document?*

In developing a Power of Attorney.

1. Do they understand what it means to delegate to another individual, the authority to make financial and legal decisions?
2. Do they understand what their assets are?
3. Then do they understand what their liabilities are?
4. Can they appreciate what the ramifications are of delegating that authority?

There is a legal task but in the context of Health Care, it is a medical task. I.e., you are in a hospital and you have a Representation Agreement that permits your Representative to make decisions on your behalf, it is a supportive tool, to help you make decisions while you are at capacity.

Then when you lose capacity that Representative has authority to make decisions on your behalf. Based on the terms of the Representation Agreement that decision of *Capacity* can be obvious if you are unconscious. You do not have to pass; you cannot make decisions.

If there is some uncertainty about whether you are unable to make decisions, or whether you have *Capacity*, it is typically when the doctor is providing that care to determine whether through great efforts like his or her part, that they cannot get instructions in their mind that necessitate a decision. They have

that ability at that point to say, “I do not feel that you have Capacity to make decisions and now I am going to defer to your Representatives to make decisions.”

There is that financial task and a legal task and then there is the health care side. Capacity is a challenging area, and there is a lot of jurisprudence, a lot of case law on this, it is very complex, but I think it is important to understand some of those distinctions. I hope that helps.

**Q.** Can a CSIL employee be a Representative and or a POA to CSIL client?

**A.** Yes, I think about perceptions of conflict right away, in terms of, if a CSIL employee was named as an Attorney and they were also receiving payment as an employee, conceivably they may have the ability to write themselves cheques. I think there are some issues, to think about. I do not believe there are any restrictions, either within the CSIL Agreement, or the policy around CSIL that says that an employee cannot serve in that capacity but I guess, in my mind, I would see some potential for conflict.

**Paul Gauthier** – Regarding the CSIL Program, it does not appear to allow someone to be an employee and be the Representative, so likely not an Attorney. There was only a Temporary Agreement. At this very moment during the Pandemic, family members, and even POA’s and Representatives because they are family members, the CSIL Program is allowing that to happen at the moment because we are in the middle of a Pandemic. After the Pandemic that that will cease and not be available at that point.

**Noted by Hilary Currie:** “Representatives, alternate representatives, and the monitor are entitled to be reimbursed for reasonable out-of-pocket expenses related to carrying out their duties. The law says you cannot pay a representative a fee (on top of expenses) for making health care decisions on your behalf. If you want to pay your representative(s) a fee for other authorities, this must be spelled out in the Agreement and it must be approved by the Supreme Court of BC.”

**NIDUS Source** [Click Here!](#)

**Q.** I have a Representation Agreement that deals with both Health and Financial. Recently the Health Authorities said that the Representation Agreement is not as valid as an Enduring Power of Attorney. I recognize the Power of Attorney itself only deals with Financials, but the Enduring deals with Medical as well. I am wondering if there has been a change, or if you know something about that, we could bring it up to ACE?

**A.** I will emphasize that the RA 7 is intended for those with a diminished level of capacity. I know you do not have diminished capacity, but you have also been very strategic, in adding that document and it allows you to basically delegate to a Representative, authority for routine, financial matters, and also Health Care. You effectively have kind of chopped off your bases, of both the Power of Attorney, and the Representation Agreement, which is intended for persons with requisite capacity.

My understanding, and I have seen this, is that for purposes of CSIL, and or for purposes of CLBC funding, an RA 7 is a legitimate document that is generally considered valid and acceptable.

**Q.** Regarding Advance Care and Representation Agreement, what are the differences and the best?

**A.** If you look at the Legislative scheme a Representation Agreement is at the very top of the list. It permits the broadest authority and oversight and delegation of health care of any document that is out there; it

is providential. The great thing about the Representation Agreement is that it enables you to instill that decision making in the Representative.

If I am making a decision, I am encouraging a Representation Agreement as a priority. If you have specific wishes that you want to ensure are fulfilled, then utilize the Rep Agreement, in conjunction with that Advanced Care Directive.

**Q.** What if you have the documents noted and come into a large inheritance, not in a trust. What should the appointed person do with the money side of things?

**A.** This is a whole presentation. Go to my website and view the two-hour presentation on this topic. It covers multiple issues, and you may find the relevant topic.

- The presentation will review the Will; if there is or is not a Will.
- If there is a Trust, there may be other mechanisms.
- Protection and Provincial Benefits might be relevant.
- There are PowerPoints and Webinars to watch for valuable information.

If you require additional assistance, do not hesitate to contact me.

**Q.** Can we amend our wishes after we have completed and signed the Enduring Power of Attorney?

**A.** Yes. As long as you are living and are in your capacity, you can always modify that Power of Attorney.

**Q.** Can someone with the Power of Attorney sign CSIL cheques to continue to pay employees should one become unable to?

**A.** Yes if you have an Enduring Power of Attorney which will permit your attorney to effectively step into your shoes and manage financial and legal affairs, including signing cheques. Please remember that role ends when you die.

**Q.** Regarding the Representation Agreement, and the Enduring Power of Attorney. Can you speak more to the protections available to make sure a Representative is not abusing their power over you.

**A.** Monitors are typically individuals appointed in the agreement to oversee what the Representatives are doing and doing their jobs well. Monitors are not mandatory in a Section 9 Agreement, but are mandatory in Section 7.

Monitors have a lot of powers, and the powers are either outlined in the Agreement itself or in the Legislation. If there is no Monitor, there are mechanisms where a report must be made to the Public Guardian and Trustee.

**Q.** I am going through Immigration right now in the United States. I married someone here, and I am from Vancouver, where my father still lives and he asked me to be involved in this because he wants to give me his Power of Attorney. However, I am not in Canada right now and I cannot leave the US until my Immigration status is over.

I am not sure which would be the right one for him? From what it sounds like, the Power of Attorney is very limited and like you said when the mental state no longer comes to the clients. Then you will not have any of the rights after that?

I was wondering if it would be an RA 7 or 9? I was confused as to which would probably be better for him. Then what would happen if something did happen, would I have to rush back and deal with it or is there a way for me to be able to do it from here.

**A.** Those are a lot of issues. The starting point is that there are practical issues and one of the practical issues is, '*can you do your job?*', if you are an Attorney or a Representative, and you are not in the Country, it will depend on the decision.

From a financial and legal standpoint it is possible that you could still fulfill your role remotely. On the Healthcare side, a similar decision could be made remotely, but I think it is always a preference that you be here in person as it is much more efficient to be in place. I think it is important for dad to understand exactly what he is wanting you to do, and what role. Whether it is Financial, Legal or Health Care or all of the above, the starting point is, does dad have capacity?

If the answer is yes, then, a combination of a Power of Attorney, and a Section 9 Representation Agreement might be prudent. Dad would generally either work with his own Legal Adviser here, or if he does not have a Legal Advisor, he may try to develop these documents on his own, without a Lawyer being involved.

I think the starting point is for you and dad to understand what he is looking for, in delegating. You just might need a little education on that role and what the rules are. Encouraging him to get legal support might be the starting point.

At the end of the day we want to be able to leave things for people in a way that is going to be beneficial, not just for our CSIL Employers and employees, but also to the ones we love.

## Open Discussion

### Comment

There are a number of people in our South Fraser Active Living Group who receive the traditional home support in Fraser Health and in the last two weeks Fraser Health said, '*You are going lose all your workers and you get some new people,*' because they hired about 95 new part time, for casual positions.

If existing workers were casual, they can go to part time regular and get benefits. The Fraser Health decided that all the staff needed to reapply for their jobs, and all the clients are in turmoil, as of last Monday they are not getting their regular workers and the new staff do not know their routines.

### Paul Gauthier

This is one of the major reasons that people do leave traditional home support and move to the CSIL Program. Quite a few people in this group are CSIL Employers and they would tell you that the one of the best benefits is that relationship building and consistency with staff and training.

One of the challenges that CSIL Employers having these days is finding caregivers. To hear that Fraser Health has hired 95 new employees which will impact the current recruitment challenges for CSIL Employers.

If you or any of the other people affected are interested in getting support, the Individualized Funding Resource Center is here to help people go through the process of applying for the CSIL program.

It seems like a very daunting thing to think about; becoming an employer, but to be honest with you, once you get things up and running, it becomes so much smoother because you would then be in control.

Do not get me wrong, there is work and responsibilities involved in becoming a CSIL Employer, but it is quite rewarding.

Other participants spoke about the positiveness of the CSIL program.

### Upcoming Pathways Meeting

Wednesday, July 28<sup>th</sup>, 2021, 1:30pm to 3:30pm

#### Topic for the July Meeting

- CSIL Contract Update with Tim Louis
- CSIL Expense Exemptions End Date Discussion
- Payment to Family Members Application for Exception
  - Eligibility and Reasons for Applying
- Accessible Nature Wellness Program Update with Kari Krogh
- Creating a CSIL Survey with Elaine Willis
- Translink and City of Vancouver updates with Laura Mackenrot
- Open Discussion

**Please Note:** Open discussion periods will follow each speaker.

Peers are reminded that if they have a topic idea for a future meeting, to please send an email to [pathways@ifrcsociety.org](mailto:pathways@ifrcsociety.org)

**Pathways To Independence Peer Group Meeting Notes and pertinent documents are uploaded to <https://www.ifrcsociety.org/pathways>**

The Pathways To Independence Meeting is in partnership with Technology for Living, whose Technical Team, headed by Ean Price, successfully ensured that peers could connect to the meeting from across the province.

**THANK YOU EVERYONE, FOR YOUR ATTENDANCE AND CONTRIBUTION TO THE MEETING!**