

It's Your Choice

A Guide To Making A Representation Agreement



PUBLIC GUARDIAN
AND TRUSTEE OF
BRITISH COLUMBIA

Sixth Edition
November 2002

This guide is published by the Public Guardian and Trustee of BC. The material contained in this guide is current at the time of publication (November 2002) and includes comments about changes that are anticipated as a result of a review of representative agreements and enduring powers of attorney by Professor Albert McClean in 2001/02. The government of British Columbia is currently considering the McClean report and have announced that legislative change will occur. This guide provides general information about the British Columbia Representation Agreement Act. It is not a complete statement of the law, and it is not a substitute for professional legal advice. If you need legal advice about the Act and about representation agreements, contact a lawyer or your local community law office.

The most current edition of this guide can be obtained from our website, www.trustee.bc.ca, by calling (604) 660-4444, or by e-mailing mail@trustee.bc.ca

Table of Contents

1. Introduction	page 4
2. What is a Representation Agreement?	page 4
3. Who Can Make a Representation Agreement?	page 5
4. What Kinds of Decisions Can Be Covered by a Representation Agreement? ...	page 5
5. What Happens to My Existing Documents?	page 6
(a) Enduring Powers of Attorney	page 6
(b) Living Wills and Similar Documents	page 6
6. What Does a Representation Agreement Look Like?	page 7
7. How Do I Choose a Representative?.....	page 7
8. What are the Duties and Responsibilities of My Representative?	page 8
9. Can I Choose More Than One Representative?	page 8
10. Can I Choose an Alternate Representative?	page 9
11. Do Representatives Get Paid?	page 9
12. Can I Appoint a Monitor?	page 9
13. When Does a Representation Agreement Become Effective?	page 10
14. What Do I Need to Know About the Signing and Witnessing of the Representation Agreement?	page 10
15. What Happens Once My Representation Agreement is Signed?	page 11
16. Can a Representation Agreement be Changed or Cancelled?	page 12
17. Representation Agreement Checklist	page 12
18. Where Do I Go For More Information?	page 14
19. Wallet-Card Template	page 15

1. Introduction

As adults, we make decisions about our lives every day: what to eat, what to wear, and how to spend our time and money. Occasionally we make major decisions; for example, whether to obtain medical treatment, sell property or move to a new home.

At some point in our lives, it is possible that we may not be able to make these decisions on our own because of illness, injury or disability. For example, we might be seriously injured in a car accident and be temporarily unable to make our own decisions. Or, we may acquire a serious illness that affects our ability to make decisions about health, finances and other aspects of our lives.

Like making a will to plan for the distribution of our belongings after our death, it is never too early to plan for a time when we might not be able to make day-to-day decisions about important areas of our lives. Adults of any age, at some time in the future, may not be able to make their own decisions. Planning ahead for these events allows us to make our wishes known so that others can follow them.

The purpose of this guide is to help you understand representation agreements, one of the tools you can use to help you plan for the future.

This 6th Edition reflects the current provisions of the *Representation Agreement Act* including amendments in the *Adult Guardianship Statutes Amendment Act, 2001*, which came into effect on September 1, 2001. This edition also notes where further changes may be made as a result of a review of representation agreements and enduring powers of attorney by Professor Albert McClean in the year 2001/2002. To view the McClean report, go to www.ag.gov.bc.ca/public/McClean-Report.pdf.

2. What is a Representation Agreement?

Representation agreements are new in British Columbia and are made possible by the *Representation Agreement Act*, which came into effect on February 28, 2000.

A representation agreement is a legal planning document that enables us to choose another person to make important decisions for us in the future while we are living (unlike a will, which takes effect only after our death). It gives us some control over our lives for a time when we may not be capable of making decisions about our financial and legal affairs, as well as our health and personal care. It gives us an opportunity to make choices about who will make those decisions and how they will be made.

A representation agreement allows us to name a person (or people) who may make decisions for us. This person is called a representative. It allows us to say which decisions the representative will make and what they are to consider when making those decisions. And, it allows us to decide when, and under what circumstances, this agreement will take effect.

You do not have to make a representation agreement. It's your choice. It is up to each of us to decide whether we want to make a representation agreement. It is simply a tool we can choose to use to plan for our future.

3. Who Can Make a Representation Agreement?

In order to make a representation agreement, you must be 19 years of age or older and be capable of making an agreement.

Only you can decide if you want a representation agreement. No one else can decide this for you. A representation agreement cannot be made on behalf of someone else by, for example, a group of friends or relatives, although you can ask friends and family to assist you to make a representation agreement.

However, a person who is physically unable to sign a representation agreement can direct someone to complete and sign a representation agreement on their behalf.

4. What Kinds of Decisions Can Be Covered by a Representation Agreement?

Under the current Act, you can include almost any kind of decision in a representation agreement. It is likely that this will change in the near future, but agreements made now will continue to be effective for as long as you live, unless revoked earlier.

An *agreement with general powers*, sometimes called a Section 9 representation agreement, allows you to give authority to your representative to make virtually any type of decision that may affect you. Currently it deals with decisions about your:

- health care, such as treatments or services you might want or not want, and life supporting care and treatment,
- personal care, such as where you might live or services that you may need,
- financial affairs, such as paying bills, investing your money, taking care of your bank accounts and making financial provisions for dependent family members,
- property, such as buying, selling or refinancing your home,
- business, such as running your company, and
- legal affairs, such as retaining and instructing a lawyer on your behalf.

It is expected that future representation agreements with general powers will be restricted to decisions about health and personal care. You will need an enduring power of attorney for financial and legal matters.

In order to make an agreement with general powers, you must understand the nature of the authority you are giving to your representative and the effect of giving that authority to that person. To make an agreement with general powers, the law currently requires that you consult with a lawyer. Your lawyer is required to sign a certificate that must be attached to your representation agreement. Although your lawyer will charge a fee for preparing your agreement, making this type of agreement ensures that your representative can make all the decisions you may need. This is important because if an agreement does not cover all the decisions required, your representative will not be able to make these decisions using your representation agreement.

If you are already having difficulty managing your affairs, you may consider making a representation agreement with limited powers. This kind of agreement should be considered only if you are not able to make an agreement with general powers. Agreements with limited powers are sometimes called Section 7 agreements. These representation agreements are not likely to change in any important ways.

A representation agreement with limited powers gives a narrower scope of authority to the person acting as representative. It enables you to name a representative to make routine decisions that may help you on a day-to-day basis; however, certain decisions cannot be made. For example, a representative acting under an agreement with limited powers cannot buy or sell real property or refuse life supporting care and treatment. It is not necessary to consult with a lawyer professional to complete an agreement with limited powers. However, obtaining independent advice is always a good idea.

5. What Happens to My Existing Documents?

(a) Enduring Powers of Attorney

If you have an existing valid enduring power of attorney, it remains in effect. And under the changes recommended by Professor McClean, enduring powers of attorney will continue to be the documents that are made to deal with the types of financial and legal decisions that you can currently make part of a representation agreement with general powers. An enduring power of attorney does not, however, let your attorney make health and personal care decisions on your behalf. For those types of decisions you need a representation agreement. These two documents, an enduring power of attorney and a representation agreement for health and personal care, can work together to make sure that the person or persons you have chosen as your attorney and your representative have the tools they need to make all the decisions that you may need them to make on your behalf.

(b) Living Wills and Similar Documents

Over the years, people have made various documents that contain their health care wishes in case they themselves become unable to make those decisions. These documents went by many different names, such as living wills or advance directives. In the past, such documents, although often made and used, did not have legal effect.

These documents are given certain legal effect by the *Representation Agreement Act* and by another new law that came into effect on February 28, 2000 called the *Health Care (Consent) & Care Facility (Admission) Act*.

Under the *Health Care (Consent) & Care Facility (Admission) Act*, if you are unable to make your own health care decision and you do not have a court appointed committee of the person or a representation agreement giving someone the authority to make health care decisions on your behalf, your health care provider must turn to your nearest relative to act as your substitute decision maker for health care. Your relative must follow any instructions you expressed while capable when they make a health care decision on your behalf if the instructions apply to the

health care being considered. These instructions can be given verbally or in writing, such as in a living will.

It is important to note that it doesn't matter whether the expressed wishes, living wills or advance directives were made before or after February 28, 2000. These instructions will still have effect under the *Health Care (Consent) & Care Facility (Admission) Act*.

If, rather than just giving instructions about your health care, you want to name someone other than your nearest relative to make health care decisions on your behalf when you are not able to do so, it is necessary for you to make a representation agreement. Again, in most circumstances, your representative would be required to make decisions in accordance with the instructions or wishes you expressed when capable, either verbally or in writing, in a living will or advance directive.

To learn more about the *Health Care (Consent) & Care Facility (Admission) Act* and substitute decision makers for health care, please visit our website at www.trustee.bc.ca.

6. What Does a Representation Agreement Look Like?

As with many legal documents, there is no legally required format for representation agreements. However, it is important to remember that a representation agreement is a legal document and will only be effective if it is properly made and validly executed so that your representative can rely on it and third parties accept it. If you are making a representation agreement with general powers, the law currently requires that you consult with a lawyer who will help you to prepare the agreement.

7. How Do I Choose a Representative?

The choice of a representative is a very important personal decision. If you are considering making a representation agreement, think about what you want your representative to do for you and who is best able to do those things.

Many people will choose an adult family member or friend. The person you choose should be someone you trust, and who understands the values and beliefs that guide your decision-making.

Under the current Act, you can also choose a trust company, a credit union of the PGT, but only for financial matters. With the changes that are expected to be made to the Act, you will no longer be able to ask any of these organizations to be your representative unless you are making a representation agreement with limited powers.

Some practical considerations when choosing a representative:

- Choose someone who is willing and able to act as your representative.
- Choose someone who can help when the time comes. For example, you may wish to choose someone who is in close contact, rather than someone seen only infrequently or who travels extensively.

- Talk with the person you are considering as your representative before making your decision. Being a representative is an important responsibility.
- Discuss the values and beliefs that form the basis of your decision-making and how you want decisions to be made. Your representative will then be better able to make decisions that are consistent with your views.
- Discuss your choice of a representative with the important people in your life, if possible. You may want to choose someone who will be able to get along with others in your life.

8. What Are the Duties and Responsibilities of My Representative?

The *Representation Agreement Act* says that a representative must:

- act honestly and in good faith,
- use the care, diligence and skill of a reasonably prudent person, and
- do only those things that the agreement allows.

A representative can only make decisions in areas that your representation agreement gives authority. A representative has the duty to act on your behalf and to make decisions in accordance with the law and with any prior capable wishes you expressed either verbally or in writing. It is extremely important to tell your representative as much as you can about the things that are important to you so that your representative can make the right decision when needed.

When it is necessary for your representative to make a decision for you, your representative will talk with you to try to find out what you want. If feasible, your current wishes and instructions will be followed. If you cannot make your wishes known, or it is not reasonable to carry them out, your representative must follow any instructions or wishes you made when you were capable. These may be instructions or wishes set out in the representation agreement or any other oral or written instructions made in another document, such as a living will. If you did not specify instructions for a particular situation, your representative will make the decision based on your values and beliefs. If the representative cannot make the decision based upon your values and beliefs, then your representative must make the decision based on what will be in your best interests.

9. Can I Choose More Than One Representative?

You can choose more than one representative to make decisions for you. You can separate the kinds of decisions your representatives can make on your behalf or you can ask them to work together.

If you appoint more than one person in the same area of decision-making responsibility, the law states that they need to make decisions unanimously unless your agreement specifically gives them permission to act separately. There are some good reasons for giving your representatives the flexibility to make decisions separately. For example, if one of your representatives is temporarily unavailable because of sickness or vacation and your representatives are allowed to act separately, decisions can continue to be made on your behalf.

On the other hand, you may want your representatives to make decisions together to ensure there is always a “double check” regarding the decision. If you decide that your representatives are going to make decisions together, it is a good idea to specify how disagreements will be resolved.

10. Can I Choose an Alternate Representative?

You can also choose an alternate representative who can act in place of your representative if he or she is unable to act for any reason. If you want to appoint an alternate representative, it is important to be specific in your agreement about the circumstances when your alternate can act as your representative. You can have more than one alternate representative.

11. Do Representatives Get Paid?

A representative is not automatically entitled to be paid for things done on your behalf. For example, a representative cannot be paid for health care decision-making. For other matters you should discuss the issue of payment with your representative when the agreement is made. If you choose to pay your representative, you must state in your representation agreement how much the representative is to be paid. In addition, if you are making an agreement with limited powers, your representative will need to get permission from the court to be paid even if your agreement says the representative should be paid.

All representatives are entitled to be reimbursed for reasonable out-of-pocket expenses incurred on your behalf.

12. Can I Appoint a Monitor?

You can appoint a monitor if you choose. The monitor’s job is to try to ensure that the representative is doing their job. You must appoint a monitor if you are making an agreement with limited powers that gives your representative authority to manage your financial affairs unless:

- your representative is your spouse (*under the Representation Agreement Act, a spouse is considered to be the person you are married to or living with in a marriage-like relationship; this includes same sex partners*), or
- your representative is a trust company, credit union or the Public Guardian and Trustee
- you have named two representatives who must act together to make decisions about your financial affairs
- you have consulted with a lawyer who has completed the necessary certificate.

Even if you do not need to appoint a monitor, you may still do so if you wish. Or, you can appoint a monitor for a specific situation, for example, where your alternate representative is acting for you. If you do appoint a monitor, the monitor must be an individual, not a corporation or business. Monitors are entitled to have their out-of-pocket expenses reimbursed and, like representatives, can be paid in certain circumstances.

13. When Does a Representation Agreement Become Effective?

Unless you state otherwise in your representation agreement, your agreement will come into effect as soon as it is signed and witnessed. This is the simplest way to have your agreement take effect. You can arrange, if you want, to have a trusted third party hold the document and release it to the representative when it is needed.

If you do not want your agreement to come into force immediately, you must describe in the agreement the specific event that will bring your agreement into effect. You will continue to manage your own affairs in the meantime.

If your agreement is to become effective at a later time:

- be as clear as possible when describing the specific event in your agreement,
- choose the person who will tell your representative when the specific event has happened, and
- describe how people will know that the event has happened so that it will be clear to everyone involved that your representation agreement is in effect.

For example, you can state in your representation agreement, that the agreement won't take effect until a physician determines that you are no longer capable of managing your own affairs and provides a written letter to your representative that can be used as proof that the representation agreement is in effect.

Think carefully about whether to have a specific event bring your agreement into effect and if so, what that event will be. Remember that your representative may have to satisfy your bank, your doctor or other third parties that the event has occurred in order to use the agreement.

The representative cannot use the agreement until it takes effect. The adult who made the agreement continues to make their own decisions while capable of doing so, but with the added assurance that, if it ever becomes necessary, someone whom they trust will be able to make decisions for them.

14. What Do I Need to Know About the Signing and Witnessing of the Representation Agreement?

It is expected that some of the rules concerning witnessing a representation agreement and preparing certificates will change. Until they do however, your agreement must be made according to the current Act.

The current Act contains very specific requirements regarding the signing and witnessing of a representation agreement. These must be complied with for your agreement to be valid.

Your representation agreement must be signed by you, your representative, any alternate representative and one witness (if that witness is the lawyer who you consulted about the agreement). Where a lawyer is not acting as a witness, there must be two witnessed signatures on the repre-

sentation agreement. Witnesses must be at least 19 years old and cannot be your representative, alternate representative, related to, or employed by your representative or alternate representative. Two witnesses to your signature are needed if you are making a representation agreement with limited powers without the assistance of a lawyer. No witnesses are needed to your representative's or alternate representative's signatures.

The representative, alternate representative (if any), monitor (if any) and all the witnesses must complete and sign certificates that are attached to your representation agreement. These are set out in the *Representation Agreement Act Regulation* and can be obtained from your lawyer or visit our website at www.trustee.bc.ca.

If you have a physical disability that makes writing or signing difficult, you can direct another person to sign the representation agreement for you but this must be done in your presence. This signature must be witnessed by either your lawyer or by two witnesses and a particular type of certificate must be completed. A witness, other than your lawyer, must be able to understand your form of communication (i.e. if you use sign language, your witnesses must understand your form of sign language). Your lawyer can use the assistance of an interpreter.

If the representation agreement is not properly signed and witnessed and the necessary certificates completed, it may not be valid. Your representative would then have to go to court to see if the problem could be fixed. This would cost money and add delay. Furthermore, the court could decide not to validate the agreement. For this reason, it is very important to ensure that the agreement is properly completed.

15. What Happens Once My Representation Agreement is Signed?

Your representation agreement is an important legal document. Keep the signed original document and certificates in a safe place that is accessible. Your safety deposit box may not be the best place to keep the agreement because your representative may not be able to access it when required. Tell each person named in the agreement where you are keeping the original.

It may be a good idea to give a copy of the agreement to:

- each person named in the agreement as a representative or monitor,
- the manager of your financial institution, if your agreement deals with financial matters,
- your family physician or other health care provider,
- the administrator of a care facility if you live in one,
- your lawyer, and/or
- family members.

Keep a list of everyone who has a copy so that you can contact them if you want to change or cancel the agreement.

Although it is not mandatory, you may register your agreement in an internet based registry. Service providers may check to see if you have registered your enduring power of attorney or representation agreement. Go to www.nidus.ca for details.

Finally, once you have made an agreement, it is a good idea to carry a notice of your representation agreement on a card in your wallet or purse. That way, even if you are unable to tell someone that you have made a representation agreement, someone can contact your representative if necessary. A wallet-card template is provided on the last page of this guide. Do not send your representation agreement to the Public Guardian and Trustee.

16. Can a Representation Agreement be Changed or Cancelled?

You can change or cancel your agreement at any time, provided you are capable of doing so.

You should review your representation agreement at least once a year, perhaps on your birthday or another date that is easy to remember, to ensure that:

- it still reflects your wishes,
- the people named are still ready and able to make decisions if and when needed, and
- it continues to address all the decisions that may need to be made.

If you make changes, you must have the changes signed and witnessed in the same way the agreement was signed and witnessed, though not necessarily by the same people. To cancel your agreement, you must do so in writing to your representative(s) with a copy to any alternate representative and/or monitor.

17. Representation Agreement Checklist

If you decide to make an agreement with general powers under the current Act, you can help your lawyer by thinking beforehand about some of the issues in this guide. You can also discuss with them the option of making a representation agreement for health and personal care and an enduring power of attorney.

When looking for a lawyer, you may wish to phone several and ask about their experience and fees. There is no fixed cost for a representation agreement so you might want to get more than one estimate. The following checklist summarizes the information provided in this guide and is included to help you prepare for the meeting with your lawyer. This is not a representation agreement; it is a checklist to help you get ready to make an agreement under the current Act.

What do you want your representative to make decisions about?

- health care decisions that may be required like:
 - ✓ routine medical and dental care
 - ✓ medical tests
 - ✓ major surgery
 - ✓ treatments for serious illnesses
 - ✓ palliative care or end of life care and treatment

- personal care decisions like:
 - ✓ living arrangements
 - ✓ family and friend visitation
 - ✓ admission to a care facility
- management of your financial affairs including:
 - ✓ payment of everyday living expenses
 - ✓ receiving and depositing income
 - ✓ selling of personal effects
 - ✓ arrangements for investments
 - ✓ buying or selling land
 - ✓ providing financial support for dependant family members
 - ✓ conducting your business affairs
- managing your legal affairs such as:
 - ✓ retaining or instructing a lawyer
 - ✓ signing legal documents or contracts

When do you want the agreement to take effect?

- on the date the agreement is signed, or
- at a later date:
 - ✓ what is the triggering event that activates the agreement?
 - ✓ how will people know the triggering event has happened?

Who have you chosen to be your representative?

- identify the full name of your representative and their contact information (address, work and home phone number)
- if you have chosen more than one representative, you must state:
 - ✓ the areas of decision making responsibility for each representative
 - ✓ how they will make decisions – jointly or separately – and how disagreements will be resolved

Do you want to choose an alternate representative?

- identify the full name of your alternate representative and their contact information
- specify the circumstances in which the alternate will act instead of your representative

Do you want to have someone act as a monitor?

- identify the full name of your monitor and their contact information
 [Note: Agreements with limited powers covering financial affairs must have a monitor except where: your representative is your spouse, a trust company, a credit union or the Public Guardian and Trustee; you have consulted with a lawyer; or you have two representatives.]

Do you want to provide any specific instructions to your representative in your agreement that will guide them when they are making decisions on your behalf?

- about your health care
- about your financial affairs
- about your legal affairs
- about your personal care

Do you want your representative to be paid?

- if yes, describe:
 - ✓ the amount your representative will be paid
 - ✓ how the fee will be paid and from what source

Signing the agreement...

- choose the witnesses to your agreement

When the agreement has been signed, discuss with your lawyer...

- where the original document will be kept
- who requires copies of the document
- who needs to be advised of the agreement

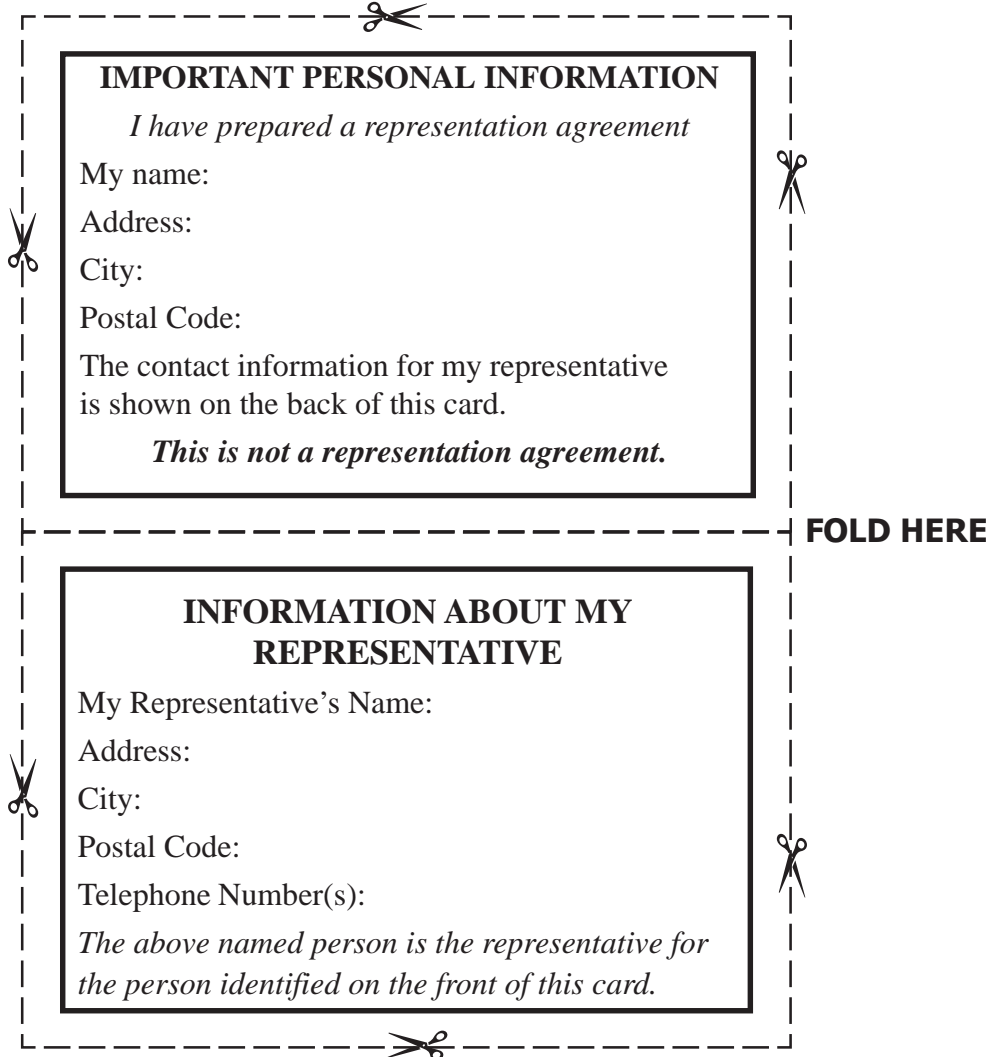
18. Where Do I Go For More Information?

If you have questions about making a representation agreement with general powers, you can contact a lawyer in your community. You can also visit the Public Guardian and Trustee website at www.trustee.bc.ca for an updated list of other resources and information. To learn about the internet based registry or enduring powers of attorney and representation agreements, go to www.nidus.ca.

19. Wallet-Card Template

The following is a notice you can use so people are aware you have made a representation agreement. **IT IS NOT A REPRESENTATION AGREEMENT**

Wallet-Card Template



IMPORTANT PERSONAL INFORMATION
I have prepared a representation agreement
My name:
Address:
City:
Postal Code:
The contact information for my representative is shown on the back of this card.
This is not a representation agreement.

FOLD HERE

INFORMATION ABOUT MY REPRESENTATIVE
My Representative's Name:
Address:
City:
Postal Code:
Telephone Number(s):
The above named person is the representative for the person identified on the front of this card.



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