

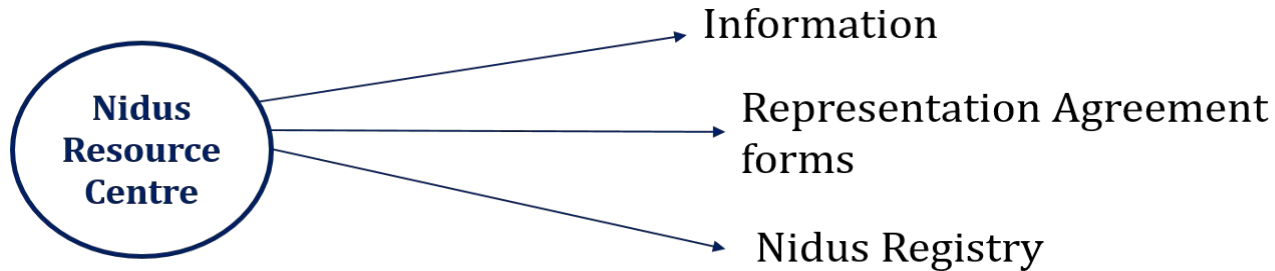
Essential Personal Planning Documents: What Family Lawyers Need to Know

CBABC - Family Law - Vancouver Island Subsection

January 25, 2023 | Audrey Jun

Nidus

- Latin for “nest” – symbol of support & safety
- Non-profit, charitable organization – expertise in Representation Agreements
- Set up in 1995 by seniors & disability groups after grassroots law reform

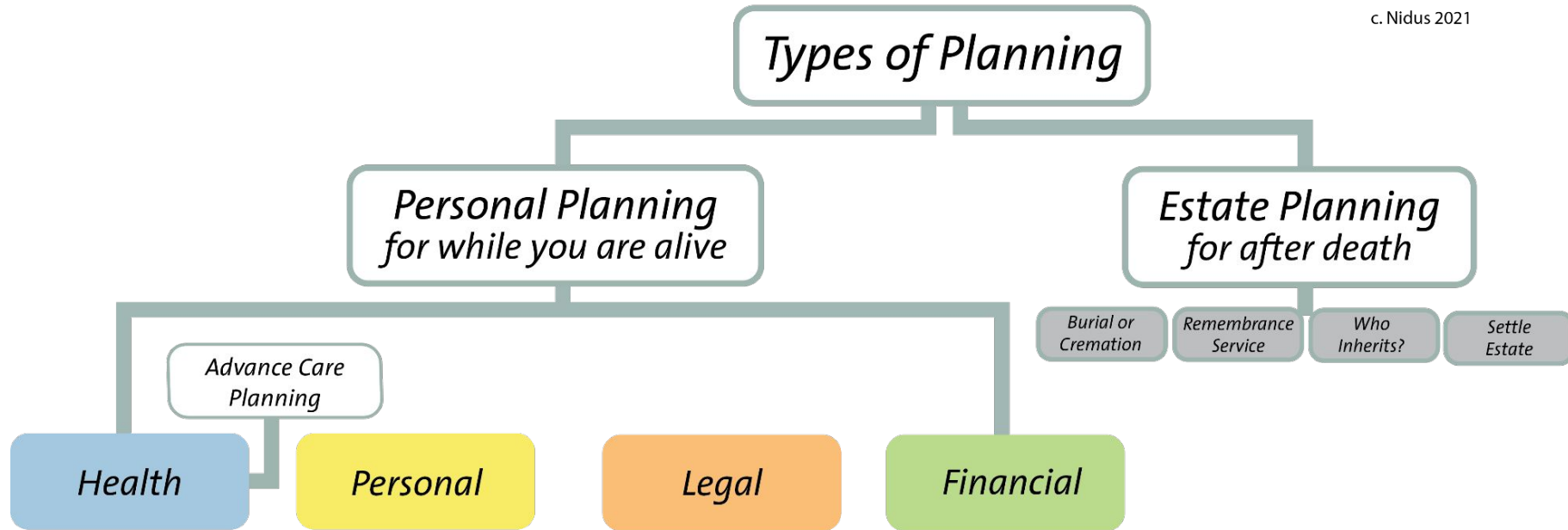


Learning Outcomes

- Differentiating between **Representation Agreement (RA)** vs. **Enduring Power Of Attorney (EPOA)**
- Differentiating between a **Section 7** vs. **Section 9** Representation Agreement
- New **Remote Witnessing** provisions for RAs and EPOAs
- Understanding the relevance and importance of **capacity** to develop the personal planning documents
- What is a **Private Committeeship** and what does it involve

What is “Personal Planning”?

c. Nidus 2021



Turning 19 – presumption of capacity

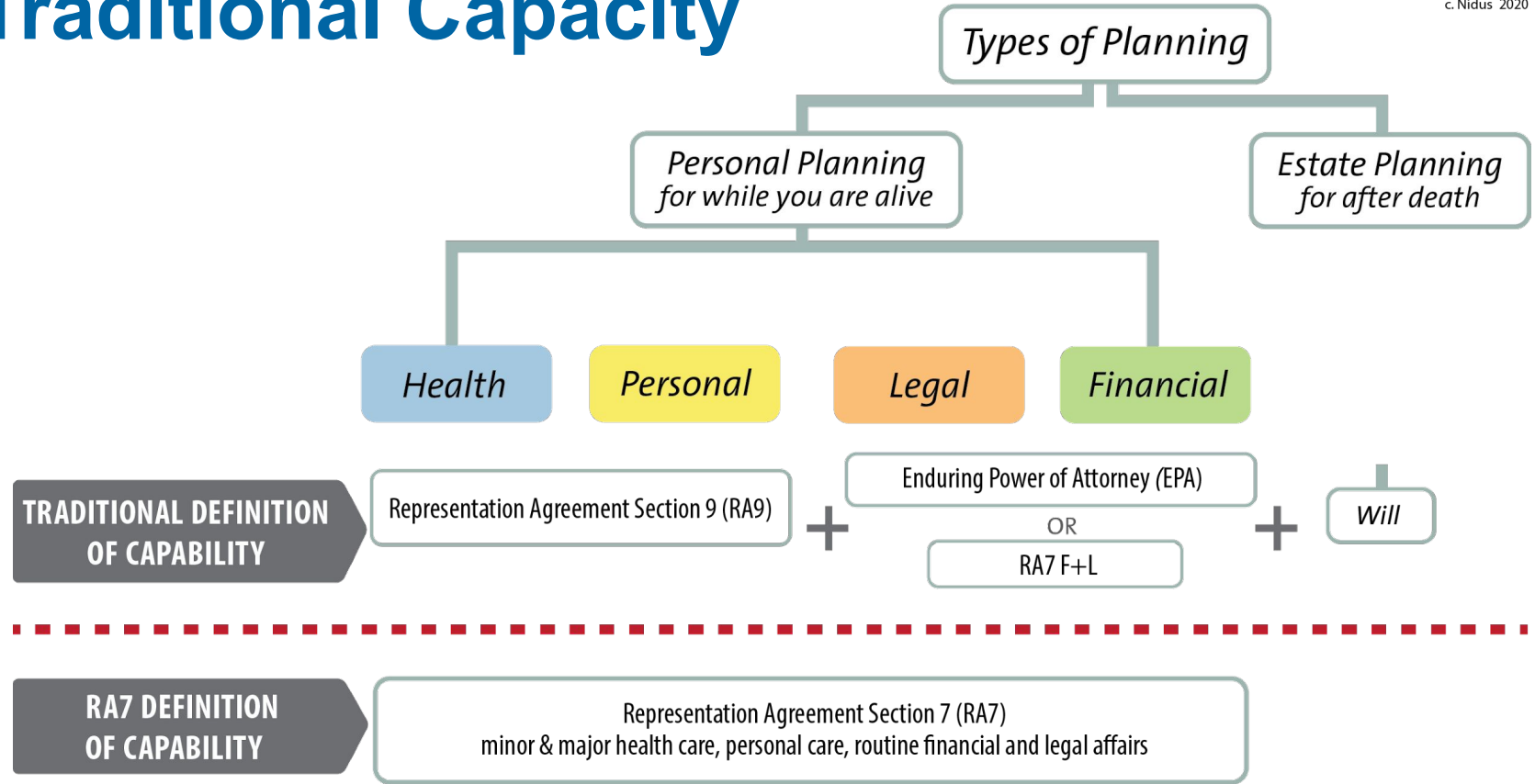
- When someone becomes an adult (19 is the age of adulthood in BC), no one has automatic legal authority to act on their behalf.
 - > Parental/guardianship rights end.
 - > What if the adult needs help? Two solutions:
 1. Adult can be **pro-active** by making legal document
 - To give someone legal authority, in case adult's mental capability/capacity is questioned;
 2. Authority is **imposed** on adult.

Presumption of capability

- *Adult Guardianship Act - s. 3*
- *Health Care (Consent) and Care Facility (Admission) Act - s. 3*
- *Power of Attorney Act - ss. 11, 12*
- *Representation Agreement Act - ss. 3, 4*

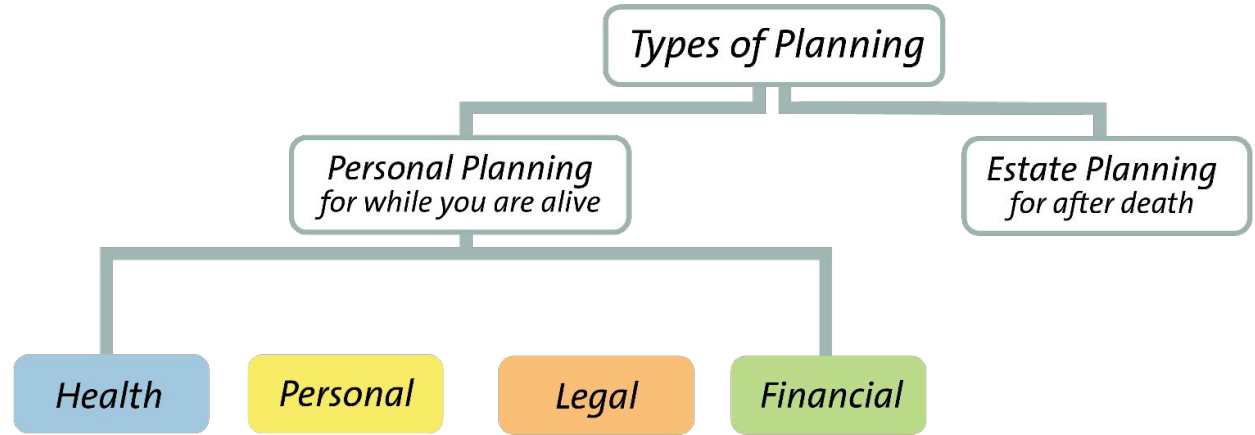
Traditional Capacity

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Capacity

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TRADITIONAL DEFINITION OF CAPABILITY

Understand the nature and effect of legal document at the time of making it.

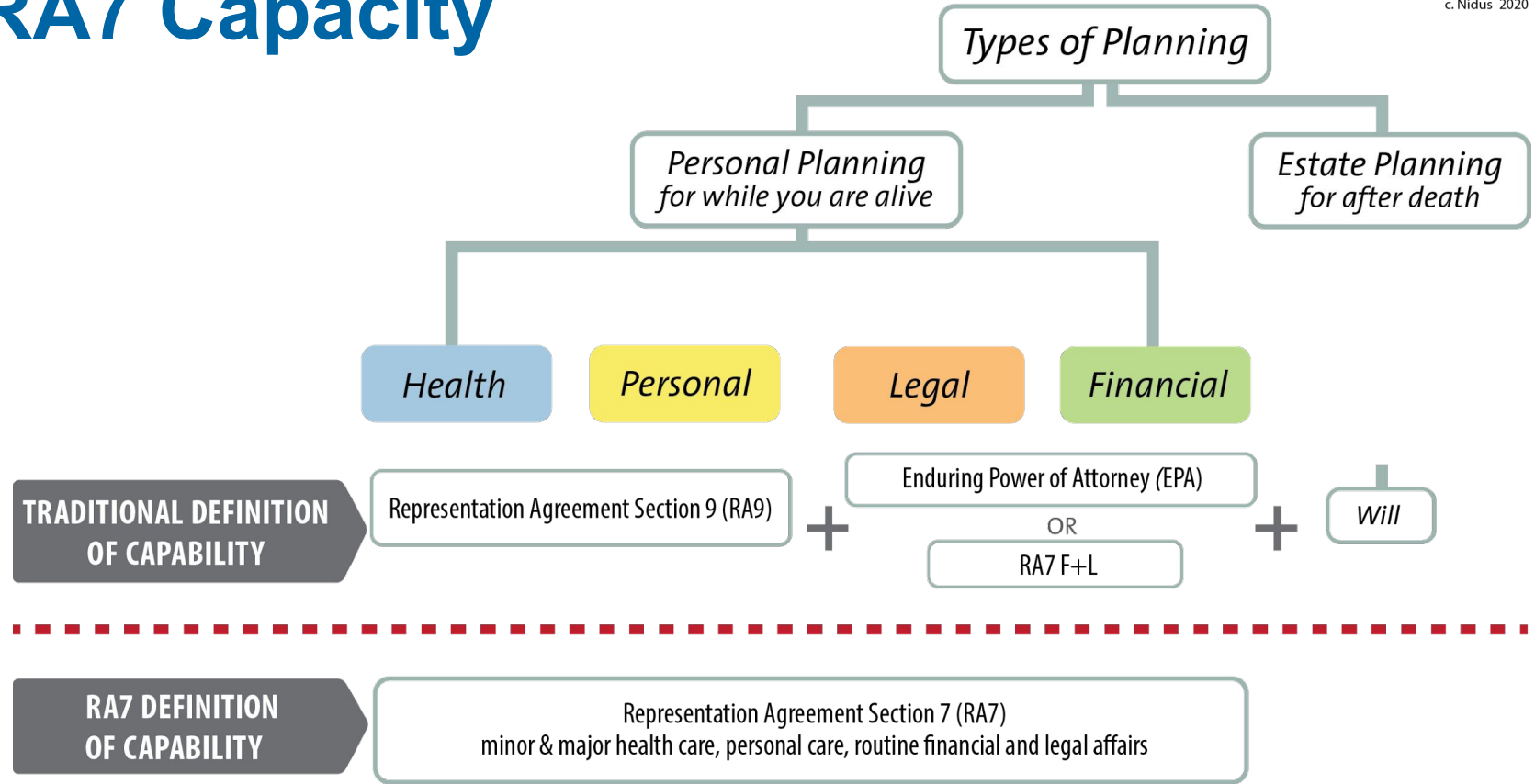
RA7 HAS DIFFERENT DEFINITION OF CAPABILITY

May make Representation Agreement under section 7 with some or all four standard powers, **even if capability to 'understand' is in question** (*cannot meet traditional definition*).

Inclusive view of Capacity

- What if the traditional definition of capability prevents some adults from making a legal document to avoid imposed authority?
 - > That was the case in BC before the RA Act and its new definition of capability for Representation Agreements made under section 7 (RA7).

RA7 Capacity



(Enduring) Power of Attorney - EPA

- **Financial & Legal**
- Capable: Must understand nature & consequence
 - > (a) the property the adult has and its approximate value;
 - > (b) the obligations the adult owes to his or her dependants;
 - > (c) that the adult's attorney will be able to do on the adult's behalf anything in respect of the adult's financial affairs that the adult could do if capable, except make a will, subject to the conditions and restrictions set out in the enduring power of attorney;
 - > (d) that, unless the attorney manages the adult's business and property prudently, their value may decline;
 - > (e) that the attorney might misuse the attorney's authority;
 - > (f) that the adult may, if capable, revoke the enduring power of attorney;
 - > (g) any other prescribed matter.
- Why?

Duties of an Attorney

- ***Power of Attorney Act*** – Section 19

- > An attorney must act honestly and in good faith, exercise the care, diligence and skill of a reasonably prudent person, act within the authority given under the EPA, and keep prescribed records and produce those records for inspection and copying at the adult's request (e.g. list of property and liabilities, records showing how you have exercised your authority under the EPA, invoices, bank statements and other records and receipts)
- > When managing the adult's financial affairs, the attorney must act in the adult's best interests, taking into account the adult's current wishes, known beliefs and values, and any directions set out in the EPA
- > The attorney must to the extent reasonable when managing the adult's financial affairs, give priority to meeting the personal and health care needs of the adult, foster the adult's independence and involve the adult in any decision-making that affects them, not dispose of property that the attorney knows is subject to a specific testamentary gift in the adult's will, except if the disposition is necessary to comply with the attorney's duties
- > The attorney must keep the adult's property separate from their own property, unless owned as joint tenants

RA's – RA9 vs. RA7

- **RA9**

- > Health care & personal care
- > Refuse care for life-saving treatment/care
- > Specialized medical procedures
- > Temporary care & education of minor children

- **RA7**

- > Financial affairs (limited) – no real estate
- > Legal affairs
- > Health Care – dental care, physio, medications, tests
- > Personal Care – living arrangements

Duties of a Representative

- **Representation Agreement, s. 16**
 - > A representative must act honestly and in good faith, exercise the care, diligence and skill of a reasonably prudent person, and act within the authority given in the RA.
 - > The representative must consult (to a reasonable extent) with you to determine your current wishes, and comply with those wishes if it is reasonable to do so – or, depending on the situation, comply with those instructions or wishes you expressed while capable.
 - > If these specific instructions or wishes are not known, the representative must act on the basis of your known beliefs and values, or if unknown, your best interests.
 - > Representatives are required to keep accounts and records regarding the exercise of their authority, which may be requested by you, your monitor, and the PGT.

Making a Representation Agreement

- **Representation Agreement, s. 13**

- > The adult, the representative (at least one, if there are multiple that may act independently), and the monitor (if one is provided for – usually only for RA7s) must all sign the agreement.
- > The adult must sign in the presence of two witnesses, unless one of the witnesses is a lawyer or a member of the Society of Notaries Public of British Columbia.
- > Options for another person signing on behalf of the adult if they are physically incapable and is physically present but directs the agreement be signed.
- > Certain restrictions on who may act as a witness (e.g. no minors, no one named as a representative, or their spouse, child or parent.)

Other Planning Documents

- **Advance Directive** – a written document where you may give or refuse consent to specific health care matters. Quite limited in its use as your instructions must clearly articulate and apply to the specific health care situation that arises at the time consent is sought. (*Health Care Consent and Care Facility Admission Act, Part 2.1*)
 - > A representation agreement supersedes the advance directive (if the adult has made both), although the RA may state that a health care provider may act in accordance with an instruction in the advance directive without the consent of the representative.
- **Organ or Body Donation** – donation for research or education purposes. A consent is required for body donation while you are capable of understanding, and must register your wishes with **BC Transplant's Organ Donor Registry**
- **Medical Assistance in Dying** - As of June 17, 2016, Canada now has legislation that allows someone 18 years or older to request medical assistance in dying. You must meet the eligibility criteria for your request to be considered and assistance provided.

RA/EPA Remote Witnessing

- **RAs:** Order in Council 679/2022 - Amends B.C. Reg. 199/2001 — Representation Agreement Regulation, effective January 1, 2023
 - > Electronic presence (adult and witness) – hear and see each other (or assistive technology)
 - > Witness must be lawyer or BC notary public
 - > Signing complete and identical copies in counterpart
 - > Must include a statement that it was signed and witnessed in accordance with the alternative process
- **EPOAs:** Order in Council 678/2022 - Amends B.C. Reg. 20/2011 — Power of Attorney Regulation, effective January 1, 2023
 - > Materially same as above

Private Committeeship

- **What is a committee?** A court appointed personal or property guardian with the power to make personal, financial and/or legal decisions for an incapable adult.
- Governing legislation is the *Patients Property Act* and this model of guardianship has not changed in half a century.
- Public Guardian and Trustee of BC (PGT) may also be committee of estate by Certificate of Incapability issued under the *Adult Guardianship Act* (**Statutory Guardianship**)
- Committeeship is considered a **last resort** measure when other options are unavailable.

Health Care Decision Hierarchy

1. **You (while capable)**
2. **Committee (of Person)** – already determined to be incapable by Court
If health care provider finds you incapable of informed consent:
3. **Representative** appointed in your **Representation Agreement**
4. **Advance Directive** – if it applies to the specific situation at hand
5. **Temporary Substitute Decision Maker (TSDM)** – temporary and determined by statute: Spouse > Adult Child > Parent > Sibling > Grandparent... etc.
 - > Must be an adult, have been in contact within past 12 months, and have no “dispute”
 - > No authority for personal care decisions, no authority in emergency situations
 - > No general authority to refuse life-supporting health care

Benefits of Planning

- **If possible**, make a **Section 9** Representation Agreement + **Enduring** Power of Attorney
- **If capability is in question**, a **Section 7** Representation Agreement may still be available to:
 - > Legally and directly empower someone to assist/support you in making health and financial decisions;
 - > Identify the specific decisions your representative can or cannot make;
 - > Provide comfort of knowing your representative must follow your known wishes and beliefs;
 - > Provide ability to override the statutory scheme of consent to health care by substitute decision-makers;
 - > Avoid court, expense, and intrusiveness of committeehip;
 - > Provide ability to give someone authority to help you make decisions rather than only to make them on your behalf.

Situations to consider

- Blended family – disabled child nearing adulthood
- RDSP – after December 31, 2023 (for now)
- No longer spouses – but still want to be the first individuals to make health care or other decisions for each other?
- Do clients have any personal planning documents they want to revoke?
 - > s., 29 RA Act - RA can end on termination of marriage (s. 3(4) of FLA) or marriage like relationship (s. 3(4) FLA) – but are there alternates? Does the RA provide that breakdown doesn't end the agreement?
 - Revocation effective when **written notice** has been given to each rep, alternate, and), or on a later date as specified in the notice.
 - > s. 29 POA Act - authority of attorney ends if marriage/marriage-like relationship ends unless the POA states otherwise
 - s. 28 - adult must give **written notice** to each attorney

Nidus Personal Planning Registry

Be prepared for a health crisis, fire, flood, earthquake or other emergency. Keep track of documents you or others may need to find.

[Sign Up](#)

Access your account.

[Log In](#)

Online Repository

- The Nidus Registry helps with **communication**:
 - > Register RAs, EPAs, Wills, Trusts, etc.
 - > Online service.
 - > Securely stores information and copies of documents and arrange access – for future needs.
 - > Registration is not required; but has many benefits.
 - > Operated by the Nidus Resource Centre, as a separate service.

Thank you

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nidus.ca & nidusregistry.ca