



**Manitoba Law
Reform Commission**

**CREATING EFFICIENCIES IN THE LAW:
SUBSTITUTE POWERS OF ATTORNEY**

**Consultation Report
August 2016**

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CONSULTATION REPORT

Comments on this Consultation Report should reach the Manitoba Law Reform Commission (“MLRC”) by **October 1, 2016**.

The MLRC encourages you to provide your thoughts, comments and suggestions concerning this aspect of Manitoba’s law. Please refer to the provisional recommendations identified in this report, and any other matters you think should be addressed.

Please submit your comments in writing by email, fax or regular mail to:

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MLRC assumes that written comments are not confidential. You may submit anonymous written comments, or you may identify yourself but request that your comments be treated confidentially. If you do not comment anonymously, or request confidentiality, MLRC may quote from or refer to your comments in its Final Report.

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EXPLANATORY NOTE

This Consultation Report is the first in a series of reports entitled “Creating Efficiencies in the Law”, which seek to address discrete, straightforward issues identified by legal practitioners which, in the Commission’s view, can be improved by relatively simple legislative amendments.

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CHAPTER 1: INTRODUCTION

When an attorney under a power of attorney wants to resign and there is a substitute attorney identified, is judicial approval necessary and efficient?

A power of attorney is a legal arrangement that gives one person, the attorney, the authority to make decisions and take action on behalf of another person. Manitoba's *Powers of Attorney Act*¹ creates the legislative framework for powers of attorneys in Manitoba. Section 21 of Manitoba's *Powers of Attorney Act* requires that once an attorney has assumed power under a power of attorney he or she can only resign with judicial approval.² This requirement exists even where the donor had expressly named a substitute attorney in contemplation of the possibility that the original attorney could no longer act. Some other jurisdictions do not require this, thereby sparing attorneys the time and expense of a court application. In the Commission's view, these provisions of the Act create unnecessary cost and expense for people who are prudently engaged in modern estate planning.

This Consultation Report is not intended to provide a wholesale review of *The Powers of Attorney Act*, but rather, will be limited to reviewing one particular aspect of the Act which has been identified by legal practitioners as problematic. This Consultation Report forms part of a series of reports entitled *Creating Efficiencies in the Law*, which seek to address discrete, straightforward issues that, in the Commission's view, can be improved with relatively simple legislative amendments.

Chapter 2 of this Consultation Report briefly describes the law related to powers of attorney in Manitoba and then follows with a discussion of the relevant provisions in other Canadian jurisdictions. Chapter 3 explores the need for reform and makes provisional recommendations to address this issue.

¹ *The Powers of Attorney Act*, CCSM c P97 (in force: 7 April 1997).

² *Ibid*, s 21.

CHAPTER 2: BACKGROUND

A power of attorney is a legal arrangement that gives one person, known as the attorney, the authority to make decisions on behalf of another person, known as the donor. The power of attorney imposes a fiduciary duty on the attorney to act in the best interests of the donor. Powers of attorney form an integral part of modern estate planning. Routinely, when an individual wants a will drafted, he or she also plans for the possible “pre-death” stages of life where he or she becomes incompetent and unable to manage his or her affairs. Powers of attorney allow individuals to plan for this unhappy eventuality and appoint someone that they trust to manage their business or personal affairs. Prudent legal practitioners will raise the possibility of appointing a power of attorney during estate planning. Further, prudent legal practitioners will contemplate the appointment of successor attorneys if the original attorney is not able to act for whatever reason.

It is in this scenario that the inefficiencies in Sections 19 and 21 of *The Powers of Attorney Act* come to the fore. Before this issue is discussed, it is important to put this issue in context by briefly examining the broader principles.

1. Common Law Principles

The concept of powers of attorney has its origins in common law agency principles. The law of agency enables person A, called the principal, to empower person B, called the agent, to effect with person C, called the third party, a transaction affecting the legal relationship of persons A and C. Often the empowerment of person B by person A is done by a document called a power of attorney. In the context of a power of attorney, person A, the principal, is called the donor and person B, the agent, is called the attorney. Thus, by a power of attorney, the donor/principal gives to the attorney/agent power to act for the donor with a third party or parties.

By the common law of agency, the agency arrangement terminates automatically with the occurrence of various events, including the principal, or donor in the case of a power of attorney, becoming mentally incompetent, necessitating a court application to have the court appoint someone, perhaps the attorney of a terminated power of attorney, to act for the mentally incompetent to take care of that person’s financial and other property affairs. This expensive and inconvenient judicial intervention was overcome, beginning in the 1970s, by the statutory creation of the enduring power of attorney, which continues to be effective after the donor becomes mentally incompetent.³

At common law, an attorney may resign his or her appointment by giving notice to the donor. However, as the next section will discuss, Manitoba’s *Powers of Attorney Act* requires that an attorney under a duty to act may only renounce the appointment with permission of the court.

³ For Manitoba by its first *Powers of Attorney Act*, S.M. 1980, c. 4. In some jurisdictions such a power of attorney is called a continuing or a durable power of attorney, instead of an enduring power of attorney.

2. Manitoba's Powers of Attorney Act

The Powers of Attorney Act provides the legislative authority for creating enduring powers of attorney in Manitoba.⁴ It was originally enacted in 1980,⁵ based on the recommendations made by the Manitoba Law Reform Commission in its report on *Special and Enduring Powers of Attorney*.⁶ The Act allows the authority given by a donor to an attorney to endure despite the mental incompetence of the donor after the execution of the power of attorney.⁷ The Act codifies the common law principle that the attorney has a fiduciary relationship vis-à-vis the donor; the Act calls on attorneys to exercise the judgment and care “that a person of prudence, discretion and intelligence would exercise in the conduct of his or her own affairs.”⁸

The Act provides that the authority of an attorney under an enduring power of attorney automatically terminates under certain circumstances; the authority of the attorney terminates if the attorney becomes bankrupt, mentally incompetent or dies.⁹ A donor of a power of attorney can anticipate these events by appointing in the power of attorney a substitute attorney and include in the wording for an attorney renouncing an appointment; incidentally, if a power of attorney does not provide for a substitute attorney, by common law a court cannot appoint a substitute attorney.¹⁰ It is especially important for a donor to provide for a substitute attorney in an enduring power of attorney, because, if the donor becomes mentally incompetent, the donor loses the mental capacity to appoint a substitute attorney in the event of the attorney renouncing, becoming mentally incompetent, or dying after the donor has become mentally incompetent.¹¹

As mentioned above, *The Powers of Attorney Act* requires that once an attorney has assumed power under a power of attorney he or she can only resign with judicial approval.¹² This is the

⁴ *The Powers of Attorney Act*, *supra* note 1, ss 10-25. In order to stimulate the harmonization of Canadian enduring powers of attorney legislation, in 2008 the four Western Canadian law reform agencies (WCLRA) published a joint Report, *Enduring Powers of Attorney: Areas for Reform - A Project of the Western Canada Law Reform Agencies*, July 2008 (available online: http://www.manitobalawreform.ca/pubs/pdf/enduring_power_attorney-full_report.pdf) and the Manitoba Law Reform Commission also published *Enduring Powers of Attorney: Areas for Reform - Supplementary Report* (Report #117, 2008), (available online: http://www.manitobalawreform.ca/pubs/pdf/117-full_report.pdf.) The WCLRA Report does not deal with all aspects of the enduring power of attorney legislation of the four western provinces, leaving some statutory differences to be treated as each of the provinces sees fit. The Supplementary Report provides an overview of the impact of the WCLRA Report on *The Powers of Attorney Act* of Manitoba, identifying the sections that are affected and not affected and recommending additional changes to the Act. Neither report has been implemented by the government.

⁵ *Powers of Attorney Act*, S.M. 1980, c. 4, *supra* note 3. The 1980 Act was subsequently repealed and replaced by CCSM c P97 (in force: 7 April 1997).

⁶ Manitoba Law Reform Commission, *Report on Special, Enduring Powers of Attorney* (Report #14, 1974), available online: http://www.manitobalawreform.ca/pubs/pdf/archives/14-full_report.pdf.

⁷ *The Powers of Attorney Act*, *supra* note 1, s 10(1).

⁸ *Ibid*, s 19(2).

⁹ *Ibid*, *supra* note 1, s 13.

¹⁰ *Re Potasky* (2002), 164 Man. R. (2d) 310 (Q.B.).

¹¹ *The Powers of Attorney Act*, *supra* note 1, s 10(3).

¹² *Ibid*, s 21.

case even where the donor had expressly named a substitute attorney in contemplation of the possibility that the original attorney could no longer act.

Sections 19(1) and 21 of *The Powers of Attorney Act* of Manitoba provide:

- 19(1) An attorney under an enduring power of attorney who knows or ought reasonably to know that the donor is mentally incompetent is under a duty to act on behalf of the donor during the mental incompetence if
- (a) the attorney has at any time acted under the power of attorney or otherwise indicated acceptance of the appointment as attorney; and
 - (b) the power of attorney has not been terminated.
- 21 An attorney **may not renounce the appointment** as attorney while subject to the duty to act under subsection 19(1) **except with the leave of the court**. [emphasis added]

Therefore, when an attorney wishes to resign and be replaced by a named substitute attorney, he or she is required to apply to court and, pursuant to the Act, give notice of the application to the donor; the Public Guardian and Trustee; and any other person as the court may order.¹³ The court may make any order it considers appropriate, including a declaration that a power of attorney is terminated and appointing a new attorney, having regard to the power of attorney and the donor's intentions.¹⁴

The Act provides that a donor may appoint any number of persons to act jointly or successively as the attorney. In circumstances where the donor has appointed two or more joint attorneys, if one of the attorneys dies, renounces the appointment, or becomes bankrupt or mentally incompetent, the remainder of the attorneys are still able to make the decisions and the decision of the majority of the remainder is deemed to be the decision of all.¹⁵

3. Other Canadian Jurisdictions

Although all the provinces and territories of Canada have enacted powers of attorney legislation, there is considerable variation. Since the enduring power of attorney is a statutory creature, the statutory law regarding it varies from place to place.

¹³ *The Powers of Attorney Act*, *supra* note 1, s 24(3).

¹⁴ *Ibid*, s 24(1).

¹⁵ *Ibid*, ss 17 & 18.

Similar to Manitoba, the powers of attorney legislation in Alberta, Yukon, the Northwest Territories, and Nunavut require an attorney to apply to court to have the power of attorney renounced, even where a substitute attorney had been named in the power of attorney.¹⁶

Unlike the Manitoba, Alberta, and the territorial Acts, the powers of attorney legislation of British Columbia, Saskatchewan, and Ontario provide for an attorney simply to renounce, without any judicial oversight.¹⁷

Section 25 of British Columbia's *Power of Attorney Act* provides:

- 25 (1) In this section, "**close friend**", in respect of an adult who has made an enduring power of attorney, means another adult who has a long-term, close personal relationship involving frequent personal contact with the adult, but does not include a person who receives compensation for providing personal care or health care to the adult.
- (2) An attorney may resign by giving written notice to the adult and any other attorneys named in the enduring power of attorney.
- (3) In addition to the persons referred to in subsection (2), if the adult is incapable of making decisions at the time the attorney resigns, the attorney must give written notice of the resignation to a spouse, near relative or, if known to the attorney, close friend of the adult.
- (4) The resignation of an attorney is effective
- (a) when notice has been given under this section, or
 - (b) on a later date specified in the notice.¹⁸

Similarly, Saskatchewan's *Powers of Attorney Act* provides that the authority of an attorney is terminated on the written resignation of the attorney given to the donor or other attorneys, if appointed, or the most immediate and available adult family member of the donor.¹⁹ Ontario's *Substitute Decisions Act*, meanwhile, contains a similar requirement to that of British Columbia and Saskatchewan and expressly provides that the attorney must give notice of his or her

¹⁶ *Powers of Attorney Act*, RSA 2000, c. P-20, ss. 8 and 12(1); *Enduring Power of Attorney Act*, RSY 2002, c. 73, ss. 9 and 13(1); *Powers of Attorney Act*, SNWT 2001, c. 15 ss. 12 and 22; *Powers Attorney Act*, SNU 2005, c.9, ss. 9 and 24.

¹⁷ *Power of Attorney Act*, RSBC 1996, c. 370, s. 25; *Powers of Attorney Act*, SS 2002, c P-20.3, s. 19(1)(e); *Substitute Decisions Act*, 1992, SO 1992, c. 30, s. 11.

¹⁸ *Power of Attorney Act*, RSBC 1996 c 370, *ibid*. In British Columbia's Act, the "adult who has made an enduring power of attorney" is equivalent to the "donor" in Manitoba's Act.

¹⁹ *Powers of Attorney Act*, SS 2002, c P-20.3, *ibid*.

resignation to the person named by the power of attorney as a substitute for the attorney who is resigning, if the power of attorney provides for the substitution of another person.²⁰

The legislation of New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland and Labrador does not address attorney renunciation.²¹

²⁰ *Substitute Decisions Act*, 1992 SO 1992, c 30, *supra* note 15.

²¹ Nova Scotia's *Powers of Attorney Act*, RSNS 1989, c 352, ss 5(1) provides that an attorney may apply to a judge of the Supreme Court for an order substituting another person as attorney, and the court may grant the application. In its Final Report on *The Powers of Attorney Act* (August 2015) at 194, the Law Reform Commission of Nova Scotia recommended that the Act should provide that the court may not substitute a person who is not named as an attorney or alternate attorney in an enduring power of attorney, unless the power of attorney so authorizes. (Available online: http://www.lawreform.ns.ca/Downloads/Final_Report_Powers_of_Attorney_Act.pdf.)

CHAPTER 3: THE NEED FOR REFORM

As discussed, Section 21 of Manitoba's *Powers of Attorney Act* requires that once an attorney has assumed power under a power of attorney he or she can only resign with judicial approval.²² This requirement exists even where the donor had expressly named a substitute attorney in contemplation of the possibility that the original attorney could no longer act. In the Commission's view, this provision creates unnecessary cost and expense for people who are prudently engaged in modern estate planning. There is no procedural benefit to court intervention when an attorney wants to resign and a substitute attorney is already identified. As previously mentioned, the Act already provides that the authority of an attorney under an enduring power of attorney terminates without judicial approval if the attorney becomes bankrupt, mentally incompetent or dies.²³ Accordingly, the Commission recommends the Act be amended to allow an attorney to renounce without judicial approval in order to carry out the donor's intentions.

The enduring power of attorney was created to obviate the necessity of a judicial proceeding after a donor becomes mentally incompetent to enable the continuation of the donor's property and affairs being looked after. Similarly, the Commission agrees with the argument that for the same reasons, inconvenience and expense, Section 21 should be amended to do away with the judicial proceeding it now requires, bringing Manitoba's Act in line with those of British Columbia, Saskatchewan and Ontario. The Commission's recommendation is also in line with a recommendation recently made by the Law Reform Commission of Nova Scotia's Report on *The Powers of Attorney Act*, which noted that "[r]equiring notice, rather than a court order, allows an attorney to resign without undue expense or burden, while making sure that the donor's family members and other interested parties are made aware that the attorney is no longer acting."²⁴

The Commission notes that Section 24 of the Act allows the Public Guardian and Trustee, the nearest relative of the donor, a recipient of an accounting or, with the approval of the court, an interested person, the ability to apply to court if there is concern about the enduring power of attorney. This provision helps to ensure that the donor's intentions are carried out and allows a person to challenge the renouncement or substitution of an attorney.

Jurisdiction of the court

24(1) Upon an application made in respect of an enduring power of attorney, the court may, having regard to the power of attorney and the donor's intentions, make any order the court considers appropriate, which may include the following:

²² *Ibid*, s 21.

²³ *Ibid*, *supra* note 1, s 13.

²⁴ Law Reform Commission of Nova Scotia, *The Powers of Attorney Act: Final Report* (2015) at 200. Available online: http://www.lawreform.ns.ca/Downloads/Final_Report_Powers_of_Attorney_Act.pdf.

- (a) an order providing advice or directions on any matter respecting the management of the donor's estate;
- (b) a declaration that the donor is mentally incompetent;
- (c) a declaration that a power of attorney is invalid or terminated;
- (d) an order removing the attorney appointed under the power of attorney;
- (e) an order requiring the attorney to provide the court with an accounting;
- (f) subject to the provisions of the enduring power of attorney, an order varying the powers of the attorney;
- (g) subject to the provisions of the enduring power of attorney, an order appointing a person as an attorney in place of the attorney appointed under the enduring power of attorney.

Who may apply and when

24(2) An application under subsection (1) may be made by an attorney, the Public Guardian and Trustee, the nearest relative of the donor, a recipient of an accounting under section 22 or, with the approval of the court, an interested person, at any time after the execution of the enduring power of attorney.

In the Commission's view, Manitoba's *Powers of Attorney Act* should be amended by repealing Section 21 and replacing it with a provision permitting an attorney to resign by giving notice to the donor, or, if the donor is mentally incompetent, to any other attorney(s) including substitute attorney(s), and, if the donor is mentally incompetent, to the donor's spouse or partner. If the donor has no spouse or partner, then notice should be given to the donor's most immediate family member(s) or close friends as that term is defined in Section 25 of British Columbia's *Power of Attorney Act*, discussed in a previous section.²⁵ Where there is no one to whom the attorney may deliver a notice of resignation, notice should be made to the Public Guardian and Trustee of Manitoba. This recommendation, if implemented, would allow the donor's intentions to be fulfilled without requiring the attorney to apply to court and would improve the efficiency of the law for enduring powers of attorney in Manitoba.

The Commission notes that, in making this recommendation, an amendment to Section 13 of the Act may also be required. Section 13(f) provides that an enduring power of attorney terminates if "subject to section 21 (renunciation of appointment as attorney), the attorney renounces the appointment and gives notice of the renunciation to the donor."²⁶ If the Commission's

²⁵ *Power of Attorney Act*, RSBC 1996, c. 370, s. 25, *supra*, note 15 provides: "**close friend**", in respect of an adult who has made an enduring power of attorney, means another adult who has a long-term, close personal relationship involving frequent personal contact with the adult, but does not include a person who receives compensation for providing personal care or health care to the adult."

²⁶ *The Powers of Attorney Act*, *supra* note 1, s 13(f).

recommendation is implemented, this provision should be amended to carry out the intent of the amended Section 21.

Provisional Recommendation: *The Powers of Attorney Act* should be amended by replacing the wording of Section 21 to permit an attorney to resign, giving notice to the donor, or, if the donor is mentally competent, to any other attorney(s), including any substitute attorney(s) , appointed by the power of attorney, and, if the donor is mentally incompetent, to the donor's spouse or partner or, if the donor has no spouse or partner, to the donor's most immediate family member(s) or close friend as defined by Section 25 of the British Columbia *Power of Attorney Act*. Where there is no one to whom the attorney may deliver the notice of resignation, notice should be made to the Public Guardian and Trustee.