# Manitoba

Law Reform Commission

Commission de réforme du droit

# ENDURING AND SPRINGING POWERS OF ATTORNEY

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# CHAPTER 1

# INTRODUCTION

A power of attorney can be a useful tool in managing an individual's finances when he or she is unable or unwilling to do so personally. It permits an individual (the donor) to grant to another person (the attorney)[1] the power to act in his or her stead with respect to financial and other property matters. However, because it often grants considerable discretionary powers, a power of attorney can be subject to considerable abuse, especially if the donor becomes mentally incompetent and is unable to monitor the activities of the attorney.

This Report will focus on safeguards to protect donors when, due to mental incompetence, they are particularly vulnerable to financial exploitation by attorneys. It will also propose ways in which the wishes of donors can be more effectively implemented, including the possibility of permitting donors to delay the effectiveness of an attorneyship until some time after the power of attorney has been executed.

## A. POWERS OF ATTORNEY

Powers of attorney are agency agreements which have been reduced to writing.[2] Strictly speaking, a signed and sealed appointment of an agent is necessary only if a principal wishes the agent to sign deeds on the principal's behalf;[3] in all other cases, an agent may be appointed orally. However, a written document may be a practical necessity in many cases where it is not required by law; if bankers, potential purchasers or potential vendors are to conduct business with an agent, they must have confidence that he or she has the legal authority to act on behalf of the owner of the property. A power of attorney is often required to provide this confidence.

As an agent of the donor, an attorney is in a position of trust and is viewed by the law as having a fiduciary duty to the donor. Among other things, this means that, when acting for the donor, the attorney must disregard his or her own interests and act only in the interests of the donor. Without the donor's informed consent, an attorney is prohibited from using the donor's property for his or her own benefit, must resolve conflicts of interest in favour of the donor and cannot benefit from an arrangement with the donor's property even if the donor also benefits.[4] Moreover, an attorney must exercise diligence and prudence in the management of the donor's property. If paid for his or her services, the attorney must meet a higher standard of care than if

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[1]The term "attorney" in this case does not refer to an attorney-at-law (that is, a lawyer). Anyone can be appointed under a power of attorney.

[2]*Black's Law Dictionary* (6th ed., 1990) 1171 and *Bowstead on Agency* (15th ed., 1985) 47-48.

[3]*Halsbury's Laws of England* (4th ed. reissue, 1990) vol. 1(2), para. 20; *Bowstead on Agency*, *supra* n. 2, at 48; and G.H.L. Fridman, *The Law of Agency* (6th ed., 1990) 48-49.

[4]On the subject of an attorney's fiduciary duty to the donor, see *Bowstead on Agency*, *supra* n. 2, at 175ff., article 45; *Halsbury's Laws of England*, *supra* n. 2, at 87; Fridman, *supra* n. 3, at 156ff.

unpaid, but, at a minimum, the attorney cannot act more foolishly or negligently than an ordinarily prudent person would in managing his or her own affairs.[5]

At common law, a donor is permitted to appoint more than one attorney. Attorneys can be instructed to act jointly; if so, unless the donor has authorized other arrangements, the attorneys must reach unanimity before they may take any action. A joint attorneyship ends when one of the attorneys is unable or unwilling to continue to act. Although the law on this point is not entirely clear, it may also be possible for a donor to appoint successive attorneys; upon the termination of one attorneyship, the next attorney would take over automatically.

A power of attorney may end in a variety of circumstances. A donor can terminate an attorneyship by simply notifying the attorney that his or her powers are revoked. The attorney can also end an attorneyship by notifying the donor of his or her decision to renounce the position. The death or loss of mental competence of the attorney will terminate the attorneyship and, unless the power of attorney is irrevocable, so will the death or bankruptcy of the donor. At common law, the donor's loss of mental competence also terminates the power of attorney.

## B. POWERS OF ATTORNEY AND MENTAL INCOMPETENCE

When a person is mentally incapable of managing his or her own affairs, an individual or the Public Trustee is usually appointed by the Court of Queen's Bench to make that person's financial and personal decisions on his or her behalf. In Manitoba, this process is governed by *The Mental Health Act*, which permits the appointment of a "committee" who is then responsible to the court for the custody of the mentally disordered person and/or the management of his or her estate.[6] Until recently, a committee was the only person who had the legal authority to manage the affairs of a mentally incompetent person and the mentally incompetent person had no voice in the decision as to who should play that role.

However, in 1974, the Manitoba Law Reform Commission suggested that, rather than forcing mentally incompetent individuals to rely on the courts to appoint a committee, they should given the freedom, while still mentally competent, to name someone to conduct their affairs when they are no longer able to do so.[7] The Commission therefore recommended that mental incompetence should not necessarily terminate all powers of attorney; the law should recognize powers of attorney which were intended by the donor to endure beyond his or her own loss of mental competence (this form of attorneyship is known as an "enduring" power of attorney). The Commission's recommendation gave rise to *The Powers of Attorney Act*,[8] proclaimed in 1980, which permitted donors to create enduring powers of attorney.[9]

*The Powers of Attorney Act* is short and relatively simple; it allows powers of attorney to endure after the onset of the donor's mental incompetence so long as the donor expresses this intention in writing and the written document is witnessed by an individual who is neither the

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[5]See *Bowstead on Agency*, *supra* n. 2, at 144ff.

[6]In the context of *The Mental Health Act*, C.C.S.M. c. M110, the word "committee" is pronounced with an accent on the last syllable and refers to anyone appointed by the court with responsibility for a mentally incapable person.

[7]Manitoba Law Reform Commission, *Special, Enduring Powers of Attorney* (Report #14, 1974) 10.

[8]*The Powers of Attorney Act*, C.C.S.M. c. P97.

[9]Most other Canadian jurisdictions now allow powers of attorney to endure beyond the onset of the donor's mental incompetence. These include British Columbia, Alberta, Saskatchewan, Ontario, New Brunswick, Newfoundland, Nova Scotia and Prince Edward Island. British Columbia and Ontario have recently enacted but not yet proclaimed legislation which deals with decision-making on behalf of the mentally incompetent through devices other than enduring powers of attorney. Although this legislation is in some ways analogous to the regime used in Manitoba, it is not sufficiently similar to justify extensive comparison. The approaches taken by Ontario and British Columbia are not, therefore, referenced in this Report.

attorney nor the attorney's spouse. The legislation therefore changed very little about the law regarding powers of attorneys; it simply extended the law to attorneyships which were intended to survive the onset of the donor's mental incompetence.

*The Powers of Attorney Act* provides that the appointment of a committee will terminate an enduring power of attorney. At the time of its enactment, a committee could only be appointed under *The Mental Health Act* by a judge of the Court of Queen's Bench.[10] Initially, therefore, these two statutes worked well together; where an individual had made an enduring power of attorney and where the attorney was acting appropriately, the court would generally not terminate the power of attorney by appointing a committee. Nevertheless, a committee could always be appointed if the attorney were acting fraudulently or negligently or wished to renounce the attorneyship. Several years later, however, other methods of appointing a committee were added to *The Mental Health Act*. The Public Trustee now automatically becomes the committee of an individual's property whenever the medical officer of a psychiatric facility issues a certificate of incompetence or the Director of Psychiatric Services issues an order of supervision.[11] The result of these changes, perhaps unintended, is that enduring powers of attorney can now be effectively terminated by order of someone other than a judge, as was originally the case.

The effect of these changes to *The Mental Health Act* were brought to the attention of the Commission by Donald Little, Q.C. and Jane Evans, Q.C., who suggested that the Commission investigate the matter. During our investigation, we concluded that the law indeed should be changed to prevent enduring powers of attorney from being so easily upset, but we also decided that further changes to the law of enduring powers of attorney needed to be considered.

Our primary concern is that the common law, while appropriate for "ordinary" powers of attorney, may be inadequate to properly protect donors who have executed enduring powers of attorney and who have subsequently become mentally incompetent. In an ordinary power of attorney, the donor can continue to supervise the attorney; in fact, the law assists the donor by requiring the attorney to account to the donor upon demand for his or her management of the donor's property. In addition, the donor can terminate the attorneyship at any time and can sue the attorney for harm caused by the attorney's negligence or fraud. By contrast, donors who have created enduring powers of attorney and have subsequently become mentally incompetent do not have these powers. They are unlikely to detect the attorney's mismanagement or fraud even if they are given the attorney's accounts. Furthermore, they lack the legal capacity to terminate an attorneyship or to bring an action in court for damages.

We believe that this situation has a great potential for abuse. All citizens who choose to order their affairs by means of an enduring power of attorney are vulnerable to the misuse of this power, but it is the elderly who are most likely to be victimized because they are most likely to need and make enduring powers of attorney. Our concerns are underlined by information concerning elder abuse. Evidence suggests that approximately 4% of elderly persons in Canada are victims of abuse and that up to 100,000 seniors are abused in Canada annually.[12] In its first year of operation alone, the Elder Abuse Centre of Manitoba reported 163 referrals of 274 incidents of abuse. Financial exploitation, including the misuse of powers of attorney, is

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[10]*The Mental Health Act*, C.C.S.M. c. M110, s. 56.

[11]*The Mental Health Act*, C.C.S.M. c. M110, ss. 26.11 and 26.12.

[12]Studies in both Canada and the United States have reached this conclusion: see M.R. Block and J.D. Sinnot, *The Battered Elder Syndrome: An Exploratory Study* (1979), as cited in M.J. Penning, *Elder Abuse Resource Centre: Research Component - Final Report* (1992) 2; E. Podnieks, K. Pillemer, J.P Nicholson, T. Shillington and A. Frizzell, *National Survey on Abuse of the Elderly in Canada: Preliminary Findings* (1989) and E. Podnieks, "Elder Abuse: It's Time We Did Something About It" (1985), 81 *The Canadian Nurse* 36, both as cited in J.B. Bond, Jr. with R.L. Penner and P. Yellen, *Final Report - The Effectiveness of Legislation Concerning Abuse of the Elderly: A Survey of Canada and the United States* (1992) 2 and 13 respectively.

involved in 40% of the cases reported to the Centre [illegible] As the numbers and proportion of elderly grow,[14] the problem of financial exploitation, including the abuse of powers of attorney, is likely to become even more severe in the future.

We believe that special precautions and safeguards should be established to minimize the risk that enduring powers of attorney will be improperly obtained or improperly used to the detriment of mentally incompetent donors. However, it is also important to ensure that the use of enduring powers of attorney is available to as many individuals as possible, that enduring powers of attorney are practical and reliable and that donors are granted as much freedom as possible to put their wishes into operation.

These diverse objectives form the basis of this Report, and particularly Chapters 2 through 6, in which our recommendations concerning enduring powers of attorney are set out and discussed. Occasionally, these objectives come into conflict; the approach which offers the greatest protection to the donor may be less practical, may make the instrument less accessible or may reduce the donor's freedom more than is acceptable. On the other hand, approaches which maximize accessibility, practicality and the donor's freedom may fail to protect donors adequately. When faced with a choice between these conflicting goals, we have attempted to balance them in a manner which we believe best serves the public interest.

## C. SPRINGING POWERS OF ATTORNEY

Another form of power of attorney also receives attention in this Report. A power of attorney which does not come into effect immediately upon the execution of the document, but which begins at a later date or upon the occurrence of a specified event is referred to as a "springing" power of attorney. Although not prohibited by common law or statute, springing powers of attorney are not explicitly recognized either. It is not entirely clear, therefore, whether or not they would be recognized by courts in Manitoba. This uncertainty will give rise to practical problems for donors who wish to use this legal device.

After investigating the issue, we have concluded that springing powers of attorney constitute a useful and practical method of managing one's affairs and we believe that they should be recognized by legislation. Chapter 7 is devoted to a discussion of springing powers of attorney and a resolution of the potential problems their recognition raises.

## D. AMBIT OF THE REPORT

Our focus in this Report has not been on powers of attorney which were previously recognized in common law (these are sometimes referred to as "ordinary" powers of attorney, in contrast to "enduring" and "springing" powers of attorney). Our perception is that the common law in this area has been working well and we are hesitant to become involved in reforming the law when it does not appear to be required. However, some of the recommendations made in this Report might be usefully applied to "ordinary" powers of attorney as well as to enduring or springing powers of attorney. If so, it may be that they will be the subject of another Report in the future.

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[13]Penning, *supra* n. 12, at 7 and 13.

[14]It has been projected that, by the year 2031, 21% of the population will be age 65 or older: R.M. Gordon, S.N. Verdun-Jones and D.J. MacDougall, *Standing in their Shoes: Guardianship, Trusteeship and the Elderly Canadian* (Simon Fraser University, Criminology Research Centre, Burnaby, B.C, 1986) 4, as cited in Alberta Law Reform Institute, *Enduring Powers of Attorney* (Report for Discussion #7, 1990) 17.

## E. APPENDIX

As an appendix to this Report, we have attached a draft statute which incorporates our recommendations with respect to both enduring and springing powers of attorney.

## F. ACKNOWLEDGEMENTS

The Commission was able to undertake this project as a result of a grant from the Manitoba Law Foundation. We gratefully acknowledge the Foundation's important support.

In addition, we wish to thank Donald Little, Q.C. and Jane Evans, Q.C. who brought to our attention the impact changes to *The Mental Health Act* have had on enduring powers of attorney.

Finally, we wish to express our thanks to the individuals with whom our staff consulted in preparing this Report: Irene Hamilton, the Public Trustee; Penny Yellen, Executive Director of the Elder Abuse Resource Centre; and Kathy Yurkowski, Executive Director of the Seniors Directorate.

# CHAPTER 2

# EXECUTION OF ENDURING POWERS OF ATTORNEY

There are two main purposes for the execution requirements of any power of attorney: to permit parties with whom an attorney will be dealing to have confidence in his or her authority to act and to prevent undue influence and fraud. While a signed and witnessed document is generally sufficient for the former purpose, we have concerns about the ability of current requirements to prevent the latter. The prospect of obtaining wide powers over the donor's property, especially when the donor is unable to supervise the use of those powers personally, will, in some cases, be sufficient incentive to induce fraud or undue influence from those who could benefit from this state of affairs. Moreover, as noted by the English Law Commission, donors of enduring powers of attorney may be particularly vulnerable to exploitation by way of undue influence or fraud.

> Many people will not consider the creation of an . . . [enduring power of attorney] until their mental state is beginning to deteriorate. There is a likelihood that such a donor will be highly suggestible and liable to do whatever the prospective attorney says is best for him without appreciating the effect of the grant either in terms of the "enduring" element or in terms of the scope of the authority being granted.[1]

In these circumstances, we believe that the execution requirements of an enduring power of attorney, while avoiding excessive formalism, ought to play a more significant role in protecting the potential donor from the effects of undue influence or fraud.

## A. EXECUTION AND WITNESSES

### 1. Current Requirements

At present, *The Powers of Attorney Act* requires that an enduring power of attorney must be written, signed by the donor and witnessed by at least one individual who is neither the attorney nor the attorney's spouse.[2] We believe that these requirements are justifiable and necessary. An independent witness can address challenges to the validity of an enduring power of attorney by attesting to the facts surrounding the execution and the donor's mental state when he or she signed the document. The requirement that a witness be someone other than the attorney or the attorney's spouse reduces the risk that the attorney, intending to act in his or her own interests, will unduly influence the donor to sign the document. An independent witness requirement also discourages forgery, provides evidence of authenticity to third parties relying on the document and is likely to impress upon the donor the seriousness of the powers being granted.

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[1]The Law Commission (Eng.), *The Incapacitated Principal* (Report #122, 1983) 15-16.

[2]*The Powers of Attorney Act*, C.C.S.M. c. P97, s. 3(1).

## 2. Additional Requirements

Although we endorse the current legislative requirements for the execution of enduring powers of attorney, we are of the view that the current requirements do not go far enough in safeguarding the donor from fraud or undue influence during the execution process. We are concerned that a single witness, albeit neither the attorney nor his or her spouse, could still conspire with the attorney to defraud or unduly influence the donor. We believe that the risk of advantage being taken of the donor would be significantly reduced if the witness were required to occupy a position or to engage in an occupation which is highly regarded within the community and which would be threatened if the witness became involved in undue influence or fraud.

The Province of Alberta and the State of South Australia have both narrowed the category of witnesses available for the execution of enduring powers of attorney. The only individuals permitted to witness these documents in Alberta are lawyers; South Australia allows only individuals authorized to take affidavits to perform this function.[3] Both of these categories meet our criteria. However, although a witness with legal training would be able to provide information to the donor as to the effect of the document, thereby providing a significant degree of protection against undue influence and fraud, we are concerned that restricting potential witnesses to these narrow categories unnecessarily reduces access to the use of this legal instrument. Instead, we propose the use of the following categories of individuals which meet our criteria and which are likely to be present throughout the province in urban, rural and northern communities. Our suggested categories are:

- ministers of religion authorized under provincial law to perform marriages;
- judges of courts of superior jurisdiction (the Court of Queen's Bench and the Court of Appeal);
- provincial judges, justices of the peace and magistrates;
- duly qualified medical practitioners (defined in *The Interpretation Act* to mean a person recognized under *The Medical Act*; that is, physicians and surgeons);
- notaries public;
- lawyers entitled to practise in the province; or
- members of the Royal Canadian Mounted Police.

A witness to an enduring power of attorney would be well-advised to designate his or her position near his or her signature. This would help to assure all interested parties, including third parties, that the document has been properly witnessed. Nevertheless, although we believe that this designation would be useful, we are not prepared to recommend that an enduring power of attorney which lacks it should be considered invalid.

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[3] *Powers of Attorney Act*, S.A. 1991, c. P-13.5, s. 2(4)(d); *Powers of Attorney and Agency Act*, 1984, No. 25 of 1984, s. 6(2)(a) (S. Aust.). Alberta's choice is largely due to the fact that it requires a certificate of legal advice to be attached to a valid enduring power of attorney.

*RECOMMENDATION 1*

***A valid enduring power of attorney should be witnessed by one of the following persons:***

- ***a minister of religion authorized under provincial law to perform marriages;***
- ***a judge of a court of superior jurisdiction;***
- ***a provincial judge, justice of the peace or magistrate;***
- ***a duly qualified medical practitioner;***
- ***a notary public;***
- ***a lawyer entitled to practise in the province; or***
- ***a member of the Royal Canadian Mounted Police.***

## B. PRESCRIBED FORM

Although there is currently no need for an enduring power of attorney to be in a prescribed form, we have considered following England's lead by recommending the imposition of such a requirement.[4] Properly drafted, a prescribed form could reduce fraud by making clear to the donor and to third parties the powers being granted to an attorney. It might also increase accessibility by making a power of attorney easier to use; rather than drafting a new document whenever a power of attorney is needed, donors could purchase the prescribed form or copy a form printed in the legislation.

However, in our view, the advantages of requiring the use of a prescribed form are outweighed by its disadvantages. Primary among these is its inflexibility; a mandatory form could not contain all of the options available to a donor unless it were extraordinarily lengthy and awkward. A mandatory form might also reduce accessibility; individuals who reside in isolated communities might find it difficult to obtain the form.

We are therefore of the view that pre-printed, fill-in-the-blank forms ought to be recognized as valid enduring powers of attorney if executed properly. However, we do not see the need for their use to be made mandatory; a document drafted by or for the donor, if properly executed, ought also to be legally recognized as valid.

*RECOMMENDATION 2*

***Enduring powers of attorney should be in any form which clearly expresses the intention of the donor.***

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[4] According to the Alberta Law Reform Institute, this approach has also been adopted in Northern Ireland and New Zealand and has been proposed by the Australian Law Reform Commission, the Law Reform Commission of the Republic of Ireland and by the National Conference of Commissioners on Uniform State Laws in the United States: Alberta Law Reform Institute, *Enduring Powers of Attorney* (Report for Discussion #7, 1990) 47.

## C. SUBSTITUTE EXECUTION

It is possible that an inability to read or sign the document may prevent a donor from being able to execute an enduring power of attorney personally.[5] In Manitoba, legislation allows an individual to execute important legal documents, including wills, health care directives and affidavits[6] on behalf of a person who cannot do so. Alberta permits substitute execution for enduring powers of attorney.[7] Permitting substitute execution of enduring powers of attorney in Manitoba would grant access to this legal device to those for whom it would be otherwise unavailable, allowing them the freedom enjoyed by other Manitobans to control their affairs after they have become mentally incompetent. For this reason, we are of the view that substitute execution of enduring powers of attorney ought to be permitted if the donor is incapable of executing the document personally.

Nevertheless, we believe that the protection of the donor requires that some safeguards be established when an enduring power of attorney is executed substitutionally. To guard against the increased risk of fraud, we propose that substitute execution should be permitted only when the donor is unable to read or sign the enduring power of attorney personally. In addition, we propose the adoption of the special formalities of execution used when wills, health care directives and affidavits are executed substitutionally. In each of these cases, the individual who would ordinarily sign the document must be physically present and must direct someone else to sign the document on his or her behalf.[8] We believe that these additional requirements are necessary to protect against fraud in the substitute execution of enduring powers of attorney as well.

Furthermore, we are of the view that the individuals who are likely to exert undue influence on the maker of a document or to act fraudulently in the execution of the document ought not to be placed in a position where undue influence or fraud could be easily conducted. For this reason, *The Health Care Directives Act* prohibits the individual who is named as proxy in a health care directive and the proxy's spouse from acting as a substitute signer.[9] The *Powers of Attorney Act* in Alberta has applied the same principle to enduring powers of attorney by prohibiting the named attorney, as well as the attorney's spouse, from signing the instrument on behalf of the donor.[10] Both the principle and its application in Alberta's legislation appear to us to be reasonable and sensible and do not unduly restrict the number of people who could sign a power of attorney on behalf of a donor.

***RECOMMENDATION 3***

***Substitute execution of an enduring power of attorney should be permitted only when the donor is incapable of reading or signing the instrument.***

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[5]For example, the donor may be unable to read the document due to illiteracy or visual impairment or may be unable to sign the document due to a physical disability.

[6]*The Wills Act*, C.C.S.M. c.W150, s. 4(a); *The Health Care Directives Act*, C.C.S.M. c. H27, s. 8(2); *The Manitoba Evidence Act*, C.C.S.M. c. E150, s. 64(4).

[7]*Powers of Attorney Act*, S.A. 1991 c. P-13.5, s. 2(3).

[8]*The Wills Act*, C.C.S.M. c.W150, s. 4(a); *The Health Care Directives Act*, C.C.S.M. c. H27, s. 8(2).

[9]*The Health Care Directives Act*, C.C.S.M. c. H27, s. 8(2)(b)(i).

[10]*Powers of Attorney Act*, S.A. c. P-13.5, s. 2(3).

*RECOMMENDATION 4*

***Substitute execution should be valid only when the donor is physically present, has directed another individual to sign the instrument on his or her behalf and has acknowledged that signature in the presence of a witness.***

*RECOMMENDATION 5*

***The attorney named in the instrument and the spouse of the attorney should not be permitted to sign the instrument on behalf of the donor.***

## D. MENTAL CAPACITY OF THE DONOR

At common law, any power of attorney which is executed by a donor who is mentally incapable is invalid.[11] However, the common law is not entirely clear as to the test which should be applied to determine the mental state of a donor. One method of determining the donor's capacity is to ask whether he or she understands the general effect of the document being executed. A valid enduring power of attorney would then require that the donor understand, in general terms, the powers being granted to the attorney, that the attorneyship will continue after the donor becomes mentally incompetent and that, while mentally incompetent, the donor will not be able to revoke the attorneyship.[12]

Another test to determine the donor's mental capacity is somewhat more stringent. It would ask whether the donor understood the acts or transactions the attorney could undertake under the instrument.[13] If interpreted strictly, this test would require the donor to be able to list every transaction available to the attorney, a test which many people who are clearly not mentally incompetent might fail.[14]

We are of the view that a donor should not have to be capable of listing all the options open to an attorney with respect to the property in question; it is sufficient that he or she understand the general nature and effect of an enduring power of attorney.

*RECOMMENDATION 6*

***At the time of the execution of an enduring power of attorney, the donor should have the mental capacity to understand the general nature and effect of the enduring power of attorney.***

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[11] *Daily Telegraph Newspaper Co. Ltd.* v. *McLaughlin* (1904), 1 C.L.R. 243 (H.C. Aust.), aff'd [1904] A.C. 776 (P.C.).

[12] *Re K, Re F*, [1988] 1 All E.R. 358 (Ch.D.). See also Alberta Law Reform Institute, *supra* n. 4, at 58.

[13] *Ranclaud* v. *Cabban* (1988) NSW Conv R (CCH) 55-385, as cited in Law Reform Commission of Victoria, *Enduring Powers of Attorney* (Discussion Paper #18, 1990) 3.

[14] The Australian Law Reform Commission did in fact interpret *Ranclaud* v. *Cabban* in this way and criticized it, arguing that "it is impossible to know, at the time when a power of attorney is executed, what acts an attorney will perform under the power.": Australian Law Reform Commission, *Enduring Powers of Attorney* (Report #47, 1988) 10.

# CHAPTER 3

# THE ATTORNEY

Although safeguards to prevent fraud or undue influence at the point when the enduring power of attorney is executed will help to protect the donor, a valid and voluntarily executed enduring power of attorney can still be abused to the detriment of the donor. This is especially true after the donor has become mentally incapable of managing his or her own affairs.

## A. PROHIBITED CATEGORIES

One method of reducing the risk that the donor's property will be mismanaged is to prevent individuals who are likely to act unethically or incompetently from acting as attorneys. Stated positively, we believe that the law should recognize as attorneys only those individuals who can adequately manage and protect the donor's property while the donor is mentally incompetent.

The common law quite sensibly refuses to recognize a grant of attorneyship to a mentally incompetent individual[1] and we would adopt the same position for enduring powers of attorney. An individual who lacks the legal capacity to manage his or her own affairs clearly cannot manage the property of another.

The appointment of minors as attorneys has been recognized as valid by common law so long as the minor can understand the nature and effect of his or her actions.[2] Deference to the donor's wishes in this regard may be appropriate for ordinary powers of attorney where the donor can terminate the power if it is not being exercised properly. However, in the case of an enduring power of attorney, where the attorney's power can be exercised while the donor is mentally incompetent, greater caution is required. Furthermore, in some circumstances, the law may not hold a minor accountable for his or her actions;[3] in these situations, a donor will be left with little or no protection or chance of compensation for harm a minor attorney may have caused. For these reasons, we believe that, in the case of an enduring power of attorney, greater weight must be placed on the protection of the donor and less on the donor's freedom to select an attorney. We believe that the prohibition on the use of minors as attorneys legislated in Alberta, England and New Zealand[4] is sensible and appropriate.

The primary reason for preventing an undischarged bankrupt from being allowed to serve as an attorney is the fear that "the bankrupt attorney might find irresistible the opportunity presented by his attorneyship to use the donor's assets to improve his own position."[5] In the case

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[1]*Bowstead on Agency* (15th ed., 1985) 33; G.H.L. Fridman, *The Law of Agency* (6th ed., 1990) 49.

[2]*Bowstead on Agency*, *supra* n. 1, at 33.

[3]Fridman, *supra* n. 1, at 51.

[4]*Powers of Attorney Act*, S.A. 1991, c. P-13.5, s. 2(2); *Enduring Powers of Attorney 1985* (Eng.), c. 29, s. 2(7)(a); *Protection of Personal and Property Rights Act* 1988, No. 4, s. 95(3) (N.Z.), as cited in Alberta Law Reform Institute, *Enduring Powers of Attorney* (Report for Discussion #7, 1990) 60.

[5]The Law Commission (Eng.), *The Incapacitated Principal* (Report #122, 1983) 23.

of an ordinary power of attorney, since the donor can always withdraw the attorneyship if this concern is borne out, this fear might not be sufficient to prohibit a donor from appointing an undischarged bankrupt as an attorney. Again, however, the prospect of an attorney acting while the donor is helpless to terminate the attorneyship requires, in our view, a greater emphasis on the donor's protection. Like England and New Zealand,[6] we believe that a donor should not be permitted to select an undischarged bankrupt to serve as an attorney in the case of an enduring power of attorney.[7]

*RECOMMENDATION 7*

***At the date of the execution of an enduring power of attorney, the named attorney should be at least 18 years of age, should be mentally competent and should not be an undischarged bankrupt.***

## B. MULTIPLE ATTORNEYS

### 1. Successive Attorneys

An attorneyship can be terminated in a variety of ways; some already exist in common law while others will be proposed in Chapter 5. So long as the attorneyship ends while the donor is mentally competent, this is not a problem; the donor, if he or she wishes, can simply appoint another attorney. However, if the donor creates an enduring power of attorney and if the attorneyship terminates while the donor is mentally incompetent, a court application may have to be made for a committee or substitute attorney to be appointed to manage the donor's property.[8] This may entail a significant expense, could result in a lapse in the management of the donor's property and may not reflect the donor's wishes.

Rather than requiring the court to appoint a committee or a substitute attorney upon the termination of an attorneyship, a donor may wish to name another attorney to act when the first attorneyship has ended. Although not currently prohibited by the common law, the appointment of successive attorneys is not expressly permitted either. Expressly granting donors the power to name successive attorneys enables them to continue to control their own affairs after they have become unable to do so personally. This is, in fact, the purpose of enduring powers of attorney and we are of the view that it is in the public interest.[9]

If the second attorney wishes to act, he or she will have to convince third parties that the first attorneyship has come to an end and the second has begun. Normally, this will be done by demonstrating that events have occurred which, by law, terminate the first attorneyship. However, the donor may wish to have the first attorneyship terminated and the second begun upon the occurrence of events which would not otherwise necessarily have this effect.[10] Again,

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[6]*Enduring Powers of Attorney 1985* (Eng.), c. 29, s. 2(7)(a); *Protection of Personal and Property Rights Act* 1988, No. 4, s. 95(3) (N.Z.), as cited in Alberta Law Reform Institute, *supra* n. 4, at 60. Alberta, however, permits a donor of an enduring power of attorney to name an undischarged bankrupt as an attorney.

[7]The reason for prohibiting an undischarged bankrupt from being named an attorney logically requires that an enduring attorneyship terminate when the attorney becomes bankrupt. This is, in fact, the position we take in Chapter 5.

[8]The appointment of a committee is authorized by *The Mental Health Act*, C.C.S.M. c. M110, s. 56, and will be discussed in Chapter 5. The power of the court to appoint a substitute attorney is recommended in this Report and will also be discussed in Chapter 6.

[9]Other jurisdictions which have permitted successive attorneys include Alberta and New Zealand: *Powers of Attorney Act*, S.A. 1991, c. P-13.5, s. 13(2); *Protection of Personal and Property Rights Act* 1988, No. 4, s. 106 (N.Z.), as cited in Alberta Law Reform Institute, *supra* n. 4, at 104.

[10]For example, the donor may wish to have the first attorneyship terminated if the first attorney moves out of the country.

we are of the view that the donor should be granted this freedom so long as he or she sets out these events in the instrument creating the power of attorney. The second attorney would have to show that the events giving rise to the second attorneyship have taken place. If doubts or disputes arise as to the occurrence of these events, the court should be asked to resolve them.[11]

***RECOMMENDATION 8***

***Donors should be permitted to name successive attorneys in an enduring power of attorney.***

***RECOMMENDATION 9***

***Successive attorneys should be able to assume the power of attorney from their predecessors upon the occurrence of events which, by law, terminate the previous attorneyship or which are set out by the donor in the instrument creating the enduring power of attorney.***

## 2. Joint Attorneys

The common law permits donors to appoint more than one attorney to act jointly. Joint attorneys must reach unanimity before they can act, unless the donor sets out another method of decision-making.[12] This arrangement has the advantage of reducing the possibility that the donor's property will be dealt with negligently or fraudulently because the attorneys will tend to act as a check upon one another. However, the joint attorney arrangement also has two major disadvantages: the prospect of stalemate among the attorneys (with the result that no activity takes place) and the fact that the termination of one attorneyship (for example, by the death of one of the attorneys) will terminate the entire power of attorney.

We are of the view that the requirement of unanimity is too restrictive in the context of enduring powers of attorney; while unanimity prevents fraud and negligence, it may also harm the donor by preventing decisive action with respect to his or her property. We believe that the common law presumption should be reversed; rather than a requirement of unanimity, unless the instrument requires otherwise, the law should permit a simple majority of joint attorneys to determine a course of action unless the document sets out different rules for decision-making. This is currently the case with respect to proxies named pursuant to *The Health Care Directives Act*.[13] If this arrangement is appropriate for decisions relating to the health care provided to an individual, we believe that it is also appropriate for decisions relating to an individual's property.

***RECOMMENDATION 10***

***Unless otherwise provided in an enduring power of attorney, where more than one attorney is appointed to act jointly, the decision of the majority should be deemed to be the decision of all.***

The rule that the death or mental incompetence of one attorney will result in the termination of the entire joint attorneyship is based on the unanimity requirement; if the consent of every joint attorney is required before actions can be taken, it follows that, when consent is

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[11] In Chapter 6, we recommend that the Court of Queen's Bench be given a general power to make orders with respect to powers of attorney. An order or declaration for this sort of situation could be given under this general power.

[12] *Bowstead on Agency*, *supra* n. 1, at 49; *Halsbury's Laws of England* (4th ed. reissue, 1990) vol. 1(2) 27.

[13] *The Health Care Directives Act*, C.C.S.M. c. H27, s. 15(2).

not possible due to the termination of one attorneyship, the others will be permanently unable to act.

*However, in the light of our recommendation that the unanimity requirement be modified to allow action on the basis of a majority decision, it is no longer necessary to terminate a joint* attorneyship upon the death, absence or inability to act of a single member of the joint attorneyship. Moreover, we are of the view that most donors would wish a joint attorneyship to continue even if one of its members is unable or unwilling to act. Once again, this is also the approach which is taken with respect to health care proxies in *The Health Care Directives Act*[14] and we are of the view that it should be applied to an enduring power of attorney for similar reasons. If the donor has contrary desires, however, we are prepared to allow him or her to waive this provision by directing otherwise in the enduring power of attorney.

*RECOMMENDATION 11*

***Where two or more attorneys are named in an enduring power of attorney and one or more of them dies, becomes mentally incompetent, is otherwise unable to act or, after reasonable inquiries, is unavailable to make a decision, the remainder of the attorneys should be permitted to make the decision, unless otherwise directed by the instrument creating the enduring power of attorney.***

In some situations, it is possible that no majority will emerge among a group of joint attorneys.[15] The donor may, if he or she wishes, address this potential problem in the instrument itself. However, if it is not addressed by the donor, a clearly defined solution should be in place. Although there are a number of methods by which this problem could be resolved, we are again prepared to adopt the solution utilized by *The Health Directives Act*. When health care proxies cannot reach a majority decision, the first-named proxy has the responsibility for making a decision.[16] The donor therefore has the opportunity to deal with this eventuality by naming first in the document the individual he or she wishes to break tie votes or by specifying another solution.

*RECOMMENDATION 12*

***Unless otherwise set out in the enduring power of attorney, where two or more attorneys, appointed to act jointly, are unable to reach a majority decision, the attorney who is named first in the document should make the decision.***

As will be noted in the following Chapter, attorneys have a duty to act in the interests of the donor and to manage the donor's property competently. If they breach this duty by using the attorneyship for their own benefit or by acting fraudulently or negligently, they will be liable to the donor for their actions.

In the case of joint attorneys, the recommendation that a majority of attorneys should be permitted to act on behalf of all could result in attorneys who disagreed with a particular course of action being held liable for the action along with the other attorneys. Indeed, an attorney who could not be located after reasonable inquiries might be held liable without even being aware of the decision. We believe that this result would be unfair. To prevent it from occurring, we suggest that, as with corporate directors who wish to dissociate themselves from the decisions of

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[14]*The Health Care Directives Act*, C.C.S.M. c. H27, s. 15(2)(b).

[15]This may be the case where an even number of attorneys are named, where the non-involvement of one or more reduces the number of active attorneys to an even number or where the attorneys are split among several options.

[16]*The Health Care Directives Act*, C.C.S.M. c. H27, s. 15(3).

the majority,[17] provisions ought to be made to permit attorneys who adopt a dissenting position to escape liability for the actions of the majority. In order to prevent attorneys from claiming immunity from actions they in fact supported, we believe that those who wish to shelter themselves from liability should be required to inform the other attorneys of their opposition in writing as soon as reasonably possible after the decision is made. When decisions are made in the absence of an attorney, the absent attorney should be permitted to escape liability if he or she informs the other attorneys of his or her opposition to the decision in writing as soon as reasonably possible after learning of it.

*RECOMMENDATION 13*

***A joint attorney should not be held liable for actions or omissions taken by a majority of attorneys so long as he or she opposed the action or omission and communicated his or her opposition to the action or omission to the other attorneys in writing as soon as reasonably possible after the decision was made.***

*RECOMMENDATION 14*

***A joint attorney should not be held liable for actions or omissions taken by a majority of attorneys if the decision to engage in the action or omission was taken in his or her absence and so long as he or she communicated his or her opposition to the action or omission to the other attorneys in writing as soon as reasonably possible after learning of it.***

### 3. Presumption

It is possible that donors will name several attorneys to act but fail to make clear whether they are to act jointly or successively. We are of the view that the law should have a presumption in this eventuality as an aid to the persons with whom the attorneys will deal.

In the absence of an indication from the donor, we recommend that multiple attorneys should be deemed to be successive. A joint attorneyship is more complex than a successive attorneyship and we are therefore reluctant to have it imposed by law in the absence of the clear intent of the donor. Our views on this matter are supported by the fact that *The Health Care Directives Act*, faced with a similar problem, deems multiple proxies to have been appointed successively unless a joint appointment is expressly indicated.[18]

*RECOMMENDATION 15*

***Where two or more attorneys are named in an enduring power of attorney without a clear indication as to whether the attorneys are to act successively or jointly, they should be deemed to be successive attorneys.***

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[17]*The Corporations Act*, C.C.S.M. c. C225, s. 118(1). A director is deemed to have consented to a decision taken at a meeting unless he or she asks to have his or her dissent entered into the minutes of the meeting, registers his or her dissent with the secretary of the meeting before it is adjourned or sends his or her dissent by registered mail or personal delivery to the office of the corporation immediately following the meeting.

[18]*The Health Care Directives Act*, C.C.S.M. c. H27, s. 15(1).

# CHAPTER 4

# THE ATTORNEY'S DUTIES

As an agent, the first duty of an attorney is to follow the directions of his or her principal, the donor. However, powers of attorney are often very general, permitting the attorney great discretion in dealing with the donor's property.

The absence of clear directions in a power of attorney does not permit the attorney to do anything he or she wishes with the donor's property; on the contrary, he or she is bound to exacting standards when acting as attorney. An attorney owes a fiduciary duty to the donor and must act only in the best interests of the donor while dealing with the donor's property. This means, among other things, that without the donor's informed consent, the attorney cannot use the position to benefit anyone other than the donor and cannot use the attorneyship to benefit himself or herself even if the donor also benefits.[1] An attorney also has a duty to meet certain standards of care and prudence in his or her dealings. A failure to meet these standards will also result in liability to the donor.

## A. STANDARD OF CARE

The common law applies two standards in judging the actions of an attorney. When the attorney is acting without pay, he or she is required to act as carefully as an ordinarily prudent person would in managing his or her own affairs.[2] When the attorney is being paid for his or her services, however, a higher standard is applied; the attorney must exhibit the care and judgment which would be expected of a professional property or financial manager.[3]

We believe that the use of these two standards is appropriate. If paid a fee or salary for his or her services, an attorney is charging for a service which is often done gratuitously. He or she is, in effect, offering a professional level of service to the donor. It seems only fair to hold such an individual to a higher standard than someone who is prepared to perform the service without pay.

## B. DUTY TO ACT

Although an attorney must meet certain standards of care and prudence in acting for a donor, at common law an attorney who is acting gratuitously cannot be held liable for failing to

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[1] *Boardman* v. *Phipps*, [1967] 2 A.C. 46 (H.L.). On the subject of an attorney's fiduciary duty to the donor, see also *Bowstead on Agency* (15th ed., 1985) 175ff. and article 45; *Halsbury's Laws of England* (4th ed. reissue, 1990) vol. 1(2) 62-63; G.H.L. Fridman, *The Law of Agency* (6th ed., 1990) 156ff.

[2] *Bowstead on Agency*, *supra* n. 1, at 152-155.

[3] *Bowstead on Agency*, *supra* n. 1, at 144ff.

take any action on behalf of the donor.[4] In adopting this position, the common law takes into account that these attorneys are performing a favour rather than earning a fee for their work. This approach also rewards prudence and discourages risk-taking on the part of attorneys. However, since this approach means that they can never be liable for inaction, overly cautious attorneys might be excessively reluctant to take sensible steps to preserve and enhance the donor's property. The result could be a lost opportunity or even depreciation in the value of the donor's property.

While the donor is mentally competent, an excessively timid attorney can be dealt with easily; the donor can simply replace him or her. However, when the donor is unable to terminate the attorneyship due to mental incompetence, we believe that the law should be more active in guiding the attorney in directions which would have been chosen by the donor had he or she been able to do so. If no duty to act is imposed, the donor's expectation - that the attorney will manage his or her affairs once he or she becomes incompetent - can be easily frustrated by an attorney who declines to act. For this reason, we agree with the Province of Alberta that a positive duty to act should be placed on attorneys in an enduring power of attorney after the donor has become mentally incompetent.[5]

This duty does not mean that every opportunity which presents itself for investing, purchasing or selling the donor's property should be seized by the attorney; indeed, the attorney has a duty not to act if acting would breach the duty of care he or she owes to the donor. However, if a failure to act should amount to negligence, fraud or breach of trust, the duty we propose would result in the attorney's liability for harm which flows from that failure.[6]

Our reasons for recommending the imposition of a duty to act apply only when the donor, due to mental incompetence, is unable to monitor the attorney's activities. Our rationale does not apply when a donor is mentally competent, even if he or she has executed an enduring power of attorney. Therefore, we believe that the duty to act should be imposed only while a donor is mentally incompetent.

Moreover, it would be unfair, in our view, to impose this obligation if the attorney has not accepted the attorneyship. In our view, given the potential liability faced by an attorney in this situation, something more than a failure to renounce the appointment should be required before acceptance is deemed.[7] In order to be held to the duty to act, the attorney should have demonstrated his or her acceptance of the attorneyship by taking some action as attorney or by signing the document or otherwise acknowledging acceptance of the attorneyship.

In addition, besides having accepted the appointment, the attorney should have been aware or should reasonably have been expected to be aware of the donor's incompetence before a duty to act should be imposed. If the donor's condition is unknown to the attorney and if a reasonable person in the attorney's position would be unaware of the donor's incompetence, the imposition of a duty to act would, in our view, be unfair.

***RECOMMENDATION 16***

***When the donor of an enduring power of attorney is mentally incompetent, an attorney should be placed under a positive duty to act on behalf of the donor and***

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[4]Fridman, *supra* n. 1, at 140; *Bowstead on Agency*, *supra* n. 1, at article 44.

[5]*Powers of Attorney Act*, S.A. 1991, c. P-13.5, s. 8.

[6]We recommend in Chapter 6 that an attorney be permitted to apply to the Court of Queen's Bench for advice and directions with respect to an attorneyship. A prudent attorney, when faced with a difficult decision, will wish to take advantage of this opportunity.

[7]The termination of an attorneyship through renunciation will be discussed in Chapter 5.

***should be held liable for any loss as a result of a failure to act which constitutes negligence or fraud.***

*RECOMMENDATION 17*

***The duty to act should be imposed only if the attorney has taken some action as attorney or has otherwise indicated acceptance of the attorneyship and if the attorney knows or ought reasonably to know of the donor's mental incompetence.***

## C. ACCOUNTING

Defining the duties and standards to which attorneys will be held is meaningless unless improper conduct by attorneys can be detected. Increasing the likelihood of detection will tend to deter inappropriate conduct and makes compensation to the donor possible. Unfortunately, detection is especially difficult in the case of enduring powers of attorney because the donor, who is usually in the best position to notice improper conduct, may be mentally incompetent.

While a donor is mentally capable, the most significant legal device for monitoring an attorney is the requirement that the attorney account to the donor for his or her actions upon demand.[8] However, when a donor is mentally incompetent, an accounting to the donor serves little purpose; the donor is unlikely to be able to use the accounting to detect mismanagement or fraud and has no capacity to act upon this information even if it is revealed.

A donor can prevent this problem by naming an individual who will receive the attorney's accounts in his or her place.[9] However, this is, at best, a partial solution; the donor may fail to name a recipient or the recipient may be deceased or mentally incompetent when his or her services are needed. To prevent abuse in this situation, we believe that some other means of holding the attorney accountable should be devised.

Some jurisdictions have concluded that the courts should be empowered, upon the application of any interested party, to direct the attorney to provide an account of the transactions entered into on behalf of the donor.[10] We agree that the court should have this authority as part of its supervisory powers. However, an approach which relies exclusively on the court to order an accounting requires the person seeking an accounting to expend time, energy and money whenever an accounting is sought. We suggest an alternative approach which would result in a regular accounting and necessitate a court order only in unusual circumstances. We propose that, where a recipient has not been named by the donor or where a named recipient is mentally incompetent or deceased, one should be statutorily named and the attorney should be obliged to account to that person on an annual basis. In order to ensure the accountability of the attorney, we propose the same solution when the donor has named the attorney or the attorney's spouse as the recipient of accounts.

The best recipient of an accounting will be someone who is concerned that the donor's property be properly managed. This sort of person is likely to review the accounts and take action if fraud or mismanagement is detected. Therefore, legislation should name recipients who have an interest in protecting the donor's property from inappropriate management by the attorney.

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[8]*Whitford* v. *Whitford*, [1941] 2 D.L.R. 701 (N.S.S.C. *en banc*), rev'd in part on other grounds [1942] S.C.R. 166; *Halsbury's Laws of England*, *supra* n. 1, at 68: *Bowstead on Agency*, *supra* n. 1, at articles 51-52.

[9]Naming a recipient is permitted in common law: *Halsbury's Laws of England*, *supra* n. 1, at 68; *Bowstead on Agency*, *supra* n. 1, at 191; *Dadswell* v. *Jacobs* (1887), 34 Ch.D. 278 (C.A.).

[10]This approach is adopted in Ontario, New Brunswick, Nova Scotia, Prince Edward Island and Alberta.

We have considered the possibility of recommending that the Public Trustee serve as the recipient in the absence of a named recipient. There is no doubt that the Public Trustee would act in the best interests of the donor. However, the Public Trustee could only perform this task competently if an obligation to examine and audit accounts were imposed and if sufficient funding were provided to meet this obligation. The costs of such an undertaking could be enormous; we believe that it would be inappropriate and, possibly, irresponsible for us to make such a recommendation.

In addition, we have concerns about such an arrangement on philosophical grounds. We doubt the wisdom of placing on government the primary responsibility to protect the property of individuals when they have arranged for their affairs to be dealt with privately. We are therefore of the view that, in a scheme such as this, the primary responsibility for enforcement and protection of the donor's property from the mismanagement or fraud of the attorney should not fall on taxpayers, but should be borne by those who benefit most from that protection, namely, the donor and the donor's heirs.

For these reasons, we propose that, if the donor is mentally incompetent and has failed to name a recipient or if the recipient is deceased or mentally incompetent, the accounts should be sent annually to the individuals most likely to be the donor's heirs.

It will never be possible until the donor's death to determine with absolute certainty the identity of his or her heirs and the inheritance each will receive.[11] Therefore, prior to the donor's death, it will be impossible to know which individuals will gain the most from the prevention of improprieties on the part of the attorney and will therefore have sufficient incentive to monitor the attorney's actions. However, generally speaking, the individuals who are the donor's closest relatives are most likely to be his or her heirs and are most likely to inherit significantly. This is true for three reasons:

- testators typically name close family members as beneficiaries;
- in some cases, legislation requires part of the deceased person's estate to be paid to certain close family members even if the will does not make provision for them;[12] and
- in the absence of a will, *The Intestate Succession Act* divides the deceased person's estate among family members.[13]

Given the high probability that family members will inherit and therefore will have an interest in ensuring that an attorney acts properly, we suggest that the attorney should be required to account annually to the donor's family members concerning the activities in which the attorney has been engaged on behalf of the donor.

The particular family members who should be the recipients of an accounting are those who are most likely to inherit significantly from the donor's estate. Of all his or her relatives, the donor's legal spouse is most likely to inherit; aside from the likelihood that a spouse will inherit by will, the provisions of *The Homestead Act*, *The Marital Property Act*, *The Intestate Succession Act* and *The Dependants Relief Act* virtually ensure that the spouse will have an

[11]There are several reasons for this. A will only takes effect upon the death of its maker; it can be altered or rewritten at any time prior to that event. In addition, a will is a private document; its maker has no obligation to reveal its existence or its contents.

[12]For example, *The Dependants Relief Act*, C.C.S.M. c. D37, s. 2(1), and *The Marital Property Act*, C.C.S.M. c. M45, Part IV.

[13]*The Intestate Succession Act*, C.C.S.M. c. I85, ss. 2-5.

interest in the estate.[14] Whether or not a legal spouse exists, the donor may be involved in a relationship with what may be termed a "spousal equivalent"; the couple may not be legally married but may view themselves as part of a *de facto* marriage relationship. In a case where the donor has publicly held out a person to be the equivalent of a spouse, their close relationship and the likelihood that the spousal equivalent will inherit makes that person a good candidate for receiving accounts.[15] We believe that a spousal equivalent should receive accounts as if he or she were a legal spouse; if both a legal spouse and a spousal equivalent exist, both should receive accounts from the attorney.

In the absence of a spouse or spousal equivalent, the donor's children are likely to inherit[16] and in their absence, the donor's grandchildren and, if necessary, great-grandchildren.[17] If there is no spouse or spousal equivalent and there are no descendants of the donor, we would adopt the approach of *The Intestate Succession Act* and name the donor's parents as the next category, followed by the donor's siblings and, if necessary, his or her nieces and nephews.[18] If no individual falls into any of these categories, we are content to rely on the Public Trustee to receive the accounts.

In each case, we propose that, in the absence of a member of the preceding category, all members of the next category ought to be recipients. However, if the accounting process is to serve to detect and deter mismanagement and fraud, the attorney and the attorney's spouse should not be permitted to act as recipients. Therefore, when the only member of a category is the attorney or the attorney's spouse, the members of the following category should be the recipients of the accounts.

*RECOMMENDATION 18*

***The Court of Queen's Bench should be empowered to order an attorney to account for his or her management of the donor's property.***

*RECOMMENDATION 19*

***The attorney should be obliged to provide accounts upon demand to a recipient or recipients named by the donor in the enduring power of attorney.***

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[14]*The Homesteads Act*, C.C.S.M. c. H80, ss. 21 and 22, grants a spouse a life interest in the couple's homestead. *The Marital Property Act*, C.C.S.M. c. M45, Part IV, permits a legally married spouse to apply to the court for an accounting and division of the marital assets after the death of one of the spouses. Generally speaking, the surviving spouse is entitled to half of the assets accumulated by the spouses during their marriage. *The Intestate Succession Act*, C.C.S.M. c. I85, s. 2(3), provides that the spouse of a person who dies without leaving a will inherits the entire estate unless the deceased person has children who are not also the children of the spouse, in which case the spouse inherits $50,000 or one half of the estate (whichever is greater) plus one-half of the remainder of the estate. *The Dependants Relief Act*, C.C.S.M. c. D37, s. 2(1), permits a spouse (whether legally married to or living in a long-term co-habitation with the deceased) to apply for an order distributing some of the deceased person's estate to him or her on the basis that he or she is in financial need.

[15]Besides the likelihood that a spousal equivalent will inherit by will, the provisions of *The Dependants Relief Act*, C.C.S.M. c. D37, s. 1, apply to spousal equivalents. In addition, the courts have increasingly been prepared to apply principles of trust law to analyze the relationship and obligations between unmarried spouses with the result that an unmarried spouse is likely to receive some of his or her deceased partner's property.

[16]Aside from the natural inclination of testators to provide for their children in their wills, minor or otherwise dependent children are entitled to support under the terms of *The Dependants Relief Act*, C.C.S.M. c. D37, ss. 1 and 2(1). If no will has been made and no spouse exists, they will inherit under *The Intestate Succession Act*, C.C.S.M. c. I85, s. 4(2).

[17]*The Intestate Succession Act*, C.C.S.M. c. I85, s. 5.

[18]*The Intestate Succession Act*, C.C.S.M. c. I85, ss. 4(3), 4(4) and 5.

*RECOMMENDATION 20*

***If no recipient is named or if the named recipient is deceased, mentally incompetent or is the attorney or the attorney's spouse, the donor should be obliged to provide annual accounts to the donor's nearest relative or relatives.***

*RECOMMENDATION 21*

***The donor's nearest relative should be:***

- ***the donor's spouse or spousal equivalent;***
- ***the donor's child or children, where there is no spouse or spousal equivalent;***
- ***the donor's grandchild or grandchildren, where there is no person in the preceding categories;***
- ***the donor's great-grandchild or great-grandchildren, where there is no person in the preceding categories;***
- ***the donor's parent or parents, where there is no person in the preceding categories;***
- ***the donor's sibling or siblings, where there is no person in the preceding categories;***
- ***the donor's niece(s) and/or nephew(s), where there is no person in the preceding categories;***
- ***the Public Trustee, where there is no person in the preceding categories.***

*RECOMMENDATION 22*

***The attorney and the attorney's spouse should not be considered the donor's nearest relatives for the purpose of receiving accounts.***

In choosing as the recipient of the attorney's accounts an individual who is likely to have an interest in protecting and enhancing the donor's property, we have hopes that the recipient will find it worthwhile to peruse the accounts personally or have them audited so that irregularities will be uncovered and brought to the attention of the court. Given this view of the recipient's role, we believe that a recipient should not be a minor or a mentally incompetent individual. Individuals in these categories are unlikely to be able to scrutinize accounts or have them professionally examined. More importantly, they are unable in their own right to launch court actions, a necessary step in bringing irregularities to the court's attention; another person must apply to the court on their behalf.[19] Given the disadvantages individuals in these categories face, we believe that it would be more appropriate to disqualify them as potential recipients, allowing other individuals to serve instead.

*RECOMMENDATION 23*

***A "nearest relative" should be an adult and should not be mentally incompetent.***

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[19]*Queen's Bench Rules*, R. 7.01, requires a minor to be represented in court by a litigation guardian and a mentally incompetent individual by that person's committee or by a litigation guardian, where no committee has been appointed.

Despite our hope that recipients of accounts will be sufficiently motivated to monitor the activities of the attorney, we are not prepared to impose on recipients a duty actively to supervise the attorney or to take steps to prevent or deter wrongdoing or negligence on the part of the attorney. Imposing such a duty on recipients would expose recipients to liability if they failed to meet the obligations. This would be unfair, in our view, because recipients will be acting gratuitously and will have had no opportunity to refuse the appointment. In these circumstances, we believe that it is sufficient to require attorneys to provide accounts to the recipients; recipients can use this information in any way they wish.

*RECOMMENDATION 24*

***No duty to act should be imposed on recipients of accounts.***

## D. GIFTS AND SUPPORT

At common law, an attorney requires the informed consent of the donor in order to use the donor's property to benefit anyone other than the donor.[20] In the case of an enduring power of attorney after the donor has become mentally incompetent, it is impossible to obtain the donor's consent with respect to gifts or financial support for the benefit of individuals other than the donor. Therefore, if gifts or support are to be permitted while a donor is mentally incompetent, the common law rule must be altered by statute.

Ideally, a donor should turn his or her mind to this issue when drafting an enduring power of attorney and specify his or her wishes with respect to gifts and support. However, in those cases where the enduring power of attorney is silent, several jurisdictions permit attorneys to take actions which benefit persons other than the donor when the donor is mentally incompetent.[21] Subject to any conditions or restrictions contained in the enduring power of attorney, England's legislation allows the attorney to provide for the needs of individuals whom the donor would have been expected to support. In addition, the attorney is permitted to make seasonal gifts to the donor's relatives and others connected to the donor as well as gifts to charities which the donor would reasonably be expected to support. In each case, the gift is to be reasonable having regard to all the circumstances, particularly the size of the donor's estate.[22] New Zealand and Northern Ireland have similar legislation.[23]

The Province of Alberta has adopted a significantly different position on this issue. Although it permits attorneys to exercise their powers for the maintenance, education, benefit and advancement of the donor's spouse and dependent children (including the attorney), it does not permit gifts to individuals or donations to charities.[24] Indeed, the Alberta Law Reform Institute Report (which gave rise to the legislation) specifically rejected the idea that an attorney should be allowed to benefit anyone other than the donor's spouse and dependent children without the donor's authorization.[25]

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[20]Alberta Law Reform Institute, *Enduring Powers of Attorney* (Report for Discussion #7, 1990) 76. See also generally *Bowstead on Agency*, *supra* n. 1, at 175-179; Fridman, *supra* n. 1, at 152; M.V. Ellis, *Fiduciary Duties in Canada* (1993).

[21]*Powers of Attorney Act*, S.A. 1991, c. P-13.5, s. 7; *Enduring Powers of Attorney Act 1985* (Eng.), c. 29, s. 3(4).

[22]*Enduring Powers of Attorney Act 1985* (Eng.), c. 29, s. 3(5).

[23]*Protection of Personal and Property Rights Act* 1988, No. 4, s. 107 (N.Z.) and Enduring Powers of Attorney (N. Ireland) Order 1987, SI 1987/1627 (NI 16) [in force April 10, 1989, S/I 1989/63] ss. 5(4) and 5(5), both as cited in Alberta Law Reform Institute, *supra* n. 20, at 76.

[24]*Powers of Attorney Act*, S.A. 1991, c. P-13.5, s. 7(b).

[25]Alberta Law Reform Institute, *supra* n. 20, at 77.

On the whole, we agree with Alberta's approach. Unless the donor has given other instructions in the enduring power of attorney, an attorney should be empowered to provide support to the individuals whom the donor is obliged by law to support. This will include the donor's spouse, dependent children and dependent parents.[26] However, permitting the attorney to give gifts or make donations to a variety of individuals or charities on behalf of the donor would, in our view, pave the way to abuses on the part of the attorney, particularly if the attorney can benefit himself or herself. When the donor has failed to provide instructions concerning gifts and donations to other individuals or charities, we believe that the law should not presume that the donor wished to give the attorney free rein. If the donor wishes to empower the attorney to give gifts or make donations, the donor should make express provision for this in the enduring power of attorney.

It is not unreasonable to suppose that an attorney will more than occasionally fall within the class of individuals whom the donor is obliged to support; for example, the attorney will often be the donor's spouse. This raises the possibility that the attorney will abuse the position in order to benefit himself or herself at the expense of the donor and other dependants. While we recognize the risk, we are prepared to trust donors to appoint someone other than a dependent relative if they perceive a potential problem. Moreover, we believe that preventing an attorney in this position from using the enduring power of attorney to provide necessary and legally required financial support for himself or herself would be unjust. We therefore agree with Alberta that attorneys ought to be permitted to benefit themselves if they fall within the category of individuals whom the donor is legally obliged to support.

***RECOMMENDATION 25***

***Subject to the provisions of an enduring power of attorney, an attorney should be able to dispose of any part of the property of the donor to provide support to a person whom the donor is legally bound to support.***

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[26] *The Family Maintenance Act*, C.C.S.M. c. F20, s. 4, requires spouses (including, in certain circumstances, common law spouses) to provide reasonable support for one another. Section 36 obliges parents to support their children. *The Parents' Maintenance Act*, C.C.S.M. c. P10, s. 1, obliges a child to support his or her dependent parents if the child "has sufficient means to provide for the parent".

# CHAPTER 5

# TERMINATION

At common law, a power of attorney ends in the following circumstances:

- the donor dies;[1]
- the attorney dies;[2]
- the donor revokes the attorneyship;[3]
- the attorney renounces the attorneyship;[4]
- the donor becomes bankrupt;[5]
- the attorney becomes mentally incompetent.[6]

These rules have developed on the assumption that the attorneyship would not survive the donor's mental incompetence. Since an enduring power of attorney negates this assumption, the common law position on termination must be reassessed in the context of an enduring power of attorney which was executed by a donor who is now mentally incompetent.

## A. DEATH OF DONOR OR ATTORNEY

It is self-evident that the death of the donor should terminate an enduring power of attorney. There is no reason why the existence of an attorneyship should affect the normal operation of succession and inheritance law.

It is equally obvious that the death of the attorney will bring the attorneyship to an end. However, if our recommendations are adopted, this event need not terminate the enduring power of attorney itself. We have recommended that a donor be permitted to appoint successive attorneys to act in the event that an earlier named attorney is unable or unwilling to do so. In this case, the death of an attorney should not prohibit the successive attorneys from acting; indeed, it is exactly the sort of eventuality for which a successive power of attorney is designed. We also recommend in Chapter 6 that the court be permitted to substitute an attorney for the individual

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[1]See eg. *McCallum* v. *Trans North Turbo Air (1971) Ltd.* (1978), 8 C.P.C. 1 (N.W.T.S.C.); *MacKenzie* v. *Carroll* (1974), 53 D.L.R. (3d) 699 (Ont. H.C.). This is not the case, however, when a power of attorney is given irrevocably and for valuable consideration: *The Powers of Attorney Act*, C.C.S.M. c. P97, s. 5(1).

[2]*Friend* v. *Young*, [1897] 2 Ch. 421; *Bowstead on Agency* (15th ed., 1985) 513-514; *Halsbury's Laws of England* (4th ed. reissue, 1990) vol. 1(2) 134.

[3]*Bromley* v. *Holland* (1802), 7 Ves. Jun. 3 at 28, 32 E.R. 2 at 12 (Ch.); *Bowstead on Agency*, *supra* n. 2, at 507.

[4]*Bowstead on Agency*, *supra* n. 2, at 507; *Halsbury's Laws of England*, *supra* n. 2, at 133; G.H.L. Fridman, *The Law of Agency* (6th ed., 1990) 359.

[5]*Dawson* v. *Sexton* (1823), 1 L.S.Ch.O.S. 185; *Bowstead on Agency*, *supra* n. 2, at 518. This is not the case, however, when a power of attorney is given irrevocably and for valuable consideration: *The Powers of Attorney Act*, C.C.S.M. c. P97, s. 5(1).

[6]*Bowstead on Agency*, *supra* n. 2, at 513-514 and 516; *Halsbury's Laws of England*, *supra* n. 2, at 134. This is not the case, however, when a power of attorney is given irrevocably and for valuable consideration: *The Powers of Attorney Act*, C.C.S.M. c. P97, s. 5(1).

named by the donor. If the court chooses to act in this way, the death of an attorney will not bring an enduring power of attorney to an end.

***RECOMMENDATION 26***

***The death of the donor should terminate an enduring power of attorney.***

***RECOMMENDATION 27***

***The death of the attorney will terminate the attorneyship, but should not necessarily terminate the enduring power of attorney.***

## B. REVOCATION

At common law, so long as the donor is mentally capable, he or she can revoke a power of attorney at any time. However, in the case of an enduring power of attorney, while the donor is mentally incompetent, this option is unavailable because the donor lacks legal capacity.

In essence, *The Powers of Attorney Act* has substituted the court for the donor in this case. Upon application by any interested party, *The Mental Health Act* permits the Court of Queen's Bench to appoint a committee to manage a mentally incompetent person's affairs;[7] the appointment of a committee will terminate an enduring power of attorney.[8] Although the Public Trustee is frequently appointed, the court has discretion to appoint any person to act as a committee.[9] In considering the appointment of a committee, the court will take into account all relevant evidence, including the existence of an enduring power of attorney and the attorney's management of the donor's estate. Typically, where an enduring power of attorney has been executed and the donor is acting appropriately, a committee will not be appointed. We firmly believe in the utility and necessity of the court's power to appoint a committee in appropriate circumstances.

Many jurisdictions have gone further, granting courts the power to terminate an attorneyship without necessarily appointing a committee.[10] This power enables the court to remove an attorney in an emergency without waiting for a committeeship hearing. Where an enduring power of attorney has named successive attorneys, this power also enables the court to allow a successive attorney to assume responsibility from an attorney who is acting improperly, without imposing a committeeship with different powers and duties. We believe that this power ought to be granted to the Court of Queen's Bench in Manitoba.

Some jurisdictions also grant the court the power to substitute an attorney for the individual named by the donor.[11] This power may be necessary to prevent a vacuum in administration when an attorney has been removed, no successive attorney has been named and no committeeship hearing held. In addition, the powers granted to an attorney may be more

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[7]*The Mental Health Act*, C.C.S.M. c. M110, s. 56.

[8]*The Powers of Attorney Act*, C.C.S.M. c. P97, s. 3(2).

[9]*The Mental Health Act*, C.C.S.M. c. M110, s. 56.

[10]Alberta, New Zealand, England, Northern Ireland, New South Wales, Northern Territory (Aust.), South Australia, Tasmania and Victoria permit the court to revoke an enduring power of attorney without appointing a committee: Alberta Law Reform Institute, *Enduring Powers of Attorney* (Report for Discussion #7, 1990) 92.

[11]Ontario, New Brunswick, Nova Scotia and Prince Edward Island permit the substitution of an attorney named by the court for the attorney named in the enduring power of attorney. Alberta specifically denies the court the power to substitute attorneys: *Powers of Attorney Act*, S.A. 1991, c. P-13.5, s. 11(4).

appropriate in some cases than the powers of a committee and a recipient named by the donor may be more suitable as a monitor of the attorney than the court. Nonetheless, we recognize that some donors may intend that only the attorney named by them in their enduring power of attorney should be able to exercise those powers; in such cases, we recommend that a donor be permitted to prevent the court from substituting an attorney by expressing this desire in the enduring power of attorney.

***RECOMMENDATION 28***

***The Court of Queen's Bench should be empowered to terminate an attorneyship.***

***RECOMMENDATION 29***

***Subject to the provisions of the enduring power of attorney, the Court of Queen's Bench should be empowered to appoint a substitute attorney.***

As we noted in Chapter 1, amendments made to *The Mental Health Act* after the enactment of *The Powers of Attorney Act* also permit the termination of an enduring power of attorney. If a physician forms the opinion that a resident of a psychiatric facility is incapable of managing his or her own affairs, a certificate of incompetence must be completed. If the medical officer in charge of the facility agrees with the physician's assessment, the certificate is forwarded to the Public Trustee who automatically becomes committee of the person and his or her estate.[12] Individuals who are not residents of a psychiatric facility may also have their enduring powers of attorney terminated by an order of supervision made by the Director of Psychiatric Services on the recommendation of a physician. An order of supervision will also result in the appointment of the Public Trustee as committee.[13]

We view these methods of terminating an enduring power of attorney in a different light than that of a termination by court order. Although the appointment of the Public Trustee by these methods is suitable for those individuals who have not executed an enduring power of attorney, we are concerned that the express wishes of a donor of an enduring power of attorney will be frustrated by medical practitioners in precisely the circumstances for which an enduring power of attorney was designed. Unlike a judge, who has the benefit of procedures designed to obtain and assess all relevant information and has the training to weigh the donor's wishes (as expressed in the enduring power of attorney) against the wisdom of appointing some other person to manage the donor's affairs, physicians and psychiatrists are not in a position to make a decision with respect to the management of an individual's affairs. They may have little or no information concerning the individual involved and may even be unaware that an enduring power of attorney exists. Furthermore, they are not likely to have an opportunity to hear evidence concerning the attorney's management of the donor's property and, even if they are aware of all relevant information, do not have the training to assess this information and reach a proper conclusion. We believe that medical practitioners ought not to be asked to make a decision of this sort; if the donor's wishes as expressed in the enduring power of attorney are to be terminated, this ought to be done only by a judge after a hearing of the matter.

***RECOMMENDATION 30***

***A certificate of incompetence or an order of supervision concerning the donor of a validly executed enduring power of attorney should not terminate the enduring power of attorney.***

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[12]*The Mental Health Act*, C.C.S.M. c. M110, s. 26.11.

[13]*The Mental Health Act*, C.C.S.M. c. M110, s. 26.12.

Our recommendation implies that orders of supervision and certificates of incompetence should still be made; however, they should only be effective in appointing the Public Trustee as committee if and when an enduring power of attorney does not exist. Because physicians and the Director of Psychiatric Services may have no way of knowing whether or not a valid enduring power of attorney exists, we suggest that they maintain the same practice as at present; when faced with an individual incapable of conducting his or her affairs, they should issue the appropriate documentation and forward it to the Public Trustee. The problem of discovering the existence, validity and terms of an enduring power of attorney is then removed from the purview of medical practitioners and becomes the responsibility of the Public Trustee and individuals associated with the donor.

In order to ensure that the affairs of mentally incompetent individuals who have not executed an enduring power of attorney are being managed, we propose that the Public Trustee should operate as the committee of the person named in the certificate or order until and unless she is notified of the existence of a valid, subsisting enduring power of attorney. However, in order to give effect to the wishes of individuals who have executed enduring powers of attorney, we believe that a procedure ought to be developed so that the Public Trustee does not act when a valid enduring power of attorney exists.

One approach we have considered is that of England and other jurisdictions which require that all enduring powers of attorney be filed at a central registry when the donor becomes mentally incompetent. In England, an enduring power of attorney is not valid and cannot be used by the attorney unless it is registered.[14] However, we have come to the conclusion that a registration requirement would be inordinately cumbersome and would place an unnecessary burden on donors, attorneys and the Public Trustee.[15] Instead, we propose that the Public Trustee be obliged to make a minimal effort which would achieve substantially the same result.

First, we recommend that any interested party (donors, attorneys and others) be permitted, but not obliged, to file an enduring power of attorney with the office of the Public Trustee. When receiving an order of supervision or certificate of incompetence, the Public Trustee should then be required to check her files to determine whether or not an enduring power of attorney has been filed. If so, reasonable inquiries should be made to determine if the enduring power of attorney is valid (that is, whether or not it has been executed properly) and subsisting (whether or not it has subsequently been terminated). The existence of a valid, subsisting power of attorney will relieve the Public Trustee of responsibility with respect to the person named in the order of supervision or certificate of incompetence.

An additional step should also be required of the Public Trustee. The Public Trustee is already obliged to serve the person named in an order of supervision or certificate of incompetence and that person's nearest relative with a copy of the order or certificate.[16] We believe that the Public Trustee should be obliged to include with this documentation a notice advising that the certificate or order has the effect of making the Public Trustee the committee of the person's estate in the absence of a valid, subsisting enduring power of attorney. The notice should also advise that the Public Trustee is authorized to manage the person's affairs until and unless a valid, subsisting enduring power of attorney is produced. This notice will give the

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[14]Tasmania and the Northern Territory (Aust.) have registration schemes but the most well known and most elaborate is England's. In England, an attorney must register the enduring power of attorney with the Court of Protection as soon as he or she has reason to believe that the donor has become or is becoming mentally incapable; without registering the enduring power of attorney, the attorney cannot act. Notification of registration must be made to the donor and to specified close relatives of the donor. The registration may be opposed on a number of grounds. Once the enduring power of attorney has been registered, the court exercises supervisory powers over the attorney.

[15]The English system has been criticized as being "so complicated that it is virtually impossible to use without professional help": Australian Law Reform Commission, *Enduring Powers of Attorney* (Report #47, 1988) 8.

[16]*The Mental Health Act*, C.C.S.M. c. M110, ss. 26.11(2) and 26.12(1).

person's nearest relative an opportunity to present to the Public Trustee a valid, subsisting enduring power of attorney.[17]

Of course, an enduring power of attorney, even if valid and subsisting, may be inadequate to protect the donor because it is too narrow and specific.[18] In other cases, a valid and subsisting enduring power of attorney may be ineffective because the named attorney is unprepared to act. In these circumstances, although the Public Trustee will not automatically become the donor's committee, she is still free to seek an order of committeeship or the appointment of a substitute attorney.

*RECOMMENDATION 31*

***Upon receiving a certificate of incompetence or an order of supervision, the Public Trustee should be empowered to act as the committee of the person named in the certificate or order until and unless the Public Trustee has knowledge that the person has executed a valid and subsisting enduring power of attorney.***

*RECOMMENDATION 32*

***Any person ought to be permitted to file a copy of an enduring power of attorney with the Public Trustee at any time after its execution.***

*RECOMMENDATION 33*

***Upon receiving a certificate of incompetence or an order of supervision, the Public Trustee should be obliged to determine whether a copy of an enduring power of attorney for that person has been filed with the office of the Public Trustee.***

*RECOMMENDATION 34*

***When sending a copy of the certificate of incompetence or order of supervision to a patient and his or her nearest relative, the Public Trustee should be required to include a statement explaining that the document has the effect of appointing the Public Trustee committee of the person's estate and that the committeeship of the Public Trustee will cease upon being notified of the existence of a valid, subsisting enduring power of attorney.***

*RECOMMENDATION 35*

***Where the Public Trustee has knowledge that an enduring power of attorney has been executed prior to the issuance of a certificate of incompetence or order of supervision, the Public Trustee should make reasonable enquiries to determine whether the enduring power of attorney is valid and subsisting.***

## C. RENUNCIATION

At common law, an attorney is permitted to renounce the attorneyship at any time by providing notice to the donor. When the donor is mentally incompetent, however, this approach has obvious shortcomings; since the donor is unable to manage his or her own affairs and is

[17]This approach has also been adopted by the Province of Alberta: *Dependent Adults Act*, R.S.A. 1980, c. D-32, s. 58(1).

[18]For example, the donor may have given an attorney the power to sell certain stocks but no other financial responsibility.

unable to appoint a new attorney, renunciation can result in the donor's affairs being left in limbo.

To avoid this eventuality, some jurisdictions require an attorney to seek leave of the court before renouncing an attorneyship if the donor is mentally incompetent.[19] While we do not expect a court to force an attorney to continue to act when he or she is unwilling to do so, we believe that such a requirement is necessary to protect the donor's interests. If successive attorneys have been named, a court hearing provides an opportunity for an orderly transfer of responsibility. If no successive attorney has been named, the hearing allows the court to consider the possibility of appointing a committee or a substitute attorney.

In most cases, it will be appropriate for an attorney wishing to renounce the attorneyship to provide an up-to-date accounting to the new attorney or committee. We expect that the court will make a practice of requiring an accounting prior to permitting an attorney to renounce.

***RECOMMENDATION 36***

***Leave of the court should be sought by an attorney who wishes to renounce the attorneyship while the donor is mentally incompetent.***

## D. BANKRUPTCY OF THE DONOR

There are several reasons for the common law rule that the bankruptcy of the donor will terminate a power of attorney. Upon a bankruptcy, a trustee in bankruptcy takes control over the individual's finances and property. Therefore, once an assignment into bankruptcy is made, an attorney will have little decision-making capacity with respect to the donor's property. In addition, it may be seen as inappropriate to permit an attorney under whose administration the bankruptcy has taken place to continue to act. If the donor retains confidence in the attorney, he or she can reappoint the attorney after being discharged from bankruptcy.

Although Alberta permits an attorneyship to continue after a mentally incompetent donor has become bankrupt,[20] we are of the view that the reasons underlying the common law rule in this case also apply to the bankruptcy of a mentally incompetent donor who has executed an enduring power of attorney. Although we are prepared to allow a donor to waive this provision, we believe that the law ought not to presume that an attorneyship should continue after the donor's bankruptcy. If someone other than the trustee in bankruptcy is needed to manage the donor's affairs during the bankruptcy or after the donor has been discharged, a succeeding attorney should do so; alternatively, a committee or substitute attorney could be appointed by the court. If deemed appropriate, the former attorney could be appointed as committee.

***RECOMMENDATION 37***

***Unless otherwise provided for in the enduring power of attorney, the bankruptcy of the donor should terminate an attorneyship.***

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[19] *Powers of Attorney Act*, S.A. 1991, c. P-13.5, s. 12; *Enduring Powers of Attorney Act 1985* (Eng.), c. 29, s. 2(12); *Powers of Attorney Act* 1980, No. 25 of 1980, s. 15(1) (N. Terr. Aust.); *Powers of Attorney and Agency Act*, 1984, No. 25 of 1984, s. 9 (S. Aust.); Enduring Powers of Attorney (N. Ireland) Order 1987, SI 1987/1627 (NI 16) [in force April 10, 1989, SI 1989/63] s. 4(11) (N. Ireland) and *Protection of Personal and Property Rights Act* 1988, No. 4, s. 104 (N.Z.), both as cited in Alberta Law Reform Institute, *supra* n. 10, at 96.

[20] *Powers of Attorney Act*, S.A. 1991, c. P-13.5. The view of the Alberta Law Reform Institute is that "it is probably in the best interests of the donor to have the attorney's authority continue, so as to enable the attorney to make decisions on the donor's behalf in relation to matters connected with the bankruptcy": Alberta Law Reform Institute, *supra* n. 10, at 103.

## E. MENTAL INCOMPETENCE OF THE ATTORNEY

We have recommended that the common law rule which prevents a mentally incompetent individual from being named as an attorney should be applied in the case of an enduring power of attorney. The common law also deems an attorneyship to be terminated when the attorney becomes mentally incompetent. We concur with this common law rule; a person who, by law, is incapable of managing his or her own affairs clearly cannot continue to manage another's. However, the mental incompetence of an attorney, while terminating an attorneyship, need not necessarily end a power of attorney; if a successive attorney has been named or if the court is prepared to appoint a substitute, the enduring power of attorney should continue.

***RECOMMENDATION 38***

***The mental incompetence of an attorney should terminate the attorneyship.***

## F. BANKRUPTCY OF THE ATTORNEY

The bankruptcy of the attorney will not, at common law, terminate the attorneyship. This is appropriate; while a donor is mentally competent, he or she should be allowed to retain an undischarged bankrupt as an attorney if he or she wishes. The situation is different when a donor is unable to supervise or terminate an attorneyship due to his or her own mental incompetence, however. In this situation, we believe that the court should play a role in protecting the donor from harm.

Earlier, we recommended that a donor should not be permitted to name an undischarged bankrupt as an attorney in an enduring power of attorney. Our concern was that an undischarged bankrupt might be tempted to take advantage of the attorneyship to better his or her own financial position. For the same reason, we are of the view that the bankruptcy of the attorney should result in the termination of the attorneyship and bring about the involvement of the court or the succession of the next named attorney.

***RECOMMENDATION 39***

***The bankruptcy of the attorney should terminate the attorneyship.***

# CHAPTER 6

# MISCELLANEOUS

## A. WAIVER

Several law reform bodies have considered allowing a donor to waive provisions of legislation governing enduring powers of attorney; all have concluded that a general waiver provision would be unwise.[1] The primary concern is that permitting a waiver clause would increase the donor's vulnerability to undue influence or fraud. For example, if a donor were allowed to waive the requirement that an attorney account to the donor's nearest relative after the donor's mental incompetence, an attorney who wished to operate unsupervised might be inclined to pressure the donor to waive this provision. This temptation would not exist if the donor had no power to waive this protective provision. For this reason, we would recommend against granting donors a general right of waiver.

It must be understood, however, that the denial of a general right of waiver does not apply to provisions which are subject to the donor's wishes as expressed in the enduring power of attorney. For example, we have recommended a provision which would allow an attorney to provide support for dependants of the donor. This provision is stated to be subject to any contrary intention as expressed by the donor in the enduring power of attorney; if a donor wishes, the attorney can be expressly prevented from providing support or can be expressly empowered to give gifts or donations to other individuals or organizations. Provisions such as this are therefore subject to the donor's waiver.

*RECOMMENDATION 40*

***The donor's right to waive or vary the provisions of legislation governing enduring powers of attorney should be restricted to provisions which are explicitly stated to be subject to the terms of the enduring power of attorney.***

## B. INVOLVEMENT OF THE COURT

### 1. Powers of the Court

We have noted that the Court of Queen's Bench already has the authority under *The Mental Health Act* to appoint a committee. In addition, we have proposed that the court be expressly granted the power to terminate an attorneyship, to appoint a substitute attorney and to order an accounting. We have also recommended that attorneys be required to seek leave of the court before renouncing an attorneyship if the donor is mentally incompetent. There may be other powers relevant to enduring powers of attorney which the superior court already possesses

[1]Law reform bodies in Ontario, Manitoba, Newfoundland and Alberta have all considered and rejected a general waiver provision. The legislation in Ontario, New Brunswick, Prince Edward Island and Newfoundland specifically states that the provisions of the statute cannot be waived: *Powers of Attorney Act*, R.S.O. 1990, c. P.20, s. 4; *Property Act*, S.N.B. 1987, c. P-19, s. 58.7; *Powers of Attorney Act*, S.P.E.I. 1988, c. P-16, s. 4; *Enduring Powers of Attorney Act*, S.N. 1990, c. E-11, s. 4.

by reason of its inherent jurisdiction. However, we believe that certain powers ought to be made explicit in the legislation for the benefit of the public generally.

In our view, the court's role in dealing with enduring powers of attorney is twofold. First, as with a variety of legal relationships, the court is involved in settling or forestalling disputes and giving effect to valid legal documents. Second, in the case of an enduring power of attorney whose donor is mentally incompetent, we believe that the court must play a special role in protecting the donor.

The court's first task will involve assisting an attorney in meeting the requirements of the law and fulfilling the wishes of a donor. For example, an attorney may not know whether an enduring power of attorney is valid or whether the donor is mentally incompetent.[2] An attorney may also wish the court's advice as to whether a certain action in the administration of the donor's estate is appropriate. In these and other situations, the court can prevent or resolve disputes by providing declarations or giving advice and directions. This will enable an attorney and third parties with whom the attorney is dealing to act with confidence. It will also provide reassurance to the donor's friends and family that an appropriate course of action is being taken.

The court's second function is to protect the donor from an attorney or others who might take advantage of the donor's mental incompetence. Our recommendations empowering the court to terminate the attorneyship (either directly or by the appointment of a committee), to appoint a substitute attorney, to order an accounting and to control an attorney's renunciation while the donor is mentally incompetent are directed to this end. Another power which is designed to protect the donor and which has been granted to the courts in other jurisdictions is the power to vary the terms of an enduring power of attorney. Like the power to substitute an attorney for the one named by the donor, this power gives the court an alternative to the appointment of a committee when the original terms of an enduring power of attorney are inadequate or inappropriate.[3] Nevertheless, like the power of substitution, the power to vary also raises the possibility that an individual who has executed an enduring power of attorney may be more vulnerable to intervention by the court than an individual who has not. We are therefore again prepared to recommend that a donor be permitted to prevent the court from exercising this power by a statement to that effect within the enduring power of attorney.

***RECOMMENDATION 41***

***The Court of Queen's Bench should be empowered to:***

***(a) provide advice and direction regarding the management of a donor's estate;***

***(b) declare an enduring power of attorney to be valid or invalid;***

***(c) declare that an enduring power of attorney or an attorneyship is terminated;***

***(d) subject to the provisions of the enduring power of attorney, vary an attorney's power;***

***(e) remove an attorney;***

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[2]The donor's mental incapacity is key for an attorney; it signals the onset of a duty to provide an accounting to the recipient named by the donor or to the donor's nearest relative and, for gratuitous attorneys, the onset of a positive duty to act. In addition, while the donor is incompetent, the donor will require the court's leave to renounce the attorneyship.

[3]For example, altering the terms permits the court to allow the named attorney to continue to act and to account to a recipient named by the donor rather than to the court.

***(f) subject to the provisions of the enduring power of attorney, substitute an attorney for the named attorney;***

***(g) order an attorney to provide the court or an applicant with an accounting; and***

***(h) make any other order or declaration relating to the enduring power of attorney as the court considers appropriate.***

## 2. Who May Apply?

To ensure that the donor's property is being managed as competently as possible, the class of people permitted to commence a court application should be reasonably large. However, frivolous applications should be discouraged.

Given the nature of the court powers we propose, it is clear that attorneys must be permitted to bring applications. The Public Trustee, as the individual responsible for the protection of mentally incompetent persons, should also be entitled to bring an action, whether acting upon her own concerns or upon concerns raised by others. As individuals to whom an attorney must account, recipients (whether named by the donor or statutorily appointed) ought also to have the ability to commence an application.

Many jurisdictions permit any "interested person" to bring a court application concerning an enduring power of attorney.[4] While we agree that allowing any interested person to bring a court application would ensure greater protection of the donor, we are not prepared to grant these individuals the same rights as the individuals previously named. To do so would, in our view, invite frivolous and vexatious applications which would overburden the court and result in cost and inconvenience for the attorney. Instead, we propose that interested persons must obtain leave of the court before commencing a court proceeding.

*RECOMMENDATION 42*

***An attorney, the Public Trustee, a recipient of accounts and, with leave of the court, any interested person may make an application to court with respect to an enduring power of attorney.***

## 3. When May an Application Be Made?

In several jurisdictions, an application may be made only after the donor is mentally incompetent.[5] Other jurisdictions are silent, implying that an application may be made at any appropriate time.[6] While we recognize that there will be little need to involve the court so long

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[4]These jurisdictions include Alberta, New Brunswick, Newfoundland, Ontario, Prince Edward Island and the Northern Territory of Australia. The South Australian legislation requires the applicant to have a "proper interest in the matter" while the legislation in Victoria requires the applicant to have "a special interest in the affairs of the donor": *Powers of Attorney and Agency Act*, 1984, No. 25 of 1984, s. 11(1), as am. by *Powers of Attorney and Agency Act*, 1988, No. 80 of 1988 (S. Aust.); *Instruments Act* 1958, s. 117(2), as am. by *Instruments (Enduring Powers of Attorney) Act* 1981, No. 9691, s. 3 (Vict.).

[5]These jurisdictions include New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island and the Northern Territory of Australia.

[6]Alberta and Victoria fall into this category. The South Australian legislation initially required applications to be made only after the donor became mentally incompetent; however, that provision was deleted in 1988: *Powers of Attorney and Agency Act*, 1984, No. 25 of 1984, s. 11(1), as am. by *Powers of Attorney and Agency Act Amendment Act*, 1988, No. 80 of 1988, s. 3.

as the donor is competent, we also recognize that there may be occasions prior to the donor's mental incompetence when the court's assistance will be required.[7] We are therefore of the view that an application ought to be permitted whenever the need arises. We are confident that the leave required of interested persons and the possibility that costs will be ordered will deter unwarranted court proceedings.

*RECOMMENDATION 43*

***An applicant should be able to bring a court application at any time after the execution of the enduring power of attorney.***

### 4. Notice

It is important that an attorney be notified of any application being brought with respect to the enduring power of attorney under which he or she is operating. Therefore we propose that an applicant be required to serve a copy of the application on the attorney. Unless the court dispenses with this requirement, we believe that the donor ought also to be served and, since the donor frequently will be or frequently will be alleged to be mentally incompetent, the Public Trustee ought also to receive notice. The court should also be empowered to require service on other interested parties where warranted.

*RECOMMENDATION 44*

***An applicant should be required to serve the donor (unless the court dispenses with this requirement), the attorney and the Public Trustee and any other person as ordered by the court with a copy of the application.***

## C. INTER-JURISDICTIONAL RECOGNITION

The question of whether an enduring power of attorney, validly executed in one jurisdiction, will be recognized as valid in another has, to our knowledge, not been directly addressed by any court. Nevertheless, the principles of conflict of laws for agency agreements are reasonably clear and, because a power of attorney is a form of agency, would seem to apply here.

Stated briefly, the common law position is that the proper law of the agency agreement (usually the law of the place where the agency agreement was made)[8] will govern the obligations between agent and principal (in this case, the attorney and the donor).[9] However, any dealings the agent has with third parties will be governed by the proper law of the contract between them, which may well be the law of a different place. Significantly, it appears that the proper law of the contract between agent and third party will determine the existence and extent of the agent's authority to act for the principal.[10]

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[7]For example, the attorney and others may be uncertain as to whether or not the donor is mentally incompetent or whether the enduring power of attorney is valid because of doubts concerning the donor's competence when it was executed.

[8]The "proper law" is a concept basic to the resolution of conflicts between laws of different jurisdictions. Generally speaking, it is the law having the closest connection to the agency agreement in question; in most cases, this will be the law of the jurisidiction in which the agency agreement was made.

[9]Presumably, this would include the attorney's duties to the donor, including the duty to account to the donor or to a recipient named by the donor.

[10]J.-G. Castel, *Canadian Conflict of Laws* (2nd ed., 1986) 563-564; J.G. McLeod, *The Conflict of Laws* (1983) 506-507; *Dicey and Morris on The Conflict of Laws* (11th ed., 1987) vol. 2, 1341-1347; G.H.L. Fridman, *The Law of Agency* (6th ed., 1990) 348-351.

The current state of the law can be illustrated by two examples. Suppose a Manitoba resident appointed another Manitoba resident his or her attorney using an enduring power of attorney executed in Manitoba. In this case, the proper law of the enduring power of attorney would undoubtedly be the law of Manitoba and all issues between donor and attorney would be dealt with by Manitoba law. However, the attorney's dealings with an Ontario resident concerning real property located in Ontario would almost certainly be governed by Ontario law. Therefore, if the donor were mentally incompetent, the attorney would require an enduring power of attorney which met Ontario's criteria for validity in order to make this contract.[11] If the situation were reversed, the same result would obtain; an attorney whose power was granted by an enduring power of attorney governed by Ontario law would require an enduring power of attorney which met Manitoba's standards in order to enter into a contract governed by Manitoba law on behalf of a mentally incompetent donor.

The first scenario cannot be addressed in this Report; it is up to the courts and legislatures of other jurisdictions to determine whether or not to recognize enduring powers of attorney which are valid in Manitoba. However, it should be noted that the requirements for validity proposed in this Report are more stringent that those of most other Canadian jurisdictions; an enduring power of attorney which is valid in Manitoba would also meet the standards of most other provinces.[12]

This issue of "foreign" attorneys acting in Manitoba is, however, within the purview of this Report. In this respect, Alberta has adopted an approach which is noteworthy. Having imposed stringent requirements for the execution of enduring powers of attorney, Alberta's legislation also provides that an enduring power of attorney will be recognized as valid in Alberta if it meets the requirements of the jurisdiction in which it was executed and if it provides that it is not to be terminated upon the mental incompetence of the donor. Alberta's legislation therefore alters the common law by allowing the law of the jurisdiction in which the enduring power of attorney was executed to determine the attorney's authority. In addition, Alberta has done away with the concept of "proper law" in this circumstance and has opted instead for a simpler, but perhaps cruder, criterion - the law of the jurisdiction in which the enduring power of attorney was executed.[13]

After consideration, we have concluded that the common law, applied to enduring powers of attorney, would result in undue restrictions on foreign attorneys operating in Manitoba. Although we believe that the restrictions we have recommended (for example, the requirement that enduring powers of attorney be witnessed by certain individuals and the prohibition on appointing undischarged bankrupts, minors and mentally incompetent individuals as attorneys) are reasonable and beneficial for donors, we are not prepared to recommend that donors from other provinces must comply with these requirements if their attorneys are to do business here. We agree with Alberta's approach to this issue.

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[11]If the donor were not mentally incompetent, the attorney would be able to act in Ontario since only the requirements for an ordinary power of attorney would have to be met. Since both Ontario and Manitoba have not altered the common law as it applies to ordinary powers of attorney, a power of attorney which is valid in Manitoba would also be valid in Ontario.

[12]*Power of Attorney Act*, R.S.B.C. 1979, c. 334, s. 7(1); *The Powers of Attorney Act*, S.S. 1983, c. P-20.1, s. 3; *Property Act*, S.N.B. 1987, c. P-19, s. 58.2(1); *Powers of Attorney Act*, S.N.S. 1988, c. 352, s. 3; *Enduring Powers of Attorney Act*, S.N. 1990, c. E-11, s. 3; *Powers of Attorney Act*, R.S.O. 1990, c. P.20, s. 5. A significant exception to this general rule is the Province of Alberta whose legislation requires that a lawyer provide legal advice to the donor of an enduring power of attorney and witness the donor's execution of the document. However, as will be noted, Alberta also recognizes any enduring power of attorney which meets the requirements of the jurisdiction in which it was executed. Therefore an enduring power of attorney which was executed in Manitoba and meets Manitoba's requirements would also be valid in Alberta.

[13]Although the proper law of an enduring power of attorney will usually be the law of the place where it was executed, there are some exceptions. For example, a Manitoba resident owning considerable property in Manitoba could execute an enduring power of attorney while vacationing in Ontario. The proper law of this enduring power of attorney would likely be Manitoba's but Alberta's approach would apply Ontario's law to determine the validity of this enduring power of attorney.

We have some doubts about the suitability of following Alberta's lead in abandoning the use of the proper law of the enduring power of attorney to assess its validity in the context of foreign attorneys acting in Manitoba. The concept of proper law has been developed in order to resolve conflicts between laws of different jurisdictions and would normally be applicable in this context. Moreover, Alberta's approach would occasionally yield anomalous results; an enduring power of attorney, executed elsewhere, might be invalid according to its proper law but would be accepted as valid in Alberta because it met the tests for validity in the place where it was executed.

Nevertheless, Alberta's approach has the advantages of simplicity and certainty; a donor (or legal counsel advising the donor) may be unsure as to the proper law of the enduring power of attorney but will rarely be unclear as to the jurisdiction in which it is executed. Moreover, in the vast majority of cases, the proper law of the enduring power of attorney will also be the law of the place where it was executed. For these reasons and in the interests of uniformity of legislation,[14] we recommend that Alberta's approach be adopted for use in Manitoba.

*RECOMMENDATION 45*

***A written enduring power of attorney should be recognized as valid in Manitoba if it is valid in the jurisdiction in which it was executed and if it provides that it shall not be terminated upon the mental incompetence of the donor.***

## D. TRANSITION

In our view, the legislation incorporating our recommendations should apply to actions taken by all attorneys after it comes into force, whether the attorneys have been appointed before or after the legislation. Our recommendations are designed to provide greater protection for donors, particularly after they have become incapable of monitoring and controlling their attorneys. Applying these changes to the future actions of attorneys will therefore benefit donors. At the same time, we do not believe that our recommendations will impose on attorneys obligations which are particularly onerous; we believe these obligations can be easily met by most honest and diligent individuals. Moreover, if an attorney who is currently acting is unwilling or unable to comply with our proposed requirements, he or she can easily renounce the attorneyship.[15] Of course, the legislation incorporating our recommendations should not act to invalidate valid existing enduring powers of attorney[16] nor should it apply new standards to actions already taken by attorneys which complied with the law as it then stood.

In order to ensure that the public is made aware of the changes to enduring powers of attorneys and to permit existing donors and attorneys to take the steps necessary to accommodate these changes, we suggest that legislation incorporating our recommendations take effect some time after the legislation has been enacted. This may be accomplished by providing for it to take effect upon a specific date at some point in the future or upon proclamation, so long as it is proclaimed only after a reasonable period of time has passed.

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[14]Alberta is the only jurisdiction to have addressed the issue of conflict of laws to date. We anticipate that other jurisdictions may do so in the future.

[15]Prior to our recommendations coming into force, an attorney can renounce unilaterally; after that time, an attorney will require leave of the court and may be obliged by the court to provide an accounting. We are confident that courts will not force an attorney to continue to act if he or she does not wish to do so.

[16]If applied retroactively, our recommendations would invalidate enduring powers of attorney which were not witnessed by a member of the categories we propose or which appointed a minor or an undischarged bankrupt as an attorney.

*RECOMMENDATION 46*

***Legislation incorporating the recommendations of this Report should apply to enduring powers of attorney executed after it comes into force and to actions of attorneys taken after it comes into force.***

*RECOMMENDATION 47*

***Legislation incorporating the recommendations of this Report should not have the effect of invalidating valid existing enduring powers of attorney and should not apply to actions taken by attorneys prior to the coming into force of the legislation.***

*RECOMMENDATION 48*

***The legislation should not come into force until a reasonable time after it has been enacted in order to allow donors, attorneys and the public to become familiar with it.***

# CHAPTER 7

## SPRINGING POWERS OF ATTORNEY

Whether "ordinary" or enduring, at common law, powers of attorney become effective as soon as they are executed. This may not reflect the wishes of the donor, however. A donor who executes a power of attorney in contemplation of a trip or in anticipation of his or her own mental incompetence, for example, may wish to delay the effectiveness of the power of attorney and retain exclusive control over his or her property until the trip begins or until he or she becomes mentally incompetent.

A donor can solve this problem by extracting a promise from the attorney not to act until a certain date or until the occurrence of a specific event. However, if the attorney breaks this promise, third parties are entitled to deal with the attorney without fear of liability to the donor.[1] Although the attorney would likely be liable to the donor for taking action in defiance of the donor's instructions, the better solution is to prevent the attorney from acting in the first place. Another option is to physically withhold the power of attorney from the attorney until the donor wishes the attorney to act. Without the document, the attorney will find it difficult or impossible to conduct business. However, this solution is also less than ideal; in many cases, the donor will be forced to rely on another person to safeguard the power of attorney and deliver it to the attorney at the appropriate time.[2]

A third option is to include within the power of attorney itself a provision that the attorneyship will only take effect on a certain date or upon the occurrence of a specific event. Powers of attorney containing this sort of clause have come to be known as "springing" powers of attorney, because they only spring into effect at some point after they have been executed.

Springing powers of attorney are not prohibited by statute or common law and, in fact, have been upheld as valid.[3] However, without specific legislative recognition, third parties may be reluctant to accept the validity of a springing power of attorney and may refuse to deal with the attorney. In this case, the legal validity of a springing power of attorney is irrelevant; practical, not legal, considerations will frustrate the donor's wishes. To remove all doubt from the minds of third parties and attorneys, several jurisdictions have expressly recognized the

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[1]Third parties are entitled to rely on the apparent authority of an agent in their dealings: *Bowstead on Agency* (15th ed., 1985) 284-303; *Halsbury's Laws of England* (4th ed. reissue, 1990) vol. 1(2), 37. The existence of a valid power of attorney would almost certainly provide the attorney with apparent authority.

[2]An example of this sort of situation is the case of a donor who wishes the power of attorney to take effect upon his or her mental incapacity. The donor could not rely upon himself or herself to deliver the power of attorney to the attorney at a point when he or she becomes mentally incapable.

[3]*Sinclair* v. *Dewar* (1872), 19 Gr. 59 (Ont. C.A.). The Law Reform Commission of British Columbia and the Alberta Law Reform Institute have both concluded that springing powers of attorney are legally valid and enforceable: Law Reform Commission of British Columbia, *The Enduring Power of Attorney: Fine-Tuning the Concept* (Report #110, 1990) 12-13; Alberta Law Reform Institute, *Enduring Powers of Attorney* (Report for Discussion #7, 1990) 81.

validity of springing powers of attorney in legislation.[4] We believe that Manitoba should follow suit.

*RECOMMENDATION 49*

***Powers of attorney which are to take effect at some point after their execution ("springing" powers of attorney) should be expressly recognized in legislation as valid legal mechanisms.***

Some jurisdictions have specifically recognized springing powers of attorney which endure beyond the onset of the donor's mental incompetence but have not expressly considered the possibility of a "springing clause" in the context of "ordinary" powers of attorney.[5] In our view, there is no reason for such a distinction. The ability to delay the introduction of an attorney's powers will be useful whether the donor wishes an attorneyship to survive the onset of his or her mental incompetence or not. Furthermore, ordinary springing powers of attorney pose no difficulties which do not also exist for enduring springing powers of attorney. We believe that both springing enduring and springing "ordinary" powers of attorney should be recognized in law.

*RECOMMENDATION 50*

***Springing provisions should be recognized in legislation as valid whether or not the power of attorney endures beyond the onset of the mental incompetence of the donor.***

In most situations, legislative recognition of springing powers of attorney will resolve the doubts of attorneys and third parties and will permit the donor's wishes to be acted upon. The power of attorney will usually state that it is to take effect on a particular date[6] or upon the occurrence of an event which is common knowledge.[7] In either of these cases, the attorney will know when to act and third parties will have no difficulty in doing business with him or her.

However, when the occurrence of a triggering date or event is in doubt, third parties and attorneys may not know whether the power of attorney is effective or not.[8] Currently, neither statute nor common law provide a method for proving the occurrence of an event which would

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[4]*Powers of Attorney Act*, S.A. 1991 c. P-13.5, s. 5(1); *Powers of Attorney and Agency Act*, 1984, No. 25 of 1984, s. 6(1), as am. by *Powers of Attorney and Agency Act Amendment Act*, 1988, No. 80 of 1988, s. 2(1) (S. Aust.); *Powers of Attorney Act* 1934, as amended by the *Powers of Attorney Amendment Act* 1987, No. 87, s. 11A(1) (Tasmania), as cited in Alberta Law Reform Institute, *supra* n. 3, at 83; and the *Uniform Durable Power of Attorney Act* (1979) (United States) produced by the National Conference of Commissioners on Uniform State Laws and adopted by most U.S. jurisdictions all include an express recognition of springing powers of attorney. Recognition has been recommended by the Law Reform Commission of British Columbia, *supra* n. 3, at 25, the South African Law Commission, *Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons* (1988) 52 and the Australian Law Reform Commission, *Enduring Powers of Attorney* (Report #47, 1988) 13 and 34.

[5]*Powers of Attorney Act*, S.A. 1991 c. P-13.5, s. 2(1)(b)(ii); *Powers of Attorney and Agency Act*, 1984, No. 25 of 1984, s. 6, as am. by *Powers of Attorney and Agency Act Amendment Act*, 1988, No. 80 of 1988, s. 2(1) (S. Aust.). This same, limited approach was adopted by the Alberta Law Reform Institute, *supra* n. 3, at 84. Although British Columbia's Law Reform Commission seems to take this limited approach in its Report, its draft legislation refers to the possibility of any power of attorney having a "springing" provision: Law Reform Commission of British Columbia, *supra* n. 3, at 8-18 and 25.

[6]The date may be a calendar date (for example, January 1, 1995) or a date fixed by another event (for example, six months from the execution of the power of attorney).

[7]For example, the date of the next federal election, the Canadian dollar falling below $.70 (U.S.) or the Toronto Stock Exchange Composite Index reaching 5000.

[8]This may be the case, for example, if the date is based on a calendar with which the attorney or third party is not familiar (Chinese, lunar or Julian calendars are all possible) or if the event is not widely known and difficult to prove (the donor's trip overseas or the donor's mental incapacity are examples).

authorize the attorney to act. In order to give effect to the donor's wishes as expressed in a springing power of attorney, we believe that methods should be developed for proving the occurrence of a triggering event or date when these are in doubt.

We propose three possible methods of proof. The first is to allow the donor to name in the springing power of attorney a person who is authorized to swear a declaration that the event or date has occurred. This approach has been adopted in several jurisdictions and has been recommended by law reform bodies in others.[9] It would be relatively easy to use this method in Manitoba, since *The Manitoba Evidence Act* already permits the swearing of a declaration as to the truth of any fact. Declarations may be sworn before individuals found in all areas of the province; these include postmasters, members of the R.C.M.P., mayors, reeves and municipal clerks, lawyers and commissioners for oaths.[10]

It is possible that a declarant could betray the donor and benefit the attorney by swearing a declaration prematurely. This concern has caused some law reform bodies to examine the possibility of restricting the category of individuals who may serve as declarants. For example, law reform bodies in Alberta and British Columbia have considered the possibility of precluding the attorney or the attorney's spouse from acting as declarant.[11]

However, the law reform bodies which have dealt with this issue have concluded that restricting the class of declarant is not justified by the potential harm.[12] We have reached the same conclusion. A declarant who knowingly swears a false declaration would be guilty of perjury[13] and would also be criminally[14] and civilly liable if he or she swears a false declaration in order to defraud the donor. If the false declaration were sworn negligently, the declarant could also be civilly liable.[15] Moreover, we view as unlikely the possibility that an attorney would place unwarranted pressure on the donor to name the attorney or the attorney's spouse as declarant. We agree with Alberta's Law Reform Institute that "unscrupulous attorneys are far more likely to persuade the donor to grant an . . . [enduring power of attorney] which takes effect immediately."[16]

***RECOMMENDATION 51***

***A donor should be permitted to name a declarant in the springing power of attorney who is authorized to swear a declaration in accordance with The Manitoba Evidence Act that the event which brings the springing power of attorney into effect has occurred.***

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[9]*Powers of Attorney Act*, S.A. 1991 c. P-13.5, s. 5(2); Laws of New York, General Obligations Law para. 5-1602(2) [re-en. 1988, c. 210, para.1], as cited in Alberta Law Reform Institute, *supra* n. 3, at 83. It has been recommended by the Law Reform Commission of British Columbia, *supra* n. 3, at 25 and the California Law Revision Commission, *Recommendations relating to Powers of Attorney* (1989) 411.

[10]*The Manitoba Evidence Act*, C.C.S.M. c. E150, s. 62.

[11]Alberta Law Reform Institute, *supra* n. 3, at 86; Law Reform Commission of British Columbia, *supra* n. 3, at 25.

[12]See for example, Alberta Law Reform Institute, *supra* n. 3, at 22 and Law Reform Commission of British Columbia, *supra* n. 3, at 25.

[13]*Criminal Code*, R.S.C. 1985, c. C-46, s. 131.

[14]*Criminal Code*, R.S.C. 1985, c. C-46, s. 380.

[15]The Alberta Law Reform Institute recognized that "[i]t is possible that the named person might incur liability to the donor for any loss arising from a negligent determination that the contingency had (or had not) occurred.": Alberta Law Reform Institute, *supra* n. 3, at 90.

[16]Alberta Law Reform Institute, *supra* n. 3, at 86.

*RECOMMENDATION 52*

***There should be no restrictions on who may be named as declarant.***

Our second recommended method of proving the occurrence of a triggering event would apply only in cases where an enduring power of attorney is to take effect upon the occurrence of an event which relates to the mental incompetence of the donor. In this sort of case, the occurrence of the event may well be in doubt and it is possible that no declarant will have been named or, if named, the declarant may be reluctant to make a judgment about the donor's mental capacity. In these circumstances, we would follow Alberta's lead in permitting declarations sworn by two physicians to serve as proof of the donor's mental incompetence.

*RECOMMENDATION 53*

***Where the specified event upon which the springing power of attorney becomes effective relates to the mental incompetence of the donor, declarations as to the donor's mental incompetence sworn by two qualified physicians should be permitted to serve as proof of the occurrence of the specified event.***

Although unlikely, it is possible that the two previous methods of proving the occurrence of a triggering event are insufficient to give effect to the wishes of the donor. No declarant may have been named, the named declarant may be unwilling or unable to swear a declaration and the sworn declaration of two physicians may be impossible or irrelevant. When no other option is available, we believe that an attorney or another interested person should have the option of obtaining a declaration as to the occurrence of a triggering event from the Court of Queen's Bench.

A variety of individuals may have good reason to initiate an application for a declaration from the court. Frequently, the attorney will wish to act but find it impossible to do so. On occasion, the donor's relatives and friends and even the Public Trustee may decide to seek a judicial declaration in order to allow an attorney to act. We would permit a broad category of individuals, including, with leave of the court, any interested person, to initiate an application of this sort.

As with court applications concerning an enduring power of attorney, notice of an application for a judicial declaration should be provided to all interested parties. These parties will include the attorney, any declarant named in the springing power of attorney, the donor, the donor's nearest relative and the Public Trustee. The court should also be authorized to require notification of other individuals where this is warranted.

*RECOMMENDATION 54*

***The Court of Queen's Bench should be empowered to declare that an event has occurred which would bring a springing power of attorney into effect***

***(a) if no declarant is named or if the declarant is unable or unwilling to provide a declaration; or***

***(b) in any other circumstance the court considers appropriate.***

*RECOMMENDATION 55*

***The attorney, the Public Trustee, the declarant or, with leave of the court, any interested person should be permitted to apply for a judicial declaration.***

### *RECOMMENDATION 56*

***Notice of an application for a judicial declaration should be provided to the attorney, the donor (unless the court orders otherwise), the donor's nearest relative, the Public Trustee, the declarant (if named) and any other person as the court directs.***

Legislation in Alberta and New York deems the springing power of attorney to come into effect upon the swearing of a declaration, whether by a declarant or (in the case of Alberta) by physicians.[17] The goal of these provisions appears to be the elimination of doubt on the part of third parties with whom an attorney is dealing; if an event is deemed to have occurred upon the swearing of a declaration, the third party need not worry about whether the event has or has not in fact occurred.[18]

However, by deeming a springing power of attorney to come into effect when a declaration is sworn, these provisions suggest that an event which would trigger a springing power of attorney will not be legally recognized in the absence of a declaration, even if it is clear to all that it has occurred. If this is the effect of these provisions, we wish to avoid it. As has been noted, in most cases, a declaration will be unnecessary since the date or event which initiates the power of attorney will be obvious to all. In these cases, the attorney and third parties should be permitted to act without further delay. It is only when there is doubt as to the triggering date or event that recourse to a named declarant, physicians or the court will be necessary. What we propose is that a springing power of attorney should come into effect when the event identified in the document occurs; a declaration should serve as proof that the triggering event has occurred but it should not be required if the occurrence of the triggering event is not in doubt.

New York's and Alberta's concern that a declaration will not be sufficient to induce a third party to deal with the attorney is not based on a problem with the law; a third party is entitled to rely upon the apparent authority of an attorney in his or her dealings and will not be held liable so long as the attorney appears to have the authority to act.[19] A sworn declaration by a declarant named in a springing power of attorney would give an attorney this authority in most cases. Nevertheless, we agree that in some cases an ignorance of the law on the part of third parties may prevent an attorney from acting. To prevent this situation from arising and to ensure that third parties will be prepared to recognize and act upon a springing power of attorney without feeling obliged to verify the occurrence of the triggering event, we propose that third parties should be entitled to view a declaration as conclusive proof of the occurrence of the triggering event.

Unlike third parties, attorneys who act on the basis of an erroneous belief that a triggering event has occurred could be held liable because they would be exceeding their authority.[20]

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[17]*Powers of Attorney Act*, S.A. 1991, c. P-13.5, ss. 5(2) and 5(4); Laws of New York, 1988 Regular Session, Ch. 210, s. 2, as cited in Law Reform Commission of British Columbia, *supra* n. 3, at 16. The use of a "deeming" provision was recommended by the Law Reform Commission of British Columbia, *supra* n. 3, at 25 and the California Law Revision Commission, *supra* n. 9, at 412.

[18]The Law Revision Commission of New York, for example, suggested that a springing power of attorney "will take effect upon such written declaration [of the named declarant] and third parties may safely deal with the attorney-in-fact, without regard to whether the contigency has in fact occurred. Put another way, the power will "spring" upon the written declaration of the named person, and will not depend on whether the named person has made a "correct" determination that the contingency has occurred.": Law Revision Commission, State of New York, *Report of the Law Revision Commission for 1988* published in Mckinney's Session Law News No. 4, August, 1988 at A-505, as quoted in Law Reform Commission of British Columbia, *supra* n. 3, at 15.

[19]See *Halsbury's Laws of England*, *supra* n. 1, at 37; *Bowstead on Agency*, *supra* n. 1, at 284-303.

[20]This would be the case whether or not the attorney's belief was supported or based upon a sworn declaration.

Conversely, attorneys who fail to act due to a mistaken belief that a triggering event has not occurred might also be found liable.[21] In some situations, this is appropriate; attorneys should be held liable when their belief in the occurrence or non-occurrence of the triggering event (whether or not it is supported by a declaration) is unreasonable or held in bad faith. However, in our view, holding an attorney liable for nothing more than a reasonable and good-faith but mistaken belief concerning the triggering event would be unfair and would tend to weaken the utility of springing powers of attorney. We propose that the attorney be excused from liability which flows exclusively from his or her mistaken belief in the occurrence or non-occurrence of the event, so long as the belief is reasonable and held in good faith. The attorney would, however, still be liable if the mistaken belief were the result of the attorney's negligence or if the attorney acted negligently while operating under the mistaken belief.

*RECOMMENDATION 57*

***The effective date of a springing power of attorney should be the occurrence of the specified date or event set out in the springing power of attorney; if made, a declaration or judicial declaration should merely act as proof that the specified date or event has occurred and that the springing power of attorney is effective.***

*RECOMMENDATION 58*

***A third party acting in good faith should be entitled to view a declaration as conclusive proof of the occurrence of an event which would bring the springing power of attorney into effect.***

*RECOMMENDATION 59*

***No liability should attach to the attorney by reason only of his or her actions or lack of actions based upon a reasonable but mistaken belief held in good faith in the occurrence or non-occurrence of the event which would bring the springing power of attorney into effect.***

[21]This would be the case if the springing power of attorney were also enduring and if our recommendation that the attorney be placed under a positive duty to act while the donor is mentally incompetent were adopted.

# CHAPTER 8

# LIST OF RECOMMENDATIONS

The following is a list of the recommendations contained in this Report.

1. A valid enduring power of attorney should be witnessed by one of the following persons:
   - a minister of religion authorized under provincial law to perform marriages;
   - a judge of a court of superior jurisdiction;
   - a provincial judge, justice of the peace or magistrate;
   - a duly qualified medical practitioner;
   - a notary public;
   - a lawyer entitled to practise in the province; or
   - a member of the Royal Canadian Mounted Police. (p. 8)
2. Enduring powers of attorney should be in any form which clearly expresses the intention of the donor. (p. 8)
3. Substitute execution of an enduring power of attorney should be permitted only when the donor is incapable of reading or signing the instrument. (p. 9)
4. Substitute execution should be valid only when the donor is physically present, has directed another individual to sign the instrument on his or her behalf and has acknowledged that signature in the presence of a witness. (p. 10)
5. The attorney named in the instrument and the spouse of the attorney should not be permitted to sign the instrument on behalf of the donor. (p. 10)
6. At the time of the execution of an enduring power of attorney, the donor should have the mental capacity to understand the general nature and effect of the enduring power of attorney. (p. 10)
7. At the date of the execution of an enduring power of attorney, the named attorney should be at least 18 years of age, should be mentally competent and should not be an undischarged bankrupt. (p. 12)
8. Donors should be permitted to name successive attorneys in an enduring power of attorney. (p. 13)

Conversely, attorneys who fail to act due to a mistaken belief that a triggering event has not occurred might also be found liable.[21] In some situations, this is appropriate; attorneys should be held liable when their belief in the occurrence or non-occurrence of the triggering event (whether or not it is supported by a declaration) is unreasonable or held in bad faith. However, in our view, holding an attorney liable for nothing more than a reasonable and good-faith but mistaken belief concerning the triggering event would be unfair and would tend to weaken the utility of springing powers of attorney. We propose that the attorney be excused from liability which flows exclusively from his or her mistaken belief in the occurrence or non-occurrence of the event, so long as the belief is reasonable and held in good faith. The attorney would, however, still be liable if the mistaken belief were the result of the attorney's negligence or if the attorney acted negligently while operating under the mistaken belief.

*RECOMMENDATION 57*

***The effective date of a springing power of attorney should be the occurrence of the specified date or event set out in the springing power of attorney; if made, a declaration or judicial declaration should merely act as proof that the specified date or event has occurred and that the springing power of attorney is effective.***

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## LIST OF RECOMMENDATIONS

The following is a list of the recommendations contained in this Report.

1. A valid enduring power of attorney should be witnessed by one of the following persons:
   - a minister of religion authorized under provincial law to perform marriages;
   - a judge of a court of superior jurisdiction;
   - a provincial judge, justice of the peace or magistrate;
   - a duly qualified medical practitioner;
   - a notary public;
   - a lawyer entitled to practise in the province; or
   - a member of the Royal Canadian Mounted Police. (p. 8)
2. Enduring powers of attorney should be in any form which clearly expresses the intention of the donor. (p. 8)
3. Substitute execution of an enduring power of attorney should be permitted only when the donor is incapable of reading or signing the instrument. (p. 9)
4. Substitute execution should be valid only when the donor is physically present, has directed another individual to sign the instrument on his or her behalf and has acknowledged that signature in the presence of a witness. (p. 10)
5. The attorney named in the instrument and the spouse of the attorney should not be permitted to sign the instrument on behalf of the donor. (p. 10)
6. At the time of the execution of an enduring power of attorney, the donor should have the mental capacity to understand the general nature and effect of the enduring power of attorney. (p. 10)
7. At the date of the execution of an enduring power of attorney, the named attorney should be at least 18 years of age, should be mentally competent and should not be an undischarged bankrupt. (p. 12)
8. Donors should be permitted to name successive attorneys in an enduring power of attorney. (p. 13)

9. Successive attorneys should be able to assume the power of attorney from their predecessors upon the occurrence of events which, by law, terminate the previous attorneyship or which are set out by the donor in the instrument creating the enduring power of attorney. (p. 13)

10. Unless otherwise provided in an enduring power of attorney, where more than one attorney is appointed to act jointly, the decision of the majority should be deemed to be the decision of all. (p. 13)

11. Where two or more attorneys are named in an enduring power of attorney and one or more of them dies, becomes mentally incompetent, is otherwise unable to act or, after reasonable inquiries, is unavailable to make a decision, the remainder of the attorneys should be permitted to make the decision, unless otherwise directed by the instrument creating the enduring power of attorney. (p. 14)

12. Unless otherwise set out in the enduring power of attorney, where two or more attorneys, appointed to act jointly, are unable to reach a majority decision, the attorney who is named first in the document should make the decision. (p. 14)

13. A joint attorney should not be held liable for actions or omissions taken by a majority of attorneys so long as he or she opposed the action or omission and communicated his or her opposition to the action or omission to the other attorneys in writing as soon as reasonably possible after the decision was made. (p. 15)

14. Joint attorney should not be held liable for actions or omissions taken by a majority of attorneys if the decision to engage in the action or omission was taken in his or her absence and so long as he or she communicated his or her opposition to the action or omission to the other attorneys in writing as soon as reasonably possible after learning of it. (p. 15)

15. Where two or more attorneys are named in an enduring power of attorney without a clear indication as to whether the attorneys are to act successively or jointly, they should be deemed to be successive attorneys. (p. 15)

16. When the donor of an enduring power of attorney is mentally incompetent, an attorney should be placed under a positive duty to act on behalf of the donor and should be held liable for any loss as a result of a failure to act which constitutes negligence or fraud. (pp. 17-18)

17. The duty to act should be imposed only if the attorney has taken some action as attorney or has otherwise indicated acceptance of the attorneyship and if the attorney knows or ought reasonably to know of the donor's mental incompetence. (p. 18)

18. The Court of Queen's Bench should be empowered to order an attorney to account for his or her management of the donor's property. (p. 20)

19. The attorney should be obliged to provide accounts upon demand to a recipient or recipients named by the donor in the enduring power of attorney. (p. 20)

20. If no recipient is named or if the named recipient is deceased, mentally incompetent or is the attorney or the attorney's spouse, the donor should be obliged to provide annual accounts to the donor's nearest relative or relatives. (p. 21)

21. The donor's nearest relative should be:

- the donor's spouse or spousal equivalent;
- the donor's child or children, where there is no spouse or spousal equivalent;
- the donor's grandchild or grandchildren, where there is no person in the preceding categories;
- the donor's great-grandchild or great-grandchildren, where there is no person in the preceding categories;
- the donor's parent or parents, where there is no person in the preceding categories;
- the donor's sibling or siblings, where there is no person in the preceding categories;
- the donor's niece(s) and/or nephew(s), where there is no person in the preceding categories;
- the Public Trustee, where there is no person in the preceding categories. (p. 21)

22. The attorney and the attorney's spouse should not be considered the donor's nearest relatives for the purpose of receiving accounts. (p. 21)

23. A "nearest relative" should be an adult and should not be mentally incompetent. (p. 21)

24. No duty to act should be imposed on recipients of accounts. (p. 22)

25. Subject to the provisions of an enduring power of attorney, an attorney should be able to dispose of any part of the property of the donor to provide support to a person whom the donor is legally bound to support. (p. 23)

26. The death of the donor should terminate an enduring power of attorney. (p. 25)

27. The death of the attorney will terminate the attorneyship, but should not necessarily terminate the enduring power of attorney. (p. 25)

28. The Court of Queen's Bench should be empowered to terminate an attorneyship. (p. 26)

29. Subject to the provisions of the enduring power of attorney, the Court of Queen's Bench should be empowered to appoint a substitute attorney. (p. 26)

30. A certificate of incompetence or an order of supervision concerning the donor of a validly executed enduring power of attorney should not terminate the enduring power of attorney. (p. 26)

31. Upon receiving a certificate of incompetence or an order of supervision, the Public Trustee should be empowered to act as the committee of the person named in the certificate or order until and unless the Public Trustee has knowledge that the person has executed a valid and subsisting enduring power of attorney. (p. 28)

32. Any person ought to be permitted to file a copy of an enduring power of attorney with the Public Trustee at any time after its execution. (p. 28)

33. Upon receiving a certificate of incompetence or an order of supervision, the Public Trustee should be obliged to determine whether a copy of an enduring power of attorney for that person has been filed with the office of the Public Trustee. (p. 28)

34. When sending a copy of the certificate of incompetence or order of supervision to a patient and his or her nearest relative, the Public Trustee should be required to include a statement explaining that the document has the effect of appointing the Public Trustee committee of the person's estate and that the committeeship of the Public Trustee will cease upon being notified of the existence of a valid, subsisting enduring power of attorney. (p. 28)

35. Where the Public Trustee has knowledge that an enduring power of attorney has been executed prior to the issuance of a certificate of incompetence or order of supervision, the Public Trustee should make reasonable enquiries to determine whether the enduring power of attorney is valid and subsisting. (p. 28)

36. Leave of the court should be sought by an attorney who wishes to renounce the attorneyship while the donor is mentally incompetent. (p. 29)

37. Unless otherwise provided for in the enduring power of attorney, the bankruptcy of the donor should terminate an attorneyship. (p. 29)

38. The mental incompetence of an attorney should terminate the attorneyship. (p. 30)

39. The bankruptcy of the attorney should terminate the attorneyship. (p. 30)

40. The donor's right to waive or vary the provisions of legislation governing enduring powers of attorney should be restricted to provisions which are explicitly stated to be subject to the terms of the enduring power of attorney. (p. 31)

41. The Court of Queen's Bench should be empowered to:

    (a) provide advice and direction regarding the management of a donor's estate;

    (b) declare an enduring power of attorney to be valid or invalid;

    (c) declare that an enduring power of attorney or an attorneyship is terminated;

    (d) subject to the provisions of the enduring power of attorney, vary an attorney's power;

    (e) remove an attorney;

    (f) subject to the provisions of the enduring power of attorney, substitute an attorney for the named attorney;

    (g) order an attorney to provide the court or an applicant with an accounting; and

    (h) make any other order or declaration relating to the enduring power of attorney as the court considers appropriate. (pp. 32-33)

42. An attorney, the Public Trustee, a recipient of accounts and, with leave of the court, any interested person may make an application to court with respect to an enduring power of attorney. (p. 33)

43. An applicant should be able to bring a court application at any time after the execution of the enduring power of attorney. (p. 34)

44. An applicant should be required to serve the donor (unless the court dispenses with this requirement), the attorney and the Public Trustee and any other person as ordered by the court with a copy of the application. (p. 34)

45. A written enduring power of attorney should be recognized as valid in Manitoba if it is valid in the jurisdiction in which it was executed and if it provides that it shall not be terminated upon the mental incompetence of the donor. (p. 36)

46. Legislation incorporating the recommendations of this Report should apply to enduring powers of attorney executed after it comes into force and to actions of attorneys taken after it comes into force. (p. 37)

47. Legislation incorporating the recommendations of this Report should not have the effect of invalidating valid existing enduring powers of attorney and should not apply to actions taken by attorneys prior to the coming into force of the legislation. (p. 37)

48. The legislation should not come into force until a reasonable time after it has been enacted in order to allow donors, attorneys and the public to become familiar with it. (p. 37)

49. Powers of attorney which are to take effect at some point after their execution ("springing" powers of attorney) should be expressly recognized in legislation as valid legal mechanisms. (p. 39)

50. Springing provisions should be recognized in legislation as valid whether or not the power of attorney endures beyond the onset of the mental incompetence of the donor. (p. 39)

51. A donor should be permitted to name a declarant in the springing power of attorney who is authorized to swear a declaration in accordance with *The Manitoba Evidence Act* that the event which brings the springing power of attorney into effect has occurred. (p. 40)

52. There should be no restrictions on who may be named as declarant. (p. 41)

53. Where the specified event upon which the springing power of attorney becomes effective relates to the mental incompetence of the donor, declarations as to the donor's mental incompetence sworn by two qualified physicians should be permitted to serve as proof of the occurrence of the specified event. (p. 41)

54. The Court of Queen's Bench should be empowered to declare that an event has occurred which would bring a springing power of attorney into effect

    (a) if no declarant is named or if the declarant is unable or unwilling to provide a declaration; or

    (b) in any other circumstance the court considers appropriate. (p. 41)

55. The attorney, the Public Trustee, the declarant or, with leave of the court, any interested person should be permitted to apply for a judicial declaration. (p. 41)

56. Notice of an application for a judicial declaration should be provided to the attorney, the donor (unless the court orders otherwise), the donor's nearest relative, the Public Trustee, the declarant (if named) and any other person as the court directs. (p. 42)

57. The effective date of a springing power of attorney should be the occurrence of the specified date or event set out in the springing power of attorney; if made, a declaration or judicial declaration should merely act as proof that the specified date or event has occurred and that the springing power of attorney is effective. (p. 43)

58. A third party acting in good faith should be entitled to view a declaration as conclusive proof of the occurrence of an event which would bring the springing power of attorney into effect. (p. 43)

59. No liability should attach to the attorney by reason only of his or her actions or lack of actions based upon a reasonable but mistaken belief held in good faith in the occurrence or non-occurrence of the event which would bring the springing power of attorney into effect. (p. 43)

This is a Report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 29th day of March 1994.

Clifford H.C. Edwards, President

John C. Irvine, Commissioner

Gerald O. Jewers, Commissioner

Eleanor R. Dawson, Commissioner

Pearl K. McGonigal, Commissioner

# APPENDIX

# DRAFT LEGISLATION

## THE POWERS OF ATTORNEY ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

### INTERPRETATION AND APPLICATION

**Definitions**

1 In this Act,

"accounts" means the accounts of the estate of a donor;

"attorney" means a person who is authorized to act for a donor under a power of attorney;

"court" means the Court of Queen's Bench;

"declarant" means a person who makes a declaration under subsection 19(2);

"declaration" means a declaration as provided in subsection 19(2);

"donor" means a person who gives a power of attorney;

"enduring power of attorney" means a power of attorney as provided in section 6;

"mental incompetence" means the inability of a person to manage his or her affairs by reason of mental infirmity arising from disease, age, addiction or other cause;

"nearest relative" means, with respect to the donor,

(a) every mentally competent adult person who is

(i) a spouse,
(ii) a child, where there is no spouse,
(iii) a grandchild, where there is no person in the preceding subclauses,
(iv) a great-grandchild, where there is no person in the preceding subclauses,
(v) a parent, where there is no person in the preceding subclauses,
(vi) a sibling, where there is no person in the preceding subclauses,
(vii) a niece or nephew, where there is no person in the preceding subclauses, or

(b) the Public Trustee, where there is no nearest relative under clause (a);

"Public Trustee" means the Public Trustee appointed under The Public Trustee Act;

"spouse" means a person who is publicly represented by a donor or an attorney as his or her spouse or to whom a donor or an attorney is married;

"springing power of attorney" means a power of attorney as provided in subsection 19(1).

**Application**
**2(1)** Subject to subsection (2), this Act applies to all powers of attorney whether executed before or after this Act comes into force, despite any agreement or waiver to the contrary.

**Exception**
**2(2)** Sections 7 and 10 do not apply to a power of attorney that was executed before this Act comes into force.

## POWERS OF ATTORNEY GENERALLY

**After acquired property**
**3** Every power of attorney, unless otherwise expressed, confers upon the attorney the same rights and powers in respect to property acquired by the donor after the execution of the power of attorney, as is conferred upon the attorney by the power of attorney in respect to the property owned by the donor at the time of the execution of the power of attorney.

**Termination of authority**
**4(1)** Where the authority under a power of attorney is terminated, an act in pursuance of the power by the attorney in favour of a person who does not know of the termination of the authority is valid and binding in favour of the person and in favour of a person claiming under that person.

**Liability of attorney**
*4(2)* *Where the authority under a power of attorney is terminated, the attorney is not liable* to the donor or the estate of the donor for an act in pursuance of the power *where the attorney did* not know, and with the exercise of reasonable care would not have known, of the termination of the authority.

**Irrevocable power of attorney for value**
**5(1)** Where a power of attorney given for valuable consideration is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser,

(a) the power shall not be revoked at any time, either by anything done by the donor without the concurrence of the attorney, or by the death, disability or bankruptcy of the donor;

(b) any act done at any time by the attorney in pursuance of the power is as valid as if anything done by the donor without the concurrence of the attorney, or the death, disability or bankruptcy of the donor, had not been done or happened; and

(c) neither the attorney nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor, without the concurrence of the attorney, or of the death, disability or bankruptcy of the donor.

**Meaning of "property" and "purchaser"**
5(2) In this section,

"property" includes anything in action and any interest in real or personal property;

"purchaser" means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in, or lien, or charge, upon property.

## ENDURING POWERS OF ATTORNEY

**Enduring power of attorney**
6(1) The authority of an attorney given by a power of attorney does not terminate by reason only of the subsequent mental incompetence of its donor, where that power of attorney

(a) is in writing;

(b) is signed by the donor and a witness in accordance with this Act; and

(c) provides that it is to continue notwithstanding any mental incompetence of its donor.

**Substitute execution**
6(2) Notwithstanding clause 6(1)(b), where a donor is incapable of reading or signing an enduring power of attorney, it may be signed by some person other than the donor in the presence and by the direction of the donor, in which case

(a) the person who signs shall not be the attorney or the spouse of the attorney;

(b) the donor shall acknowledge the signature in the presence of a witness in accordance with this Act; and

(c) the witness shall attest and subscribe the enduring power of attorney in the presence of the donor.

**Termination of authority**
6(3) Subject to section 4, the authority of an attorney under an enduring power of attorney terminates where

(a) the custody, management and administration of the estate of the donor is committed to the Public Trustee or other committee by order of the court under The Mental Health Act;

(b) a substitute decision maker for property is appointed for the donor under The Vulnerable Persons Living with a Mental Disability Act;

(c) the donor becomes bankrupt, unless the enduring power of attorney provides otherwise;

(d) the attorney becomes bankrupt;

(e) the attorney becomes mentally incompetent;

(f) the donor or the attorney dies; or

(g) a court terminates the power of attorney.

**Witness**
**7(1)** Subject to subsection (2), a witness to the execution of an enduring power of attorney must be a

(a) minister of religion authorized under provincial law to solemnize marriages;

(b) judge of a superior court;

(c) justice;

(d) duly qualified medical practitioner;

(e) notary public;

(f) lawyer entitled to practise in the province; or

(g) member of the Royal Canadian Mounted Police.

**Attorney and spouse excluded**
**7(2)** The attorney and the spouse of the attorney shall not be a witness to the execution of the enduring power of attorney.

**Capacity**
**8** An enduring power of attorney is void if, at the date of its execution, its donor is mentally incapable of understanding the nature and effect of the enduring power of attorney.

**Public Trustee**
**9** The donor or attorney may forward a copy of the executed enduring power of attorney to the Public Trustee.

**Eligible attorneys**
**10** Every attorney, at the date the donor executes the enduring power of attorney, shall be an adult, shall be mentally competent and shall not be an undischarged bankrupt.

**More than one attorney**
**11(1)** Where two or more attorneys are appointed in an enduring power of attorney and the instrument does not indicate whether they are to act jointly or successively, the attorneys shall act successively, in the order that they are named in the enduring power of attorney.

**Successive attorneys**
**11(2)** A donor may in an enduring power of attorney name any number of persons to act successively as the attorney.

**Joint attorneys**
**12(1)** Subject to subsection (3) and to the provisions of the enduring power of attorney, where two or more attorneys are appointed to act jointly,

(a) the decision of the majority is deemed to be the decision of all; and

(b) where one or more of the attorneys dies, becomes mentally incompetent, is unwilling or is, after reasonable inquiries, unavailable to make a decision, the remainder of the

attorneys may make the decision and the decision of the majority of the remainder is deemed to be the decision of all.

**Disagreement between joint attorneys**
12(2) Unless otherwise provided in the enduring power of attorney, where two or more attorneys who are appointed to act jointly disagree about the making of a decision and there is no majority decision, the attorney who is first named in the enduring power of attorney shall make the decision.

**Dissent**
12(3) Where a majority decision is made, an attorney is not liable for any consequences of that decision where the attorney

(a) did not at the time of the decision vote for or consent to that decision; and

(b) provides a written dissent to each of the other joint attorneys as soon as reasonably possible after becoming aware of the majority decision.

**Duty to act under an enduring power of attorney**
13(1) During any period in which the attorney knows or reasonably ought to know that the donor is mentally incompetent, the attorney shall be under a duty to act if

(a) the attorney has at any time acted under that enduring power of attorney or has otherwise indicated acceptance of the appointment of attorney; and

(b) the enduring power of attorney has not been terminated.

**Standard of care where no compensation**
13(2) An attorney who does not receive compensation for acting in that position shall exercise the degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs.

**Standard of care where compensation**
13(3) An attorney who receives compensation for acting in that position shall exercise the degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise.

**Liability of attorney**
14(1) Every attorney who fails to act as required by section 13 is liable to the donor for any loss occasioned by that failure.

**Renunciation**
14(2) During any period that an attorney is subject to the duty imposed by subsection 13(1), the attorney shall not renounce the appointment as attorney except with leave of the court.

**Duty to forward accounts**
15(1) During any period in which an attorney has a duty to act under subsection 13(1), the attorney shall forward the accounts

(a) upon demand to all persons named for that purpose as a recipient by the donor in the enduring power of attorney; or

(b) annually to the nearest relative of the donor, where the donor does not name a recipient in the enduring power of attorney or where the named recipient is the attorney, the spouse of the attorney, deceased or mentally incompetent.

**"Nearest relative" restricted**
**15(2)** For purposes of this section the attorney and spouse of the attorney are deemed not to be a nearest relative of the donor.

**No duty or liability**
**15(3)** No person who receives accounts under this section has any duty or liability concerning those accounts.

**Support**
**16(1)** Subject to the provisions of the enduring power of attorney, an attorney may dispose of any part of the property of the donor to provide support to a person whom the donor is legally obliged to support.

**Attorney not excluded**
**16(2)** The attorney may be a recipient under subsection (1).

**Jurisdiction of court**
**17(1)** Upon application, a court may, after due consideration of the presumed wishes of the donor, make one or more of the following orders:

(a) an order of advice and directions regarding the management of the estate of the donor;

(b) a declaration that a donor is mentally incompetent;

(c) a declaration that a power of attorney is invalid;

(d) a declaration that a power of attorney is terminated;

(e) subject to the provisions of the enduring power of attorney, a variation of the powers of an attorney;

(f) an order that an attorney be removed from the position as attorney;

(g) subject to the provisions of the enduring power of attorney, an order of substitution of an attorney for the named attorney;

(h) an order that an attorney provide the court with an accounting;

(i) any other order relating to a power of attorney that the court considers appropriate.

**Who may apply and when**
**17(2)** An attorney, the Public Trustee, a nearest relative of the donor, a recipient of accounts under section 15 or, in the discretion of the court, any interested person may commence an application under subsection (1) at any time after the execution of the enduring power of attorney.

**Notice of application**
**17(3)** An applicant under subsection (1) shall give notice of the application to

(a) the donor of the enduring power of attorney, unless the court otherwise orders;

(b) the attorney of the enduring power of attorney;

(c) the Public Trustee; and

(d) any other person as the court may order.

**Recognition of foreign instruments**
**18** Notwithstanding anything in this Act, a power of attorney is an enduring power of attorney if

(a) it is a valid power of attorney according to the law of the place where it is executed; and

(b) it complies with clauses 6(1)(a) and (c) of this Act.

## SPRINGING POWERS OF ATTORNEY

**Springing power of attorney**
**19(1)** A donor may provide that any general or enduring power of attorney comes into effect at a specified date in the future or on the occurrence of a specified contingency.

**Declarant**
**19(2)** A donor of a springing power of attorney may appoint in that instrument one or more persons from whom an attorney may seek a written declaration that the specified date or contingency has occurred.

**Attorney may be declarant**
**19(3)** A donor may appoint as a declarant the attorney of the springing power of attorney.

**When doctors may declare**
**19(4)** Two duly qualified medical practitioners may act as a declarant where

(a) the specified contingency relates to the mental incompetency of the donor; and

(b) a donor does not appoint a declarant or the declarant is unable or unwilling to provide a declaration.

**When court to determine**
**20(1)** Upon application, a court may determine whether a specified date or contingency of a springing power of attorney has occurred where

(a) a donor does not appoint a declarant or the declarant is unable or unwilling to provide a declaration; or

(b) in any other circumstances that the court considers appropriate.

**Who may apply**
**20(2)** A person named as an attorney in the springing power of attorney, the Public Trustee, a declarant or, in the discretion of the court, an interested person may apply to court under subsection (1).

**Notice**
**20(3)** An applicant under subsection (1) shall give notice of the application to

(a) the donor of the enduring power of attorney, unless the court orders otherwise;

(b) the attorney of the enduring power of attorney;

(c) the declarant;

(d) the Public Trustee; and

(e) any other person as the court may order.

**Effect of declaration**

**21** For the purposes of any third party who relies in good faith on a declaration as evidence of the authority of an attorney, that declaration is conclusive proof that the specified date or contingency has occurred.

**Defence**

**22** Where an attorney of a springing power of attorney mistakenly but reasonably believes in good faith that a specified date or contingency necessary to bring it into effect has or has not occurred, the attorney shall not for that reason alone be liable for acting or failing to act, as the case may be, under that power of attorney.

## GENERAL

*Repeal*

**23** The Powers of Attorney Act, R.S.M. 1987, c. P97, is repealed.

**C.C.S.M. reference**

**24** This Act may be referred to as chapter P97 of the Continuing Consolidation of the Statutes of Manitoba.

**Coming into force**

**25** This Act comes into force on a day fixed by proclamation.

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## THE MENTAL HEALTH AMENDMENT ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

*C.C.S.M. c. M110 amended*
*1 The Mental Health Act is amended by this Act.*

*2 Section 1 is amended by adding the following definition in alphabetical order:*

"enduring power of attorney" has the same meaning as in The Powers of Attorney Act;

*3 Subsection 26.10(1) is amended by adding the following after subclause (iii):*

(iii.1) to communicate with any attorney of the patient under an enduring power of attorney,

*4 In the following provisions,* "Upon receipt" *is struck out and* "Subject to section 26.15, upon receipt" *is substituted:*

*(a) subsection 26.11(3); and*

*(b) subsection 26.12(2).*

*5 The following is added after section 26.14:*

**Interpretation**
**26.15(1)** In this section,

"certificate" means a certificate issued under subsection 26.11(1);

"order" means an order of supervision made under subsection 26.12(1).

**Enduring power of attorney governs**
**26.15(2)** Notwithstanding subsections 26.11(3) and 26.12(2), the Public Trustee shall not be the committee of the estate of any person who has given an enduring power of attorney that exists at the time a certificate or order is issued concerning that person.

**Validity of interim actions**
**26.15(3)** Notwithstanding subsection (2), any action taken or thing done by the Public Trustee is valid as if the enduring power of attorney did not exist where the Public Trustee purports to act as committee of the estate in the belief that no enduring power of attorney exists.

**Notice to be given**
**26.15(4)** Upon receipt of a certificate or order, the Public Trustee shall, as soon as practicable, give a notice in accordance with subsection (5) to

(a) the person who is the subject of the certificate or order; and

(b) the nearest relative of that person.

**Contents of notice**
**26.15(5)** A notice under subsection (4) shall be in writing and shall

(a) identify the person who is the subject of a certificate or order;

(b) explain that the effect of the certificate or order is to make the Public Trustee the committee of the estate of that person unless an enduring power of attorney exists that was given by that person; and

(c) explain that the Public Trustee may nevertheless manage the estate until notified of any such enduring power of attorney.

**Files to be checked**
**26.15(6)** Upon receipt of a certificate or order, the Public Trustee shall ascertain whether an enduring power of attorney has been filed in its office relating to the person who is the subject of that certificate or order.

**Duty to inquire**
**26.15(7)** Upon learning by any means that an enduring power of attorney exists for a person who is the subject of a certificate or order, the Public Trustee shall make reasonable inquiries to ascertain whether the enduring power of attorney remains valid.

*6 Subsection 80(1) is amended by striking out* "When" *and substituting* "Subject to section 26.15, when".

*7 This Act comes into force on the day it receives royal assent.*

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## EXECUTIVE SUMMARY OF

## REPORT ON ENDURING AND SPRINGING POWERS OF ATTORNEY

## EXECUTIVE SUMMARY

The Manitoba Law Reform Commission's Report on *Enduring and Springing Powers of Attorney* proposes changes to the law which are designed to grant makers of powers of attorney greater protection from mismanagement and financial exploitation, greater flexibility in ordering their affairs and greater assurance that their wishes will be carried out.

### ENDURING POWERS OF ATTORNEY: BACKGROUND

Powers of attorney are documents in which the maker (called the "donor") appoints another person (called the "attorney") to act on his or her behalf in financial and property matters; they are especially useful when absence or disability prevents individuals from controlling their finances personally. Until recently, however, powers of attorney automatically terminated upon the donor's mental incapacity and were not therefore available to those who wished to plan for a time when their mental incapacity would prevent them from conducting their affairs personally; these individuals could only rely on the court to appoint a "committee" to look after their affairs. In 1980, this situation was altered by legislation which adopted a Manitoba Law Reform Commission recommendation that powers of attorney which were intended to endure beyond the donor's mental incapacity should be recognized in law.

*The Powers of Attorney Act* permits individuals, while mentally competent, to make "enduring" powers of attorney which will continue after they have become mentally incapable (this might occur due to mental illness, senility, Alzheimer disease or some other reason). Nevertheless, the present law does not make allowances for the fact that makers of enduring powers of attorney, while they are mentally incompetent, may not be able to supervise an attorney properly and are not legally able to terminate an attorneyship or sue an attorney who is acting improperly. In this situation, attorneys could operate without an effective check on their powers. The Commission's concerns about potential abuse in this situation were underlined by information about increasing financial exploitation of the elderly (who are likely to make enduring powers of attorney in anticipation of declining mental and physical health). The Commission also had concerns that the wishes of mentally incompetent individuals, contained in valid enduring powers of attorney, were being ignored or frustrated as a result of changes made to *The Mental Health Act* since 1980.

### ENDURING POWERS OF ATTORNEY: RECOMMENDATIONS

The Report on *Enduring and Springing Powers of Attorney* sets out a variety of recommendations intended to better protect donors of enduring powers of attorney. For example, to deter improprieties at the time an enduring power of attorney is made, the Commission recommends that enduring powers of attorney be witnessed by a minister of religion, a judge, justice of the peace or magistrate, a physician, a lawyer, a notary public or a member of the R.C.M.P.; all these individuals occupy positions which would be threatened if they were involved in undue influence or fraud.

The Report also makes several recommendations designed to reduce the likelihood that the donor's property will be mismanaged while a donor is mentally incompetent. This is the purpose, for example, of the recommendation that minors, undischarged bankrupts and individuals who are mentally incompetent should not be allowed to serve as attorneys. The Report also proposes that, while the donor is mentally incapable, an attorney should be required

to account for his or her actions to an individual named by the donor for this purpose or, if no one is named, to the donor's nearest relatives. In addition, the Commission would place on gratuitous attorneys who have accepted the position a duty to act while the donor is mentally incompetent; attorneys in this situation would no longer be able to escape liability by declining to take reasonable actions with the donor's property. The Report also recommends that the Court of Queen's Bench be granted broad supervisory powers over enduring powers of attorney, including the power to terminate an attorneyship, to replace an attorney, to alter the terms of an enduring power of attorney and to grant an attorney leave to withdraw from the position.

While protecting the donor, the Report also recommends giving donors greater flexibility in expressing their wishes and greater power to have them carried out. Individuals who are unable to sign an enduring power of attorney because of a physical disability or because they cannot read the document would be permitted to instruct someone else to sign it for them. If they wish to, donors would be allowed to name several attorneys to act jointly in administering the donor's property or could name an alternate attorney to act if the first named attorney declines or renounces the attorneyship. The Report suggests that attorneys should be allowed to give financial support to individuals whom the donor is legally required to support. Finally, the Report proposes that the effect of recent amendments to *The Mental Health Act* should be changed. It recommends that a valid enduring power of attorney should not be terminated whenever physicians determine that the donor is mentally incompetent; since this is the very situation for which enduring powers of attorney were designed, it recommends that termination in these circumstances should require a court order.

## SPRINGING POWERS OF ATTORNEY

Generally, a power of attorney (whether "enduring" or not) takes effect immediately upon execution. However, some donors may not wish to empower their attorney until a certain date in the future or until a specific event takes place. For example, a donor may want a power of attorney to take effect only after he or she leaves the country. (Powers of attorney which come into effect some time after their execution are referred to as "springing" powers of attorney.) Although the common law would likely recognize a springing power of attorney as valid, individuals with whom an attorney wished to deal might not. In order to ensure that the donor's wishes in this respect are carried out, the Report recommends that springing powers of attorney be expressly recognized in legislation.

Occasionally, an attorney of a springing power of attorney and those with whom he or she is dealing may find it difficult to determine whether or not the event which would make the attorneyship effective has occurred. To solve this problem, the Report proposes that the donor be allowed to name an individual who has the authority to swear a declaration that the event has occurred. In addition, when the triggering event is the mental incapacity of the donor, the Commission suggests that the sworn declarations of two physicians be recognized as proof. If doubts about the occurrence of the triggering event still exist, the Report recommends that the Court of Queen's Bench should be empowered to make a declaration which would settle the issue.

## SOMMAIRE DU RAPPORT SUR

## *ENDURING AND SPRINGING POWERS OF ATTORNEY*
## (PROCURATIONS DURABLES ET SUBORDONNÉES À UNE CONDITION SUSPENSIVE)

## SOMMAIRE

Dans son rapport intitulé « *Enduring and Springing Powers of Attorney* », la Commission de réforme du droit du Manitoba propose des modifications législatives dans le but d'accorder aux mandants une plus grande protection contre la mauvaise gestion et l'exploitation financière, plus de souplesse pour mettre de l'ordre dans leurs affaires et la garantie d'un plus grand respect de leurs volontés.

### PROCURATIONS DURABLES — RENSEIGNEMENTS GÉNÉRAUX

La procuration est un instrument par lequel son auteur (le « mandant ») nomme une autre personne (le « mandataire ») pour administrer en son nom ses affaires financières et ses biens. Elle est particulièrement utile aux personnes qui sont dans l'impossibilité, en raison d'absence ou d'incapacité, d'administrer personnellement leurs finances. Jusqu'à récemment, les procurations prenaient fin d'office dès que le mandant était atteint d'une incapacité mentale. Elles ne pouvaient donc pas servir aux personnes qui désiraient y recourir comme moyen de planification dans l'éventualité d'une incapacité mentale les empêchant de s'occuper de leurs affaires. Comme unique recours, ces personnes devaient attendre que le tribunal nomme un curateur pour administrer leurs affaires. La situation a toutefois changé en 1980, année au cours de laquelle l'Assemblée législative a adopté une recommandation de la Commission de réforme du droit du Manitoba voulant que demeurent en vigueur après la survenance d'une incapacité mentale les procurations données dans cette intention.

La *Loi sur les procurations* autorise les mandants habiles sur le plan mental à donner des procurations durables qui demeurent valides même après qu'ils sont frappés d'une incapacité mentale (en raison notamment d'une maladie mentale, de sénilité ou de la maladie d'Alzheimer). L'auteur d'une procuration durable peut être dans l'impossibilité, pendant son incapacité mentale, de surveiller convenablement son mandataire, de mettre légalement fin à la procuration ou d'intenter des poursuites contre le mandataire qui agit de façon irrégulière. Pourtant, la loi actuelle ne tient compte d'aucune de ces situations qui font que les mandataires pourraient exercer leurs pouvoirs sans surveillance véritable. La Commission craint que ces situations ne prêtent à des abus, d'autant plus que les renseignements qu'elle a obtenus corroborent qu'il y a augmentation de l'exploitation financière des personnes âgées (qui sont celles qui recourront probablement aux procurations en prévision de la détérioration de leur santé mentale et physique). Le fait que les modifications apportées à la *Loi sur la santé mentale* depuis 1980 ne tiennent pas compte des volontés exprimées dans les procurations durables des mandants devenus inhabiles sur le plan mental constitue également une source d'inquiétude pour la Commission.

### PROCURATIONS DURABLES — RECOMMANDATIONS

La Commission formule dans son rapport diverses recommandations visant à mieux protéger les auteurs de procurations durables. Par exemple, afin de décourager les pratiques répréhensibles, elle recommande que les procurations durables soient signées devant un témoin tel un ministre du culte, un juge, un juge de paix, un magistrat, un médecin, un avocat, un notaire public ou un membre de la GRC, ces personnes occupant toutes un poste qu'elles risqueraient de perdre en cas de fraude ou d'abus d'influence.

Le rapport contient également de nombreuses recommandations visant à réduire les probabilités de mauvaise gestion des biens des mandants atteints d'une incapacité mentale. C'est dans cet esprit, par exemple, qu'a été formulée la recommandation voulant que les mineurs, les faillis non libérés et les inhabiles sur le plan mental ne soient pas autorisés à agir comme mandataires. Il est également proposé dans le rapport que les mandataires rendent compte de leur gestion à une tierce personne nommée par les mandants ou, à défaut d'une telle nomination, au plus proche parent des mandants, pendant que ceux-ci ont une incapacité mentale. En outre, la Commission suggère qu'on impose aux mandataires à titre gratuit qui ont accepté d'agir comme tels l'obligation de s'occuper des affaires des mandants pendant que ceux-ci sont inhabiles sur le plan mental. Ainsi, ces mandataires ne pourraient plus refuser de prendre des mesures raisonnables concernant les biens des mandants. La Commission recommande aussi que l'on accorde à la Cour du Banc de la Reine un droit de regard sur les procurations durables, y compris le pouvoir de résilier les procurations, de remplacer les mandataires, de modifier les termes des procurations durables et d'autoriser les mandataires à démissionner de leur poste.

Les recommandations formulées dans le rapport visent non seulement à protéger les mandants, mais aussi à leur accorder plus de souplesse pour exprimer leurs volontés ainsi qu'un plus grand pouvoir pour les faire exécuter. Les personnes qui ne peuvent signer une procuration durable en raison d'une incapacité physique ou parce qu'elles ne peuvent la lire pourraient demander à une autre personne de la signer en leur nom. Les mandants qui le désirent pourraient nommer plusieurs mandataires chargés d'administrer conjointement leurs biens ou nommer un mandataire suppléant en cas de refus d'agir ou de démission du premier. La Commission suggère que l'on autorise les mandataires à fournir un soutien financier aux personnes que les mandants sont tenus de soutenir de par la loi. Enfin, elle propose que l'on change les effets des dernières modifications apportées à la *Loi sur la santé mentale* et recommande qu'il soit interdit de mettre fin aux procurations durables données par des mandants qui sont déclarés inhabiles sur le plan mental par un médecin. Comme il s'agit là de la raison d'être fondamentale des procurations durables, la Commission recommande qu'elles ne puissent être résiliées dans ces circonstances que par une ordonnance judiciaire.

## PROCURATIONS SUBORDONNÉES À UNE CONDITION SUSPENSIVE

En règle générale, les procurations (qu'elles soient ou non durables) prennent effet dès leur signature. Il peut arriver cependant que des mandants ne désirent leur donner effet qu'à compter d'une certaine date ou d'un certain événement. Par exemple, il est possible qu'un mandant désire que la procuration ne prenne effet qu'après son départ du pays. (Les procurations qui ne prennent pas effet dès leur signature sont appelées « procurations subordonnées à une condition suspensive ».) Même si la common law reconnaîtrait probablement la validité des procurations subordonnées à une condition suspensive, il pourrait en être autrement des personnes avec lesquelles les mandataires voudraient faire affaire. Pour que soient respectées les volontés des mandants à ce sujet, la Commission recommande que les procurations subordonnées à une condition suspensive soient reconnues en droit.

Il peut arriver que les mandataires et les personnes avec lesquelles ils font affaire aient de la difficulté à déterminer si s'est produit l'événement donnant effet aux procurations. Pour régler ce problème, la Commission propose que les mandants soient autorisés à nommer une personne habilitée à déclarer sous serment que s'est produit l'événement. En outre, elle suggère que soient admises en preuve les déclarations sous serment de deux médecins lorsque l'incapacité mentale des mandants constitue l'événement déclencheur. En cas de persistance du doute quant à la survenance de cet événement, la Commission recommande que la question soit réglée par la Cour du Banc de la Reine.