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ENDURING POWERS OF ATTORNEY: AREAS FOR REFORM

SUPPLEMENTARY REPORT

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TABLE OF CONTENTS

CHAPTER 1

INTRODUCTION

A. BACKGROUND

The Manitoba Law Reform Commission is a member of the Western Canada Law Reform Agencies (WCLRA), a consortium of law reform agencies formed in 2003 to encourage harmonization of the laws of the four western provinces. The other members of the WCLRA are the Alberta Law Reform Institute, the British Columbia Law Institute and the Saskatchewan Law Reform Commission. WCLRA members have agreed to work on joint law reform projects in areas where uniformity may be beneficial.

The first project undertaken by the WCLRA addresses the law governing enduring powers of attorney (EPAs). A power of attorney is an instrument under which a person (the donor) confers upon another person the power to manage the donor's property and financial affairs. A power of attorney that is enduring continues in effect even though the donor subsequently loses the mental capacity to deal with his or her own affairs. Alternatively, an enduring power of attorney may come into effect on the donor's mental incapacity (a type of springing power of attorney). In Manitoba, *The Powers of Attorney Act*[1] governs powers of attorney, including EPAs.

In July 2008, the WCLRA published its report *Enduring Powers of Attorney: Areas for Reform*.[2] The report is the product of a consultation process carried out in each of the four western provinces followed by consideration of the policy matters by the WCLRA. The WCLRA published a consultation paper, *Enduring Powers of Attorney: Areas for Reform*,[3] seeking comments on possible reforms, and member agencies consulted the legal profession, government bodies and the public in their respective provinces. The member agencies carried out deliberations in person and by teleconference, and the final report incorporates the consensus view of the agencies.[4]

The WCLRA report makes a number of recommendations for legislative reform in the four western provinces to increase consistency in respect of EPAs and to facilitate the recognition of EPAs among the provinces. The report recognizes that EPAs are useful planning tools for many Canadians, and that reform initiatives must minimize their complexity and cost and keep EPAs as simple, private and user-friendly as possible. The recommendations encompass three areas: the recognition of EPAs, the duties of attorneys under EPAs, and

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[1] C.C.S.M. c. P97 [*Manitoba Act*].

[2] Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform* (Final Report, 2008) [*WCLRA Report*].

[3] Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform* (Consultation Paper, April 2004).

[4] *WCLRA Report*, *supra* note 2 at 8.

safeguards against EPA misuse. As expressed in the WCLRA report:

> This report was inspired by WCLRA's desire to promote harmony in the laws governing EPAs in each of the four western provinces. The recommendations are designed to foster EPA recognition across provincial boundaries, provide ease of access to the use of EPAs, place reasonable expectations on persons appointed as attorneys and protect the interests of donors against the misuse of powers by attorneys. Ease of access is facilitated by maintaining simplicity in the procedures that attend the making and operation of EPAs.[5]

The Manitoba Law Reform Commission participated in and is a signatory to the WCLRA report, and the Commission supports its recommendations. However, the WCLRA report was not intended to deal with all aspects of enduring power of attorney legislation in all four provinces. Statutory differences will remain. Apart from the uniform provisions recommended by the WCLRA, the four law reform agencies are free to examine additional matters within their respective jurisdictions that may require reform. The Commission considers that the publication of the WCLRA report provides a timely opportunity to examine additional EPA matters in Manitoba and other aspects of *The Powers of Attorney Act*[6] that may require reform.

B. SCOPE OF REPORT

This report is a supplementary report to the WCLRA report *Enduring Powers of Attorney: Areas for Reform*. This report provides an overview of the impact of the WCLRA report on *The Powers of Attorney Act*[7] of Manitoba and identifies additional areas of reform for Manitoba. Chapter 2 outlines the sections of the Manitoba Act that are affected by the WCLRA report and those that are not affected. Chapter 3 makes additional recommendations that the Commission considers appropriate in relation to matters that are not addressed by the WCLRA report. These recommendations clarify certain aspects of the Act, and deal with the qualifications required in order for a person to act as an attorney under an EPA and the circumstances that will terminate an attorney's authority. The Commission also recommends amendments to provide for registration on the title to a donor's land of a notice that an attorney is acting under an EPA. Finally, amendments related to EPAs are recommended to *The Wills Act*[8] and *The Homesteads Act*,[9] and the Commission recommends that a legislative review be conducted to ensure that Manitoba statutes include the appropriate references to an attorney acting under an EPA.

Appendix A provides a concordance of the WCLRA report recommendations to the Manitoba Act and identifies the WCLRA recommendations that will require new legislative provisions in Manitoba.

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[5] *Ibid.* at 83.

[6] *Manitoba Act*, *supra* note 1.

[7] *Ibid.*

[8] C.C.S.M. c. W150.

[9] C.C.S.M. c. H80.

In accordance with *The Law Reform Commission Act*,[10] the Commission submits its report to the Minister of Justice and Attorney General for consideration.

C. ACKNOWLEDGEMENT

The Commission wishes to thank Richard Wilson, Registrar General and Chief Operating Officer of the Manitoba Property Registry for his assistance with our deliberations respecting the registration of notice on the title to a donor's land that his or her attorney has begun acting under an enduring power of attorney. However, the views expressed and recommendations contained in this report are those of the Commission.

[10] C.C.S.M. c. L95.

CHAPTER 2

WESTERN CANADA LAW REFORM AGENCIES REPORT

A. WCLRA REPORT RECOMMENDATIONS

The WCLRA report *Enduring Powers of Attorney: Areas for Reform*[1] makes several recommendations to increase legislative consistency in relation to enduring powers of attorney (EPAs) in Manitoba, Saskatchewan, Alberta and British Columbia. The WCLRA report focuses on the recognition of EPAs, the duties of attorneys and safeguards against EPA misuse. It does not address all legislative provisions dealing with EPAs. It is acknowledged that the elements of provincial EPA legislation that are not addressed by the WCLRA report will remain intact, unless reformed through other measures.

This chapter outlines the impact of the WCLRA report on *The Powers of Attorney Act*[2] of Manitoba. The Act came into force in 1997, replacing the earlier *Powers of Attorney Act*[3] and implementing the Commission's recommendations in our 1994 report *Enduring and Springing Powers of Attorney*.[4] While some WCLRA recommendations are consistent with the existing Manitoba Act, in several areas amendments to the Manitoba Act are required. The WCLRA recommendations are explained in detail in the WCLRA report; this report does not attempt to reproduce that discussion.

The WCLRA recommendations affect *The Powers of Attorney Act* as follows:

1. Statement of Enduring Effect

An enduring power of attorney may be springing or continuing. In general, a springing power of attorney comes into effect at a future time or event specified in the power of attorney. A springing EPA is a power of attorney that comes into effect on the donor's mental incapacity. A continuing EPA may take effect immediately, or may spring into effect at a future time specified in the EPA, and continues in effect despite the subsequent loss of mental capacity by the donor.

The first WCLRA recommendation calls for all four western provinces to provide in legislation for both springing and continuing EPAs.[5] The Manitoba Act currently provides for both forms of EPA. Subsection 6(1) provides that a donor may provide in a power of attorney

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[1] Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform* (Final Report, 2008) [*WCLRA Report*].

[2] C.C.S.M. c. P97 [*Manitoba Act*].

[3] *The Powers of Attorney Act*, R.S.M. 1987, c. P97.

[4] Manitoba Law Reform Commission, *Enduring and Springing Powers of Attorney* (Report #83, 1994).

[5] *WCLRA Report*, *supra* note 1 at 10.

that it comes into force at a specified future date or on the occurrence of a specified contingency (a springing power of attorney). Subsections 6(4) and (5) contemplate a power of attorney that comes into force on the mental incompetence of the donor (a springing EPA). Subsection 10(1) sets out the requirements that must be met in order for the authority given by a donor to an attorney to continue despite the mental incompetence of the donor after the execution of the power of attorney. One of these is the requirement in clause 10(1)(d) that the power of attorney state that it is to continue despite the mental incompetence of the donor (a continuing EPA). This requirement is addressed in respect of springing EPAs later in this report. [6]

The remaining recommendations of the WCLRA report apply to both continuing and springing EPAs.

2. Criteria for Recognition

The WCLRA report recommends that the western provinces implement uniform provisions for the recognition of EPAs made in other jurisdictions.[7] An EPA would be recognized if it met the formal requirements of the legislation of the province in which recognition is sought, or if it was made under and met the requirements of the jurisdiction where the EPA was made or the jurisdiction where the donor was habitually resident at the time the EPA was made.

Section 25 of the Manitoba Act provides for recognition of a foreign EPA only if it is valid according to the law of the place in which it was executed. This leads to regrettable consequences. For example, an EPA executed in Saskatchewan with only one witness, say an RCMP officer, is not valid in that province.[8] As a result, the EPA may not be used in Manitoba to effect transactions even if the EPA would have been valid if made in Manitoba.

Implementation of this recommendation requires an amendment to section 25 of the Manitoba Act.

3. Uniform Formalities

The WCLRA report recommends that the four western provinces adopt common formal requirements for the making of EPAs.[9] This concept is elaborated further in the recommendations that follow.

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[6] The springing EPA and the interaction between sections 6 and 10 are discussed in more detail in Chapter 3.

[7] *WCLRA Report, supra* note 1 at 13.

[8] *The Powers of Attorney Act, 2002*, S.S. 2002, c. P-20.3, s. 12 [*Saskatchewan Act*].

[9] *WCLRA Report, supra* note 1 at 15.

4. Formal Validity – Donor Capacity, Express Statement and Donor's Signature

The first set of recommendations regarding formal validity deals with issues related to the donor and to the execution of the EPA. The WCLRA report recommends that EPA legislation require that the donor have capacity to understand the nature and effect of the EPA at the time it is made. The EPA should be in writing and expressly state that the attorney's authority continues in effect during, or comes into effect on, the donor's mental incompetence. The legislation should also require that the EPA be signed by the donor in the presence of a witness, separate and apart from the attorney. Alternatively, the donor could acknowledge his or her signature in the presence of the witness. A proxy may sign on behalf of the donor if the donor is physically incapable of signing and directs the proxy to sign in the donor's presence. The proxy's signature must be witnessed in the same manner as a donor's, and the proxy may not be a witness.[10]

The Manitoba Act is currently consistent with these recommendations in some respects. Subsection 10(1) of the Manitoba Act requires an EPA to be in writing and to provide expressly that it is to continue despite the mental incompetence of the donor, and subsections 6(1) and (4) provide for a springing power of attorney that comes into effect on the mental incompetence of the donor.[11] Under subsection 10(3), an EPA is void if, at the time of execution, the donor is mentally incapable of understanding the nature and effect of the document. Subsection 10(1) also requires the donor to sign the EPA, or acknowledge his or her signature, in the presence of a witness. Under subsection 10(2), where the donor is incapable of reading or signing an EPA, another individual may sign the EPA on the donor's behalf in his or her presence and at his or her direction.

In other respects, the Manitoba Act is not consistent with the WCLRA recommendations. Where a proxy signs an EPA on the donor's behalf, the WCLRA recommends that the proxy's signature be witnessed, while the Manitoba Act currently requires instead that the donor's acknowledgement of the proxy's signature be witnessed. As well, the Manitoba Act does not require the donor to sign the EPA separate and apart from the attorney. Further, while the Manitoba Act prohibits the attorney or the attorney's spouse or common-law partner from being a proxy, it does not expressly state that a witness to the EPA may not be a proxy.

5. Formal Validity – Witnesses

The current legislation of the four western provinces contains formal requirements in respect of the witnessing of an EPA. The WCLRA report recommends that these requirements be uniform among the provinces. It recommends that one witness be required to be present when an EPA is signed, and that the attorney, the attorney's spouse or common-law partner and the donor's spouse or common-law partner be ineligible to act as a witness. A witness should also be required to sign a witness statement setting out that the EPA was signed by the donor, or a proxy in the donor's presence, that the EPA was signed separate and apart from the attorney, and

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[10] *Ibid.* at 23-24.

[11] The Commission discusses the interaction of these provisions further in Chapter 3.

that the donor appeared to understand the nature of the EPA and to agree voluntarily to sign it. The statement should also confirm that the witness is not the attorney, the attorney's spouse or common-law partner or the donor's spouse or common-law partner.[12]

Sections 10 and 11 of the Manitoba Act deal with EPA witness requirements. As recommended by the WCLRA, the Manitoba Act requires one witness to the execution of an EPA. However, subsection 11(1) sets out a restrictive list of categories of individuals who are qualified to be a witness: an individual registered or qualified to be registered to solemnize marriages, a Court of Queen's Bench or Provincial Court judge, a justice of the peace, a medical practitioner, a notary public, a lawyer entitled to practise in Manitoba, a member of the RCMP and a peace officer in a municipal police force. The WCLRA considered defining the categories of persons who would be eligible to be witnesses, and rejected the option as constituting a barrier to EPA accessibility.[13] An amendment to this subsection is required if uniformity among the four provinces is to be achieved. As well, subsection 11(2) of the Manitoba Act provides that the attorney under an EPA and his or her spouse or common-law partner may not act as a witness, but does not disqualify the donor's spouse or common-law partner. The Manitoba Act also contains no requirement for a witness statement.

6. Standard Form EPA

The WCLRA report recommends that a brief standard form EPA be prescribed by regulation. The use of the standard form would be voluntary, but might serve to facilitate EPA recognition among the provinces. The form would include the following elements: the date; the donor's name and date of birth or most recent address; the attorney's name, the donor's choice for a continuing or springing EPA, the statutory list of attorney duties and provision for the donor to define and limit the attorney's authority.[14]

None of the four western provinces has legislation or regulations providing for a standard form EPA. As well, implementation of this recommendation would require an amendment to the Manitoba Act to authorize regulations to be made to provide for a standard form, since the Act currently contains no regulation-making authority.

7. Content of Attorney Duties, Standard of Care, Remuneration and Liability of Attorney

None of the four western provinces has detailed legislative provisions providing guidance to attorneys concerning their duties. The WCLRA report recommends that each of the provinces set out in legislation a list of duties, described in plain language, that are specific to EPA attorneys. The report recommends that EPA legislation provide that attorneys have the duty to:

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[12] *WCLRA Report*, *supra* note 1 at 24.

[13] *Ibid.* at 23.

[14] *Ibid.* at 25.

(a) act honestly, in good faith and in the best interests of the donor;
(b) take into consideration the known wishes of the donor and the manner in which the donor managed his or her affairs while competent;
(c) use assets for the benefit of the donor;
(d) keep the donor's property and funds separate, except as permitted by statute;
(e) keep records of financial transactions;
(f) provide details of financial transactions upon request; and
(g) give Notice of Attorney Acting.[15]

The attorney should be held to the standard of care of a prudent person having comparable experience and expertise. As well, the attorney should not receive remuneration unless the EPA expressly authorizes the remuneration and states the basis for it. The legislation should provide that the attorney may be reimbursed from the donor's property for reasonable expenses properly incurred in acting as the attorney. The legislation should not characterize attorneys as fiduciaries, trustees or agents.[16]

Finally, the WCLRA report recommends that the attorney should not be personally liable for loss or damage to the donor's property or financial affairs if the attorney complies with the provisions of the EPA, the attorney's duties under the Act or as set out by court order, the directions of a court or any other duty that may be imposed by law.[17]

Subsections 22(1) and (2) of the Manitoba Act currently require an attorney to provide an accounting in certain circumstances, as discussed in the following section. However, the Act does not include most of the detailed provisions recommended by the WCLRA, and does not require express authorization in the EPA for attorney remuneration, or require that notice be given by the attorney.

As well, the Manitoba Act sets two standards of care for attorneys, depending on whether the attorney receives compensation for acting, that are not consistent with the WCLRA recommendations. Subsection 19(2) provides that an attorney who is not compensated for acting must exercise the judgment and care that a person of prudence, discretion and intelligence would exercise in the conduct of his or her own affairs. Under subsection 19(3), an attorney who is compensated must exercise the judgment and care that a person of prudence, discretion and intelligence in the business of managing the property of others is required to exercise.[18] These subsections will require amendment to achieve uniformity with the other western provinces.

As well, rather than providing that an attorney who complies with all legal requirements is protected from liability, section 20 of the Manitoba Act provides that an attorney who fails to act as required by section 19 is liable to the donor for any loss occasioned by the failure. While

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[15] *Ibid.* at 40-41.

[16] *Ibid.*

[17] *Ibid.* at 41.

[18] In our 1994 report, we noted that these subsections reflect the standards applied by the common law in judging the actions of an attorney: see Manitoba Law Reform Commission, *Enduring and Springing Powers of Attorney*, *supra* note 13 at 16.

the Manitoba Act has essentially the same effect, the recommendation of the WCLRA should be adopted in place of the current provision, in the interest of uniformity.[19]

8. Specific Requirements of the Duty to Account

The WCLRA report contains detailed recommendations regarding the duty of an attorney under an EPA to account to others with respect to his or her administration of the donor's property and financial affairs. It recommends that the duty of an attorney to keep records be active, ongoing and mandatory, and that the duty require making an inventory of the property concerned, recording transactions and preserving documents. The duty to provide details of transactions, however, would be passive, arising upon the request of specified persons. This duty would be met by providing a summary statement of the property controlled by the attorney and giving the person an opportunity to examine records. Immediate family members and any person designated by the donor would be entitled to request details at reasonable intervals, although the donor could exclude any person by name in the EPA.[20]

The report recommends further that where an immediate family member or designated person disagrees with the attorney about what constitutes a reasonable interval, the person requesting the information should be entitled to apply to court for an order directing the attorney to provide the financial details. Other interested persons should be entitled to request a public official appropriate to the province (e.g., the Public Trustee) to direct the attorney to provide details or to apply to court for an order so directing. To qualify as an 'interested person', an individual or institution must establish a need to know in the best interests of the donor.[21]

The duty to account under the Manitoba Act is somewhat different, and amendments will be required to comply with the recommendations for uniformity. Subsection 22(1) is similar to the WCLRA recommendation, in that it requires an attorney to provide an accounting upon demand by any person named as a recipient of an accounting by the donor in the EPA. However, where no recipient is named or the recipient is the attorney or the attorney's spouse or common-law partner, or is mentally incompetent or deceased, the Manitoba Act requires the attorney to provide an accounting annually to the nearest relative of the donor.

In the Manitoba Act, 'nearest relative' is defined in subsection 1(1) according to a declining list: the donor's spouse or common-law partner, child, grandchild, great-grandchild, parent, sibling, niece or nephew, or where no person qualifies, the Public Trustee. The WCLRA report explains that an 'immediate family member' should be the donor's spouse, adult child, parents and adult siblings; it recommends that all of these persons be entitled to obtain information from the donor's attorney.[22]

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[19] The WCLRA recommendation is also more consistent with the approach of Manitoba's *Trustee Act*, C.C.S.M., c. T160, ss. 73(2), 79.

[20] *WCLRA Report*, *supra* note 1 at 46.

[21] *Ibid.*

[22] *Ibid.* at 44.

9. Inclusion of Duties in Standard Form EPA

The WCLRA report recommends that the standard form EPA to be prescribed by regulation include a list of the statutory attorney duties.[23] As noted above, none of the four western provinces currently provides for a standard form EPA.

10. Knowledge of Duties

The WCLRA report recognizes that educational mechanisms will be needed to increase awareness among donors and attorneys in respect of attorney duties. The report recommends that public education materials and best practices for lawyers and lay persons be developed and made widely available online and through the office of a public official or appropriate organization (e.g., the Public Trustee or Law Society) in each province.[24]

11. Knowledge and Acceptance of Duties by Attorney

Currently, none of the four western provinces provides a formal mechanism for an attorney to acknowledge or consent to his or her appointment. The WCLRA report recommends that the attorney acknowledge and accept the duties under an EPA in a Notice of Attorney Acting,[25] described in more detail below.

12. Giving Notice of Attorney Acting

The WCLRA report recommends that legislation require an attorney under an EPA to give a 'Notice of Attorney Acting', signed by the attorney, to specified persons. The notice should be required to be sent within a reasonable period of time after the donor is declared to lack the mental capacity to manage his or her affairs and the attorney assumes exclusive responsibility for managing the donor's affairs. The legislation should provide that the donor may designate in the EPA any person to receive the notice. Where no person is named, the attorney should be required to make reasonable efforts to give notice to all of the donor's immediate family members (the donor's spouse or common-law partner, adult children, parents and adult siblings). The legislation should not permit the donor to waive the attorney's duty to give notice, but should allow the donor to name in the EPA any immediate family member who should not receive notice. Where there is no person to whom notice can be given, the attorney should give notice to the appropriate public official. The attorney should also be required to give notice to the donor.[26]

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[23] *Ibid.* at 47.

[24] *Ibid.* at 49.

[25] *Ibid.* at 54.

[26] *Ibid.* at 63-64.

The WCLRA recommended that the Notice of Attorney Acting list the attorney's statutory duties. Finally, the regulations should provide a standard form Notice of Attorney Acting, although use of the standard form should not be mandatory.[27]

The Manitoba Act currently does not require an attorney under an EPA to give notice that the donor is no longer capable of managing his or her affairs. New provisions are required to implement these recommendations, and to provide the regulation-making authority to prescribe a standard form of notice. We note that under the Manitoba Act, joint attorneys may be appointed under an EPA, so that more than one attorney may be required to give notice.

13. Reporting Suspected Misuse of EPA

The WCLRA report discusses actions that might be taken by a person who suspects misuse of an EPA by an attorney. Currently, section 24 of the Manitoba Act authorizes an attorney, the Public Trustee, the donor's nearest relative, a recipient of an accounting or, with the approval of the court, an interested person, to apply to court in respect of an EPA. The court may make any order it considers appropriate, including an order providing advice or directions respecting the management of the estate, an order removing the attorney, an order requiring the attorney to provide the court with an accounting or, subject to the provisions of the EPA, an order varying the attorney's powers or appointing a replacement attorney.

The WCLRA report recommends that the four western provinces create a voluntary reporting scheme with certain features in common, modeled after *The Public Guardian and Trustee Act*[28] of Saskatchewan. The legislation should designate a public official to receive reports of concerns about the conduct of an attorney. A person who in good faith reports possible misuse should be protected; the legislation should prohibit any action or other proceeding against a person who reports misuse or participates in an investigation unless the person acted maliciously or without reasonable and probable grounds.[29]

The public official should have the discretion to investigate suspected EPA misuse. An investigation should be made where the official has grounds to believe that the donor has been declared mentally incapable and the attorney has breached one or more of the statutory attorney duties. The legislation should provide the public official with investigation powers and authority, including the authority to suspend the withdrawal or payment of funds from an account at a financial institution for up to 30 days and to require the institution to provide relevant information, to authorize payments from a suspended account, and to apply for a warrant to enter and search premises and seize and take possession of records. The official should have the authority to apply to court for an order terminating an EPA or appointing a new attorney, and should also undertake an educative and supportive role in the prevention of EPA

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[27] *Ibid.* at 64.

[28] S.S. 1983, c. P-36.3.

[29] *WCLRA Report*, *supra* note 1 at 73.

misuse. In addition, private persons should also have the right to apply to court to terminate an EPA.[30]

The WCLRA report also makes recommendations with respect to financial institutions. Institutions should be given the authority to suspend the withdrawal or payment of funds from an account for up to five days where the institution has reasonable grounds to believe that an attorney under an EPA is acting for an incapable donor and has breached one or more of the statutory attorney duties. Financial institutions should also have the discretion to allow payments from the suspended account, and the duty to advise the public official referred to above immediately of the reasons for the suspension, and to provide any financial information held by the institution respecting the person involved.[31]

The scheme recommended in the WCLRA report is significantly more comprehensive than that of the current Manitoba Act. Currently, the Act merely provides that the court may make an order in respect of an EPA, including an order providing advice and directions, a declaration that the EPA is invalid or terminated, or an order requiring an accounting. There is no mechanism for reporting suspected EPA misuse or providing for the investigation of suspected misuse. Amendments will be required to the Act to implement the recommended model.

14. Transitional Provisions

The WCLRA report recommends that a number of provisions be enacted in the four western provinces to provide for the transition to the new EPA harmonized scheme:

(a) EPAs that were validly made under the existing law should continue in effect under the revised legislation;
(b) the new 'foreign EPA' recognition criteria should apply to existing EPAs;
(c) the new attorney duties should apply to an attorney under an existing EPA where the attorney is acting for a mentally incapable donor when the new law takes effect (including the duty to give Notice of Attorney Acting within a reasonable period);
(d) the duty to give Notice of Attorney Acting should apply to an attorney under an existing EPA where the donor becomes mentally incapable after the new requirements take effect;
(e) an attorney under an existing EPA should be required to meet the new standard of care provisions when carrying out duties in respect of a donor who is mentally incapable when, or becomes mentally incapable after, the new law takes effect;
(f) the new attorney remuneration provisions should not apply to existing EPAs, and a transitional provision should validate any existing EPA that expressly authorizes remuneration even if it does not meet the new criteria. The provision authorizing attorneys to claim reasonable expenses properly incurred should apply to attorneys acting under existing or new EPAs;

[30] *Ibid.* at 73-74.

[31] *Ibid.* at 74.

(g) the protection from liability provisions should apply to all attorneys, under existing or new EPAs;
(h) each province should undertake an extensive public education process before the new provisions take effect; and
(i) the new measures for reporting and investigating suspected EPA misuse should apply to existing and new EPAs.[32]

With respect to the duty to provide details of financial transactions, the WCLRA recommended that each of the provinces should determine whether any differences in the details of the duty under the new law are of such significance with respect to the donor's likely expectations that the existing law, or part of it, should continue to apply to existing EPAs.[33]

In Manitoba, the WCLRA duty to provide details on the request of any person designated by the donor is consistent with clause 22(1)(a), which requires an accounting to be provided on demand by any named recipient. However, the WCLRA recommendations would also allow any immediate family member to request details, unless specifically excluded by the donor. Under the current Manitoba Act, in the absence of an appropriate recipient, the attorney must account annually to the donor's nearest relative, but there is no general right for any other immediate family member to request details. A donor under an EPA made under the existing Act who did not wish another immediate family member to receive details would not have known that it was necessary to exclude the person. For example, a donor with several children and grandchildren may not have expected that a sibling would become entitled to receive information from the donor's attorney.

In the Commission's opinion, the provisions of the existing Act regarding the duty to provide an accounting in respect of the estate should continue to apply to EPAs made before the amendments recommended by the WCLRA come into force.

RECOMMENDATION 1

***The pertinent sections of* The Powers of Attorney Act *should be amended to comply with the recommendations of the Western Canada Law Reform Agencies (WCLRA) report* Enduring Powers of Attorney: Areas for Reform.**

RECOMMENDATION 2

The provisions of the existing Act regarding the duty of an attorney acting during the mental incompetence of the donor to provide an accounting in respect of the donor's estate should continue to apply to enduring powers of attorney made before the amendments recommended by the WCLRA come into force.

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[32] *Ibid.* at 81-82.

[33] *WCLRA Report*, *supra* note 1 at 78.

B. PROVISIONS OF *THE POWERS OF ATTORNEY ACT* THAT ARE NOT AFFECTED

Several provisions of *The Powers of Attorney Act* are not affected by the recommendations of the WCLRA; some of these are discussed further in Chapter 3. The provisions that are not affected:

- define several terms and deem cohabiting persons who have registered their common-law relationship under *The Vital Statistics Act* to be cohabiting in a conjugal relationship of some permanence (the definition of 'nearest relative' and subsequent references to that term will require amendment to comply with the WCLRA recommendations relating to immediate family members) (s. 1);
- provide that the Act applies despite any agreement or waiver to the contrary, subject to certain exceptions for EPAs executed before the Act came into force (s. 2);
- provide that the rights and powers of an attorney apply in respect of property acquired by the donor after execution of a power of attorney unless the power of attorney provides otherwise (s. 3);
- provide that where the authority of an attorney terminates, an act in favour of a person who does not know of the termination is valid and binding, and an attorney who does not know of the termination, and could not have known with reasonable care, is not liable to the donor for acting (s. 4);
- provide for an irrevocable power of attorney for valuable consideration (s. 5);
- provide for a springing power of attorney that comes into force at a specified future date or on the occurrence of a specified contingency, and for the making of a declaration that the date or contingency has occurred (this provision may remain intact other than as treated in this report in Chapter 3) (s. 6);
- authorize a court to determine whether the date or contingency specified in a springing power of attorney has occurred (s. 7);
- provide that a declaration that a specified date or contingency has occurred is conclusive proof that it has occurred where a third party relies on the declaration in good faith (s. 8);
- protect an attorney from liability where the attorney mistakenly but reasonably believes in good faith that a specified date or contingency has or has not occurred (s. 9);
- provide that a donor or attorney may file a copy of an EPA with the Public Trustee (s. 12);
- set out the circumstances in which the authority of an attorney under an EPA terminates or is suspended (this provision may remain intact other than as treated in this report in Chapter 3) (ss. 13-14);
- provide that an action taken by an attorney under an EPA after its suspension or termination is valid if the attorney reasonably believed the power of attorney was in effect (s. 15);

- set out the eligibility requirements for an individual to be an attorney under an EPA (this provision may remain intact other than as treated in this report in Chapter 3) (s. 16);
- provide for the appointment of any number of attorneys to act jointly or successively under an EPA, set out how decisions are made by joint attorneys where there is disagreement and protect an attorney who provides a written objection to a decision from liability (ss. 17-18);
- impose a duty on an attorney to act during the donor's mental incompetence if the attorney has at any time acted under the EPA or otherwise indicated acceptance of the appointment (s. 19(1));
- prohibit an attorney who is subject to the duty to act from renouncing his or her appointment except with the leave of the court (s. 21);
- provide that no person who receives an accounting from an attorney under the Act has any duty or liability in respect of the accounting (s. 22(3));
- authorize the attorney, subject to the provisions of the EPA, to satisfy a legal obligation of the donor to maintain and support another person, including the attorney (s. 23);
- provide that the court may, on application made in respect of an EPA, having regard to the EPA and the donor's intentions, make any order that the court considers appropriate, including an order providing advice or directions, an order removing the attorney, an order requiring an accounting, and others (s. 24).

CHAPTER 3

ADDITIONAL ENDURING POWER OF ATTORNEY REFORMS

The WCLRA report *Enduring Powers of Attorney: Areas for Reform*[1] makes several recommendations to increase legislative consistency in relation to EPAs, but does not deal with all aspects of provincial EPA legislation. In the Commission's view, there are additional improvements that are appropriate for Manitoba.

A. SPRINGING POWERS OF ATTORNEY

Sections 6 through 9 of *The Powers of Attorney Act*[2] deal with springing powers of attorney. Springing powers of attorney may be created to come into effect at a specified future date – related, for example, to a planned vacation or surgery – or on the occurrence of a specified contingency. The specified contingency may be the mental incompetence of the donor. The donor may name one or more persons from whom the attorney may request a written declaration that the date or contingency has occurred, or two medical practitioners may act as the declarant in respect of the donor's mental incompetence where no declarant is named or the named declarant is unwilling or unable to act.

The WCLRA report describes a springing power of attorney that comes into force on the donor's mental incompetence as one form of enduring power of attorney (EPA). In the Manitoba Act, and under the WCLRA recommendations, certain formal requirements are specified for an EPA. As noted in Chapter 2, the formal requirements of sections 10 and 11 of the current Act will require amendment to comply with the WCLRA recommendations. Further, in the interests of certainty and consistency, the Manitoba Act should specifically provide that for a springing power of attorney contingent upon the donor becoming mentally incompetent to be an EPA, it must comply with the formal requirements for an EPA.

Currently, clause 10(1)(d) of the Manitoba Act requires that an EPA include a statement that "it is to continue despite the [subsequent] mental incompetence of the donor".[3] In practice, such a statement may not be included in a springing power of attorney contingent upon the donor becoming mentally incompetent, and is arguably superfluous. The recommendations of the WCLRA report clarify this point; the report recommends that an EPA "must contain an express statement that the attorney's authority continues in effect during, *or comes into effect on*, the donor's mental incompetence".[4]

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[1] Western Canadian Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform* (Final Report, 2008) [*WCLRA Report*].

[2] C.C.S.M. c. P97 [*Manitoba Act*].

[3] *Ibid*., s. 10(1)(d).

[4] *WCLRA Report*, *supra* note 1 at 23 [emphasis added].

RECOMMENDATION 3

The Act should be amended to clarify that, for a springing power of attorney that comes into force on the mental incompetence of the donor to be an enduring power of attorney, it must comply with the formal requirements for an enduring power of attorney.

RECOMMENDATION 4

Clause 10(1)(d) of the Act should be amended to provide that the authority of an attorney under an enduring power of attorney is not terminated by the mental incompetence of the donor if the power of attorney provides that it is to continue despite the mental incompetence of the donor or that it comes into effect on the mental incompetence of the donor.

B. TERMINATION OF AN ATTORNEY'S AUTHORITY

The WCLRA report does not address the termination of an attorney's authority under an EPA. Section 13 of the Manitoba Act sets out a number of circumstances that will terminate the attorney's authority, including the appointment of a substitute decision maker for the donor in relation to the donor's estate under *The Vulnerable Persons Living with a Mental Disability Act*,[5] the bankruptcy, mental incompetence or death of the attorney, the death of the donor or termination by a court.

The Commission has reviewed provisions dealing with the termination of an attorney's authority and the termination of an EPA in several other provincial powers of attorney statutes, and considers that there are additional terminating events that should be adopted in Manitoba. In addition to the existing circumstances set out in section 13, the Act should provide that an attorney's authority under an EPA terminates:

- if the attorney is the donor's spouse or common-law partner and the marriage or common-law relationship ends;
- if the donor, while mentally competent, expressly or impliedly revokes the attorney's authority or terminates the EPA;
- if the donor executes a new EPA, unless a contrary intention appears in the new EPA;
- on the date specified in the EPA;
- if the attorney ceases to qualify as an attorney;
- on the dissolution, winding-up or cessation of business of a corporate attorney.[6]

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[5] C.C.S.M. c. V90.

[6] *Adult Guardianship and Planning Statutes Amendment Act, 2007*, S.B.C. 2007, c. 34, s. 38, amending the *Power of Attorney Act*, R.S.B.C. 1996, c. 370, creating new s. 29-30 (unprocl.) [*B.C. Amendment Act*]; *The Powers of Attorney Act, 2002*, S.S. 2002, c. P-20.3, s. 19 [*Saskatchewan Act*]; *Powers of Attorney Act*, R.S.A. 2000, c. P-20, s. 13 [*Alberta Act*]; *Substitute Decisions Act, 1992*, S.O. 1992, c. 30, s. 12 [*Ontario Act*].

RECOMMENDATION 5

The Act should be amended to provide that, in addition to the circumstances set out in section 13, an attorney's authority under an enduring power of attorney terminates:

- ***if the attorney is the donor's spouse or common-law partner and the marriage or common-law relationship ends;***
- ***if the donor, while mentally competent, expressly or impliedly revokes the attorney's authority or terminates the enduring power of attorney;***
- ***if the donor executes a new enduring power of attorney, unless a contrary intention appears in the new enduring power of attorney;***
- ***on the date specified in the enduring power of attorney;***
- ***if the attorney ceases to qualify as an attorney;***
- ***on the dissolution, winding-up or cessation of business of a corporate attorney.***

C. APPOINTMENT OF SUBSTITUTE ATTORNEY

As discussed above, section 13 of the Manitoba Act provides that the authority of an attorney under an EPA terminates on the death of the attorney. The Act does not address the termination of the EPA itself. In *Re Potasky*,[7] the son of the donor was the sole attorney appointed under an EPA. The son died, and the donor's daughter in law applied to be appointed as attorney in place of her husband, under clause 24(1)(g). The Manitoba Court of Queen's Bench considered the effect of the death of the sole attorney appointed under an EPA, and concluded that the Manitoba Act did not alter the common law principle that an EPA terminates on the death of the sole attorney. As a result, the court dismissed the application.[8]

The Commission considers that, where the sole attorney under an EPA dies during the mental incompetence of the donor and the EPA does not name a successor attorney, the EPA should not automatically terminate, unless expressly provided in the EPA. The court should have jurisdiction to appoint a substitute attorney. Alternatively, an interested person may apply to court to terminate the EPA.

RECOMMENDATION 6

The Act should be amended to provide that where the sole attorney under an enduring power of attorney dies during the mental incompetence of the donor, and no successor attorney was named in the enduring power of attorney:

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[7](2002), 164 Man. R. (2d) 310 (QB).

[8] In *Potasky*, the daughter in law had been informally managing the donor's property but could not apply to be appointed committee of the donor's estate because the daughter in law was not a Manitoba resident.

- ***the enduring power of attorney does not automatically terminate; and***
- ***the court may, on application by a person referred to in subsection 24(2), make an order appointing a substitute attorney.***

D. ATTORNEY ELIGIBILITY

The WCLRA report declined to recommend uniformity in relation to eligibility requirements for EPA attorneys; rather, the WCLRA suggested that each province should deal with the issue as it sees fit.[9] The requirements among western provinces vary. Section 16 of the Manitoba Act provides simply that "an individual is eligible to be an attorney under an enduring power of attorney if, at the time the donor signs the document, the individual is an adult and mentally competent and is not an undischarged bankrupt".[10]

Other provinces include additional criteria that disqualify a person from acting as an attorney under an EPA. In Saskatchewan, an individual is disqualified if he or she has been convicted within the last 10 years of a criminal offence relating to assault, sexual assault or other acts of violence, intimidation, criminal harassment, uttering threats, theft, fraud or breach of trust (unless the individual is pardoned or the donor, in writing, acknowledges the conviction and consents to the individual acting). An individual or corporation is disqualified if the person's business or occupation involves providing personal care or health care services to the donor for remuneration.[11]

Under the B.C. amendments, an individual is disqualified if he or she provides personal care or health care services to the donor for compensation (unless the individual is a spouse or near relative of the donor) or is an employee of a facility in which the donor resides and through which the donor receives personal care or health care services. Other than individuals, the only bodies that may be named as an attorney are the Public Guardian and Trustee or a financial institution authorized to carry on trust business.[12]

In the Commission's view, the Saskatchewan and B.C. provisions represent some reasonable protections for the donor under an EPA. In previous reports, the Commission has considered whether a person who provides health care or personal care services to another for compensation should be disqualified from appointment as a substitute decision maker for the purpose of making health care decisions. The Commission rejected such a restriction as "an unreasonable restraint on the discretion of the maker to appoint the individual in whom he or she

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[9] *WCLRA Report*, *supra* note 1 at 17.

[10] *Manitoba Act*, *supra* note 2, s. 16. See Manitoba Law Reform Commission, *Enduring and Springing Powers of Attorney* (Report #83, 1994) at 11-12.

[11] *Saskatchewan Act*, *supra* note 6, s. 6.

[12] *B.C. Amendment Act*, *supra* note 6, s. 38 creating new s. 18.

has the greatest confidence".[13] Instead, we recommended an eligibility requirement that the person must have no conflict with the patient that raises a reasonable doubt whether the person will comply with the duties imposed by the Act.[14] In the present case, however, the substitute decision making relates to financial decisions and the management of property rather than to health care. In this context, the Commission considers that the potential for a conflict of interest is high, and that a person who provides personal care or health care services to the donor for compensation should be disqualified from appointment.

The Commission recommends that the Manitoba Act be amended to disqualify the following from acting as an attorney under an EPA:

- an individual who has been convicted within the previous 10 years of a criminal offence relating to assault, sexual assault or other acts of violence, intimidation, criminal harassment, uttering threats, theft, fraud or breach of trust, unless the individual has been pardoned or the donor, in writing, acknowledges the conviction and consents to the individual acting;
- an individual (other than a spouse or near relative of the donor) or corporation that provides personal care or health care services to the donor for compensation; and
- an individual (other than a spouse or near relative of the donor) who is an employee of a facility in which the donor resides and through which the donor receives personal care or health care services.

As well, the Public Trustee and a corporation other than a corporation that provides personal care or health care services to the donor for compensation should be authorized to act as an attorney under an EPA.

RECOMMENDATION 7

The Act should be amended to disqualify the following from acting as an attorney under an enduring power of attorney:

- ***an individual who has been convicted within the previous 10 years of a criminal offence relating to assault, sexual assault or other acts of violence, intimidation, criminal harassment, uttering threats, theft, fraud or breach of trust, unless the individual has been pardoned or the donor, in writing, acknowledges the conviction and consents to the individual acting;***
- ***an individual (other than a spouse or near relative of the donor) or corporation that provides personal care or health care services to the donor for compensation; and***

[13] Manitoba Law Reform Commission, *Self-Determination in Health Care (Living Wills and Health Care Proxies)* (Report #74, 1991) at 14; Manitoba Law Reform Commission, *Substitute Consent to Health Care* (Report #110, 2004) at 33-35.

[14] Manitoba Law Reform Commission, *Substitute Consent to Health Care*, *ibid*. at 34.

- ***an individual (other than a spouse or near relative of the donor) who is an employee of a facility in which the donor resides and through which the donor receives personal care or health care services.***

RECOMMENDATION 8

The Act should be amended to provide that the Public Trustee and a corporation other than a corporation that provides personal care or health care services to the donor for compensation may act as an attorney under an enduring power of attorney.

E. DUTY TO ACT

The WCLRA report recommended that EPA legislation identify the duties of an attorney who acts for a mentally incompetent donor, and that these duties be uniform among the four western provinces. The WCLRA noted that legislation in Manitoba and Alberta places a positive duty on an attorney to act in certain circumstances, but did not recommend uniform adoption of that requirement.[15]

Subsection 19(1) of the Manitoba Act provides as follows:

> (1) An attorney under an enduring power of attorney who knows or ought reasonably to know that the donor is mentally incompetent is under a duty to act on behalf of the donor during the mental incompetence if
>
> (a) the attorney has at any time acted under the power of attorney or otherwise indicated acceptance of the appointment as attorney; and
>
> (b) the power of attorney has not been terminated.[16]

This provision implements a recommendation of the Commission in our 1994 report,[17] and in our opinion, the duty to act as set out in subsection 19(1) remains entirely appropriate. A donor who understands an attorney to have accepted appointment as an attorney may quite reasonably believe that the donor's affairs will be under proper management should he or she become mentally incompetent. An attorney who wishes to be relieved of his or her duties may renounce the appointment with leave of the court, but until that time, the acceptance of attorney duties under an EPA should be considered to be a binding commitment and give rise to a duty to act.

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[15] *WCLRA Report*, *supra* note 1 at 31.

[16] *Manitoba Act*, *supra* note 2.

[17] Manitoba Law Reform Commission, *Enduring and Springing Powers of Attorney*, *supra* note 10 at 16-18.

F. RECORDING AN EPA ON TITLE TO LAND

The WCLRA report recommends that an attorney under an EPA be required to give a Notice of Attorney Acting to persons designated by the donor, immediate family members or the appropriate public official, to let others know that the attorney has begun managing the donor's affairs without the donor's supervision. As discussed earlier in this report, the Notice would be required to be sent within a reasonable period of time after the donor is declared to lack the mental competence to manage his or her affairs and the attorney assumes exclusive responsibility for managing the donor's affairs.[18]

Where a donor owns real property, the WCLRA report notes that the land titles systems of the four western provinces provide no means of noting on the title to the donor's land that the donor is precluded from dealing with the property. The WCLRA did not propose a uniform solution, but also noted "Manitoba's solution to an analogous situation in that a spouse with a homestead (dower) interest can register a notice against title to prevent any dealings with the land until the notice is vacated or discharged".[19]

In the Commission's view, *The Powers of Attorney Act* should be amended to provide a mechanism for registering a Notice of Attorney Acting in respect of a donor's land.[20] The Act should require an attorney who has authority in respect of land under an EPA to register the Notice in the appropriate land titles office. The attorney should also be required to file a statutory declaration stating that all persons entitled to receive the Notice of Attorney Acting under the Act have been served with notice of the land titles registration. Registration should be required within a reasonable period of time after service. The registration form should be prescribed by regulation, developed in consultation with the Land Titles Office. As well, the district registrar should have the authority to refuse registration where he or she is not satisfied that the requirements of the Act have been met.

The Commission does not consider that it is necessary to require that the EPA itself be registered with the Notice of Attorney Acting or that proof of the donor's incompetence be provided. The purpose of registering the Notice of Attorney Acting is to give notice to others that the attorney has become solely responsible for decision making in respect of the land (or jointly responsible, in the case of multiple attorneys with responsibility respecting the land). Like the registration of a builders' lien[21] or a homestead notice, registration of the Notice would not constitute proof of the facts alleged; instead it would serve notice to others that a set of

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[18] *WCLRA Report*, *supra* note 1 at 63-64.

[19] *Ibid*. at 62, n. 108; *The Homesteads Act*, C.C.S.M. c. H80, s. 19.

[20] Provision is required with respect to land registered in the land titles system under *The Real Property Act*, C.C.S.M., c. R30, and with respect to land recorded in the deed registry under the operation of *The Registry Act*, C.C.S.M., c. R50; some privately owned land in Manitoba is sill registered in the older system. Under section 8 of *The Registry Act*, a reference to a land titles office in any Act means a reference to a registry office under *The Registry Act*. Note also that *The Registry Act* authorizes the registration of the appointment of a substitute decision maker for property under *The Vulnerable Persons Living with a Mental Disability Act*, *supra* note 5: see the definition of 'instrument' in section 1 of *The Registry Act.*

[21] See *The Builders' Liens Act*, C.C.S.M., c. B91.

circumstances is claimed to exist. The persons most likely to have an interest in the matter will be served with notice of the registration of the Notice of Attorney Acting on the title, and a person who disputes the accuracy of the claim may apply to court to have the Notice vacated.

When an attorney wishes to carry out a transaction in respect of land under the authority of a power of attorney, whether enduring or non-enduring, the power of attorney must be provided. The current practice of the Land Titles Office is to require that the power of attorney be attached to the document to be registered, or that the power of attorney itself be registered in the Document Register (in which case the document dealing with the land must refer to the power of attorney registration number).[22] As well, where the power of attorney is a springing power of attorney, "Land Titles will not rely on the mere execution of a document by the attorney … as proof that the power he or she is relying on has become effective".[23] In the case of a springing EPA, the Land Titles Office will require evidence of incompetence as set out in the power of attorney, or if it is silent or the declarant is unable or unwilling to act, the declaration of two medical practitioners as required under *The Powers of Attorney Act*. These verification practices may continue where an attorney who has filed a Notice of Attorney Acting intends to carry out a transaction in respect of the land.

The Homesteads Act also provides that on the registration of a homestead notice, the district registrar shall not complete the registration of a disposition of the homestead described in the notice unless the notice is vacated or discharged.[24] *The Powers of Attorney Act* should include a similar prohibition, providing that no further dealings with the land may be accepted by the district registrar unless the notice has been vacated or discharged, the court has directed that a disposition be permitted or the transaction is carried out by an attorney under the EPA (which would be subject to the verification practices discussed above). The Act should authorize the district registrar to vacate the notice in appropriate situations, such as on the death of the donor or the filing of a court order requiring the notice to be vacated.

RECOMMENDATION 9

The Act should be amended to require an attorney acting under an enduring power of attorney to register a Notice of Attorney Acting in respect of the donor's land in the appropriate land titles office. The Act should provide that

- ***the Notice must be registered within a reasonable period of time after service of the Notice as required under the Act;***
- ***the Notice must be accompanied by a statutory declaration of the attorney stating that notice of the registration has been served on all persons entitled to receive the Notice of Attorney Acting;***
- ***the district registrar may refuse registration of the Notice where he or she is not satisfied that the requirements of the Act have been met;***

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[22] Manitoba Property Registry, online: <www.gov.mb.ca/tpr/rg_directives/poa_partrevocation.pdf.

[23] Manitoba Property Registry, online: <www.gov.mb.ca/tpr/land_titles/lto_offices/docs/cecc/cecc19_poa.pdf>.

[24] *Supra* note 19, s. 19(2).

- ***on registration of the Notice, the district registrar shall not complete the registration of any transaction in respect of the land unless the Notice has been vacated or discharged, the court has directed that the transaction be permitted or the transaction is carried out by an attorney under the enduring power of attorney; and***
- ***the district registrar may vacate the Notice in circumstances such as the death of the donor or the filing of a court order requiring the Notice to be vacated.***

G. PROTECTION FOR BENEFICIARIES

Section 24 of *The Wills Act*[25] of Manitoba protects the interests of beneficiaries to a will in cases where a committee or a substitute decision maker for property appointed under *The Vulnerable Persons Living with a Mental Disability Act*[26] disposes of property that was devised or bequeathed in the owner's will. It provides that the beneficiaries under the will have the same interest in the proceeds of the disposition as they would have had in the property if it had not been disposed of. Section 24 was amended to include the reference to substitute decisions makers[27] before EPAs were added to *The Powers of Attorney Act*, and it does not provide similar protection when the person disposing of the property is an attorney acting under an EPA.

In the Commission's 2003 report, *Wills and Succession Legislation*,[28] we recommended that section 24 should include a reference to an attorney acting under an EPA.[29] We reiterate that recommendation.

RECOMMENDATION 10

Section 24 of* The Wills Act *should be amended to provide that where an attorney appointed under an enduring power of attorney under* The Powers of Attorney Act *disposes during the mental incompetence of the donor of property that was devised or bequeathed in the donor's will, the beneficiaries under the will have the same interest in the proceeds of the disposition as they would have had in the property if the disposition had not been made.

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[25] C.C.S.M. c. W150.

[26] *Supra* note 5.

[27] *The Vulnerable Persons Living with a Mental Disability and Consequential Amendments Act*, S.M. 1993, c. 29, s. 208.

[28] Manitoba Law Reform Commission, *Wills and Succession Legislation* (Report #108, 2003) at 36.

[29] This issue was also addressed in the *B.C. Amendment Act*, *supra* note 6, s. 74, amending the *Estate Administration Act*, R.S.B.C. 1996, c. 122, creating new s. 67.2.

H. *THE REAL PROPERTY ACT*

Subsection 172(1) of *The Real Property Act*[30] provides that an application, consent, proceeding or act required or permitted to be done under the Act may be made, given, taken or done on behalf of a person of unsound mind by the person's committee of the estate or by the person's substitute decision maker for property appointed under *The Vulnerable Persons Living with a Mental Disability Act*, if the substitute decision maker has the power to act with respect to matters falling within the scope of *The Real Property Act*. Under subsection 172(2), where a person of unsound mind has no committee or substitute decision maker for property, the Public Trustee or another person appointed by the district registrar may act on his or her behalf. Subsection 34(1) similarly refers to committees and substitute decision makers in respect of applications to bring land under *The Real Property Act*.

These subsections of *The Real Property Act* were amended with the enactment of *The Vulnerable Persons Living with a Disability Act*[31] to incorporate references to substitute decision makers. *The Real Property Act* has not been similarly updated with respect to attorneys acting under EPAs. In the interests of clarity, these provisions should be amended to also refer to an attorney acting under an EPA.

RECOMMENDATION 11

***Sections 34 and 172 of* The Real Property Act *should be amended to provide that an attorney acting under an enduring power of attorney under* The Powers of Attorney Act *may act on behalf of a person of unsound mind in matters arising under* The Real Property Act.**

I. *THE HOMESTEADS ACT*

Two primary objectives of the WCLRA report are to increase the level of EPA uniformity among the four western provinces and promote the recognition of EPAs made in other provinces. The report notes that the issue of the recognition of EPAs between jurisdictions is compounded by differences in legislative requirements within jurisdictions.[32]

In Manitoba, *The Homesteads Act*[33] presents obstacles to EPA recognition. Under section 23, a consent to a disposition, a consent to a change of homestead or a release under the Act may only be executed by an attorney on behalf of an owner's spouse or common-law partner if the power of attorney expressly authorizes the attorney to do so. When executing the power of

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[30] *Supra* note 20.

[31] *The Vulnerable Persons Living with a Mental Disability and Consequential Amendments Act*, *supra* note 27, s. 201.

[32] *WCLRA Report*, *supra* note 1 at 11.

[33] *Supra* note 19.

attorney, the donor must acknowledge apart from the owner that he or she is doing so freely and voluntarily without any compulsion on the part of the owner of the land and that he or she is aware of the nature and effect of the power of attorney. The acknowledgement must be in the prescribed form and endorsed on or attached to the power of attorney. An owner may not execute a consent, release or discharge as attorney for his or her spouse or common-law partner. The WCLRA commented that "[t]hese types of provisions inhibit effective recognition of EPAs generally and whatever purpose they might serve in the context of individual legislation needs to be reconsidered in light of broader considerations".[34]

The larger issue, in the Commission's view, is that as noted above with respect to *The Real Property Act*,[35] *The Homesteads Act* does not recognize an attorney acting under an EPA during the mental incompetence of the donor in the same manner as it recognizes a person's committee or substitute decision maker for property appointed under *The Vulnerable Persons Living with a Mental Disability Act*.[36] There is no reference to an enduring power of attorney in the Act. For example, section 25 of *The Homesteads Act* provides that the committee of an owner's spouse or common-law partner, may, without a court order, consent to a disposition or a change of homestead, release homestead rights, consent to terminate a release, make an election or discharge a homestead notice. The substitute decision maker for property of an owner's spouse or common-law partner who has been granted power under clause 92(2)(l) of *The Vulnerable Persons Living with a Mental Disability Act* may exercise the same authority. The execution requirements noted above in respect of powers of attorney do not apply, and there is no prohibition on the committee or substitute decision maker acting where he or she is also the owner of the land.

In addition, subsection 5(1) of *The Homesteads Act* provides that proof as to whether a person is or is not married or in a common-law relationship, whether a person is the spouse or common-law partner of an owner of land or whether land is or is not a homestead may be made by affidavit or statutory declaration or a statement authorized under *The Real Property Act*. Subsection 5(2) provides that the affidavit, statutory declaration or statement shall be made by the person who executes the document or instrument or by his or her attorney, or, if the person required to make the affidavit, statutory declaration or statement is not mentally capable, by the person's committee or substitute decision maker for property. There is no similar authority given to an attorney appointed under an EPA.

Like *The Real Property Act*, *The Homesteads Act* was amended with the enactment of *The Vulnerable Persons Living with a Mental Disability Act*[37] to incorporate references to substitute decision makers, but it has not been similarly updated with respect to attorneys acting under EPAs.

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[34] *WCLRA Report*, *supra* note 1 at 12.

[35] *Supra* note 20.

[36] *Supra* note 5.

[37] *The Vulnerable Persons Living with a Mental Disability and Consequential Amendments Act*, *supra* note 27, s. 185.

RECOMMENDATION 12

The Homesteads Act *should be amended to provide that an attorney acting during the mental incompetence of the donor under an enduring power of attorney made under* The Powers of Attorney Act *may exercise the same authority as a committee or a substitute decision maker for property appointed under* The Vulnerable Persons Living with a Mental Disability Act.

J. LEGISLATIVE REVIEW

When *The Vulnerable Persons Living with a Mental Disability Act* was enacted in 1993, consequential amendments were made to 40 other statutes, including *The Real Property Act* and *The Homesteads Act* as discussed above, to update the statutes with references to substitute decision makers for property. Similarly, the recent B.C. *Adult Guardianship and Planning Statutes Amendment Act, 2007*,[38] makes consequential amendments to 28 statutes, in many cases to add a reference to an enduring power of attorney made under the B.C. *Power of Attorney Act*.[39]

It appears that a comprehensive review of affected statutes may not have been conducted when the current Manitoba *Powers of Attorney Act* was enacted and enduring powers of attorney were first recognized in Manitoba legislation.[40] Many statutes do not refer to an attorney acting under an EPA during the mental incompetence of the donor in sections where reference is made to a committee or substitute decision maker for property.[41] In many cases, an attorney under an EPA may be able to act under the authority of the EPA without specific statutory recognition. However, the existing statutes can be confusing to many current and prospective donors and attorneys. As well, where a statute refers to other decision makers but does not contemplate an attorney under an EPA, the result may be an inadvertent limitation on the ability of the attorney to act in matters arising under that Act.

The Commission recommends that a legislative review be undertaken to ensure that Manitoba statutes include the appropriate references to an attorney acting during the mental incompetence of the donor under the authority of an EPA.

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[38] *B.C. Amendment Act*, *supra* note 6. For example, the Act amends the *Assessment Act*, R.S.B.C. 1996, c. 20; the *Expropriation Act*, R.S.B.C. 1996, c. 125; the *Financial Institutions Act*, R.S.B.C. 1996, c. 141; the *Home Owner Grant Act*, R.S.B.C. 1996, c. 194; the *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996, c. 231; the *Land Title Act*, R.S.B.C., c. 250 and others to add references to an attorney acting under an EPA in addition to statutory property guardians and other representatives.

[39] R.S.B.C. 1996, c. 370.

[40] *The Powers of Attorney and Mental Health Amendment Act*, S.M. 1996, c. 62.

[41] One example is *The Civil Service Superannuation Act*, C.C.S.M. c. C120; s. 49 authorizes the Board to pay an annual allowance payable to a person to the person's committee or substitute decision maker, but does not refer to an attorney acting for a mentally incompetent person under an enduring power of attorney.

RECOMMENDATION 13

The Manitoba Government should undertake a legislative review to ensure that Manitoba statutes include the appropriate references to an attorney acting during the mental incompetence of the donor under an enduring power of attorney made under **The Powers of Attorney Act.**

CHAPTER 4

LIST OF RECOMMENDATIONS

1. The pertinent sections of *The Powers of Attorney Act* should be amended to comply with the recommendations of the Western Canada Law Reform Agencies (WCLRA) report *Enduring Powers of Attorney: Areas for Reform.* (p. 13)

2. The provisions of the existing Act regarding the duty of an attorney acting during the mental incompetence of the donor to provide an accounting in respect of the donor's estate should continue to apply to enduring powers of attorney made before the amendments recommended by the WCLRA come into force. (p. 13)

3. The Act should be amended to clarify that, for a springing power of attorney that comes into force on the mental incompetence of the donor to be an enduring power of attorney, it must comply with the formal requirements for an enduring power of attorney. (p. 17)

4. Clause 10(1)(d) of the Act should be amended to provide that the authority of an attorney under an enduring power of attorney is not terminated by the mental incompetence of the donor if the power of attorney provides that it is to continue despite the mental incompetence of the donor or that it comes into effect on the mental incompetence of the donor. (p. 17)

5. The Act should be amended to provide that, in addition to the circumstances set out in section 13, an attorney's authority under an enduring power of attorney terminates:
   - if the attorney is the donor's spouse or common-law partner and the marriage or common-law relationship ends;
   - if the donor, while mentally competent, expressly or impliedly revokes the attorney's authority or terminates the enduring power of attorney;
   - if the donor executes a new enduring power of attorney, unless a contrary intention appears in the new enduring power of attorney;
   - on the date specified in the enduring power of attorney;
   - if the attorney ceases to qualify as an attorney;
   - on the dissolution, winding-up or cessation of business of a corporate attorney. (p. 18)

6. The Act should be amended to provide that where the sole attorney under an enduring power of attorney dies during the mental incompetence of the donor, and no successor attorney was named in the enduring power of attorney:
    - the enduring power of attorney does not automatically terminate; and
    - the court may, on application by a person referred to in subsection 24(2), make an order appointing a substitute attorney. (p. 18)

7. The Act should be amended to disqualify the following from acting as an attorney under an enduring power of attorney:
    - an individual who has been convicted within the previous 10 years of a criminal offence relating to assault, sexual assault or other acts of violence, intimidation, criminal harassment, uttering threats, theft, fraud or breach of trust, unless the individual has been pardoned or the donor, in writing, acknowledges the conviction and consents to the individual acting;
    - an individual (other than a spouse or near relative of the donor) or corporation that provides personal care or health care services to the donor for compensation; and
    - an individual (other than a spouse or near relative of the donor) who is an employee of a facility in which the donor resides and through which the donor receives personal care or health care services. (p. 20)

8. The Act should be amended to provide that the Public Trustee and a corporation other than a corporation that provides personal care or health care services to the donor for compensation may act as an attorney under an enduring power of attorney. (p. 21)

9. The Act should be amended to require an attorney acting under an enduring power of attorney to register a Notice of Attorney Acting in respect of the donor's land in the appropriate land titles office. The Act should provide that
    - the Notice must be registered within a reasonable period of time after service of the Notice as required under the Act;
    - the Notice must be accompanied by a statutory declaration of the attorney stating that notice of the registration has been served on all persons entitled to receive the Notice of Attorney Acting;
    - the district registrar may refuse registration of the Notice where he or she is not satisfied that the requirements of the Act have been met;
    - on registration of the Notice, the district registrar shall not complete the registration of any transaction in respect of the land unless the Notice has been vacated or discharged, the court has directed that the transaction be permitted or the transaction is carried out by an attorney under the enduring power of attorney; and
    - the district registrar may vacate the Notice in circumstances such as the death of the donor or the filing of a court order requiring the Notice to be vacated. (p. 23)

10. Section 24 of *The Wills Act* should be amended to provide that where an attorney appointed under an enduring power of attorney under *The Powers of Attorney Act* disposes during the mental incompetence of the donor of property that was devised or bequeathed in the donor's will, the beneficiaries under the will have the same interest in the proceeds of the disposition as they would have had in the property if the disposition had not been made. (p. 24)

11. Sections 34 and 172 of *The Real Property Act* should be amended to provide that an attorney acting under an enduring power of attorney under *The Powers of Attorney Act* may act on behalf of a person of unsound mind in matters arising under *The Real Property Act*. (p. 25)

12. *The Homesteads Act* should be amended to provide that an attorney acting during the mental incompetence of the donor under an enduring power of attorney made under *The Powers of Attorney Act* may exercise the same authority as a committee or a substitute decision maker for property appointed under *The Vulnerable Persons Living with a Mental Disability Act*. (p. 27)

13. The Manitoba Government should undertake a legislative review to ensure that Manitoba statutes include the appropriate references to an attorney acting during the mental incompetence of the donor under an enduring power of attorney made under *The Powers of Attorney Act*. (p. 28)

This is a report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 2nd day of September 2008.

"Original Signed by"
Cameron Harvey, President

"Original Signed by"
John C. Irvine, Commissioner

"Original Signed by"
Gerald O. Jewers, Commissioner

"Original Signed by"
Alice R. Krueger, Commissioner

"Original Signed by"
Perry W. Schulman, Commissioner

APPENDIX A

TABLE OF CONCORDANCE

WCLRA Recommendation	*The Powers of Attorney Act*	New
1: Statement of enduring effect	Sections 6, 10	
2: Criteria for recognition	Section 25	
3: Uniform formalities	N/A	
4: Formal validity – donor capacity, express statement and donor's signature	Sections 6, 10	
5: Formal validity – witnesses	Sections 10, 11	
6: Standard form EPA		x
7: Content of attorney duties, standard of care, remuneration and liability of attorney	Sections 19, 20, 22	
8: Specific requirements of the duty to account	Sections 1, 22	
9: Inclusion of duties in standard form EPA		x
10: Knowledge of duties	N/A	
11: Knowledge and acceptance of duties by attorney		x
12: Giving Notice of Attorney Acting		x
13: Reporting suspected misuse of an EPA	Section 24	x
14: Transitional provisions		x

ENDURING POWERS OF ATTORNEY: AREAS FOR REFORM SUPPLEMENTARY REPORT

EXECUTIVE SUMMARY

A. INTRODUCTION

The Manitoba Law Reform Commission is a member of the Western Canada Law Reform Agencies (WCLRA), along with the Alberta Law Reform Institute, the British Columbia Law Institute and the Saskatchewan Law Reform Commission. The WCLRA was formed to encourage harmonization of the laws of the four western provinces. In July 2008, the WCLRA published its report *Enduring Powers of Attorney: Areas for Reform*.

A power of attorney is an instrument under which a person (the donor) confers upon another person the power to manage the donor's property and financial affairs. An enduring power of attorney (EPA) continues in effect during, or comes into effect on, the subsequent mental incompetence of the donor. The WCLRA report makes several recommendations for legislative reform in the four western provinces to increase consistency in respect of EPAs and to facilitate the recognition of EPAs among the provinces.

The publication of the WCLRA report provides a timely opportunity to examine additional aspects of *The Powers of Attorney Act* in Manitoba that may require reform. This supplementary report provides an overview of the impact of the WCLRA report on *The Powers of Attorney Act* and identifies additional areas of reform for Manitoba.

B. WESTERN CANADA LAW REFORM AGENCIES REPORT

The WCLRA report *Enduring Powers of Attorney: Areas for Reform* makes several recommendations to increase legislative consistency in relation to EPAs in Manitoba, Saskatchewan, Alberta and British Columbia. In some respects, the recommendations are consistent with the existing Manitoba Act, but some amendments will be necessary for implementation.

The WCLRA report calls for all four western provinces to provide in legislation for both springing and continuing EPAs, and to implement uniform criteria for the recognition of EPAs made in other jurisdictions. The report also makes several recommendations with respect to uniform formalities for making an EPA. The EPA should expressly state that the attorney's authority continues in effect during, or comes into effect on, the donor's mental incompetence. The legislation should also require that the donor sign or acknowledge his or her signature in the presence of a witness, separate and apart from the attorney. If the donor is physically incapable, a proxy may sign on behalf of the donor. A brief standard form EPA should be prescribed by regulation to facilitate EPA recognition, although its use would be voluntary.

The WCLRA report recommends that each province set out in legislation a list of specific attorney duties, and that an attorney should be held to the standard of care of a prudent person having comparable experience and expertise. The attorney should not receive remuneration unless the EPA expressly authorizes the remuneration and states the basis for it. The report also contains detailed recommendations regarding the duty of an attorney to account to others with respect to his or her administration of the donor's property. Immediate family members and any person designated by the donor would be entitled to request details at reasonable intervals, although the donor could exclude any person by name.

Currently, none of the four provinces provides a formal mechanism for an attorney to acknowledge or consent to his or her appointment. The WCLRA report recommends that the attorney acknowledge and accept the duties under an EPA in a Notice of Attorney Acting. Legislation should require an attorney to give the Notice to the donor and to specified persons within a reasonable period of time after the donor is declared to lack the mental capacity to manage his or her affairs. Where no person is named in the EPA to receive the Notice, the attorney should be required to make reasonable efforts to give notice to all of the donor's immediate family members. The legislation should allow the donor to exclude any person in the EPA, and where there is no person to whom the Notice can be given, the attorney should give the Notice to the appropriate public official.

The WCLRA report recommends the implementation of a voluntary reporting scheme for persons who suspect misuse of an EPA by an attorney. The legislation should designate a public official to receive reports of concerns. Other persons should also have the right to apply to court to terminate an EPA. Financial institutions should have the power to freeze accounts where they have reasonable grounds to suspect misuse and the duty to report the suspected misuse to the public official. The WCLRA report also recommends a number of transitional provisions.

The Commission recommends that the recommendations of the WCLRA be implemented in Manitoba. However, the attorney's duty to provide financial details under the WCLRA report is broader than the duty in the existing Manitoba Act, and as a transitional measure, the provisions of the existing Act should continue to apply to EPAs made before the amendments recommended by the WCLRA come into force.

Several provisions of *The Powers of Attorney Act* are not affected by the recommendations of the WCLRA. These provisions will remain intact, except where the Commission makes recommendations for additional reforms.

C. ADDITIONAL ENDURING POWER OF ATTORNEY REFORMS

The WCLRA report *Enduring Powers of Attorney: Areas for Reform* does not deal with all aspects of power of attorney legislation. In the Commission's view, there are additional improvements that are appropriate for Manitoba.

The Commission recommends amendments to *The Powers of Attorney Act* to clarify that the mental incompetence of a donor does not terminate the authority of his or her attorney if the

EPA provides that it is to continue despite, or come into effect on, the mental incompetence of the donor. The amendments should also clarify that in order for a springing power of attorney to be an EPA, it must comply with the formal requirements for an EPA.

The Manitoba Act currently sets out a number of circumstances that will terminate an attorney's authority under an EPA. The Commission considers that there are additional events that should cause an attorney's authority to terminate. For example, an attorney's authority should terminate where the attorney is the spouse or common law partner of the donor and the marriage or common law relationship ends, or on the dissolution, winding up or cessation of business of a corporate attorney.

The Manitoba Act does not currently address the termination of the EPA itself, and under the common law, the death of the sole attorney appointed under an EPA terminates the EPA. In the Commission's view, where the sole attorney dies and no successor attorney has been named in the EPA, the Act should provide that the court has jurisdiction to appoint a substitute attorney.

The Commission recommends that additional eligibility criteria be established for EPA attorneys, to reduce the risk of EPA misuse. Individuals who have been convicted within the previous 10 years of certain criminal offences, including assault, sexual assault, theft, fraud and breach of trust, should be disqualified, unless the individual has been pardoned or the donor gives his or her written acknowledgement and consent. Individuals and corporations involved in providing personal care or health care services to the donor for compensation should also be disqualified. The Commission also recommends that the Public Trustee and a corporation other than one that provides personal care or health care services to the donor for compensation should be authorized to act as an attorney under an EPA. The duty of an attorney in the existing Act to act on behalf of the donor once the attorney has accepted his or her appointment under the EPA should continue in place.

The WCLRA report noted that there is no mechanism in the four western provinces for noting on the title to a donor's land that the donor is precluded from dealing with the property. In the Commission's view, the Act should be amended to require an attorney to register a Notice of Attorney Acting in respect of the donor's land, to give notice to others that the attorney has become solely responsible for decision making regarding the land.

The Wills Act of Manitoba protects the interests of beneficiaries to a will in cases where a committee or substitute decision maker for property disposes of property that was devised or bequeathed in the owner's will. Beneficiaries have the same interest in the proceeds of the disposition as they would have had in the property if it had not been disposed of. The Commission recommends that similar protection be extended when the person disposing of the property is an attorney acting under an EPA.

Finally, the Commission recommends that *The Real Property Act* and *The Homesteads Act* be updated in relation to EPAs, and that a legislative review be undertaken to ensure that all Manitoba statutes include the appropriate references to enduring powers of attorney.

ENDURING POWERS OF ATTORNEY: AREAS FOR REFORM
RAPPORT COMPLÉMENTAIRE

SOMMAIRE

A. INTRODUCTION

La Commission de réforme du droit du Manitoba est membre de la Western Canada Law Reform Agencies (WCLRA), tout comme l'Alberta Law Reform Institute, le British Columbia Law Institute et la Saskatchewan Law Reform Commission. La WCLRA est une association créée pour favoriser l'harmonisation des lois des quatre provinces de l'Ouest. En juillet 2008, la WCLRA a publié son rapport intitulé *Enduring Powers of Attorney: Areas for Reform*.

Une procuration est un acte en vertu duquel une personne (le mandant) confère à une autre personne le pouvoir de gérer les biens et les affaires financières du mandant. Une procuration durable entre en vigueur quand commence l'inhabilité mentale du mandant, et elle le reste pendant la durée de celle-ci. Le rapport de la WCLRA contient des recommandations en matière de réforme législative, pour les quatre provinces de l'Ouest; ces recommandations visent à accroître l'uniformité dans les procurations durables et à faciliter la reconnaissance de celles-ci d'une province à l'autre.

La publication de son rapport par la WCLRA constitue une excellente occasion d'examiner d'autres aspects de la *Loi sur les procurations* au Manitoba qui pourraient être modifiés. Le présent rapport complémentaire donne un aperçu de l'incidence du rapport de la WCLRA sur la *Loi sur les procurations* et il précise d'autres domaines de réforme pour le Manitoba.

B. RAPPORT DE LA WESTERN CANADA LAW REFORM AGENCIES

Le rapport de la WCLRA, intitulé *Enduring Powers of Attorney: Areas for Reform,* contient plusieurs recommandations en vue d'accroître l'uniformité des lois en ce qui concerne les procurations durables au Manitoba, en Saskatchewan, en Alberta et en Colombie-Britannique. À certains égards, les recommandations sont conformes à la loi actuelle du Manitoba, mais il faudra faire certaines modifications pour les mettre en œuvre.

Dans son rapport, la WCLRA recommande aux quatre provinces de l'Ouest de prévoir des mesures législatives, tant sur les procurations durables subordonnées à une condition suspensive que sur les procurations durables permanentes, et d'adopter des critères uniformes pour les reconnaître si elles proviennent d'autres ressorts. Le rapport fait également plusieurs recommandations en vue d'uniformiser les formalités de rédaction des procurations durables. La procuration durable devrait expressément énoncer qu'elle entre en vigueur quand commence l'inhabilité mentale du mandant, et qu'elle le reste pendant la durée de celle-ci. Il devrait aussi être exigé dans la loi que le mandant signe ou qu'il atteste la procuration comme étant la sienne en présence d'un témoin, de façon séparée du mandataire. Si le mandant souffre d'un handicap

physique, un mandataire peut signer en son nom. Le règlement devrait prescrire une courte procuration durable standard, ce qui faciliterait la reconnaissance des procurations durables, bien que son utilisation soit volontaire.

Selon le rapport, chaque province devrait énoncer, par voie législative, une liste des devoirs particuliers du mandataire, et ce dernier devrait respecter la norme de diligence d'une personne prudente, dotée d'une expérience et de connaissances spécialisées comparables. Le mandataire ne devrait pas recevoir de rémunération à moins que la procuration durable ne l'autorise expressément et n'en énonce le fondement. Le rapport comprend aussi des recommandations détaillées concernant l'obligation redditionnelle d'un mandataire envers d'autres personnes, en ce qui concerne la façon dont il gère les biens du mandant. Les membres de la famille immédiate et toute personne désignée par le mandant auraient le droit de demander des détails à intervalles raisonnables, bien que le mandant puisse exclure toute personne de façon nominative.

Actuellement, aucune des quatre provinces ne prévoit de mécanisme officiel pour qu'un mandataire reconnaisse sa nomination, ou y consente. Selon le rapport de la WCLRA, le mandataire devrait reconnaître et accepter les devoirs prévus dans la procuration durable, au moyen d'un avis de représentation. La loi devrait exiger du mandataire qu'il donne, dans un délai raisonnable, l'avis au mandant et aux personnes précisées, une fois qu'il a été déclaré que le mandant n'a pas la capacité mentale de gérer ses affaires. Si personne n'est nommé dans la procuration durable pour recevoir l'avis, le mandataire devrait être tenu de faire des efforts raisonnables pour donner l'avis à tous les membres de la famille immédiate du mandant. La loi devrait permettre au mandant d'exclure toute personne de la procuration durable, et lorsqu'il n'y a personne à qui l'avis peut être donné, le mandataire devrait donner l'avis au fonctionnaire approprié.

Le rapport de la WCLRA recommande que soit instauré un régime de déclaration volontaire pour que les personnes qui soupçonnent le mauvais usage d'une procuration durable par un mandataire puissent le signaler. La loi devrait désigner un fonctionnaire chargé de recevoir les déclarations de soupçons. D'autres personnes devraient aussi avoir le droit de demander aux tribunaux de mettre fin à une procuration durable. Les institutions financières devraient pouvoir geler des comptes lorsqu'elles ont des motifs raisonnables de soupçonner le mauvais usage et elles devraient avoir l'obligation de signaler le mauvais usage soupçonné au fonctionnaire. Le rapport de la WCLRA recommande également un certain nombre de dispositions transitoires.

La Commission recommande la mise en œuvre au Manitoba des recommandations faites par la WCLRA. Toutefois, l'obligation du mandataire de fournir des détails financiers en conformité avec le rapport de la WCLRA est plus large que celle que prévoit la *Loi* actuellement en vigueur au Manitoba et, à titre de mesure transitoire, les dispositions de la *Loi* actuelle devraient continuer de s'appliquer aux procurations durables faites avant l'entrée en vigueur des modifications recommandées par la WCLRA.

Plusieurs dispositions de la *Loi sur les procurations* ne sont pas visées par les recommandations de la WCLRA. Ces dispositions demeureront intactes, sauf lorsque la Commission fait des recommandations en vue d'apporter d'autres réformes.

C. AUTRES RÉFORMES CONCERNANT LES PROCURATIONS DURABLES

Le rapport de la WCLRA, intitulé *Enduring Powers of Attorney: Areas for Reform,* ne traite pas tous les aspects des lois relatives aux procurations. De l'avis de la Commission, d'autres améliorations seraient appropriées pour le Manitoba.

La Commission recommande que des modifications soient apportées à la *Loi sur les procurations* afin de préciser que l'inhabilité mentale d'un mandant ne met pas fin à la qualité de son mandataire, si la procuration durable stipule qu'elle entre en vigueur au moment où commence l'inhabilité mentale du mandant ou qu'elle le demeure malgré cette-ci. Il devrait aussi être précisé dans les modifications qu'une procuration subordonnée à une condition suspensive doit être conforme aux exigences formelles d'une procuration durable si elle doit en être une.

À l'heure actuelle, la *Loi* du Manitoba prévoit un certain nombre de cas où le mandataire perd la qualité que lui confère une procuration durable. De l'avis de la Commission, il existe d'autres événements qui devraient mettre fin à la qualité d'un mandataire. Par exemple, cette qualité de mandataire devrait prendre fin lorsque le mandataire est le conjoint ou le conjoint de fait du mandant, et si le mariage ou l'union de fait prend fin, ou au moment de la dissolution, de la liquidation ou de la cessation d'activité d'un avocat en droit commercial.

À l'heure actuelle, la *Loi* du Manitoba ne dit rien sur la fin de la procuration durable comme telle et, en common law, il est prévu que le décès du mandataire unique nommé conformément à une procuration durable mette fin à celle-ci. Selon la Commission, lorsque le mandataire unique décède et qu'aucun mandataire remplaçant n'a été nommé dans la procuration durable, la *Loi* devrait prévoir que le tribunal a compétence pour nommer un mandataire remplaçant.

La Commission recommande que des critères d'admissibilité supplémentaires soient établis pour les mandataires visés par une procuration durable, et ce, afin de réduire le risque de mauvais usage des procurations durables. Les particuliers ayant été déclarés coupables de certaines infractions criminelles, notamment de voies de fait, d'agression sexuelle, de vol, de fraude et d'abus de confiance, devraient être déclarés inadmissibles, à moins d'avoir fait l'objet d'un pardon ou que le mandant donne sa confirmation et son consentement par écrit. Les particuliers et les corporations qui fournissent des services de soins personnels ou de santé au mandant, moyennant rémunération, devraient aussi être déclarés inadmissibles. La Commission recommande également que le curateur public et une corporation autre qu'une corporation fournissant des services de soins personnels ou de santé au mandant, moyennant rémunération, soient autorisés à agir en tant que mandataires, aux termes d'une procuration durable. Le devoir du mandataire d'agir au nom du mandant, une fois que le mandataire a accepté sa nomination, conformément à la procuration durable, comme il est prévu actuellement par la loi, devrait demeurer en vigueur.

Comme le note le rapport de la WCLRA, il n'existe aucun mécanisme, dans les quatre provinces de l'Ouest, qui prévoit d'inscrire sur le titre de propriété d'un mandant que ce dernier n'a pas le droit de gérer ses biens. Selon la Commission, la *Loi* devrait être modifiée afin d'exiger du mandataire qu'il enregistre un avis de représentation en ce qui concerne le bien-fonds du mandant, afin que les tiers soient ainsi avisés que le mandataire est devenu la seule personne apte à décider en ce qui concerne le bien-fonds.

La *Loi sur les testaments* du Manitoba protège les intérêts des bénéficiaires d'un testament lorsqu'un curateur ou un subrogé à l'égard des biens aliène des biens qui ont fait l'objet d'un legs ou d'une disposition testamentaire prévu dans le testament du propriétaire. Les bénéficiaires ont les mêmes intérêts dans le produit de l'aliénation que ceux qu'ils auraient eus dans les biens, si ceux-ci n'avaient pas été aliénés. La Commission recommande qu'une protection semblable soit offerte lorsque la personne qui aliène les biens est un mandataire agissant conformément à une procuration durable.

Enfin, la Commission recommande que la *Loi sur les biens réels* et la *Loi sur la propriété familiale* soient mises à jour en ce qui a trait aux procurations durables et qu'une révision législative soit entreprise pour s'assurer que toutes les lois du Manitoba comprennent les renvois appropriés concernant les procurations durables.