ALBERTA LAW REFORM INSTITUTE

ENDURING POWERS OF ATTORNEY

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ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

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The Institute is also grateful to the Alberta Law Foundation which made it possible for the Institute to take on additional project work and to retain the expert services of the Special Counsel. Many groups and individuals have contributed to the finished product. They are listed in Appendix C and we are grateful for the time and information which they have contributed.

ENDURING POWERS OF ATTORNEY

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CHAPTER 1 - THE INSTITUTE'S REPORT FOR DISCUSSION

A. Introduction

The loss of capacity to manage one's own affairs is becoming a fact of life for a growing number of Albertans. Chronic and degenerative illnesses which affect mental capacity are becoming increasingly common. It is estimated that at least 10% of Canadians over the age of sixty-five, and 20% of those over the age of eighty, suffer from dementia of some kind, most commonly of the Alzheimer's type. In many cases the onset of incapacity may be a gradual process; the individual, while still competent, realizes that incapacity is likely or even imminent. People faced with this situation often wish to plan for the future management of their affairs, in particular by granting a power of attorney to a family member or trusted advisor, in the expectation that the attorney will have authority to manage their financial affairs when they become mentally incapable of doing so themselves.

However, under the present law of Alberta, this cannot be done. At common law a power of attorney terminates on the mental incapacity of the donor. Thus, at the very point when it is most needed, the power of attorney comes to an end.

This common law rule was the focus of the Institute's Report for Discussion published in February 1990.[1] The Report concluded that the common law rule is unsatisfactory[2] and should be replaced by legislation providing for an enduring power of attorney ("EPA"), that is, a power of attorney which would continue notwithstanding the subsequent mental incapacity of the donor.

The first chapter of our Final Report briefly summarizes the main conclusions and recommendations contained in the Report for Discussion. Chapter 2 discusses the submissions which we received in response to the Report for Discussion, while Chapter 3 outlines some developments which have occurred since its publication. Chapter 4 sets out the Institute's final recommendations. A draft *Powers of Attorney*

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1 Report for Discussion No. 7: *Enduring Powers of Attorney* (1990).

2 The Report for Discussion noted that, although the common law rule is clear, there are relatively few Canadian cases directly on point. Since the publication of the Report for Discussion, another Canadian case has come to our attention which affirms the common law rule that a power of attorney terminates on the mental incapacity of the donor - see *Re Cutler* (1989) 236 A.P.R. 76 (N.B.Q.B.).

Act and a draft *Dependent Adults Amendment Act*, based on our recommendations, are produced in Appendix A and Appendix B respectively.

B. The EPA Concept

EPAs provide a relatively simple and straightforward means of enabling people to plan for their own incapacity. The concept of a power of attorney seems ideally suited to the situation where a person anticipates becoming unable to manage his or her own affairs. For the law to revoke the attorney's authority at the very point when it is most needed is, in our view, illogical and unacceptable. As the Australian Law Reform Commission notes:[3]

> When a person has the foresight to make arrangements for his or her impending incapacity, it is most unsatisfactory if the law frustrates that planning. There is a need for a cheap, simple, self-help procedure, subject to appropriate safeguards, whereby a person can prepare in advance for his or her possible incapacity.

An EPA enables people to plan for their own incapacity, giving them the freedom to choose someone whom they feel is most likely to act in their best interests. This sense of control over one's life after incapacity promotes self-determination and autonomy, and enhances personal dignity. It also helps to ease some of the anxiety which people feel in knowing that they may soon lose the ability to manage their own affairs.

EPA legislation would also offer a much-needed alternative to proceedings for the appointment of a trustee under the *Dependent Adults Act*.[4] Despite the undoubted merits of this Act, there are significant problems associated with its use. The proceedings are often time-consuming and expensive, the dependent adult is merely a passive participant, and the stigma and emotional distress can be considerable. EPA legislation would avoid many of these problems.

EPA legislation would also promote the underlying philosophy of the *Dependent Adults Act*, namely, that trusteeship should be viewed as a last resort and should not be imposed if there exists a less restrictive alternative. The absence of EPA legislation is inconsistent with this principle. The concept of trusteeship as a

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3 *Enduring Powers of Attorney* (Report No. 47, 1988) at 7.

4 R.S.A. 1980, c. D-32, as amended.

"last resort" is meaningful only if there exists a viable alternative to trusteeship. EPAs represent such an alternative.

C. Safeguards

Despite their many advantages, EPAs present an obvious potential for abuse. They enable the attorney to exercise authority after the donor's mental incapacity and, *ipso facto*, after the donor has lost the capacity to control and monitor the attorney's conduct. The prospect of the attorney having unlimited power over the donor's estate after the donor's incapacity, and being accountable to no-one other than the donor, involves a clear risk of abuse.

Safeguards are certainly necessary. But if the legislative scheme is too formal and complex, there is a real danger of defeating the underlying purpose of the legislation, namely, to provide a relatively simple and straightforward means of planning for one's own incapacity. Excessive formality may well result in EPAs being rarely used, in which case the legislation will have achieved very little. The goal is to strike a proper balance between safeguards and simplicity.

Having examined a number of possible safeguards surrounding the execution of an EPA, and the position in various other jurisdictions, the Report for Discussion recommended the following requirements relating to formalities of execution: the instrument must be signed by (or on behalf of) the donor, who must be mentally capable of understanding its nature and effect; it must contain a statement indicating its enduring nature; it must incorporate a series of prescribed notes explaining its nature and effect; and it must be accompanied by a certificate of legal advice signed by a lawyer, stating (*inter alia*) that the donor attended before the lawyer and appeared competent to grant the power of attorney, and that the lawyer satisfied himself or herself that the donor understood the explanatory notes contained in the EPA.

The Report for Discussion also recommended additional safeguards relating to the monitoring of the attorney's conduct. In particular, it recommended that interested persons (and others with leave of the Court) be at liberty to apply to the Surrogate Court for an order requiring the attorney to bring in and pass accounts, and for an order terminating the EPA; the Court would have the power to terminate the EPA if it considered this to be in the best interests of the donor.

The Report for Discussion concluded that these recommendations strike a proper balance between simplicity and formality. The Institute viewed its proposed scheme as simple and straightforward, one which offers a practical and accessible method of planning for incapacity, while at the same time providing adequate safeguards to protect the interests of the donor.

D. Powers and Duties of the Attorney

In the absence of a contractual undertaking by the attorney, a power of attorney imposes no obligation on the attorney to exercise the authority which it confers. The attorney has the power to act, but no duty to do so. However, this legal position is inconsistent with the reasonable expectations of EPA donors. In granting an EPA, donors are planning for their own incapacity, with the expectation that the attorney will manage their affairs once they become mentally incapable of doing so themselves. That expectation may easily be frustrated if the attorney is under no legal duty to exercise the authority conferred by the EPA.

Accordingly, the Report for Discussion recommended that (subject to certain qualifications) the proposed legislation provide that, once the donor has become mentally incapable, the attorney has a duty to exercise his or her powers to protect the donor's interests, and cannot renounce his or her appointment without leave of the Court.

We also recommended that, to a limited extent, attorneys should be able to exercise their authority so as to benefit persons other than the donor. Attorneys should not be left without authority to attend to the needs of the donor's spouse and dependent children. This principle has been accepted in the context of a trustee appointed under the *Dependent Adults Act*. The Report for Discussion recommended that the proposed legislation contain a provision similar (but not identical) to the one contained in the *Dependent Adults Act*, namely, that attorneys may exercise their powers for the maintenance, education, benefit and advancement of the donor's spouse and dependent children.

E. Springing Powers of Attorney

Unless it provides otherwise, an EPA comes into effect as soon as it is executed, and confers immediate authority on the attorney. Some donors may be reluctant to grant such a power, preferring to have the EPA take effect only once they become mentally incapable. This is usually referred to as a "springing" power

of attorney. The Report for Discussion recommended that the proposed legislation permit donors to grant a springing EPA by specifying a future contingency (including, but not limited to, their own mental incapacity) upon which the EPA will take effect.

The main problem with EPAs which are contingent on the mental incapacity of the donor is determining when the contingency has occurred. Third parties may be reluctant to deal with the attorney under a springing power in the absence of conclusive proof that the donor is mentally incapable. Accordingly, the Report for Discussion recommended that the proposed legislation enable donors to name a person (including the attorney) upon whose written declaration the contingency would be conclusively deemed to have occurred.

F. Termination

We have already mentioned the Report for Discussion's recommendation that the Surrogate Court, on the application of any interested person (and others with leave of the Court), should have the power to terminate an EPA if it considers this to be in the best interests of the donor. In addition, the Report recommended that an EPA should terminate upon a trusteeship order being granted under the *Dependent Adults Act* in respect of the estate of the donor or the attorney, and also upon the death of the donor or attorney.

G. Protection of Attorneys and Third Parties

At common law, attorneys who act after their authority has been terminated by the donor's mental incapacity are personally liable to third parties for breach of the implied warranty of authority, even if the attorney is unaware of the donor's incapacity. The Report for Discussion concluded that this common law rule is unfair and of questionable validity, and ought to be changed by legislation. The Report recommended that attorneys should not incur personal liability for breach of the implied warranty of authority unless they know or ought to know that their authority has been terminated, and that the attorney's act should be valid and binding in favour of any person who does not know of the termination of the attorney's authority.

CHAPTER 2 - RESPONSE TO THE REPORT FOR DISCUSSION

A. Overall Response

We noted in our Report for Discussion that the submissions which we received in preparing the Report were overwhelmingly in favour of EPA legislation. The same is true of the submissions which we received in response to the Report. Indeed, the vast majority of these not only supported the principle of EPA legislation, they also endorsed the specific legislative scheme proposed in the Report. Many submissions expressed the view that this is an especially important area of reform, and urged that immediate legislative action be taken to implement the recommendations contained in the Report for Discussion.

Of the submissions which we received in response to the Report for Discussion, only two were opposed to the introduction of EPA legislation. The first was from a legal practitioner in Alberta who felt that the problem could be dealt with quite simply, by means of a joint bank account with a family member, and thus EPA legislation was unnecessary. In response, we should stress that we are not recommending that EPAs be mandatory. If some people prefer to use other options rather than execute an EPA, they are perfectly free to do so. However, as we pointed out in our Report for Discussion, these other options are of very limited scope, and this was one of the main reasons which led us to conclude that there was a need for EPA legislation.

The other submission was from the Canadian Mental Health Association (Alberta Division).[5] This comprised majority and minority reports prepared by a working group established by the Association to examine the issue of EPAs. The minority report concluded that EPA legislation should be introduced in Alberta. The majority report concluded that (1) EPA legislation was unnecessary; (2) amendments should be made to the *Dependent Adults Act* relating to costs and also to allow people to designate in advance the person they would like the court to appoint as their trustee or guardian under the Act; and (3) the *Dependent Adults Act*, with these amendments, would be adequate to address the concerns raised by those who favour EPA legislation.

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5 In fact, this submission was not received *in response* to the Report for Discussion; it was received after the Report was completed, but before publication.

We do not accept the view that amendments to the *Dependent Adults Act* would remove the need for EPA legislation. As we pointed out in our Report for Discussion,[6] many of the problems associated with proceedings under the Act cannot be removed by "improving" the Act - they are inherent in any system which relies on judicial or state intervention as a means of dealing with incapacity. We believe that fundamental principles of autonomy, self-determination, and personal dignity, as well as the underlying philosophy of the *Dependent Adults Act* (trusteeship as a "last resort"), dictate that individuals be given the opportunity to plan for their own incapacity without judicial or state intervention.

B. Specific Suggestions

A number of submissions focused on individual recommendations in our Report for Discussion, and made specific suggestions for change. We shall deal with each of these in turn.

(1) The Lawyer's Certificate

One submission suggested that the requirement of attendance before a lawyer, as set out in Recommendation 7, is overly complicated and should be abandoned. As we noted in our Report for Discussion, this was one of the most difficult issues which we considered, and we reached our conclusion after much reflection and discussion. We still believe that, on balance, the requirement is necessary and justifiable in view of the importance of ensuring that donors are aware of the legal implications of signing an EPA. Nor do we view it as a particularly onerous requirement, either in terms of time or expense. The responsibilities of the lawyer in issuing the certificate are relatively straightforward, and this should be reflected in the legal fees which are charged.

(2) Certificate as Conclusive Proof of Capacity

A legal practitioner in Edmonton raised concerns about the relationship between the proposed lawyer's certificate and Recommendation 14, namely, that the legislation provide that an EPA is void if, at the date of its execution, the donor is mentally incapable of understanding its nature and effect. He stated that:

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6 Report for Discussion at 23.

> [S]uch a provision would significantly weaken the effectiveness of having such powers of attorney and would also place lawyers who had given the certificates in the unenviable position of being challenged against the clear and unequivocal words of their certificate. I believe that the lawyer's certificate should be framed in such a way that to the greatest possible extent possible it is conclusive proof of the facts referred to in the certificate. If that is not to be the case, it is my view that the certificate is largely useless. The clear words of the certificate will be open to regular challenge and the ability of any party to rely upon the enduring power of attorney will be significantly reduced. If the power of attorney is void with the result that any transaction undertaken by its authority is also void then how would individuals or parties relying upon the power of attorney have any assurance that any transaction was in fact effective?

This raises two important points. The first is whether the lawyer's certificate should be conclusive proof that the donor had the necessary mental capacity to grant the EPA. We do not believe that it should; interested parties should not be precluded from having the EPA declared void by asserting that, notwithstanding the terms of the certificate, the donor lacked the requisite capacity. This may indeed place lawyers in the "unenviable position" of having to justify their certificate, but this is true of many similar certificates issued by lawyers. In our view the existence of the certificate would almost certainly place the evidentiary burden on the party challenging capacity, and, coupled with the Court's discretion to award costs, would represent a disincentive to those wishing to challenge capacity on frivolous grounds.

However, this does not address the other point raised by the above submission - the position of third parties (and, indeed, the attorney) who rely on an EPA which is subsequently held to be void on the ground that the donor lacked the mental capacity to grant it. As presently framed, our recommendations (Recommendations 42 and 43) confer protection only on third parties and attorneys who act after the attorney's authority has been *terminated*; they do not protect third parties and attorneys who act without knowledge that the EPA is void *ab initio* because of the donor's incapacity when the EPA was granted. We agree that, unless the protection is extended, the ability (and willingness) of people to rely on EPAs may be significantly reduced, which in turn will reduce the practical utility of EPAs. The

legislation in England confers this type of protection,[7] and we believe that the proposed legislation should do likewise. Accordingly, we have amended Recommendations 42 and 43 to give effect to this.

(3) Mandatory Review of Springing Powers

We received one submission that there should be a requirement that springing EPAs be reviewed by the donor every five years until such time as the "springing" contingency occurs and the EPA takes effect. The underlying reason for this suggestion was that donors may forget about their EPA and it may no longer reflect their wishes. While it is certainly desirable that donors review the terms of their EPA periodically, we do not believe that this should be a requirement (for example, by providing that a springing EPA lapses unless re-executed every five years). We view the position as analogous to that of a will; there are many sound reasons why testators should review their wills periodically, but there is no requirement that they do so.

(4) Dower Consent

It was suggested to us that the *Dower Act*[8] be amended to allow for a "Consent to Disposition" to be executed by an attorney under an EPA where the donor is mentally incapable of signing the consent. In our view such an amendment could give rise to a serious conflict of interest. In many cases the attorney will be the donor's spouse, and we do not think it appropriate that the attorney should be permitted to execute a dower consent on behalf of his or her own spouse so as to enable the attorney to grant a disposition of the homestead.

Our concern is not so much that attorneys might abuse this power - by their very nature EPAs present a risk of abuse, and attorneys may abuse their powers in much more significant and damaging ways than simply facilitating the disposition of homestead. Our concern is the conflict of interest involved in having an attorney execute dower consent on behalf of the donor. Such a power would be exercised for the benefit of the donor's spouse (who, as we have pointed out, in many cases would be the attorney), and this is inconsistent with the basic principle that attorneys should

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7 *Enduring Powers of Attorney Act 1985*, c. 29, s. 9. This implemented the recommendation of the English Law Commission in its Report, *The Incapacitated Principal* (Report No. 122, 1983) at 48-49.

8 R.S.A. 1980, c. D-38.

exercise their authority for the benefit of the donor. We are mindful, of course, that we have recommended that attorneys should be able to use their powers to benefit the donor's dependent children and spouse (including the attorney). However, as we discussed in our Report for Discussion, we view this as a means of enabling the attorney to provide for the maintenance and needs of the donor's dependents, and we do not believe that this should be extended to include the execution of dower consent. In our view the appropriate recourse, as provided for in the *Dower Act*,[9] is an application to the court for an order dispensing with the requirement of dower consent.

(5) Advice and Directions

One submission recommended that the proposed legislation contain a provision enabling the attorney under an EPA to apply to the Court for advice and directions. It was felt that this could be especially important if the attorney wished the Court's directions with respect to payments to the donor's dependents (including the attorney). We agree with this suggestion, and have added a new recommendation (Recommendation 44) giving effect to it.

(6) Trusteeship Order

In our Report for Discussion we recommended[10] that the *Dependent Adults Act* be amended to provide that, where an application is made for a trusteeship order in respect of the estate of the donor of an EPA, the Court shall have regard to the existence of the EPA in deciding whether the donor needs a trustee and whether the trusteeship order would be in the donor's best interests. If a trusteeship order *is* granted, should there be a statutory presumption or preference in favour of the attorney being appointed as trustee?

We received one submission on this issue. It expressed the view that there should be no such presumption, and we agree with that view. In some cases, the Court may well conclude that the attorney is the best person to act as trustee (for example, where the need for a trusteeship order arises from the fact that the attorney has limited authority under the EPA). However, in many cases the need for a trusteeship order will arise from the fact that the attorney is not acting in the donor's best interests, or is no longer capable of acting, and thus would not be a suitable

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9 *Dower Act*, s. 10(1)(f).

10 Recommendation 33.

person to appoint as trustee. Accordingly, we do not think that it would be appropriate to have a statutory presumption or preference in favour of the attorney being appointed as trustee.

CHAPTER 3 - DEVELOPMENTS SINCE THE REPORT FOR DISCUSSION

A. Legislation in Other Provinces

Of the legal developments which have occurred since the publication of our Report for Discussion, the most important relates to legislation in other Canadian provinces. The Report for Discussion noted that EPA legislation exists in every Canadian province except three - Newfoundland, Quebec, and Alberta; it also noted that the first two were unlikely to remain exceptions for very long.[11] This prediction has now come to pass. Newfoundland enacted EPA legislation on June 13, 1990,[12] based on the report of the Newfoundland Law Reform Commission,[13] and the Quebec EPA legislation was proclaimed in force as of April 15, 1990.[14] Thus, Alberta is now the only Canadian province without EPA legislation.

B. Law Reform Reports

A number of reports were issued by other law reform agencies shortly before or after the publication of our Report for Discussion. The recommendations contained in these reports are generally in line with our own. For example, the Law Reform Commission of British Columbia's recent report on "fine-tuning" the EPA concept[15] (published in the same month as our Report for Discussion) adopted most of the recommendations set out in its earlier working paper.[16] In particular, it recommended that EPA legislation make provision for springing powers of attorney, and enable donors to designate a person upon whose declaration the "springing" contingency would be conclusively deemed to have occurred. Our own recommendation on this issue (Recommendation 25) was modelled to a large extent

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11 Report for Discussion at 23.

12 *Enduring Powers of Attorney Act*, S.N. 1990, c. 15.

13 *Enduring Powers of Attorney* (Report No. 2, 1988).

14 S.Q. 1989, c. 54, s. 111 [enacting articles 1731.1-1731.11 of the *Civil Code*], proclaimed in force April 15, 1990 by O.C. 360-90, Official Gazette of Quebec, March 28, 1990.

15 *Report on the Enduring Power of Attorney: Fine-Tuning the Concept* (Report No. 110, 1990).

16 Working Paper No. 62 (1989).

on the views expressed in the B.C. working paper. A recent report from the California Law Revision Commission also makes similar recommendations with respect to springing powers of attorney.[17]

One recommendation in the B.C. Law Reform Commission's working paper which was not adopted in its final report relates to termination of EPAs. The working paper recommended that an EPA should not automatically terminate upon the appointment of a committee (trustee) in respect of the donor's estate; rather, the EPA would continue, with the attorney accountable to the committee of estate, and the committee of estate would have the power to terminate the EPA. In our Report for Discussion we rejected this approach, and recommended that an EPA should terminate immediately upon a trusteeship order being granted under the *Dependent Adults Act* in respect of the donor's estate. In its final report, the B.C. Law Reform Commission changed its position on this issue, and recommended in favour of automatic termination.

A discussion paper on EPAs was published by the Law Reform Commission of Victoria in April 1990.[18] Many of its recommendations are similar to our own. For example, it recommends that an EPA should contain an explanation of its nature and effect; that provision should be made for springing powers of attorney; and that the test of capacity for executing an EPA should be codified in the legislation, based on the principles enunciated in the English case of *Re K.*[19]

Our Report for Discussion made reference to a special committee of the Succession, Trusts and Fiduciary Relationships section of the Canadian Bar Association (B.C. Branch), which was established to examine the EPA legislation in British Columbia. We have now obtained a copy of the committee's final report and have considered its recommendations.[20] The thrust of the committee's report is that

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17 *Recommendation Relating to Springing Powers of Attorney*, 20 California Law Revision Commission Reports 405 (1990).

18 *Enduring Powers of Attorney* (Discussion Paper No. 18, 1990).

19 [1988] 2 W.L.R. 781 (Ct. of Protection). The test of capacity enunciated in *Re K.* was adopted and applied in *Godelie v. Pauli*, unreported, June 27, 1990, Action No. 4146/89, [1990] O.J. No. 1207 (Ont. Dist. Ct., Oxford County), and was approved in *McCardell's Estate v. Cushman* (No. 2) (1989) 107 A.R. 161 at 175 (Q.B.).

20 We are grateful to the committee's chairman, Mr. Owen Dolan, Q.C., for kindly sending us a copy of the report.

greater safeguards should be incorporated into the legislation with a view to protecting vulnerable donors. Some of the proposed safeguards are similar to those recommended in our Report for Discussion; for example, a requirement that the donor attend before a lawyer who must certify that the donor appeared to understand the EPA. However, the committee's report also recommends many other safeguards, most of which we considered and rejected in our Report for Discussion; for example, mandatory registration of all EPAs, mandatory periodic accounting by the attorney, and an affidavit of execution by the attorney. In our Report for Discussion we concluded that these additional safeguards were not justified, and we are still of that opinion.

Finally, it should be noted that the "Rainbow Report" - the Report of the Premier's Commission on Future Health Care for Albertans, published in December 1989 - recommended that EPA legislation be introduced in Alberta.[21]

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21 *The Rainbow Report: Report of the Premier's Commission on Future Health Care for Albertans* (December, 1989), vol. 1, at 34.

CHAPTER 4 - RECOMMENDATIONS

Having considered the submissions which we received in response to the Report for Discussion, and the developments which have taken place since its publication, we have decided to adopt in their entirety the recommendations set out in the Report for Discussion, subject to the two modifications discussed in Chapter 2. The first relates to the attorney's application for advice and directions, and is reflected in Recommendation 44. The second involves the protection of attorneys and third parties in cases where the EPA is void for lack of capacity, and is reflected in amendments to Recommendations 42 and 43.

Accordingly, our final recommendations are as follows:

RECOMMENDATION 1

We recommend that legislation be introduced to enable a power of attorney to be granted which will continue notwithstanding any subsequent mental incapacity or infirmity of the donor.

[Draft Act, s. 4]

RECOMMENDATION 2

We recommend that the proposed legislation require that an enduring power of attorney be in writing and (subject to recommendation No. 3) be signed by the donor.

[Draft Act s. 2(1)(a)]

RECOMMENDATION 3

We recommend that the proposed legislation provide that an enduring power of attorney may be signed on the donor's behalf, in the presence and under the direction of the donor, by a person other than the attorney, a witness, or the spouse of the attorney or witness, if the donor is physically incapable of signing it.

[Draft Act s. 2(2)]

RECOMMENDATION 4

We recommend that the proposed legislation should not require an enduring power of attorney to be signed or acknowledged by the attorney.

RECOMMENDATION 5

We recommend that the proposed legislation require the execution of an enduring power of attorney to be witnessed by a lawyer as set out in Recommendation 7.

[Draft Act s. 2(3)]

RECOMMENDATION 6

We recommend that the proposed legislation require that an enduring power of attorney contain a statement indicating either that it is to continue notwithstanding the donor's subsequent mental incapacity or infirmity, or that it is to take effect upon the mental incapacity or infirmity of the donor.

[Draft Act s. 2(1)(b)]

RECOMMENDATION 7

We recommend that the proposed legislation require that an enduring power of attorney be accompanied by a certificate of legal advice in prescribed form, signed by a lawyer who is not the attorney or the attorney's spouse (including "common law" spouse), stating that:

(a) the donor attended before the lawyer providing the certificate;

(b) the donor appeared competent to grant the power of attorney;

(c) (i) **the donor signed the power of attorney (or acknowledged his or her signature) in the presence of the lawyer, and acknowledged having signed voluntarily, or**

(ii) **the power of attorney was signed on behalf of the donor as provided in Recommendation No. 3, in the presence of the lawyer and the donor, and the donor acknowledged that he or she was physically incapable of signing and that his or her direction to sign was given voluntarily; and**

(d) **the lawyer satisfied himself or herself that the donor understood the explanatory notes referred to in Recommendation 8.**

[Draft Act ss. 2(1)(d), 2(3)]

RECOMMENDATION 8

We recommend that the proposed legislation require every enduring power of attorney to include a series of explanatory notes, setting out the essential nature and effect of the instrument.

[Draft Act s. 2(1)(c)]

RECOMMENDATION 9

We recommend that the explanatory notes referred to in Recommendation No. 8 be as follows:

NOTES ON THE ENDURING POWER OF ATTORNEY

Read These Notes Before Signing This Document

1. The effect of this document is to authorize the person you have named as your attorney to act on your behalf with respect to your property and financial affairs.

2. Unless you state otherwise in the document, your attorney will have very wide powers to deal with your property on your behalf. The attorney will also be able to use your property to benefit your spouse and dependent children. You should consider very carefully whether or not you wish to impose any restrictions on the powers of your attorney.

3. This document is an "enduring" power of attorney, which means that it will *not* come to an end if you become mentally incapable of managing your own affairs. At that point your attorney will have a duty to manage your affairs, and will not be able to resign without first obtaining permission from the court. The power of attorney comes to an end if you or your attorney dies.

4. This document takes effect as soon as it is signed and witnessed. If you do not want your attorney to be able to act on your behalf until after you become mentally incapable of managing your own affairs, you should state this in the document.

5. You can cancel this power of attorney at any time, so long as you are still mentally capable of understanding what you are doing.

6. You should ensure that your attorney knows about this document and agrees to being appointed as attorney.

[Draft Act Schedule]

RECOMMENDATION 10

We recommend that the proposed legislation provide that the prescribed formalities apply only to enduring powers of attorney, and that failure to comply with these formalities should not in itself prevent an otherwise valid instrument from being a power of attorney (albeit a non-enduring one).

[Draft Act s. 2(1)]

RECOMMENDATION 11

We recommend that the proposed legislation should provide that the prescribed formalities apply notwithstanding any agreement or waiver to the contrary.

[Draft Act s. 2(5)]

RECOMMENDATION 12

We recommend that the proposed legislation provide that, notwithstanding the formalities of execution prescribed in the legislation, an instrument is an enduring power of attorney if, according to the law of the place where it is executed,

(a) it is a valid power of attorney, and

(b) the attorney's authority thereunder is not terminated by the subsequent mental incapacity or infirmity of the donor.

[Draft Act s. 2(4)]

RECOMMENDATION 13

We recommend that the proposed legislation should not impose a mandatory registration requirement for enduring powers of attorney.

RECOMMENDATION 14

We recommend that the proposed legislation provide that an enduring power of attorney is void if, at the date of its execution, the donor is mentally incapable of understanding its nature and effect.

[Draft Act s. 3]

RECOMMENDATION 15

We recommend that the proposed legislation should not prescribe a minimum age for donors of enduring powers of attorney.

RECOMMENDATION 16

We recommend that the proposed legislation should not place any restrictions on who can be appointed as an attorney under an enduring power of attorney.

RECOMMENDATION 17

We recommend that the proposed legislation should not require that an enduring power of attorney appoint a minimum of two attorneys.

RECOMMENDATION 18

We recommend that the proposed legislation should not place a financial limit on the value of estates which can be the subject of an enduring power of attorney.

RECOMMENDATION 19

We recommend that the proposed legislation should not place a time limit on the duration of enduring powers of attorney.

RECOMMENDATION 20

We recommend that the proposed legislation provide that where an attorney has acted in pursuance of an enduring power of attorney, or has otherwise indicated acceptance of the appointment, and the power of attorney has not been terminated, the attorney has a duty (unless the power of attorney provides otherwise) to exercise his or her powers to protect the donor's interests during any period in which the attorney knows, or ought to know, that the donor is unable

to make reasonable judgments in respect of matters relating to all or part of his or her estate.

[Draft Act s. 8]

RECOMMENDATION 21

We recommend that the proposed legislation provide that:

(a) **The donor of an enduring power of attorney, or the donor's personal representative or trustee appointed under the *Dependent Adults Act*, may apply to the Surrogate Court by way of originating notice for an order directing the attorney to bring in and pass accounts in respect of any or all transactions entered into in pursuance of the power of attorney.**

(b) **An application referred to in paragraph (a) may also be brought by any interested person, and by any other person with leave of the Court, if the donor is unable to make reasonable judgments in respect of matters relating to all or part of his or her estate.**

(c) **A copy of the application and order shall be served on the donor (unless the Court dispenses with this requirement), the attorney, and the Public Trustee (unless the person to be served is the applicant).**

(d) **The Court may grant whatever order for accounting it considers appropriate in the circumstances.**

(e) **These provisions apply notwithstanding any agreement or waiver to the contrary.**

[Draft Act s. 9]

RECOMMENDATION 22

We recommend that the proposed legislation provide that an attorney under an enduring power of attorney has authority to do on behalf of the donor anything which the donor can

lawfully do by an attorney, subject to any conditions or restrictions in the instrument creating the power.

[Draft Act s. 7(1)]

RECOMMENDATION 23

We recommend that the proposed legislation provide that, subject to any conditions, restrictions or additions in the instrument creating the power, an attorney under an enduring power of attorney may exercise his or her authority for the maintenance, education, benefit and advancement of the donor's spouse and dependent children (including the attorney).

[Draft Act s. 7(2)]

RECOMMENDATION 24

We recommend that the proposed legislation should not address the issue of ademption of specific legacies resulting from the act of an attorney under an enduring power of attorney.

RECOMMENDATION 25

We recommend that the proposed legislation provide that:

(a) **An enduring power of attorney may provide that it takes effect at a specified future time or on the occurrence of a specified contingency, including, but not limited to, the mental incapacity or infirmity of the donor.**

(b) **A power of attorney described in paragraph (a) may name one or more persons on whose written declaration the specified contingency is conclusively deemed to have occurred for the purpose of bringing the power of attorney into effect.**

(c) **A person referred to in paragraph (b) may be the attorney appointed under the power of attorney.**

(d) **Where the specified contingency referred to in paragraph (a) relates to the mental incapacity or infirmity of the donor, but**

(1) the power of attorney does not name a person as provided in paragraph (b), or

(2) the named person dies before the power of attorney takes effect,

the specified contingency shall be conclusively deemed to have occurred, for the purpose of bringing the power of attorney into effect, when two medical practitioners declare in writing that it has occurred.

[Draft Act s. 5]

RECOMMENDATION 26

We recommend that the proposed legislation provide that, notwithstanding any restriction (whether statutory or otherwise) relating to the release of confidential health care information, where an enduring power of attorney is contingent upon the donor's mental incapacity or infirmity, information concerning the donor's mental and physical health may be released to the extent necessary for the purposes of confirming whether the specified contingency has occurred.

[Draft Act s. 6]

RECOMMENDATION 27

We recommend that the proposed legislation provide that an enduring power of attorney terminates if it is revoked by the donor, provided that the donor is capable of understanding the nature and effect of the revocation.

[Draft Act s. 12(1)(a)]

RECOMMENDATION 28

We recommend that the proposed legislation provide that:

(a) **If the donor of an enduring power of attorney is unable to make reasonable judgments in respect of matters relating to all or part of his or her estate, the donor, any interested person, or any other person with leave of the Court, may apply to the Surrogate Court by way of originating notice for an order terminating the enduring power of attorney.**

(b) **A copy of the application and order shall be served on the donor (unless the Court dispenses with this requirement), the attorney, and the Public Trustee (unless the person to be served is the applicant).**

(c) **On hearing an application under paragraph (a), the Court may grant an order terminating the enduring power of attorney if it considers that this would be in the best interests of the donor.**

[Draft Act s. 10]

RECOMMENDATION 29

We recommend that the proposed legislation provide that, if a termination order is granted as provided in Recommendation 28,

(a) **the Court shall not appoint a substitute attorney,**

(b) **the Court may direct the applicant or the Public Trustee to bring an application forthwith under the *Dependent Adults Act* for a trusteeship order in respect of the donor's estate, and**

(c) **pending the application referred to in paragraph (b), the Court may appoint an interim trustee of the donor's estate with such powers as the Court considers appropriate.**

[Draft Act s. 10(4)]

RECOMMENDATION 30

We recommend that the proposed legislation should not provide that the Court may vary the terms of an enduring power of attorney.

RECOMMENDATION 31

We recommend that the proposed legislation provide that:

(a) **Subject to paragraph (b), an enduring power of attorney terminates upon the attorney renouncing the appointment and giving notice of the renunciation to the donor.**

(b) **During any period in which an attorney is subject to the duty referred to in Recommendation 20, the attorney shall not renounce the appointment without leave of the Court.**

(c) **An application for leave to renounce shall be deemed to be an application for a termination order as provided in Recommendation 28.**

[Draft Act ss. 11, 12(1)(b)]

RECOMMENDATION 32

We recommend that the proposed legislation provide that an enduring power of attorney terminates upon a trusteeship order being granted under the *Dependent Adults Act* in respect of the donor's estate.

[Draft Act s. 12(1)(d)]

RECOMMENDATION 33

We recommend that the *Dependent Adults Act* be amended to provide that:

(a) **Where an application is made for a trusteeship order in respect of the estate of the donor of an enduring power of attorney,**

(i) **the attorney shall be served with a copy of the application, a copy of the trusteeship order if granted, and notice of appeal if any, and**

(ii) **the Court shall have regard to the existence of the enduring power of attorney in deciding whether the donor needs a trustee and whether the trusteeship order would be in the donor's best interests.**

(b) **An attorney under an enduring power of attorney must be served with a copy of any application for a guardianship order in respect of the donor, a copy of the order if granted, notice of appeal if any, and notice of any application for review of the order.**

[Draft DPA Amendment Act ss. 3-6 and 9]

RECOMMENDATION 34

We recommend that the *Dependent Adults Act* be amended to provide that:

(a) **If at the time a certificate of incapacity is issued, there exists an enduring power of attorney granted by the person named in the certificate, the certificate is of no effect and the Public Trustee does not become trustee of the donor's estate.**

(b) **Notwithstanding paragraph (a), any action taken by the Public Trustee in the belief that no enduring power of attorney exists is as valid as if it had been done pursuant to a certificate of incapacity and as if no enduring power of attorney had been in existence.**

(c) **The written statement which the Public Trustee is required to give under section 58(1) must explain that the certificate of incapacity has no effect if there exists an enduring power of attorney granted by the person named in the certificate prior to the certificate being issued, but that the Public Trustee may manage the estate until notified of the enduring power of attorney.**

[Draft DPA Amendment Act ss. 7-8]

RECOMMENDATION 35

We recommend that the proposed legislation provide that an enduring power of attorney terminates upon the death of the donor or the attorney.

[Draft Act s. 12(1)(e)]

RECOMMENDATION 36

We recommend that the proposed legislation should not provide that an enduring power of attorney terminates upon the bankruptcy of the donor or the attorney.

RECOMMENDATION 37

We recommend that the proposed legislation provide that an enduring power of attorney terminates upon a trusteeship order being granted or a certificate of incapacity being issued in respect of the attorney's estate.

[Draft Act s. 12(1)(f)]

RECOMMENDATION 38

We recommend that the *Dependent Adults Act* be amended to provide that, on granting a trusteeship order in respect of the estate of an attorney under an enduring power of attorney, the Court may direct the applicant or the Public Trustee to apply for an order appointing a trustee on behalf of the donor of the power, if the Court has reason to believe that the donor may be unable to make reasonable judgments

in respect of matters relating to all or part of his or her estate.

[Draft DPA Amendment Act s. 6(b)]

RECOMMENDATION 39

We recommend that the proposed legislation provide that, where an enduring power of attorney appoints more than one attorney, each with joint and several authority, or provides for alternate attorneys, the appointment of one being conditional upon the cessation of the appointment of another, references in the legislation to "the attorney" in relation to termination of the power shall be interpreted as a reference to the last remaining attorney.

[Draft Act s. 12(2)]

RECOMMENDATION 40

We recommend that the proposed legislation provide that its provisions relating to termination of an enduring power of attorney do not apply to irrevocable powers of attorney.

[Draft Act s. 12(1)]

RECOMMENDATION 41

We recommend that the proposed legislation provide that its provisions relating to termination of an enduring power of attorney apply notwithstanding any agreement or waiver to the contrary.

[Draft Act s. 12(1)]

RECOMMENDATION 42

We recommend that the proposed legislation provide that an attorney shall not incur any liability to the donor or to any other person for having acted in pursuance of a power of attorney which has been terminated, or which is void on the

ground of the donor's mental incapacity, if the attorney did not know, and with the exercise of reasonable care would not have known, of the termination or absence of his or her authority.

[Draft Act s. 14(1)]

RECOMMENDATION 43

We recommend that the proposed legislation provide that where a power of attorney is terminated, or is void on the ground of the donor's mental incapacity, any exercise of the power by the attorney is valid and binding in favour of any person who did not know, and with the exercise of reasonable care would not have known, of the termination or absence of the attorney's authority.

[Draft Act s. 14(2)]

RECOMMENDATION 44

We recommend that the proposed legislation provide that:

(a) **An attorney under an enduring power of attorney may apply by originating notice for the opinion, advice or direction of the Surrogate Court on any question respecting the management or administration of the donor's property.**

(b) **An attorney who acts on the opinion, advice or direction of the Court has the same protection as is given to trustees by section 43 of the *Trustee Act*, to legal representatives by section 61 of the *Administration of Estates Act*, and to guardians and trustees by section 45 of the *Dependent Adults Act*.**

[Draft Act s. 13]

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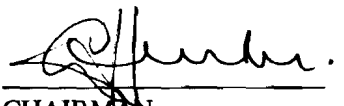
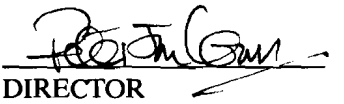


CHAIRMAN



DIRECTOR

December 1990

APPENDIX A

Draft *Powers of Attorney Act*

Definitions

1 In this Act,

(a) "attorney" means an attorney under a power of attorney;

(b) "certificate of incapacity" has the same meaning as in the *Dependent Adults Act*;

(c) "Court" means the Surrogate Court of Alberta;

(d) "donor" means the donor of a power of attorney;

(e) "enduring power of attorney" means an enduring power of attorney as defined in section 2;

(f) "spouse" includes parties to a relationship between a man and a woman who are living together on a *bona fide* domestic basis;

(g) "trustee" and "trusteeship order" have the same meaning as in the *Dependent Adults Act*.

Enduring power of attorney

2(1) A power of attorney is an enduring power of attorney if

(a) it is in writing and is signed by the donor,

(b) it contains a statement indicating either that it is to continue notwithstanding the donor's subsequent mental incapacity or infirmity, or that it is to take effect upon the mental incapacity or infirmity of the donor,

(c) it incorporates the explanatory notes set out in the Schedule to this Act, and

(d) it is accompanied by a certificate of legal advice signed by a lawyer who is not the attorney or the attorney's spouse.

(2) Notwithstanding subsection (1)(a), an enduring power of attorney may be signed on the donor's behalf, in the presence and under the direction of the donor, by a person other than the attorney, the lawyer referred to in subsection 1(d), or the spouse of the attorney or the lawyer, if the donor is physically incapable of signing it.

(3) The certificate of legal advice referred to in subsection (1)(d) shall be in the prescribed form and shall state that:

(a) the donor attended before the lawyer providing the certificate,

(b) the donor appeared competent to grant the power of attorney,

(c) (i) the donor signed the power of attorney (or acknowledged his or her signature) in the presence of the lawyer, and acknowledged having signed voluntarily, or

(ii) the power of attorney was signed on behalf of the donor as provided in subsection (2), in the presence of the lawyer and the donor, and the donor acknowledged that he or she was physically incapable of signing and that his or her direction to sign was given voluntarily, and

(d) the lawyer satisfied himself or herself that the donor understood the explanatory notes referred to in subsection (1)(c).

(4) Notwithstanding subsection (1), an instrument is an enduring power of attorney if, according to the law of the place where it is executed,

(a) it is a valid power of attorney, and

(b) the attorney's authority thereunder is not terminated by the subsequent mental incapacity or infirmity of the donor.

(5) This section applies notwithstanding any agreement or waiver to the contrary.

Incapacity at execution

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

Subsequent incapacity

4 An enduring power of attorney is not terminated by the subsequent mental incapacity or infirmity of the donor.

Springing powers

5(1) An enduring power of attorney may provide that it takes effect at a specified future time or on the occurrence of a specified contingency, including, but not limited to, the mental incapacity or infirmity of the donor.

(2) A power of attorney described in subsection (1) may name one or more persons on whose written declaration the specified contingency is conclusively deemed to have occurred for the purpose of bringing the power of attorney into effect.

(3) A person referred to in subsection (2) may be the attorney appointed under the power of attorney.

(4) Where the specified contingency referred to in subsection (1) relates to the mental incapacity or infirmity of the donor, and

(a) the power of attorney does not name a person as provided in subsection (2), or

(b) the named person dies before the power of attorney takes effect,

the specified contingency shall be conclusively deemed to have occurred, for the purpose of bringing the power of attorney into effect, when two medical practitioners declare in writing that it has occurred.

Release of confidential information

6 Notwithstanding any restriction (whether statutory or otherwise) relating to the disclosure of confidential health care information, where an enduring power of attorney is contingent upon the donor's mental incapacity or infirmity, information concerning the donor's mental and physical health may be disclosed to the extent necessary for the purposes of confirming whether the specified contingency has occurred.

Authority of attorney

7(1) An attorney under an enduring power of attorney has authority to do on behalf of the donor anything which the donor can lawfully do by an attorney, subject to any conditions or restrictions in the instrument creating the power.

(2) Subject to any conditions, restrictions or additions in the instrument creating the power, an attorney under an enduring power of attorney may exercise his or her authority for the maintenance, education, benefit and advancement of the donor's spouse and dependent children (including the attorney).

Duty to act

8 Where

(a) an attorney has acted in pursuance of an enduring power of attorney, or has otherwise indicated acceptance of the appointment, and

(b) the power of attorney has not been terminated,

the attorney has a duty (unless the power of attorney provides otherwise) to exercise his or her powers to protect the donor's interests during any period in which the attorney knows, or ought to know, that the donor is unable to make reasonable judgments in respect of matters relating to all or part of his or her estate.

Accounting

9(1) An application may be made to the Court by way of originating notice for an order directing an attorney under an enduring power of attorney to bring in and pass accounts in respect of any or all transactions entered into in pursuance of the power of attorney.

(2) The application may be brought by

(a) the donor, the donor's personal representative, or a trustee of the donor's estate, and

(b) any interested person, and any other person with leave of the Court, if the donor is unable to make reasonable judgments in respect of matters relating to all or part of his or her estate.

(3) A copy of the application and order shall be served on the donor (unless the Court dispenses with this requirement), the attorney, and the Public Trustee (unless the person to be served is the applicant).

(4) On hearing an application under subsection (1), the Court may grant whatever order for accounting it considers appropriate in the circumstances.

(5) This section applies notwithstanding any agreement or waiver to the contrary.

Termination order

10(1) If the donor of an enduring power of attorney is unable to make reasonable judgments in respect of matters relating to all or part of his or her estate, the donor, any interested person, or any other person with leave of the Court, may apply to the Court by way of originating notice for an order terminating the enduring power of attorney.

(2) A copy of the application and order shall be served on the donor (unless the Court dispenses with this requirement), the attorney, and the Public Trustee (unless the person to be served is the applicant).

(3) On hearing an application under subsection (1), the Court may grant an order terminating the enduring power of attorney if it considers that this would be in the best interests of the donor.

(4) On granting an order terminating an enduring power of attorney, the Court

(a) shall not appoint a substitute attorney;

(b) may direct the applicant or the Public Trustee to bring an application forthwith for a trusteeship order in respect of the donor's estate; and

(c) pending the application referred to in clause (b), may appoint an interim trustee of the donor's estate with such powers as the Court considers appropriate.

Renunciation

11(1) During any period in which an attorney is subject to the duty imposed by section 8, the attorney shall not renounce the appointment without leave of the Court.

(2) An application for leave to renounce shall be deemed to be an application under section 10.

Termination of enduring power of attorney

12(1) Except in the case of an irrevocable power of attorney, and notwithstanding any agreement or waiver to the contrary, an enduring power of attorney terminates

(a) if it is revoked by the donor, provided that the donor is mentally capable of understanding the nature and effect of the revocation;

(b) subject to section 11, if the attorney renounces the appointment and gives notice of the renunciation to the donor;

(c) on a termination order being granted pursuant to section 10(3);

(d) on a trusteeship order being granted in respect of the donor;

(e) on the death of the donor or the attorney; and

(f) on a trusteeship order being granted or a certificate of incapacity being issued in respect of the attorney.

(2) Where an enduring power of attorney

(a) appoints more than one attorney, each with joint and several authority, or

(b) provides for alternate attorneys, the appointment of one being conditional upon the cessation of the appointment of another,

references to "the attorney" in subsection (1) shall be interpreted as a reference to the last remaining attorney.

Application to court for advice

13(1) An attorney under an enduring power of attorney may apply by originating notice for the opinion, advice or direction of the Court on any question respecting the management or administration of the donor's property.

(2) The attorney acting on the opinion, advice or direction given by the Court shall be deemed, so far as regards the attorney's own responsibility, to have discharged his or her duty as attorney in respect of the subject matter of the opinion, advice or direction.

(3) Subsection (2) does not extend to indemnify an attorney in respect of any act done in accordance with the opinion, advice or direction of the Court if the attorney has been guilty of any fraud or wilful concealment or misrepresentation in obtaining the opinion, advice or direction.

Protection of attorneys and third parties

14(1) An attorney shall not incur any liability to the donor or to any other person for having acted in pursuance of a power of attorney which has been terminated, or which is void on the ground of the donor's mental incapacity, if the attorney did not know, and with the exercise of reasonable care would not have known, of the termination or absence of his or her authority.

(2) Where a power of attorney is terminated, or is void on the ground of the donor's mental incapacity, any exercise of the power by the attorney is valid and binding in favour of any person who did not know, and with the exercise of reasonable care would not have known, of the termination or absence of the attorney's authority.

Regulations

15 The Lieutenant Governor in Council may make regulations prescribing the form of the certificate of legal advice referred to in section 2.

SCHEDULE

Section 2(1)(c)

NOTES ON THE ENDURING POWER OF ATTORNEY

Read These Notes Before Signing This Document

1. The effect of this document is to authorize the person you have named as your attorney to act on your behalf with respect to your property and financial affairs.

2. Unless you state otherwise in the document, your attorney will have very wide powers to deal with your property on your behalf. The attorney will also be able to use your property to benefit your spouse and dependent children. You should consider very carefully whether or not you wish to impose any restrictions on the powers of your attorney.

3. This document is an "enduring" power of attorney, which means that it will *not* come to an end if you become mentally incapable of managing your own affairs. At that point your attorney will have a duty to manage your affairs, and will not be able to resign without first obtaining permission from the court. The power of attorney comes to an end if you or your attorney dies.

4. This document takes effect as soon as it is signed and witnessed. If you do not want your attorney to be able to act on your behalf until after you become mentally incapable of managing your own affairs, you should state this in the document.

5. You can cancel this power of attorney at any time, so long as you are still mentally capable of understanding what you are doing.

6. You should ensure that your attorney knows about this document and agrees to being appointed as attorney.

APPENDIX B

Draft *Dependent Adults Amendment Act*

1 The *Dependent Adults Act* is amended by this Act.

2 Section 1 is amended by adding the following after clause (d):

(d.1) "enduring power of attorney" has the same meaning as in the *Powers of Attorney Act*;

3 Section 3(2) is amended by adding the following after clause (e):

(e.1) any attorney under an enduring power of attorney granted by the person in respect of whom the application is made if he is not the applicant or a person served pursuant to this subsection,

4 Section 15(2) is amended by adding the following after clause (e):

(e.1) any attorney under an enduring power of attorney granted by the dependent adult if he is not the applicant or a person served pursuant to this subsection,

5 Section 22(2) is amended by adding the following after clause (e):

(e.1) any attorney under an enduring power of attorney granted by the person in respect of whom the application is made if he is not the applicant or a person served pursuant to this subsection,

6 Section 25 is amended

(a) by adding the following after subsection (2):

(2.1) In considering the matters referred to in subsections (1)(c) and (2), the Court shall have regard to the existence of any enduring power of attorney granted by the person in respect of whom the application is made.

(b) by adding the following after subsection (3):

(4) If the Court makes an order under this section in respect of an attorney under an enduring power of attorney, and the Court has reason to believe that the donor of that power may be unable to make reasonable judgments in respect of matters relating to all or part of his estate, the Court may direct the applicant or the Public Trustee to make an application for a trusteeship order in respect of the donor's estate.

7 Section 52 is amended

(a) by adding the following after subsection (1):

(2) A certificate of incapacity is of no effect, and the Public Trustee does not become trustee of the estate of the person named in the certificate, if at the time the certificate is issued there exists an enduring power of attorney granted by the person named in the certificate.

(b) in subsection (6) by adding "or enduring power of attorney" after "trusteeship order" wherever it occurs.

8 Section 58(1) is amended by adding the following after clause (e):

(e.1) a statement explaining that the certificate of incapacity has no effect if there exists an enduring power of attorney granted by the person named in the certificate prior to the certificate being issued, but that the Public Trustee may manage the estate until notified of the enduring power of attorney;

9 Section 68(2) is amended by adding the following after clause (a):

(a.1) any attorney under an enduring power of attorney granted by the dependent adult,

APPENDIX C

LIST OF INDIVIDUALS AND ORGANIZATIONS WHO MADE SUBMISSIONS OR WITH WHOM CONSULTATIONS WERE HELD IN PREPARING THE REPORT FOR DISCUSSION AND THE FINAL REPORT

David Abbey, Barrister and Solicitor	Edmonton, Alberta
Alzheimer Society of Calgary	Calgary, Alberta
Alzheimer Society of Edmonton	Edmonton, Alberta
Darcy Anderson, Barrister and Solicitor	Calgary, Alberta
Allan Barker	Calgary, Alberta
Judy Boyes, Barrister and Solicitor	Calgary, Alberta
Canadian Bar Association, Health Law Subsection (Northern Alberta)	Edmonton, Alberta
Canadian Bar Association, Wills and Estates Subsection (Northern Alberta)	Edmonton, Alberta
Canadian Bar Association, Wills and Trusts Subsection (Southern Alberta)	Calgary, Alberta
Canadian Mental Health Association (Alberta Division)	Edmonton, Alberta
G. Thomas Carter, Barrister and Solicitor	Edmonton, Alberta
Gerald Chipeur, Barrister and Solicitor	Edmonton, Alberta
John Cumming, Barrister and Solicitor	Calgary, Alberta
R.G. Drew, General Counsel, Public Trustee's Office (Alberta)	Edmonton, Alberta
Stephen Fram, Policy Development Division, Ministry of the Attorney General (Ontario)	Toronto, Ontario
R. Stan Galbraith, Barrister and Solicitor	Edmonton, Alberta
Melane Hotz, Public Guardian (Alberta)	Edmonton, Alberta
Eugene Kush, Barrister and Solicitor	Hanna, Alberta

June Laker, Deputy Public Trustee (B.C.)	Vancouver, B.C.
R. Blaine Logan, Barrister and Solicitor	Westlock, Alberta
Richard Low, Barrister and Solicitor	Lethbridge, Alberta
A.B. MacFarlane, Master of the Court of Protection	London, England
George Monticone, Advocacy Centre for the Elderly	Toronto, Ontario
David Nichols, Scottish Law Commission	Edinburgh, Scotland
Hugh Paisley, Public Trustee (Ontario)	Toronto, Ontario
Robert Paston, Barrister and Solicitor	Eckville, Alberta
Premier's Commission on Future Health Care for Albertans	Edmonton, Alberta
Alexander Romanchuk, Barrister and Solicitor	St. Albert, Alberta
Remi G. St. Pierre, Barrister and Solicitor	Edmonton, Alberta
Bernard Starkman, Chairman, Ontario Guardianship and Advocacy Committee	Toronto, Ontario
Hon. Mr. Justice Wm. Stevenson	Ottawa, Ontario
Robert Teskey, Barrister and Solicitor	Edmonton, Alberta
Judith Wahl, Advocacy Centre for the Elderly	Toronto, Ontario