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NON-RESIDENT TRUSTEES UNDER THE *DEPENDENT ADULTS ACT*

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In examining this issue we have had the benefit of feedback from a number of members of the profession and from representatives of the Public Trustee's Office. We have met with the following members of the Public Trustee's Office to examine the incidence of the issue, and the effectiveness of any potential safeguards:

C. Suzanne McAfee, Manager, Legal Services
Leslie A. Hills, Solicitor
Ernest Kambeitz, Manager, Dependent Adult Estates
Roman Bombak, Director, Estate Administration
Kim Gossman, Solicitor

In addition, we have been fortunate in receiving feedback from a number of legal practitioners, government officials, and other professionals on various matters, including incidence of the issue, legislative history, the use of surety bonds, and the appropriate circumstances in which a non-resident trustee might be appointed. In particular, we acknowledge the comments of:

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Steven Jewell, Contract and Legislative Consultant, Alberta Human Resources and Employment
Jeff Steel, Phoenix Group of Insurance Brokers

While the report raises a very specific point, it has also required the review of some broad enforcement and recognition issues, which themselves have undergone some significant change in the last few years. We are grateful to our counsel, Debra Hathaway, who has had carriage of this project and whose assiduous research clarified the issues for the Board.

Table of Contents

PART I — EXECUTIVE SUMMARY

A trustee under the *Dependent Adults Act* of Alberta handles some or all of the financial affairs of a dependent adult, depending on the terms of the trusteeship order. Usually the trustee is a spouse, adult child, sibling or other member of the dependent adult's family. More rarely, the trustee may be a trust corporation. As a last resort, the Public Trustee may be appointed.

An individual cannot be appointed as trustee under the *Dependent Adults Act* unless the individual is a resident of Alberta. The Act's prohibition of non-resident trustees creates significant practical difficulties if the only suitable or most suitable potential trustee is a non-resident or if an Alberta trustee is appointed but subsequently becomes a non-resident. We believe that these difficulties, although they arise in only a small minority of cases, are sufficient to justify providing a remedy. Further, the combination of an aging population, smaller family size and an increasingly mobile population are likely to make such difficulties more common.

It seems to us that preventing willing and capable non-resident family members from becoming trustees undermines the philosophy of the *Dependent Adults Act* that family responsibility for dependent adults should be encouraged and facilitated as preferable to state control of people's affairs. We therefore recommend that the law be changed so that a resident of any province or territory of Canada can be appointed a trustee.

Alberta courts do not have jurisdiction over residents of other provinces and territories. Allowing non-residents to be trustees will therefore have two legal consequences for which safeguards must be put in place to address directly or indirectly:

- An Alberta court order will not be able to compel a trustee to act nor prevent the trustee from acting. So if a non-resident trustee fails to perform the trustee's duties as required (such as filing an inventory, passing

accounts, etc.), the non-resident trustee (unlike a resident trustee) cannot be forced by an Alberta court order to perform the duties.

- If the non-resident trustee misappropriates the estate and an Alberta judgment for damages is obtained, an Alberta court could not order the seizure and sale of the trustee's assets located in another jurisdiction. An Alberta court controls only what is within the borders of Alberta. Enforcing an Alberta money judgment in another Canadian province or territory has become easier since the 1990 Supreme Court of Canada decision in *Morguard Investments Ltd.* v. *De Savoye*, but it still requires bringing a lawsuit in the other province or territory. Some provinces are currently in the process of adopting an improved statutory enforcement system that will make interprovincial enforcement of money judgments virtually automatic, but such legislation will not be uniform across Canada for many years. Despite these legal developments, an additional legal safeguard will be needed to address this issue.

It should be noted that, although legal consequences flow from non-residency, it does not mean that non-residents when acting as trustees are any more likely than residents to default in their duties or to mishandle or misappropriate the estate.

Despite the legal consequences of non-residency, almost all other Canadian jurisdictions allow non-residents to be appointed trustees for dependent adults. The standard safeguard used in these jurisdictions is to require non-resident trustees to provide a surety bond or some other form of security for performance of their duties. The court can order damages to be paid out of the security if the non-resident trustee misappropriates the estate. Thus, security overcomes the difficulty of enforcing a money judgment against a non-resident trustee. But security still does not enable a court to compel a non-resident trustee to act or restrain a non-resident trustee from acting. Moreover, security is expensive, difficult to obtain and problematic to receive from resident trustees who subsequently move to another province, which is why we propose a new reform approach in this area.

Our principal recommendation is that the *Dependent Adults Act* be changed so that a resident of any Canadian province or territory can be eligible for appointment as a trustee. Because of the difficulties and uncertainties of enforcing an Alberta judgment outside Canada, we do not recommend that residents of other countries be eligible.

As for the safeguards that are necessary due to the legal consequences of non-residency, we propose a new approach based on the law of interprovincial enforcement of judgments within Canada. Our goal is to make enforceable across Canada any money judgment ordered by an Alberta court against a non-resident Canadian trustee who defaults. This will protect the dependent adult by allowing damages to be recovered from the trustee's assets elsewhere in Canada, even though those assets are not within the jurisdiction of Alberta.

We recommend the following safeguards:

- In order to be appointed as a trustee, every proposed trustee must provide written, voluntary, irrevocable attornment to the jurisdiction of Alberta courts. "Attornment" is a legal concept that means the person agrees to submit to court control despite being beyond the geographical borders of the court's authority. Attornment removes the most powerful statutory defence a person can have against interprovincial enforcement of money judgments and makes enforcement of money judgments very easy in other provinces. All proposed trustees will have to consent to attornment regardless of whether they are resident or non-resident at the date of appointment, so that the protective safeguard of attornment will be in place if a resident trustee subsequently moves from Alberta to another province or territory in Canada.

  Attornment, like the use of security, cannot overcome the inability to enforce a court order compelling or restraining the actions of a non-resident trustee. An interprovincial legal mechanism to enforce these types of non-money orders simply does not currently exist at all. The Uniform Law Conference of Canada has proposed a model Act that will solve this

problem and someday, if all provinces and territories adopt that model, it will be possible to enforce such orders interprovincially, thus eliminating all enforcement risks in having a non-resident trustee.

But in the meantime, a non-resident trustee who neglects or fails to file the inventory or pass accounts would have to be dealt with using an indirect (but still effective) method. An interested person who sees the dereliction of duty would simply have to start a court application to review the trusteeship order itself (rather than bring an application to get a court order forcing the trustee to perform the neglected duty). If the non-resident trustee does not cooperate with that review, the court could appoint a new trustee.

- A wider group of relatives should be notified when a non-resident is being considered for appointment than when a resident is proposed as trustee. When a non-resident is proposed as trustee, the application should be served on all persons living in Canada who would be the heirs on intestacy of the dependent adult (as if the dependent adult had just died intestate). If any of these close relatives have misgivings about having a non-resident trustee, the best time for objections to be raised is at the beginning of the appointment process, not afterwards.

- So that legal remedies against a non-resident trustee's assets may be pursued as easily as against a resident trustee's assets, no order for service ex juris should be necessary when suing a non-resident trustee. All proposed trustees will be obliged to provide a personal address for service and to update its currency as required. We also recommend some consequential provisions to facilitate service.

We do not recommend that the limited statutory role of the Public Trustee be expanded or that greater costs be imposed on the Public Trustee in relation to non-resident trustees. Therefore, in the event of the death of a non-resident trustee where no provision has been made for a replacement, the default trustee should not be the Public Trustee but rather, the dependent adult's nearest relative living in

Canada. This prevents a lapse in the trusteeship while avoiding negative resource implications for the Public Trustee, who would not have to hire legal agents in another province or send its own personnel to that other province in order to determine the state of the trusteeship.

We also recommend that the limitations on the Public Trustee's statutory role in the event of trustee default be clarified with family members at the beginning of the appointment process. The family is primarily responsible for producing another private trustee to pursue legal remedies on the dependent adult's behalf, with the Public Trustee being only a trustee of last resort. Clarifying the Public Trustee's role with family members is especially important if a non-resident is to be appointed trustee. When family members assess the advantages and disadvantages of having a non-resident trustee, they should not be potentially labouring under false assumptions about who will be responsible for taking action should something go wrong.

Finally, we propose that resident trustees who were appointed before the requirement of attornment comes into force be required to consent to attornment when their trusteeship orders are reviewed or their accounts are passed. Until they provide the consent, they will be deemed to have attorned.

PART II — LIST OF RECOMMENDATIONS

PART III — REPORT

CHAPTER 1. INTRODUCTION

A. Issue

[1] To be appointed under the *Dependent Adults Act*[1] as a trustee of the estate of a dependent adult, an individual must be a resident of Alberta.[2] If no resident can be found to act as trustee and no trust corporation is hired to act as trustee,[3] the Public Trustee of Alberta will be appointed as a last resort. Typically, however, private trustees are recruited from among the spouse, adult children, siblings or other family members of dependent adults.

[2] A trustee under the *Dependent Adults Act* handles some or all of the financial affairs of a dependent adult, depending on the terms of the trusteeship order. This can include legal matters like litigation arising out of those financial affairs. By contrast, a guardian under that Act handles some or all of the personal decisions and lifestyle issues of a dependent adult, depending on the terms of the guardianship order. This can include health care decisions or legal matters like litigation that do not concern financial affairs.

[3] Alberta's prohibition of non-resident trustees can pose a practical problem in various circumstances – for example:

- a dependent adult has no family in Alberta but has a relative outside the province who would act as trustee, if possible;

- a dependent adult has family both in and outside the province, but the Alberta relatives are unwilling or unable to act or would not be a good choice as trustee;

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[1] R.S.A. 2000, c. D-11.

[2] *Ibid*, s. 36(1)(a)(iv).

[3] Trust corporations typically act only for large estates, so this is not really an option for most people.

- the only Alberta relative of a dependent adult is appointed as trustee but then moves to another province.

[4] The issue examined by this Report is whether the residency requirement for trustees should be removed from the Act and the prohibition of non-resident trustees ended.

B. Project History

[5] This project originated from concerns expressed by some legal practitioners that the current prohibition is too restrictive and prevents some dependent adults from receiving assistance from otherwise qualified non-resident family members. Throughout the project, the opinions and input of selected private practitioners and the Office of the Public Trustee were sought and considered. We thank all consultants for their invaluable contribution to this project.

C. Report Outline

[6] This Report is divided into four chapters. Chapter 1 is introductory. Chapter 2 surveys the statutes of other Canadian jurisdictions, outlines the courts' approach to this issue and discusses the legislative background of the Alberta prohibition. Whether reform is needed is examined in Chapter 3 and a new approach to this issue is discussed. Chapter 4 contains our detailed recommendations for reform.

CHAPTER 2. COMPARATIVE OVERVIEW AND BACKGROUND

A. Legislation in Other Canadian Jurisdictions

[7] Only two other Canadian jurisdictions (Northwest Territories[4] and Nunavut)[5] have the same absolute prohibition as Alberta against non-resident trustees.[6]

[8] All the other jurisdictions' statutes are wide enough to allow the appointment of non-resident trustees. They provide for various safeguards that differ between provinces (and even within the same province, may differ between classes of mentally disabled people). Most of the safeguards also apply to resident trustees. These safeguards may be classified as follows:

- Three jurisdictions require the trustee to provide mandatory security (New Brunswick in the case of "mentally incompetent persons,"[7] Nova Scotia[8] and Prince Edward Island).[9] While the court has discretion to set the amount and form of the security, the court cannot dispense with security altogether.

- Seven jurisdictions provide that the court has discretion whether to order security or to waive the provision of security (British Columbia,[10] Manitoba

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[4] *Guardianship and Trusteeship Act*, S.N.W.T. 1994, c. 29, s. 32(1)(a)(v).

[5] *Guardianship and Trusteeship Act*, S.N.W.T. 1994, c. 29, s. 32(1)(a)(v).

[6] When this Report discusses other provincial legislation, the Alberta term "trustee" is used for conceptual consistency despite the fact that a variety of other equivalent terms are used in the legislation of the other Canadian jurisdictions.

[7] *Infirm Persons Act*, R.S.N.B. 1973, c. I-8, s. 10(4) and (5). New Brunswick provides a different safeguard for persons "declared incapacitated by infirmity".

[8] *Incompetent Persons Act*, R.S.N.S. 1989, c. 218, s. 8; *Inebriates' Guardianship Act*, R.S.N.S. 1989, c. 227, s. 13(g).

[9] *Public Trustee Act*, S.P.E.I. 1994, c. 52, R.S.P.E.I. 1988, c. P-32.2, s. 25(5)(b).

[10] *Patients Property Act*, R.S.B.C. 1996, c. 349, s. 10(1)(c). British Columbia has a new unproclaimed system found in Part 2 of the *Adult Guardianship Act*, R.S.B.C. 1996, c. 6 (the rest of that Act was proclaimed in 2000). Under the new system, a non-resident is still able to serve as a trustee and the court still has discretion whether to order security. However, if security is ordered, it

(continued...)

in the case of a person with a "mental disorder",[11] New Brunswick in the case of persons "declared incapacitated by infirmity",[12] Newfoundland and Labrador,[13] Ontario,[14] Quebec[15] and Saskatchewan).[16]

- One jurisdiction provides that a non-resident trustee can be appointed only as a joint trustee with a resident or a trust company, but cannot be appointed or act as a sole trustee. The non-resident may also have to give security (Manitoba in the case of a person with a "mental disability").[17]

[9] One jurisdiction has no specific legislation governing this area, but relies on the court's traditional jurisdiction "with respect to mentally disordered persons and their property and estates" (Yukon).[18]

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[10] (...continued)
must be in the form of a bond "that is in the name of, is approved by and is filed with the Public Guardian and Trustee": *Ibid*., s. 10(6) (unproclaimed).

[11] *The Mental Health Act*, S.M. 1998, c. 36, C.C.S.M. c. M110, s. 77. Manitoba provides a different safeguard for persons with a "mental disability".

[12] *Supra*, note 7, s. 39(3.1).

[13] *Mentally Disabled Persons' Estates Act*, R.S.N.L. 1990, c. M-10, ss. 3 and 17.

[14] *Substitute Decisions Act, 1992*, S.O. 1992, c. 30, s. 24(3) and (4).

[15] *Civil Code of Quebec*, S.Q. 1991, c. 64, ss. 266 and 242-245. In Quebec, the tutorship council (not the court) determines the kind and object of the security and whether the security may be released. The security requirements do not apply where the value of the estate to be administered is less than $25,000.

[16] *The Adult Guardianship and Co-decision-making Act*, S.S. 2000, c. A-5.3. Section 55(4) of the Act specifies the circumstances under which the court may dispense with the bond, but the court still has very wide discretion –

> 55(4) The court may dispense with the filing of a bond pursuant to subsection (1):
> (a) where the value of the estate does not exceed a prescribed amount;
> (b) where the nearest relatives and public trustee consent in writing; or
> (c) in any other situation the court considers appropriate.

[17] *The Vulnerable Persons Living With a Mental Disability Act*, S.M. 1993, c. 29, C.C.S.M. c. V90, ss. 89(2), 90(2) and 92(4)(b).

[18] *Judicature Act*, R.S.Y. 1986, c. 96, s. 18.

B. The Courts' Approach

[10] Traditionally, courts have been extremely conservative about appointing non-resident trustees, because a non-resident is outside the geographical jurisdiction and control of the court.[19]

[11] In the early twentieth century, the general rule was quite clear. In *Re Swain,* the Ontario High Court examined previous caselaw and found that the general principle "that the (sole) committee[20] of a lunatic ought to be resident within the jurisdiction of the Court, has never been departed from."[21] However, a non-resident could be a joint committee with a resident since, in that situation, one of the committees would always be "within the jurisdiction of the Court, and could be made answerable for any dereliction of duty."[22]

[12] As the twentieth century passed, the general rule remained firm although less dogmatically stated. "Although it does not appear to be a mandatory one the general rule is that where possible the committee should be a resident of the jurisdiction where the appointment is made".[23] Any exceptions to the general rule should only operate in a "rather narrow area"[24] and "[i]t is desirable that at least one committee be within the jurisdiction of the Court. . . ".[25]

[13] However, in the last decade, some courts are beginning to question the general rule, although they are still cautious about departing from it.

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[19] A more detailed discussion of the legal problems created by non-residency is found in Chapter 3 at paras. 28-30.

[20] "Committee" is an old term that is, depending on how it is qualified, equivalent both to "trustee" ("committee of the estate") and "guardian" ("committee of the person"). The same person could, of course, be committee both of the person and of the estate.

[21] *Re Swain* (1916), 35 O.L.R. 613 at 614 (Ont. H.C.).

[22] *Ibid*.

[23] *Re Forrest* (1961), 30 D.L.R. (2d) 397 at 400 (Sask. Q.B.).

[24] *Re Hanson* (1987), 27 E.T.R. 297 at 298 (Sask. Q.B.).

[25] *Ibid*.

[14] In *Quinn* v. *O'Neill*,[26] the Ontario Court of Justice (General Division) stated that cases like *Re Swain*

> . . . were decided in another era, at a time when communication and indeed travel were difficult and when many of today's technological advances were not even dreamed of. Furthermore, that argument fails . . . to consider the requirement of the committee posting a security bond, something clearly contemplated in [the relevant legislation]. Families today have the potential for being more widely spread out geographically and in my view strict adherence to *Re Swain* overlooks the realities of the 1990s. Such a strict adherence would, in my view, deny many people the opportunity of managing family affairs.[27]

In this case, the Ontario court appointed a non-resident committee with a personal bond of double the value of the estate and two sureties.

[15] An Alberta court has also questioned the continued need for the absolute prohibition of non-resident guardians and trustees in the *Dependent Adults Act.* In *Re Hughes,*[28] the court states that

> . . . there appears to be no reason in principle, in this day and age, to exclude residents from other provinces, perhaps with the addition of certain safeguards that would not apply to Alberta residents, from enjoying the rights and accepting the responsibilities of guardianship and trusteeship of dependent adults. . . . Could a performance bond or sureties of some type compensate for the absence of geographical jurisdiction over a non-resident trustee?
>
> . . .
>
> It may be timely for the legislature to review whether the requirement that a guardian and trustee be an Albertan is still in the public interest. The Alberta Law Reform Commission is currently reviewing some aspects of surrogate legislation; it might wish to include this issue in its study.[29]

C. Legislative Background in Alberta

[16] Until 1978, it was possible for an Alberta court to appoint a non-resident committee of an incompetent person's estate. Under this province's *Mentally Incapacitated Persons Act*, there was no residency requirement. Anyone could be a

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[26] (1992), 47 E.T.R. 18 (Ont. Gen. Div.).

[27] *Ibid*. at 19-20.

[28] (1994), 23 Alta. L.R. (3d) 246 (Surr. Ct.).

[29] *Ibid*. at 250-251.

committee. All committees had to give security in a specified amount, with two or more sureties, unless the court waived or modified those requirements.[30]

[17] However, the Office of the Public Trustee advised us that, in practice, private committeeships (of any description) were actually very rare in those days due to the high rate of institutionalization of people with mental disabilities. Once institutionalized, the person would be the subject of a certificate of incompetence appointing the Public Trustee as committee and so the state would handle the person's affairs.

[18] The absolute prohibition of non-resident trustees of the estate (and the parallel prohibition of non-resident guardians of the person) commenced in 1978 with the proclamation of the *Dependent Adults Act*.[31] This Act was ground-breaking legislation in Canada and created an advanced legal model in this area. The philosophy underlying the Act promotes a modern approach to dependent adults by discouraging government control in favour of family and community involvement. "The role of the state in this model is to provide the enabling legislation and the back-up resources required to encourage appropriate family and community persons"[32] to take responsibility for dependent adults. Under this model, control by the Public Trustee would be the exception rather than the rule. Courts soon acknowledged that the Act creates "an implicit preference" for appointing trustees other than the Public Trustee, who should be made trustee only when no other person is willing, able and suitable.[33]

[19] Given the rarity of private committeeships under the preceding *Mentally Incapacitated Persons Act*, the prohibition in the *Dependent Adults Act* against non-resident trustees does not appear to have been a reaction against abuses caused in practice by non-resident committees or against problems arising out of the safety

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[30] *The Mentally Incapacitated Persons Act*, R.S.A. 1970, c. 232, s. 13. This Act used the older term "committee" rather than "trustee".

[31] *The Dependent Adults Act*, S.A. 1976, c. 63, ss. 7(1)(d) and 26(1)(d). Proclamation, 1 December 1978, A. Gaz. 1978.I.3398.

[32] J. Christie, "Guardianship: The Alberta Experience: A Model for Change" (1982) 3 Health L. Can. 58 at 62.

[33] *Public Trustee for Province of Alberta* v. *Stirling* (1980), 14 Alta. L.R. (2d) 214 at 216 (Surr. Ct.).

mechanism of security. The residency requirements for both trustees and guardians probably reflected the view that people who live close to the dependent adult would provide the most effective assistance. But it would also have been designed as a protective measure for the dependent adult, because residents (unlike non-residents) are subject to the jurisdiction and control of the Alberta courts in case problems occur.

[20] As noted in Part B of this chapter, the Alberta Surrogate Court in *Re Hughes*[34] questioned the continued need for the absolute prohibition of non-resident guardians and trustees. In 1999, the *Dependent Adults Act's* prohibition of non-resident guardians of the person was repealed, making performance of that function open both to residents and non-residents.[35] The prohibition of non-resident trustees, however, remains in place.

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[34] *Supra*, note 29.

[35] *Miscellaneous Statutes Amendment Act, 1999 (No. 2)*, S.A. 1999, c. 32, s. 4 repealed s. 7(1)(d) of the *Dependent Adults Act*, R.S.A. 1980, c. D-32.

CHAPTER 3. NEED FOR REFORM AND A NEW APPROACH

A. Need for Reform

[21] It is true that most dependent adults will have family members in Alberta who can be persuaded to serve as trustees and that only a minority will be faced with the difficulty of having no relatives (or no qualified relatives) in Alberta. Yet when that difficulty does arise, it can pose a significant problem for the individuals involved. Legal practitioners told us of cases where perfectly capable and willing close relatives could not be proposed as trustees due to non-residency and, as a result, a dependent adult ended up with a trustee who was a distant, less capable relative or even a mere acquaintance (like a next door neighbour) simply because that person could meet the residency requirement. In keeping with its statutory role, the Public Trustee will act as trustee only as a last resort, if absolutely no private trustee can be found.

[22] When willing and capable non-resident family members are prevented from assisting their dependent relatives, it seems to us that this undermines the philosophy of the *Dependent Adults Act* that family responsibility for dependent adults should be encouraged and facilitated.

[23] We further believe that this problematic scenario may very well become more common in the future. The demographics of our aging population mean that the need for trustees will probably increase. Yet at the same time, smaller average family size than even a generation ago will result in fewer relatives as a pool of potential trustees. It is also a social truism that the Canadian population is increasingly mobile as people move more easily today than in the past for employment or personal reasons.

[24] On the other hand, the potential for increased problems may be somewhat offset by the fact that people are now able to plan for their potential mental incapacity by executing an enduring power of attorney, a legal device that was not available for use in Alberta until the early 1990s.[36] An enduring power of attorney

[36] *Powers of Attorney Act*, S.A. 1991, c. P-13.5, R.S.A. 2000, c. P-20.

is drawn up while the donor is mentally competent, but it does not come into effect unless the donor becomes incompetent. Its legal effect lasts for the period of incompetency. Under an enduring power of attorney, a non-resident can be named as a sole or joint attorney. It is arguable that this is the more appropriate mechanism to use anyway in order to empower a non-resident to act, because the donor of an enduring power of attorney can (while competent) personally assess both the risks of having an attorney outside the jurisdiction and the non-resident's suitability and trustworthiness as an attorney.

[25] While the availability of enduring powers of attorney could address many situations where no family members reside in Alberta or where family members move out of province, it will of course be no assistance where a dependent adult did not execute an enduring power of attorney while mentally competent or where a dependent adult never had the mental capacity necessary in law to execute an enduring power of attorney. For people in those situations, the *Dependent Adults Act* remains their safety net.

[26] We believe that, as a practical matter, a non-resident trustee could in most cases handle a dependent adult's financial matters perfectly well by long distance. Non-residents can and do handle similar duties as attorneys under enduring powers of attorney and as executors, administrators or trustees of estates.[37] Sometimes it takes a bit longer or is a bit more involved or expensive to handle things by telephone, fax or email, but that does not make long-distance management impossible. If ongoing management of real property such as a house or farm is required, it is true that a non-resident trustee might have to hire a local property manager, which will involve expense to the dependent adult's estate. Depending on the size of the estate, this may or may not be feasible. But things like the exact nature of the estate to be managed, the specific management duties that will be required as a result and whether the estate can bear some additional expense are simply factors to be taken into consideration on a case-by-case basis when finding an appropriate trustee for a dependent adult. They are not reasons to prohibit all non-resident trustees out of hand.

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[37] A non-resident executor, administrator or trustee of an estate must post a security bond unless a court dispenses with that requirement or unless there are two or more such legal representatives and one is an Alberta resident: Alberta, *Surrogate Rules*, r. 28-31. There is no statutory security requirement for a non-resident attorney under an enduring power of attorney.

[27] For the foregoing reasons, we think it is time to rethink and reform the absolute prohibition of non-resident trustees.

B. A New Approach

1. The legal problem posed by non-residency

[28] Reference has already been made to the central legal problem posed by a non-resident trustee – namely, as a non-resident, the trustee is outside the geographical jurisdiction and control of the court that issues the trusteeship order. Serious legal consequences flow from this that can undermine protection of the dependent adult in situations where the trustee defaults.

[29] First, because an Alberta court has no direct personal jurisdiction over a non-resident of Alberta, that person cannot be compelled to act, or be restrained from acting, by an Alberta court order. So if a non-resident trustee fails to perform the trustee's duties as required (such as passing accounts), the non-resident trustee (unlike a resident trustee) could not be forced by an Alberta court order to perform the duties.

[30] Secondly, a non-resident's personal assets will typically be located in the jurisdiction in which the non-resident resides. Having no assets in Alberta makes the non-resident "judgment proof" in our province. Should the non-resident trustee misappropriate all or part of the estate, the trustee's assets from which recovery could be sought are beyond the direct control of Alberta courts. An Alberta court could not order the seizure and sale of those assets because such an order would have no force or effect outside Alberta.

[31] It should be noted that, although problematic legal consequences flow from non-residency, it does not mean that non-residents when acting as trustees are any more likely than residents to default in their duties or to mishandle or misappropriate the estate.

2. The safeguard of security

[32] The traditional method of safeguarding against the negative legal consequences of non-residency is to require the non-resident to provide security (a personal bond or a bond issued by an insurance company or by one or more private sureties) in the province where the court that issues the trusteeship order is

situated. Thus the security bond is an asset that is within the jurisdiction and control of the court, even though the non-resident trustee is not. If the trustee defaults, the court's judgment for damages against the trustee can be paid from the security bond, which protects the dependent adult against loss of the estate.

[33] As shown by the comparative overview of Canadian legislation contained in Chapter 2, most Canadian jurisdictions would allow a non-resident to be a trustee, relying on the safeguard of security. While a minority of provinces require mandatory security, the most common approach is that the provision of security, its amount and its form, may all be ordered at the discretion of the court. This obviously provides the greatest amount of flexibility to the court. On the whole, though, it appears that courts are generally cautious about dispensing with security and are prone to order it from residents and non-residents alike unless there is a compelling reason not to order it – "[E]ven where the legislation grants the court discretion to dispense with . . . [the provision of security], this occurs very rarely."[38] Security is "routinely imposed"[39] in those jurisdictions.

3. Difficulties with security as a safeguard

[34] Although security provides a safeguard against loss by creating a source within the province for recovery of misappropriated amounts, it does not remedy a court's lack of personal jurisdiction over the non-resident trustee. Lack of personal jurisdiction is a problem primarily because a non-resident trustee cannot be forced to pass accounts. Failure to pass accounts (and, if passed, irregularities in those accounts) can be an early signal that misappropriation or mismanagement is occurring.

[35] This weakness in the protection offered by security bonds was the reason that the Manitoba Queen's Bench refused to appoint a non-resident as a sole committee in the case of *Sheluk* v. *Sheluk (Public Trustee)*.[40] As stated by the judge:

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[38] R.M. Gordon & S.N. Verdun-Jones, *Adult Guardianship Law in Canada* (Carswell: Scarborough, Ont., 1992) at 4-35 [hereinafter "Gordon"]. See also G.B. Robertson, *Mental Disability and the Law in Canada*, 2d ed. (Carswell: Scarborough, Ont., 1994) at 27-28 [hereinafter "Robertson"].

[39] Gordon, *ibid*. at 4-36.

[40] (1995), 7 E.T.R. (2d) 199 (Man. Q.B.).

> I am not persuaded that the requirement of posting a security bond is ordinarily sufficient protection for the estate where the committee does not reside within the jurisdiction of the court. Sureties can be called upon once it can be shown that there has in fact been default. From a practical point of view, however, the common occurrence is the failure of the committee to pass accounts. Without jurisdiction over the person of the committee to compel the passing of accounts, the kinds of default against which security bonds are capable of protecting the estate cannot be proved.[41]

[36] There are also some practical difficulties about obtaining security that reduce its attractiveness as a safeguard. Legal practitioners advise us that not many insurance companies issue security bonds and they can be difficult and expensive to obtain. (The expense of paying the security bond premiums is borne by the dependent adult's estate, not by the trustee personally). Any insurance company that does issue security bonds would require that the trustee own assets in excess of the estate (because the trustee whose performance is guaranteed by the bond must indemnify the insurance company if it is called on to pay out under the bond).[42] Many people would not have sufficient assets to qualify for a security bond.

[37] Legal practitioners also advise us that it is not the current practice of Alberta courts to require resident trustees to provide security.[43] If the court has doubts about the suitability of a resident, it would either just not appoint the resident as trustee or it would put strict requirements or limitations on the trusteeship powers. If non-residents could be trustees by providing a security bond, a potential problem arises with trustees who are resident at the date of their appointment but who subsequently move away from Alberta. There are practical difficulties in requiring a trustee to provide security at this later date, given that the

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[41] *Ibid*. at 201-202.

[42] Steven D. Ness, "Performance Bonding as a Means of Contract Security" (paper included in Insight Workshop on Letters of Credit and Performance Bonds, Toronto, Ont., 25 June 1986) at 3.

[43] Although the *Dependent Adults Act*, *supra* note 1, does not explicitly mention security, s. 37(1) allows a court to make a trusteeship order subject to "any conditions or restrictions it considers necessary" and this could include a security bond: *Public Trustee for Province of Alberta* v. *Stirling*, *supra* note 33.

court will not be involved with the trustee at that point and will not know whether or when the trustee leaves the province.[44]

[38] We believe that security bonds are not the only answer to the problem of non-residency. We propose a new approach to this issue based on the evolving law of interprovincial enforcement of judgments.

4. Interprovincial enforcement of judgments

[39] As already discussed, non-residency of a trustee is a problem because court orders and judgments against that trustee have no effect outside the provincial or territorial boundaries of the court that makes the order or judgment. The law has partially addressed the general problem of foreign enforcement with rules about when the courts of one jurisdiction will recognize and enforce money judgments made by courts of another jurisdiction. However, court orders compelling or restraining a person's actions are never enforceable outside the jurisdiction in which they were made.[45]

[40] The law governing foreign enforcement of money judgments has traditionally been difficult to use successfully. However, legal developments in Canada within the past decade may make this a more viable remedy to use against defaulting non-resident Canadian trustees. As well, many Canadian provinces are on the brink of even greater legal reform that will make interprovincial enforcement of money judgments virtually automatic, which has great potential for the control of non-resident trustees.

a. Traditional law of foreign enforcement

[41] In 1976 when the *Dependent Adults Act* was enacted, there was no quick, efficient or even particularly effective way to enforce an Alberta money judgment against a non-resident trustee, including non-residents from elsewhere in Canada. Enforcement methods existed but were so time-consuming, expensive, cumbersome or easily defeated that they were almost more trouble than they were

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[44] This problem also arises with resident executors, administrators or trustees of estates who subsequently become non-residents and therefore subject to security requirements under Alberta's *Surrogate Rules*.

[45] J.-G. Castel, *Canadian Conflict of Laws*, 4th ed. (Toronto: Butterworths, 1997) at 296.

worth. It made greater sense simply to prohibit all non-residents from acting as trustees.

[42] There were (and are still) three ways in which an Alberta money judgment may be enforced against a non-resident judgment debtor[46] in the home jurisdiction in which the judgment debtor lives. The first method of enforcement is for the judgment creditor[47] to bring an action at common law in the other jurisdiction to sue on the Alberta judgment as a debt owing from the judgment debtor to the judgment creditor. The second method of enforcement is for the judgment creditor to essentially abandon the Alberta judgment and just sue the judgment debtor all over again right from "square one" in the other jurisdiction, resulting in a money judgment in the judgment debtor's home jurisdiction which its courts will enforce there.[48] The judgment debtor can defend either of these actions of course, resulting in a trial, possible appeals and much expense and delay. Where the judgment creditor sues on the Alberta judgment as a debt, the judgment debtor can successfully defend against it by showing that the judgment debtor did not participate in the original trial in any way and did not do anything to submit to the jurisdiction of the original court (i.e. did not "attorn" to the jurisdiction of that court).

[43] If the non-resident judgment debtor lives in a Canadian province or territory, the third method of enforcement is to use the procedure established under that jurisdiction's enforcement of judgments legislation.[49] This statutory system is designed to be faster and better than the preceding common law methods of enforcement, but it can be equally frustrating.

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[46] The "judgment debtor" is the person against whom a judgment is ordered. In all the fact scenarios with which this Report is concerned, it means the non-resident trustee.

[47] The "judgment creditor" is the person in whose favour the judgment is ordered. In all the fact scenarios with which this Report is concerned, it means the dependent adult (pursuing the matter with the assistance of a new trustee).

[48] See generally P.J.M. Lown, "Conflicts of Law" in C.R.B. Dunlop, *Creditor-Debtor Law in Canada*, 2d ed. (Scarborough: Carswell, 1995) 635 at 681-690.

[49] See generally *ibid*. at 690-697.

[44] The basic enforcement method is to apply to the court of the judgment debtor's jurisdiction for an order registering the money judgment as an order of that court. Once registered, the judgment can be enforced in the usual way and the judgment debtor's assets can be seized and sold. However, there are several statutory defences that the judgment debtor can raise to defeat the application to register. The defences are so broad and often so easily established that, in practice, the judgment debtor can frequently prevent successful registration and enforcement of the judgment.[50] One of the most popular and most effective statutory defences is based precisely on the non-residency of the judgment debtor in the jurisdiction which issued the judgment. Again, if the judgment debtor did not participate in the original trial or otherwise attorn to the jurisdiction of that court, the judgment debtor has an iron-clad defence that will make registration and enforcement impossible.

b. The Morguard case

[45] The law of interprovincial enforcement of money judgments within Canada has now changed significantly, due to the 1990 Supreme Court of Canada decision in *Morguard Investments Ltd.* v. *De Savoye*.[51] Until this case, the law that governed enforcement of judgments between Canadian provinces was the same as the law that governed enforcement of judgments between sovereign nations. But the Supreme Court held in *Morguard* that it was inappropriate (indeed, a "serious error")[52] to apply legal concepts designed for use between sovereign nations to the enforcement of judgments between sister provinces associated in a federation. The Court found that "the constitutional and subconstitutional arrangements within Canada precluded one province from treating another province as a foreign territory."[53]

[46] In Canada, the Supreme Court stated, a court in one province or territory should simply enforce the judgment of a court of another province or territory "so

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[50] See *e.g.*, the standard list of statutory defences contained in s. 2(6) of Alberta's *Reciprocal Enforcement of Judgments Act*, R.S.A. 2000, c. R-6.

[51] (1990), 76 D.L.R. (4th) 256 (S.C.C.).

[52] *Ibid*. at 270.

[53] *Supra*, note 48 at 672.

long as that court has properly, or appropriately, exercised jurisdiction in the action."[54] Where a defendant is a non-resident and does not attorn to the jurisdiction of a court, that court nevertheless properly and appropriately exercises jurisdiction over that non-resident, said the Court, if a "real and substantial connection" exists between that court's province or territory and the subject-matter of the action.[55] This approach is the exact opposite of what would happen under the previous foreign enforcement rules, where the non-resident would have an absolute defence to enforcement. The *Morguard* decision has been described as an "earthquake"[56] that "marks a fundamental shift in the rules relating to recognition of foreign judgments"[57] between Canadian provinces and territories.

[47] What effect on non-resident trustees would result from *Morguard*'s liberalization of enforcement rules within Canada? If an Alberta court issues a money judgment for damages against a defaulting non-resident trustee then, despite the trustee's non-residency in Alberta and any lack of attornment during the litigation, that judgment will be enforceable at common law in the non-resident's home province or territory. The judgment creditor could sue on the judgment as a debt and the judgment debtor (non-resident trustee) would have no defence.

[48] It is unclear what legal effect *Morguard* has on the statutory defences available to non-resident judgment debtors under the provinces' existing enforcement of judgments legislation. Rather than dealing directly with this legislation, the Supreme Court of Canada chose to reformulate the common law of interprovincial enforcement that was established by Canadian courts in the previous century.

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[54] *Supra*, note 51 at 273.

[55] *Ibid*. at 275-277.

[56] *Supra*, note 48 at 638.

[57] *Ibid*. at 636.

[49] It is perhaps arguable that the *Morguard* decision renders those statutory defences unconstitutional, so they should be regarded as defunct in practice.[58] However, until such time as they are actually repealed by a legislature or directly struck down by a court (neither of which has yet occurred), the statutory defences remain (at least on the surface) valid law that determine when registration will occur under enforcement legislation.

[50] So an Alberta judgment against a non-resident trustee who did not attorn would (due to *Morguard*) be enforceable by action at common law in the trustee's home province or territory, but might well not be registerable and enforceable under that jurisdiction's enforcement of judgments legislation.[59]

c. Pending legislative developments

[51] Many Canadian jurisdictions are in the process of getting rid of their current enforcement of judgments legislation and replacing it with a new system. Five jurisdictions are adopting the Uniform Law Conference of Canada's 1992 model of interprovincial enforcement.[60] Prince Edward Island[61] has enacted and proclaimed its statute. The four other jurisdictions have enacted statutes but have not yet proclaimed them in force (British Columbia,[62] Saskatchewan,[63] New Brunswick[64] and Newfoundland and Labrador).[65]

[52] This model greatly simplifies enforcement of money judgments between Canadian provinces and territories. Registration will occur simply by filing a certified copy of the judgment in the other court. No court application or approval

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[58] See generally *supra*, note 48 at 695-696.

[59] *Supra*, note 45 at 282.

[60] *Uniform Enforcement of Canadian Judgments Act* in Uniform Law Conference of Canada, *Proceedings of the Seventy-fourth Annual Meeting* (Corner Brook, Newfoundland, August 1992) at 44 and 318.

[61] *Canadian Judgments (Enforcement) Act*, S.P.E.I. 1994, c. 5, R.S.P.E.I. 1988, c. C-1.1.

[62] *Enforcement of Canadian Judgments Act*, R.S.B.C. 1996, c. 115.

[63] *The Enforcement of Canadian Judgments Act*, S.S. 1997, c. E-9,101.

[64] *Canadian Judgments Act*, S.N.B. 2000, c. C-0.1.

[65] *Enforcement of Canadian Judgments Act*, S.N.L. 2000, c. E-11.1.

is required – just an easy administrative act. This model makes registration fast and virtually automatic. Like the *Morguard* case, this model provides that judgments between Canadian provinces and territories should be accepted at face value and be enforceable in other Canadian jurisdictions essentially without challenge.

[53] However, this model applies only to the enforcement of money judgments. In 1997, the Uniform Law Conference of Canada revised its model and widened it to extend the enforcement system beyond money judgments.[66] The revised model makes it possible to enforce, for the first time, orders "to do or not do an act or thing."[67] Under this revised model, in other words, court orders compelling or restraining a person's actions would also become enforceable from one province or territory to another.

[54] Two jurisdictions are in the process of adopting this wider model. Yukon[68] and Nova Scotia[69] have both enacted statutes but not yet proclaimed them in force. Once in force, the practical effect of this wider model will mean that if an Alberta court orders a non-resident Nova Scotian trustee to pass accounts in Alberta, that order will be enforceable in Nova Scotia against the trustee to compel the trustee to obey the Alberta court order.

[55] If all Canadian jurisdictions were to enact this wider model, any judgment or order in the dependent adult area could automatically and easily be enforced anywhere in Canada. Issues of residency or non-residency of the trustee would become absolutely irrelevant because it would be equally easy for courts to control both residents and non-residents.

[56] However, that happy day of complete and maximum uniformity is not here yet. All Canadian jurisdictions except one still have the old enforcement of

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[66] *Uniform Enforcement of Canadian Judgments and Decrees Act* in Uniform Law Conference of Canada, *Proceedings of the Seventy-ninth Annual Meeting* (Whitehorse, Yukon, August 1997) at 41-43, online: Uniform Law Conference of Canada Homepage <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1u5>.

[67] *Ibid*., s. 1.

[68] *Enforcement of Canadian Judgements and Decrees Act*, S.Y. 2000, c. 12.

[69] *Enforcement of Canadian Judgments and Decrees Act*, S.N.S. 2001, c. 30.

judgments model actually in effect. Six jurisdictions are in the process of reform but differences concerning what kinds of judgments and orders may be enforced will result from the new systems unless further amendments are made to produce uniformity. This uneven legislative situation is likely to continue for a few years at least.

5. A new approach

[57] We are going to predicate our proposed reforms on use of the statutory enforcement system within Canada. The goal of our proposed reforms is to make enforceable across Canada any money judgment ordered by an Alberta court against a non-resident Canadian trustee who defaults. This will protect the dependent adult by allowing damages to be recovered from the trustee's assets elsewhere in Canada, even though those assets are not within the jurisdiction of Alberta.

[58] Of course *Morguard* now makes money judgments enforceable at common law across Canada. However, rather than relying solely on common law enforcement, we will propose a "belt and suspenders" type of reform to address statutory enforcement as well. Such enforcement will pose no problem in provinces and territories where a new Uniform Law Conference model is (or may be soon) in place. But we must still deal with the continuing presence of the old enforcement of judgments model in most Canadian provinces and territories. Therefore, our proposed reforms will be tailored to overcome the enforcement difficulties posed by that particular model.

[59] While our proposed reforms are designed to make a money judgment against a non-resident trustee enforceable anywhere in Canada, there may of course be situations where the trustee simply will not have sufficient assets from which to recover the damages awarded by the judgment. The dependent adult could be unable to recover the misappropriated funds. It is true that enforceability would be a hollow protection in that case.

[60] However, that situation could just as easily occur right now when trying to enforce a judgment against a resident trustee. A resident trustee does not have to post security. The resident trustee may have no assets from which to satisfy a judgment if the trustee misappropriates the dependent adult's estate. The resident

trustee may abscond with everything. Even having a resident trustee, a dependent adult's assets could be stolen without any real possibility of recovery.

[61] Thus, a dependent adult can end up facing the same unfortunate situation regardless of the residency of the trustee and so, in that respect, is at no greater risk with a non-resident trustee than with a resident trustee.

[62] In the absence of a court order for security, careful screening of the trustee at the time of appointment is how Alberta courts will continue to try to guard against this development. Various monitoring mechanisms are also in place under the statute to assist in detecting problems with the trusteeship. If these screening and monitoring mechanisms are considered sufficient protection for dependent adults when appointing a resident trustee, they can also serve as protection when appointing a non-resident trustee.

CHAPTER 4. RECOMMENDATIONS FOR REFORM

A. Canadian Non-residents as Trustees

[63] For the reasons already discussed in Chapter 3, we believe that greater flexibility is required concerning who may be appointed as a trustee under Alberta's *Dependent Adults Act*. Our proposed safeguards will be predicated on use of the current and evolving systems for Canadian interprovincial enforcement of judgments. Accordingly, we recommend that any resident of a Canadian province or territory should be eligible for appointment as a trustee.

[64] But we further recommend that the prohibition of non-resident trustees be maintained for any resident of a jurisdiction outside Canada. Enforcement of an Alberta judgment outside Canada is too difficult and uncertain to serve as an effective safeguard.

> **RECOMMENDATION No. 1**
> **The current prohibition of non-resident trustees by the *Dependent Adults Act* should be partially relaxed so as to allow any Canadian resident to be a trustee, but not anyone who lives elsewhere.**

[65] Implementing this recommendation would result in two amendments to the *Dependent Adults Act* and an amendment to one Form under the Act. (Please note that in this chapter, proposed new wording within an existing legislative provision will be shown in italics).

- Amend section 36(1)(a)(iv) of the Act so it reads: "(iv) the individual is a resident of *a province or territory of Canada*". This will allow any Canadian resident to be a trustee, but not anyone who lives elsewhere.

- Amend section 53(4)(g) of the Act so it reads: "(g) is no longer a resident of *a province or territory of Canada*". This updates the appropriate disqualifying factor for trustees.

- An amendment would also be necessary to item 5 of Form DAD 19 (Consent to Act)[70] so that it will read: "I am eighteen (18) years of age and a resident of _____" so the appropriate jurisdiction can be filled in, rather than automatically being stated as "Alberta".

B. Service of Application on Heirs on Intestacy

[66] Because the appointment of a non-resident trustee carries different enforcement consequences than the appointment of a resident trustee, we believe that a wider group of the dependent adult's relatives should be notified when a non-resident is being considered for appointment as a trustee. If close relatives have misgivings about having a non-resident trustee, the best time for objections to be raised is at the beginning of the appointment process, not after the appointment has been made.

[67] The current rule for serving family with an application for a trusteeship order (proposing a resident as trustee, of course) is that it must be served on the dependent adult's nearest relative living in Canada. If the nearest relative is the applicant for the trusteeship order, then it must be served on the dependent adult's next nearest relative.[71] Either way, it gets served on only one relative apart from the applicant (assuming that the applicant is a family member, which is not always necessarily so).

[68] We believe that, when a non-resident is being proposed as trustee, the application should be served on all the persons living in Canada who would be the dependent adult's heirs on intestacy (if the dependent adult were deemed to have

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[70] The "DAD Forms" are used under the *Dependent Adults Act* when bringing a "desk application" for the making of a court order without an oral hearing. Although they are not part of the *Surrogate Rules*, they are found for easy reference in Legal Education Society of Alberta, *Alberta Surrogate Forms*, LESA Practice Manual Series, looseleaf (Legal Education Society of Alberta: Edmonton, Alta., 1995). Those desk application forms that are originating court documents or notices to the court (Forms DAD 10 to 13) are promulgated as regulatory forms under the *Dependent Adults Regulation*, Alta. Reg. 289/81. Forms DAD 14 to 25 basically establish the nature and degree of written evidence necessary to support a desk application and are administrative forms issued by the government department responsible for the administration of the *Dependent Adults Act*. Some of those forms also have a basis in the "Surrogate Court Practice Note" entitled *Dependent Adults Act Practice Note* that was issued by the Surrogate Court of Alberta (now continued in the Court of Queen's Bench of Alberta).

[71] *Supra*, note 1, s. 31(2)(b). The hierarchical determination of who constitutes the "nearest relative" is set out in s. 1(n).

just died without a will). If the dependent adult's estate exceeds $40,000, the heirs on intestacy will be the dependent adult's spouse and all children,[72] thus maximizing the notice provided to the closest family members. If the dependent adult's only heir on intestacy is the applicant, then the next nearest relative should be served.

[69] Serving the objectively-determined heirs on intestacy is a more preferable method to use in these circumstances than serving heirs named under the dependent adult's will, for several reasons. First, it does not require disclosing the terms of the dependent adult's will before the dependent adult's death. Secondly, the proposed trustee is not legally entitled to view the dependent adult's will until appointed as trustee, which precludes using the will to determine who to serve with the application for appointment. Thirdly, a will is effective only at the date of death and, in certain situations, a dependent adult who has a will may have or recover sufficient testamentary capacity to change that will and the heirs named in it, so it may not be a "final statement" of who will ultimately inherit.

RECOMMENDATION No. 2
Where a non-resident is proposed as trustee, the application should be served on all persons living in Canada who would be the heirs on intestacy of the dependent adult (as if the dependent adult had just died intestate). If the applicant for the trusteeship order is the only heir on intestacy, then the application should be served on the dependent adult's next nearest relative.

[70] Implementing this recommendation will require a few amendments to the *Dependent Adults Act* and its Forms.

- Current section 31(2)(b) concerning service of the application would have to be amended to clarify that, in the future, it applies only where the proposed trustee is a resident. The following suggested wording provides this clarification but otherwise does not change the current rules for service in that situation:

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[72] See generally *Intestate Succession Act*, R.S.A. 2000, c. I-10.

(b) *if the person proposed as the trustee is a resident of Alberta,* the person living in Canada who is

(i) the nearest relative of the person in respect of whom the application is made, or

(ii) if the nearest relative referred to in subclause (i) is the applicant, the next nearest relative of the person in respect of whom the application is made,

- Then a new clause should be added to section 31(2), governing service of the application where the proposed trustee is a non-resident:

(b.1) if the person proposed as the trustee is not a resident of Alberta, all persons living in Canada who would be the heirs on intestacy of the person in respect of whom the application is made if that person had died immediately before the application was made or, where the only such heir on intestacy would be the applicant, the next nearest relative of the person in respect of whom the application is made,

[71] Note that the Act's provisions in section 31(7) and (8) concerning such matters as service ex juris, substitutional service and dispensing with service will also (without further amendment) apply to service on the intestate heirs. Also, under section 35(4), anyone who is served with the application must also be served with a copy of the order, so this provision will also apply in the case of served intestate heirs.

[72] On the issue of dispensing with service, we see no reason why a court should not be able to dispense with formal service on intestate heirs in an appropriate case. The current practice is that the court will not dispense with formal service unless the person to be served has signed Form DAD 20 (Consent of Nearest or Next Nearest Relative) indicating that the person has knowledge of the application and consents to the appointment of the proposed trustee. So if an intestate heir, knowing of the non-residency of the proposed trustee, consents to the appointment (evidenced by signing the equivalent Form DAD 20.1 discussed below), our reform objective of procedural transparency is achieved and there would be no harm done in dispensing with formal service, thereby saving the dependent adult's estate from incurring those costs.

[73] The changes to section 31(2)(b) and (b.1) will also affect service requirements for orders made under section 42(2) (orders to a trustee to pass accounts, file an inventory, etc.) and under section 53 (order discharging a trustee)

because those sections require service as provided in section 31(2). Thus, where non-resident trustees are involved, service will be made on the heirs on intestacy.

- The requirements contained in section 49(2) concerning service of an application for review of a trusteeship order will have to be amended in similar fashion to section 31(2) to produce the same effect. Therefore, section 49(2) should be amended to read:

  (b) *if the trustee or proposed trustee is a resident of Alberta,* the person living in Canada who is

  (i) the nearest relative of the dependent adult in respect of whom the application is made, or

  (ii) if the nearest relative referred to in subclause (i) is the applicant, the next nearest relative of the person of the dependent adult,

  (b.1) if the trustee or proposed trustee is not a resident of Alberta, all persons living in Canada who would be the heirs on intestacy of the dependent adult if the dependent adult had died immediately before the application was made or, where the only such heir on intestacy would be the applicant, the next nearest relative of the dependent adult,

- A new form mirroring the provisions of Form DAD 20 (Consent of Nearest or Next Nearest Relative) should be created for those instances where the heirs on intestacy receive notification of an application to appoint (or review) a non-resident trustee. The new form would be Form DAD 20.1 (Consent of Heir on Intestacy).

- One further incidental amendment to the Act would be required. Section 68(3)(a) obliges the Public Trustee not to publish the name of any dependent adult or nearest relative concerned in proceedings under the Act. The clause should be amended to extend this protection to heirs on intestacy as well:

  (a) the name of a dependent adult or any nearest relative *or heir on intestacy* concerned in any proceeding under this Act, or

C. Attornment of Non-resident Trustee

1. Attornment and Enforceability of Money Judgments

[74] As discussed in Chapter 3, despite the improved enforcement situation created by *Morguard* and the new enforcement statutes pending in certain Canadian provinces and territories, our proposals are designed to overcome the current enforcement problems posed by the old enforcement of judgments legislation that continues to exist in most Canadian jurisdictions. To recap a major

difficulty with that model, a money judgment is not enforceable against a non-resident judgment debtor in the judgment debtor's home province or territory if the judgment debtor did not participate in any way in the original court proceedings in the other province or territory (for our purposes, Alberta) and did not do anything else to submit to ("attorn to") the jurisdiction of that original court.

[75] Attornment can occur in a number of ways, all of which involve the non-resident's own conduct. As already noted, if the non-resident actively participates in some or all of the court proceedings that lead to the judgment, the non-resident will be found to have attorned to the jurisdiction of that court. If the non-resident agrees to a contractual term that a particular court will have jurisdiction to settle disputes under the contract, then the non-resident will be found to have voluntarily submitted to that court's jurisdiction. Such voluntary submission in advance of litigation can be express or inferred from a contract or from the conduct of the parties.[73]

[76] We propose that voluntary attornment be made a central feature of the appointment process for trustees. Just as an application to appoint a trustee would not now propose a trustee who did not consent to being appointed, it should not propose a trustee who is unwilling to attorn to the jurisdiction of Alberta courts in all matters related to or arising out of the trusteeship. The proposed trustee's voluntary submission should be clear, explicit and easily provable at a later date should a money judgment need to be enforced against the trustee in another Canadian jurisdiction. Therefore the attornment will be built into the documents that support and create the appointment and trusteeship order.

[77] Before discussing the details of this reform, there are several features to note about our attornment proposal. First, the attornment must be voluntary, just as contractual submission to a court in advance of litigation must be voluntary in order to be valid. This is one of the reasons why we recommend that the provision of attornment be built into the application process for appointment as a trustee. A proposed trustee's attornment is clearly voluntary. If a person does not want to attorn, the person can simply refuse to be proposed as a trustee.

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[73] *Supra*, note 48 at 648.

[78] Secondly, for the full and ongoing protection of the dependent adult, the consent to attornment must be irrevocable so that it cannot later be withdrawn by the trustee in order to defeat the protection it is designed to give.

[79] Thirdly, all proposed trustees will have to consent to attornment regardless of whether they are resident or non-resident at the date of appointment. Allowing non-residents as trustees also produces the legal result that a trustee who lives in Alberta at the date of appointment can subsequently move to another Canadian province or territory without being disqualified as trustee. The protection of attornment needs to be already in place if that happens. From a practical point of view, it would be unrealistic and unworkable if the Act required a resident trustee to provide consent to attornment only at the moment of leaving the province – people would forget to do it or would simply just not do it and then the dependent adult would be left without protection.

[80] If a proposed trustee is a non-resident, immediate reliance can be placed on the attornment given during the appointment process. If a proposed trustee is a resident, the attornment given during the appointment process can be relied on in the future if the trustee ever moves from Alberta to another Canadian jurisdiction. (If the trustee moves out of Canada, the trustee would of course be disqualified from continuing as a trustee).

RECOMMENDATION No. 3
Every person proposed as trustee must attorn, irrevocably and in writing, to the jurisdiction of the Alberta courts in order to be appointed trustee. If the proposed trustee is a non-resident, this attornment is immediately effective. If the proposed trustee is a resident, this attornment will be effective when the trustee leaves Alberta to take up residence in another Canadian jurisdiction.

[81] Implementing this recommendation would require the following amendments to the Act and Forms.

- Amend section 30(3) of the Act so that irrevocable written consent to attornment will be provided as part of the application process for appointment as a trustee:

> **(3)** The interested person making an application under subsection (1) shall, at the same time the application is made, file with the Court
>
> *(a)* the written consent of the person proposed as trustee to the effect that the person is willing to act as the trustee of the estate of the person in respect of whom the application is made, *and*
>
> *(b) the written irrevocable consent of the person proposed as trustee that, if that person is or becomes a non-resident of Alberta, the Court shall have jurisdiction over that person in all matters related to or arising out of the trusteeship, notwithstanding that the person resides in a foreign jurisdiction.*

- The written irrevocable consent to attornment will be contained in Form DAD 21 (Undertaking of Trustee). This document is prepared and submitted to the court with the application for appointment. We propose that this form be amended to provide the following standardized text as an undertaking:

> *I irrevocably consent that the Court of Queen's Bench of Alberta shall have legal jurisdiction over me in all matters related to or arising out of my trusteeship, no matter where I live now or in the future. I understand that this consent means that*
>
> *1. if court proceedings about my trusteeship become necessary, I can be sued in Alberta even if I am not a resident of Alberta when the proceedings occur, and*
>
> *2. if I am found liable by an Alberta court for wrongdoing as a trustee, my assets can be seized and used to pay the damages ordered by the court even if those assets are not located in Alberta.*

[82] Since attornment is a difficult and specialized legal concept, standardized wording is preferable in this area. It ensures that the attornment is clear and complete in each case. The text is also in plain language and states the legal consequences of attornment. It is important that proposed trustees understand the serious legal implications this undertaking has for them. Applications for appointment are not always prepared by lawyers, who could explain attornment and its significance to the proposed trustee, so the form relies on plain language to achieve this understanding.

[83] To make sure that this undertaking comes to the proposed trustee's attention prior to signing, it should be printed on Form DAD 21 in 12-point bold type to stand out and be clearly visible.

[84] Form DAD 21 is not currently promulgated as a regulatory form under the *Dependent Adults Regulation*[74] but it will need to be so that the standardized wording and visibility requirements of the attornment undertaking will be legislatively mandated for all who use this form.

[85] Form DAD 21 remains filed on the court file for the duration of the trusteeship order, publicly and easily accessible should a certified copy of it be required to prove the trustee's attornment when enforcing a money judgment against the trustee in another Canadian jurisdiction.

2. Attornment and Enforceability of Other Orders

[86] Voluntary attornment of non-resident trustees will not make non-money judgments or orders enforceable against them in other jurisdictions. No legal mechanism currently exists to allow the interprovincial enforcement of any personal order compelling or restraining behaviour, even if the court making the order has jurisdiction over the ordered person due to residency or attornment. As already mentioned, this legal limitation also impinges on the full effectiveness of security as a safeguard in this area.

[87] In practice, this means that if a non-resident trustee neglects or fails to file the inventory of the dependent adult's assets and liabilities or to pass accounts, for example, a court order ordering the non-resident trustee to do so will be unenforceable against that trustee in the jurisdiction in which he or she lives.

[88] However, such a non-resident trustee could be dealt with using an indirect (but still effective) method. An "interested person"[75] who sees that the inventory has not been filed or that the accounts have not been passed would simply have to start a court application to review the trusteeship order itself (rather than bring an application to get a court order forcing the trustee to file the inventory or pass the accounts). If the non-resident does not cooperate with that review of the trusteeship order, the court could appoint a new trustee, dealing in that way with

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[74] *Supra*, note 70.

[75] An "interested person" is defined in section 1(l) of Alberta's *Dependent Adult Act*, *supra*, note 1, as including the Public Trustee or any adult person who is concerned for the welfare of the dependent adult.

the ex-trustee's problematic failure to file the inventory or pass accounts. This would stop any further access to the dependent adult's assets by the uncooperative non-resident ex-trustee.

[89] The *Dependent Adults Act* currently gives a trustee a grace period of six months following appointment to file the inventory.[76] We are concerned about the length of this grace period and think it should be shortened so that if any non-resident trustee defaults in filing the inventory, this fact can potentially be noticed sooner rather than later and appropriate steps taken to replace the trustee.

[90] Although personal orders compelling or restraining behaviour cannot be directly enforced against a non-resident trustee, we strongly feel that the risk of needing to compel a non-resident trustee to perform duties does not outweigh the benefits of allowing non-residents to be trustees. We believe that risk is less than the problems and expense involved in some difficult cases to obtain a resident trustee for a dependent adult.

[91] The legal inability to enforce interprovincially personal orders compelling or restraining behaviour will be changed in the future only if each province and territory adopts the revised Uniform Law Conference of Canada statutory model that will allow enforcement of such orders.[77] If this model is adopted by every jurisdiction in Canada, it will completely eliminate any enforcement risk in having a non-resident trustee. In our opinion, the elimination of that risk provides an even greater incentive to advocate the uniform adoption of the ULCC model by Alberta and the rest of Canada.

D. Service on a Trustee

1. Service ex Juris on a Non-resident Trustee

[92] Our proposed reforms are designed to make legal pursuit of a non-resident trustee no more difficult than legal pursuit of a resident trustee. It is, however, more difficult and expensive to serve legal documents on a non-resident because a court order must be obtained to allow service to be made outside Alberta ("service

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[76] *Supra*, note 1, s. 42(1)(a).

[77] See Chapter 3 at para. 53.

ex juris").[78] Attornment by the non-resident trustee will not remove the obligation on anyone suing that trustee to obtain such an order for service ex juris.[79]

[93] The *Dependent Adults Act* currently provides that there is no need to obtain an order for service ex juris when serving any non-resident person with an application to appoint a trustee[80] or an application to review a trusteeship order.[81] The Act replaces the need for an order of service ex juris by giving an extended notice period to non-residents so they will have ample time to organize their long-distance response (a minimum of 30 days for a Canadian non-resident and 45 days for an American non-resident). Presumably the Act has varied the standard procedure concerning service ex juris in order to save trouble and expense to the dependent adult's estate.

[94] In a similar fashion and in order to remove differences between serving a resident trustee and a non-resident trustee, we propose that no order for service ex juris should be necessary when anyone sues a non-resident trustee concerning any matter related to or arising out of the trusteeship. This will extend beyond matters brought specifically under the *Dependent Adults Act* and will include any kind of lawsuit so long as it is related to or arises out of the trusteeship.

[95] The amended Act should specify an extended notice period for non-resident trustees served outside Alberta. Since only Canadian residents will be non-resident trustees, this notice period should be a minimum of 30 days, consistent with the Act's other provisions concerning service within Canada.

RECOMMENDATION No. 4
No court order for service ex juris should be necessary in order to serve legal documents on a non-resident trustee.

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[78] *Alberta Rules of Court*, r. 30.

[79] See *Ibid*., r. 30(f)(iv) concerning the need for an order of service ex juris in the comparable situation of attornment by contractual voluntary submission, which is one of the enumerated circumstances in which an Alberta court will grant an order for service ex juris.

[80] *Supra*, note 1, s. 31(7).

[81] *Ibid*., s. 49(7).

However, such service should be made at least 30 days before the proceedings are to be heard.

- Implementing this recommendation would require the addition of a section to the *Dependent Adults Act*, perhaps at the end of Part 2, Division 5 (Other Trusteeship Provisions):

  Service on non-resident trustee generally

  57.1 *No order for service ex juris is necessary for service within Canada on a trustee who is not a resident of Alberta of a document, or notice of a document, in any matter related to or arising out of the trusteeship, but service must be effected at least 30 days before the date on which the application is to be heard.*

[96] The *Dependent Adults Act* allows provisions "respecting the manner of service of documents" to be enacted as subordinate legislation by cabinet regulation.[82] However, since the Act itself already addresses the issue of orders for service ex juris in other situations, we feel it is more appropriate for our recommended provision to have similar visibility in the statute as well, rather than placing it in a regulation.

2. Method of Service on All Trustees

[97] Allowing non-residents to be trustees will increase the expense of locating them for the purpose of service if they change addresses during the course of the trusteeship. Depending on the circumstances, it can be more expensive and difficult to locate someone in another province or to trace them throughout Canada as a whole than to find someone in Alberta. Even when dealing with a resident trustee, of course, that trustee may move around in Alberta and could also move to another province or territory, necessitating an expensive search beyond Alberta.

[98] Therefore, in an attempt to keep costs down and make service less difficult, we recommend that all proposed trustees must provide a personal address for service and agree to update it as required during the trusteeship. As for the method by which service is made, we propose that an originating document (i.e. one by which an action or other proceeding is commenced) must be served on the trustee by personal service or by mail requiring a signed acknowledgement of receipt.

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[82] *Supra*, note 1, s. 89(2)(l).

Non-originating documents, however, can be served by the less expensive method of ordinary mail. Of course, in either case, service could also be made by serving a lawyer who is authorized to accept service on behalf of the trustee.[83]

[99] This method of service will save some costs in some cases – where a trustworthy, conscientious trustee moves and dutifully reports the change of address or where a misappropriating trustee does not abscond (for whatever reason) from the trustee's last recorded address. Of course, there will also be situations in which the time, trouble and expense of searching will still need to be borne. A misappropriating trustee who absconds is not going to provide a forwarding address.

RECOMMENDATION No. 5

A proposed trustee must provide a personal address for service and agree to update its currency as required. Unless substitutional service is ordered, service on a trustee of a document by which an action or other proceeding is commenced must be by personal service or by mail requiring a signed acknowledgement of receipt, but other documents can be served on the trustee by ordinary mail. Service in either case could also be made by serving a lawyer who is authorized to accept service on behalf of the trustee.

[100] This recommendation can be implemented by enacting a regulatory provision and by amending the Act's Forms.

- As already noted, regulations may be enacted under the *Dependent Adults Act* respecting the manner of service of documents. Therefore, the *Dependent Adults Regulation*[84] should be amended to specify how documents are to be served on a trustee.

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[83] Our proposals are based on section 60 of Alberta's *Surrogate Rules* and its related Forms that apply to service on personal representatives in estate matters.

[84] *Supra*, note 70.

Service on trustee

5.5(1) *Service on a trustee is to be made*

(a) in the case of a document by which an action or other proceeding is commenced,

(i) by personal service,

(ii) by mail delivery for which the addressee or a person on behalf of the addressee is required to acknowledge receipt of the mail by providing a signature, or

(iii) by serving a lawyer who is authorized to accept service on behalf of the trustee;

(b) in the case of a document by which an action or other proceeding is not commenced,

(i) by ordinary mail delivery, or

(ii) by serving a lawyer who is authorized to accept service on behalf of the trustee.

(2) *Where service of a document is made by ordinary mail delivery, the trustee is deemed to have received service 5 business days after the date that the document was mailed.*

(3) *Proof in affidavit form that a person has been served must be filed with the court.*

- Form DAD 10 (Application for Order Appointing Trustee) should be amended to require the provision of the proposed trustee's personal address for the purpose of service. The form must make it clear that a street address is required (not simply a post office box number or e-mail address) and that it must be the proposed trustee's personal address, not the address of an agent or lawyer.

- Form DAD 21 (Undertaking of Trustee) should be changed to provide the following as a standard undertaking by all trustees:

  I agree to advise the court immediately in writing of any change to my address for service.

- A new Form, DAD 26 (Notice of Trustee's Change of Address for Service), should be created. It will have appropriate spaces to indicate the trustee's former personal street address, the trustee's new personal street address and the effective date of the change. A trustee can simply fill out this form and send it to the Court when necessary. When received, the form will be stamped by court personnel and placed on the public court file where it can easily be found by anyone who needs to serve the trustee.

- Proof of service can be made using an existing Form, DAD 24 (Affidavit of Service).

E. Role of the Public Trustee

1. Public Trustee's Role as Default Trustee

[101] We are concerned that our proposed reforms should not have the inadvertent effect of expanding the limited statutory role of the Office of the Public Trustee or requiring it to incur greater costs due to non-resident trustees.

[102] One area in which this possibility exists is the Public Trustee's role as "default trustee". Under section 55 of the *Dependent Adults Act*, if a trustee dies and there is no alternate trustee, the Public Trustee automatically becomes the trustee so that there will be no vacuum in the trusteeship. We are advised by the Office of the Public Trustee that providing this service is manageable within the Public Trustee's current staffing and funding levels only so long as trustees are resident in Alberta. Taking over responsibility from a resident trustee can be accomplished relatively cost-effectively because everything relating to the trusteeship is present in Alberta.

[103] But if a non-resident trustee were to die without an alternate trustee, the Public Trustee would either have to send its own personnel to the other province or territory to figure out the state of the trusteeship or would have to hire a legal agent in that other province or territory to do so. Either way it would be an expensive proposition. The cost may or may not be recoverable from the dependent adult's estate.

[104] Therefore, in order to avoid the negative resource implications that could result from section 55, we recommend that the Public Trustee should not be the default trustee when a non-resident trustee dies without an alternate trustee (although it should continue in that role for resident trustees). The person best situated to take over from a deceased non-resident trustee is the nearest relative in Canada of the dependent adult. (If the deceased trustee was, during his or her life, the nearest relative then the default trustee will be the former next nearest relative who, on the death of the former trustee, now becomes the nearest relative as defined by the *Dependent Adults Act*).

[105] This approach avoids a lapse in the trusteeship and puts in place a default trustee who is already aware of the dependent adult's basic situation and who previously consented to the appointment of a non-resident trustee in the first place. The default trustee may soon apply to have a new private trustee appointed for the dependent adult but in the interim this default trustee, as the nearest relative in Canada, is the best person to act and to be responsible for doing the work necessary to hand the dependent adult's affairs over to any new trustee who may ultimately be appointed.

RECOMMENDATION No. 6
If a resident trustee dies and there is no alternate trustee, the Public Trustee should continue to be the default trustee under section 55. However, if a non-resident trustee dies and there is no alternate trustee, the default trustee should be the dependent adult's nearest relative in Canada.

[106] Implementing this recommendation would require the following amendments to the Act.

- Amend the marginal note to section 55 to read "Death of *resident* trustee"

- Amend the opening words of section 55 to read "On the death of a trustee *who is a resident of Alberta* and in the absence of an alternate trustee . . ."

- Add a new section after section 56 as follows:

  Death of non-resident trustee

  56.1(1) *On the death of a trustee who is not a resident of Alberta and in the absence of an alternate trustee, the dependent adult's nearest relative in Canada, on receiving notice of the death of the trustee, becomes trustee of the estate of the dependent adult, with the same authority as the former trustee.*

  (2) *The dependent adult's nearest relative in Canada continues to be the trustee of the estate of the dependent adult until*

  (a) a new trustee is appointed by the Court, or

  (b) the Court makes an order discharging the nearest relative as trustee of the estate of the dependent adult.

- Form DAD 20 (Consent of Nearest or Next Nearest Relative) should be amended to include a notice that the nearest relative in Canada will become default trustee if the non-resident trustee dies without an alternate. This is a factor that a potential default trustee might want to consider before consenting to the appointment of a non-resident trustee.

2. Public Trustee's General Role

[107] As previously discussed, the statutory role of the Public Trustee in the affairs of dependent adults is a very limited one of last resort. The *Dependent Adults Act* is designed to prefer and promote the use of private trustees. Our proposed reforms are designed to further this philosophy as well, by making it legally feasible for non-resident family members to serve as trustees too.

[108] The Office of the Public Trustee advised us that, based on its experience, this underlying philosophy of the *Dependent Adults Act* appears to be understood and accepted by the public so long as private trustees perform their duties well. But if a trustee breaches the trustee's obligations and misappropriates funds, family members of the dependent adult often expect the Public Trustee to take charge of the estate and pursue the wrongdoer. In reality, however, the Public Trustee has no such statutory obligation to act unless another "willing, able and suitable"[85] private trustee cannot be found.

[109] It might be helpful to clarify in advance with family members that there are limitations on the Public Trustee's role in the event of default by any private trustee. Such clarification might be especially useful where a non-resident is to be appointed trustee. When family members assess the advantages and disadvantages of having a non-resident trustee, they should not be potentially labouring under false assumptions about who will be responsible for taking action should something go wrong. While our proposed reforms make it possible to pursue remedies against a defaulting non-resident trustee, it is the family of the dependent adult who will bear the primary responsibility for producing another private trustee to pursue those remedies on the dependent adult's behalf.

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[85] *Supra*, note 1, s. 47.

RECOMMENDATION No. 7
The limitations on the Public Trustee's role in the event of default by a trustee should be clarified with family members at the beginning of the appointment process.

[110] We think the best place to alert family members to the reality of the limitations on the Public Trustee's statutory role is in an existing Form to which the relatives already give their specific attention at the beginning of the process. Therefore, we propose implementation in the following manner.

- As noted above, there will be a new Form DAD 20.1 (Consent of Heir on Intestacy) that will mirror existing Form DAD 20 (Consent of Nearest or Next Nearest Relative). Both forms should be amended to include the following item:

    7. *I understand and acknowledge that, if the trustee fails in the trustee's duties or breaches the trust, the Public Trustee does not have a statutory obligation to become trustee or to pursue legal remedies against the former trustee. In those circumstances, another private trustee may have to be appointed to act for the dependent adult and to pursue legal remedies against the former trustee.*

F. Transitional

[111] A transitional provision will be needed to address one scenario. On the date of implementation of our proposed legal changes, all existing trustees will (of course) be Alberta residents. If such an existing trustee subsequently moves to another Canadian province or territory, the trustee will not be disqualified (as would have been the case before) but will continue being trustee despite non-residency. However, unlike trustees appointed following the date of implementation, these existing trustees will have given no consent to attornment and therefore that protection for dependent adults will not be in place.

[112] We propose that existing trustees should give their consent to attornment when their trusteeship orders are reviewed or their accounts are passed. Thus, eventually all trustees will provide the necessary consent to attornment.

[113] Any existing trustee who moves to another Canadian jurisdiction before having consented to attornment should simply be deemed to have attorned. Even if

such deeming would not suffice to make a money judgment enforceable under the old enforcement of judgments legislation still in effect in most Canadian jurisdictions, *Morguard* could be used to enforce it at common law.

RECOMMENDATION No. 8
Existing Alberta trustees must provide consent to attornment when the trusteeship order is reviewed or accounts passed. If an existing trustee moves out of province without providing the written attornment, the trustee will be deemed to have attorned until the trusteeship order is reviewed or accounts passed.

- The transitional provision would be along the following lines:

  (1) *In this section, "existing trusteeship order" means a trusteeship order made before the coming into force of section 30(3)(b).*

  (2) *A Court shall not grant an order on review of an existing trusteeship order or an order passing the trustee's accounts unless the trustee provides the consent referred to in section 30(3)(b).*

  (3) *If a trustee under an existing trusteeship order becomes a non-resident of Alberta without providing the consent referred to in section 30(3)(b), the trustee is deemed to have consented as provided in that section until the trusteeship order is reviewed or the trustee's accounts are passed.*

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