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Enduring Powers of Attorney: Safeguards Against Abuse

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ALBERTA LAW REFORM INSTITUTE

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ACKNOWLEDGMENTS

Our first task was that of determining whether there was an issue which required attention. What was the incidence of abuse of Enduring Powers of Attorney and what were the consequences of that abuse? We received a wide range of views from estates and trust lawyers by way of the Canadian Bar Association sections, the Society of Trust and Estate Practitioners and attendees at the Banff Refresher Course on Estates, Trust and Elder law. We also had the benefit of a review of files at various time periods from the Public Trustee's Office.

Having determined the significance of the issue, we then had to attempt to balance the response to possible abuse with the effect of safeguards on the potential use of Enduring Powers of Attorney, and deal with the more general question of whether the possible safeguards would operate to make the Enduring Power of Attorney vehicle unattractive or too difficult to use for the very people the safeguards are trying to protect.

These two tasks, of acquiring information about the phenomenon, and of evaluating possible responses, fell to our Counsel and Board member, Dr. W. H. Hurlburt, Q. C. Both tasks have been carried out with his usual skill and the clearly presented proposals bear witness to the clarity of analysis which underlies them.

We express our gratitude to Dr. Hurlburt and to those correspondents who provided us with valuable information. We would also like to acknowledge the work of our research student, Mr. Jeremiah Kowalchuk who assisted with the research and collection of much of the material contained in the Appendices.

Even though the Enduring Power of Attorney legislation is comparatively recent, it is important to keep it current to meet changing conditions. These proposals will ensure that Enduring Powers of Attorney continue to be a valuable tool for personal and property management.

GLOSSARY OF TERMS USED IN THIS REPORT

"**Enduring Power of Attorney**" means an enduring power of attorney as defined in the *Powers of Attorney Act*; that is, it means a power of attorney which complies with the formal requirements of the Act and contains a statement indicating that it either

- is to continue notwithstanding any mental incapacity or infirmity of the donor that occurs after the execution of the power of attorney (a "continuing power of attorney"), or
- is to take effect on the mental incapacity or infirmity of the donor (a "springing power of attorney").

"**EPA**" means an Enduring Power of Attorney

"**Continuing power of attorney**" or "**continuing EPA**" means an Enduring Power of Attorney which is to continue notwithstanding any mental incapacity or infirmity of the donor that occurs after the execution of the power of attorney.

"**Springing power of attorney**" or "**springing EPA**" means an Enduring Power of Attorney which is to take effect on the mental incapacity or infirmity of the donor.

"**Family member**" means a spouse, adult interdependent partner or parent of the donor, or an adult child, brother or sister of the donor. (See Recommendation 2(2)(a).)

"**Qualified person**" means a person who is entitled to receive the notice of intention to act provided for in Recommendation 2(1)(a), or to inspect the records as provided in Recommendation 2(1)(b), or both, and includes

- a family member of the donor of an EPA unless excluded by the EPA, and
- a person designated in the EPA to receive the notice, or to inspect the records.

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PART I — Executive Summary

The *Powers of Attorney Act* allows a donor of a power of attorney to provide either that the power of attorney will come into effect on the donor's mental incapacity or infirmity (a "springing" power of attorney) or that the power of attorney will continue in force despite the donor's supervening mental incapacity or infirmity (a "continuing" power of attorney). It classifies both springing and continuing powers of attorney as "enduring" powers of attorney ("EPAs").

An EPA gives the attorney control over some or all of the donor's property at a time when the donor, by definition, is unable to supervise the attorney's activities. The great majority of attorneys exercise their control for the donor's benefit, but a small number abuse their powers by misapplying or misappropriating property of the donor. Although small, the number is large enough to require additional safeguards against abuse.

The present safeguards against abuse of EPA powers are:

- an EPA must be in writing and must specifically provide either that it is to continue notwithstanding any mental incapacity or infirmity of the donor that occurs after the execution of the power of attorney, or that it is to take effect on the mental incapacity or infirmity of the donor.
- the donor's signature must be witnessed.
- if the donor does not designate a person to make a declaration that the donor has become mentally incapable or infirm, two medical practitioners must make a written declaration.
- the *Powers of Attorney Act* provides that an attorney who has accepted an appointment has a duty to exercise their powers to protect the donor's interests during any period in which the attorney knows, or reasonably ought to know, that the donor is unable to make reasonable judgments in respect of matters relating to all or part of the donor's estate.

- the donor's personal representative or trustee or "any interested person" may apply to the Court of Queen's Bench for an order requiring an attorney acting under an EPA to pass accounts or for termination of the EPA.

The *Powers of Attorney Act* should be amended to provide the following additional safeguards:

- Either
  - a lawyer must sign a certificate that an EPA was signed by the donor on a specified date in the lawyer's presence separate and apart from the attorney and that the donor appeared to understand the EPA, or
  - a witness must swear an affidavit containing the same statements.
- When the donor becomes mentally incapable or infirm and the attorney intends to act under an EPA, the attorney must give notice of intention to act to specified family members whose whereabouts are, or ought reasonably to be, known to the attorney (unless excluded by the EPA) and to any person designated by the EPA to receive notice specified to family members who are not excluded by the donor in the EPA and designated persons being collectively referred to in this Report as "qualified persons").
- The attorney must prepare and keep up a list of property and rights over which the attorney takes control and a list of transactions involving the donor's property and rights.
- The attorney must allow qualified persons to inspect the EPA and the property and transaction lists at reasonable intervals and to make copies.
- If the attorney does not allow a qualified person to inspect the EPA and the property and transaction lists, the qualified person may ask the Public Trustee to direct the attorney to produce them, and, if the attorney does not comply strictly with the Public Trustee's request, the Public Trustee or the qualified person may apply to the Queen's Bench for an order to produce them.

It is the Alberta Law Reform Institute's (ALRI's) opinion that, with these additional safeguards, the *Powers of Attorney Act* will strike a proper balance between the interests of individuals

- in being able to appoint a trusted person of their own choice to administer their affairs on mental incapacity with the least cost and embarrassment, and
- in having reasonable safeguards against abuse of the powers given to attorneys.

PART II — List of Recommendations

RECOMMENDATION No. 1

We recommend that the *Powers of Attorney Act* be amended to provide as follows:

(1) The requirements that an EPA must be signed in the presence of a witness and that it must be signed by the witness in the presence of the donor should continue to apply.

(2) Either

(a) the donor of an EPA, whether springing or continuing, must appear before a lawyer who must certify that the donor was an adult; that the donor appeared to understand the EPA; and that the donor or a person signing on the donor's behalf in accordance with sec. 2(1) of the Act signed the EPA on a date specified in the EPA, separate and apart from the attorney; or

(b) a witness to the signature of the donor who is not disqualified from being a witness under sec. 2(4) of the *Powers of Attorney Act* must swear an affidavit to the same effect.

(3) The certificate or affidavit, as the case may be, must be attached to the EPA before the attorney acts upon it at a time when the donor is mentally incapable or infirm.

(4) The Court of Queen's Bench should have power to declare that an EPA is not invalid by reason only of non-compliance with any of the formalities prescribed by the Act, other than the requirement that an EPA be in writing and signed, if the Court is satisfied by clear and convincing evidence that the donor signed and understood the EPA.

(5) This Recommendation does not apply to a power of attorney on the sole ground that it will come into force on the occurrence of a contingency other than the donor's mental incapacity or infirmity. 9

RECOMMENDATION No. 2

(1) We recommend that the *Powers of Attorney Act* be amended to provide that an attorney under an EPA must, in addition to all other duties imposed by law:

(a) before or within 30 days after exercising any power or authority under the enduring power of attorney,

(i) (A) if the EPA is a springing power of attorney, or

(B) if the EPA is a continuing power of attorney and the donor has become mentally incapable or infirm,

give notice to every person designated by an EPA to receive notices, and to every family member whose whereabouts are, or ought reasonably to be known to the attorney, that the attorney intends to act or continue to act under the enduring power of attorney, as the case may be;

(ii) prepare, and thereafter maintain and update, a list of the property and rights of the donor of which the attorney takes control;

(iii) commence to maintain, and thereafter maintain and update, a record of all transactions by which the donor deals with property or rights of the donor other than usual small cash transactions, which may be recorded in totals; and

(b) upon request and at reasonable intervals allow any qualified person, at the expense of the qualified person, to inspect and receive or make copies of the EPA and the lists and records that the attorney is required to maintain.

(2) A qualified person for the purposes of this Recommendation is:

(a) a family member of the donor, being a spouse, adult interdependent partner or parent of the donor, or an adult child, brother or sister of the donor, or

(b) a person designated in an EPA

(i) to receive the notice that the attorney proposes to act, or

(ii) to inspect the EPA and the records that an attorney is required to maintain,

as the case may be.

(3) The donor may in the EPA exclude a family member from receiving the notice or inspecting the records, or both, and a family member who is excluded by the EPA is not a qualified person for that purpose.

(4) We recommend that the *Powers of Attorney Act* be amended to provide that:

(a) if an attorney refuses to allow a qualified person to inspect the EPA and the lists and records that the attorney is required to keep, or if the lists and records do not comply with the requirements, the qualified person may request the Public Trustee to direct the attorney to provide copies of the EPA and the lists and records to the Public Trustee.

(b) if in the opinion of the Public Trustee an attorney has not complied with the requirements, the Public Trustee may direct the attorney to provide the Public Trustee with copies of the EPA and the lists and records at the expense of the attorney.

(c) after considering any expressed wishes of the donor, the Public Trustee may allow a qualified person to inspect the copies of the EPA and the lists and records.

(d) The Court may, on the application of the person or the Public Trustee, order the attorney to allow the person, the Public Trustee or other person as the Court deems fit, to inspect the EPA and the lists and records and make copies thereof unless the attorney furnishes the copies, and, in either case, the Court may order the attorney to pay the cost of making the copies. 14

RECOMMENDATION No. 3

We recommend that the Government prepare and provide to the public through appropriate outlets, on a sustained basis, a pamphlet or pamphlets that set out in simple and straightforward form information about EPAs and about attorneys' duties, for the guidance of donors, attorneys, family members, and persons designated by donors. 16

RECOMMENDATION No. 4

We recommend that the following transitional provisions be made:

(1) Recommendation No. 1 (requirement of lawyer's certificate or witness's affidavit) should apply only to EPAs signed after the amendments giving effect to our Recommendations come into force.

(2) Recommendation 2(1)(a)(i) (notice of intention to act) should not apply to an EPA signed before the amendments come into force if the attorney has commenced to act under the special EPA powers and the contingency specified in section 5(1) of the Act has occurred.

(3) The remainder of Recommendation 2 (accounting and inspection obligations and related procedures) should apply to all EPAs, whether signed before or after the amendments come into force. 17

PART III — Report

A. Purpose of Report

[1] This report addresses the following issues:

- Whether the law should provide additional safeguards against abuse of Enduring Powers of Attorney ("EPAs").
- If yes, what the additional safeguards should be.

[2] The kind of abuse with which this Report is concerned is abuse by an attorney appointed by an EPA involving the misappropriation or misapplication by the attorney of money or property of the donor of the EPA.

B. Reasons for ALRI's Project

[3] A power of attorney is a document under which one person, the donor, appoints another person, the attorney, to look after some or all of the affairs of the donor. It gives the attorney the power to dispose of some or all the donor's money and property and to make contractual arrangements on behalf of the donor.

[4] Under the common law, a power of attorney became invalid if the donor became mentally incapable of looking after their affairs. This is still the case with a power of attorney which is not an EPA. A person therefore could not arrange for the administration of their affairs if they should become mentally incapable. In 1991, the Legislature enacted the *Powers of Attorney Act* in order to enable an individual to grant an EPA which would have effect if the donor becomes mentally incapable or infirm. The Act provides for two kinds of EPA:

- a power of attorney which comes into effect on the mental incapacity or infirmity of the donor (a "springing" EPA);
- a power of attorney already in force which continues in force despite the supervening mental incapacity or infirmity of the donor (a "continuing" EPA).

[5] An EPA has the following advantages:

- it allows an individual to choose the person or persons who will look after the individual's affairs if the individual becomes incapable of doing so.
- it avoids expensive and embarrassing court proceedings for the appointment of a trustee to look after the individual's affairs.
- it provides an efficient and cost-effective way of administering the individual's property.

Experience has shown that these advantages are realized in the great majority of cases.

[6] The downside of an EPA is that it turns over control of some or all of a donor's property and affairs to another individual, the attorney, whom the donor, because of their mental incapacity or infirmity, cannot effectively supervise. It is possible for an attorney to abuse those powers by using the donor's assets for purposes other than the donor's benefit. For example, an attorney may apply a donor's assets for a purpose beneficial to the attorney rather than for a purpose beneficial to the donor, or an attorney may simply steal the donor's property. Or an attorney who will benefit from the donor's estate may refuse to use the donor's money for proper care of the donor.

[7] The research and inquiries described in Appendix A and Appendix B show that some attorneys have abused their EPA powers. These cases of abuse, and the fact that abuse is possible, have raised concerns in Alberta and in other jurisdictions about the effectiveness of the safeguards against abuse that the *Powers of Attorney Act* provides. These concerns have given rise to suggestions that additional safeguards should be adopted or even that EPAs should not be permitted at all.

[8] Because of these concerns, and because EPAs have now been with us for more than ten years, ALRI concluded that it would be useful to review the Alberta EPA experience. The purpose of the review is to determine whether the *Powers of Attorney Act* in its present form represents the best possible balance between

- the interests of individuals generally in being able to arrange, in the event of their mental incapacity, for the administration of their property by one or

more trusted persons in a cost-efficient way and without the embarrassment of publicity, and

- the interest of an individual donor in being protected against misapplication or misappropriation of their property by a trusted person or persons whom they appoint to administer their property.

C. Limitations on ALRI's Project

1. Ordinary Powers of Attorney excluded

[9] Although it is possible for an attorney to abuse powers granted by an ordinary power of attorney, our project is limited to EPAs, that is, powers of attorney that are intended to operate after the donor's mental incapacity. There are two reasons for this limitation. One is that a donor of a power of attorney who is capable of managing their own affairs can supervise the exercise of the powers granted by the power of attorney. The second is that attempting to regulate ordinary powers of attorney would be a major intrusion into the freedom of individuals to manage their own affairs.

[10] While sec. 4 of the *Powers of Attorney Act* defines an EPA in terms of supervening mental incapacity or infirmity, sec. 5 says that "an enduring power of attorney may provide that it comes into effect at a specified future time or on the occurrence of a specified contingency, including, but not limited to, the mental incapacity or infirmity of the donor". This report does not deal with a power of attorney that comes into force on any contingency other than mental incapacity or infirmity, though if another contingency has already occurred the power of attorney may, if it includes the appropriate provision, be a continuing EPA.

2. Personal Directives excluded

[11] A Personal Directive under the *Personal Directives Act* gives an agent powers in relation to decisions about the maker's health and personal care that resemble the powers that an EPA gives to an attorney in relation to the donor's property and affairs. An agent may abuse the powers given by a Personal Directive in much the same way as an attorney may abuse the powers given by an EPA, and, if the agent expects to inherit all or part of the maker's estate, they may have a financial incentive to skimp on the amount of money spent on looking after the

maker. However, our inquiries and research did not disclose enough problems with the operation of Personal Directives to suggest that they should be included in this project, and we do not include them.

D. Existing EPA Safeguards

[12] The *Powers of Attorney Act* has a number of provisions which may give protection against abuse of an EPA.

1. Execution safeguards

a. Writing

[13] An EPA must be in writing (sec. 2). This requirement will help to avoid false claims that a donor has granted EPA powers, but it is not a significant safeguard against abuse where an EPA has been granted.

b. Witness

[14] An EPA must be signed before a witness who signs in the presence of the donor (sec 2). The witness must not be the attorney or the spouse of either the donor or the attorney. This requirement helps to ensure that a donor did in fact sign an EPA, but it is not a significant safeguard against abuse of powers actually granted by an EPA.

c. Statement of effect

[15] An EPA must state either that it is to continue notwithstanding any later mental incapacity or infirmity of the donor, or that it is to take effect on the mental incapacity or infirmity of the donor (sec.2). Such a statement may alert a donor to the fact that an EPA will operate when the donor is not able to supervise its use, but it is not a very effective safeguard against abuse.

2. Triggering event safeguards

[16] A springing EPA may provide that it will come into force upon the mental incapacity or infirmity of the donor. This is the most common form of EPA and it is the one with which we are principally concerned.

[17] A springing EPA comes into effect

- when a person named by the EPA for the purpose says that the triggering event (i.e., mental incapacity or infirmity of the donor)[1] has occurred. That is, the donor can name a person or persons whom they trust (including the attorney) to decide when the donor has become mentally incapable or infirm.
- if the EPA does not name a person to make the decision about mental incapacity or infirmity, or if the named person has died or is unable to act, when two medical practitioners have declared that the triggering event has occurred. That is, if the donor has not named a person or persons to make the decision, the donor is protected against an unwarranted declaration of incapacity by the requirement that two medical practitioners must concur in the decision before it can take effect.

3. Substantive law safeguard

[18] The *Powers of Attorney Act* (sec. 8) imposes a legal duty on an attorney who has accepted an appointment or has acted under a power of attorney. The duty is a duty to exercise the attorney's powers to protect the donor's interests during any period in which the attorney knows, or reasonably ought to know, that the donor is unable to make reasonable judgments in respect of matters relating to all or part of the donor's estate. An attorney who does not perform this duty can be sued by the donor or the donor's estate.

4. Accountability safeguards

[19] Under sec. 10 of the *Powers of Attorney Act,* the donor, the personal representative or trustee of the donor's estate or any "interested person" may apply to the Court of Queen's Bench

> (i) for an order directing an attorney under an EPA to bring in and pass accounts in respect of any or all transactions entered into in pursuance of the EPA, or

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[1] As noted in paragraph 10, we are not concerned with a power of attorney that comes into force upon the occurrence of a contingency other than mental incapacity or infirmity.

(ii) for an order terminating an EPA and directing the applicant to bring an application for a trusteeship order under the *Dependent Adults Act*.

[20] The power to apply to the Court is useful, but it depends, for its effectiveness, on there being some person whom the Court will regard as legitimately "interested" in protecting the donor; who has sufficient information to justify taking legal action; and who is willing to undertake the time and cost burdens and risks of bringing an application to the Court.

E. Sufficiency of Present Safeguards

[21] We describe in Appendices A and B the inquiries we have made and the research we have conducted to determine whether there is a sufficient problem of abuse of EPA powers by attorneys to make the establishment of additional safeguards desirable. Our conclusion is that EPA powers are abused in a number of cases which, though small in percentage terms, is large enough that the law should establish additional safeguards to protect donors against EPA abuse.

F. Recommendations for Additional Safeguards

1. Guiding principles

[22] We will now make a number of recommendations for additional safeguards against the abuse of EPAs. The following principles have guided our recommendations:

- An EPA should be a simple, efficient and effective means of enabling an individual to provide for the administration of their property in the event of the individual becoming mentally incapacitated or infirm.
- Safeguards against abuse of EPAs should be provided but should not be so onerous that they will unduly inhibit the use of EPAs.

[23] It is necessary to recognize that, short of a comprehensive and completely state-administered and state-guaranteed system of administration of the property of incapacitated persons, there is no way to give a 100% guarantee that no person who administers the affairs of an incapacitated person, including an attorney appointed by an EPA, will abuse the powers given to that person. Reasonable

safeguards against abuse should be provided, but piling safeguard upon safeguard in the hope of marginally reducing the number of cases of abuse will reduce or destroy the utility of a useful device that is highly beneficial in the great majority of cases in which it is utilized.

2. Execution safeguard

a. Proposed safeguard

[24] As noted above, the *Powers of Attorney Act* now requires that an EPA be in writing; that the donor's signature must be witnessed; and that the EPA must state that it is to continue notwithstanding any later mental incapacity or infirmity of the donor, or, alternatively, that it is to come into force on the occurrence of mental incapacity or infirmity. We think that there should be an additional safeguard on the execution of an EPA to give some additional assurance that the donor has capacity to grant the EPA; that the donor understands that it is an EPA; and that the donor is making their decision free from the influence of the attorney.

[25] We propose that the requirement of a witness be retained. The additional safeguard that we recommend is that one of two things must be done at the donor's option:

> **Alternative No. 1**
>
> The first alternative is that the donor must appear before a lawyer, who must certify that the donor was an adult; that the donor appeared to understand the EPA; and that the donor signed the EPA on a specified date separate and apart from the attorney. The lawyer could, but need not, be the witness to the EPA.
>
> **Alternative No. 2**
>
> The second alternative is that a witness who is qualified to be a witness under sec. 2(4) of the *Powers of Attorney Act* must swear an affidavit to the same effect, that is, that the donor was an adult; that the donor appeared to understand the EPA; and that the donor signed the EPA on a specified date separate and apart from the attorney.

[26] We think that the requirement of a lawyer's certificate or witness's affidavit should apply to both springing and continuing EPAs, and that either the lawyer's certificate or the affidavit should have to be attached to an EPA before the attorney acts upon the EPA at a time when the donor is mentally incapacitated or infirm. The requirement would not, however, apply to a continuing EPA until the donor becomes incapacitated; that is, a continuing EPA which does not comply with the requirement will be valid in accordance with its terms until the occurrence of the mental incapacity or infirmity of the donor.

[27] When it was enacted in 1991, the *Powers of Attorney Act* required a lawyer's certificate. The requirement was deleted from the Act in 1996. In that year, the *Personal Directives Act*, which provides for making personal directives about the maker's health care and personal care, was enacted. It is our understanding that it was thought that the formality of a lawyer's certificate should not be required for a Personal Directive and that the formalities of the EPAs and Personal Directives should be kept the same, so that the requirement of a lawyer's certificate was dropped for EPAs. We think that a lawyer's certificate will give better quality control than will a witness's affidavit, particularly as careful practitioners frequently go over the informative notes which the 1991 Act required, and we think that a donor is likely to get useful advice when appearing before a lawyer. However, we think that the a witness's affidavit will provide some assurance of the facts set out in it, and providing for the two alternatives will give a donor a choice.

b. Dispensing power

[28] There is one difficulty with prescribing formalities that must be complied with in order to make an instrument – in this case, an EPA – effective. That difficulty is that, unless some form of relief is provided, an ignorant or inadvertent failure to comply with a formality will defeat the intentions of a donor who is capacitated, who understands the EPA, and who wants to appoint an attorney in the terms of the EPA. To avoid this difficulty we think an EPA should not be invalid by reason of non-compliance with any of the formalities prescribed by the Act, other than the requirements of writing and signature, if the Court is satisfied by clear and convincing evidence that the donor signed and understood the EPA. The

requirement of "clear and convincing evidence" is, we think, a sufficient safeguard against validating an EPA that does not express the wishes of a capacitated and informed donor[2].

RECOMMENDATION No. 1
We recommend that the *Powers of Attorney Act* be amended to provide as follows:

(1) The requirements that an EPA must be signed in the presence of a witness and that it must be signed by the witness in the presence of the donor should continue to apply.

(2) Either
- **(a) the donor of an EPA, whether springing or continuing, must appear before a lawyer who must certify that the donor was an adult; that the donor appeared to understand the EPA; and that the donor or a person signing on the donor's behalf in accordance with sec. 2(1) of the Act signed the EPA on a date specified in the EPA, separate and apart from the attorney; or**
- **(b) a witness to the signature of the donor who is not disqualified from being a witness under sec. 2(4) of the *Powers of Attorney Act* must swear an affidavit to the same effect.**

(3) The certificate or affidavit, as the case may be, must be attached to the EPA before the attorney acts upon it at a time when the donor is mentally incapable or infirm.

(4) The Court of Queen's Bench should have power to declare that an EPA is not invalid by reason only of non-compliance with any of the formalities prescribed by the

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[2] A similar problem exists with the formalities required for the execution of wills. ALRI's Report 84, *Wills: Compliance with Formalities* discusses the problem at greater length and makes a similar recommendation.

Act, other than the requirement that an EPA be in writing and signed, if the Court is satisfied by clear and convincing evidence that the donor signed and understood the EPA.

(5) This Recommendation does not apply to a power of attorney on the sole ground that it will come into force on the occurrence of a contingency other than the donor's mental incapacity or infirmity.

3. Accounting safeguards

a. Requirements of notice, records and inspection

[29] The advantage of an EPA is that it enables an honest attorney to look after the affairs of the donor efficiently. The downside is that it enables a dishonest attorney to misuse the money and property of the donor. This downside, of course, applies to any device under which one person has control of money or property of another, including the appointment of a trustee under the *Dependent Adults Act*.

[30] The *Powers of Attorney Act* imposes upon an attorney, while the donor is incapacitated, a duty to exercise the attorney's powers to protect the donor's interests. However, it makes no general provision for the supervision of attorneys to ensure that attorneys will not abuse their powers under EPAs. As noted in paragraphs 19 and 20, Sec. 10 of the Act does provide a mechanism under which the donor, the donor's personal representative or any "interested person" may apply to the Queen's Bench for an order directing the attorney to bring in and pass accounts in respect of any or all transactions entered into in pursuance of the enduring power of attorney, and the Court will then have power to order an accounting or to terminate the EPA. In some cases, this will be a useful and effective safeguard. However, there are likely to be cases in which there is no "interested person" who is willing to undertake the cost, risk and trouble of bringing an application to the Queen's Bench, and it may be difficult for an "interested person" to obtain enough information about the attorney's conduct of the donor's affairs to make an application possible. Furthermore, the bringing of an application to the Queen's Bench, followed by a formal passing of accounts is likely to be an expensive process.

[31] We think that an appropriate balance between the interests of individuals in maintaining EPAs as an inexpensive, efficient and effective device for the management of the money and property of incapacitated donors, on the one hand, and, on the other, the interests of a donor in some reasonable protection against abuse of EPA powers would be struck by the following requirements:

- an attorney must give notice to a person designated by an EPA to receive notices and to all family members whose whereabouts are, or ought reasonably to be, known to the attorney of the attorney's intention to act under a springing EPA or to continue to act under a continuing EPA after the donor becomes mentally incapable or infirm.
- an attorney must keep a list of the donor's property of which the attorney takes control.
- an attorney must keep a record of all transactions by which the attorney deals with property or rights of the donor.
- an attorney must allow a "qualified person" or persons at reasonable intervals, to inspect and make copies of the EPA and the lists and records kept by the attorney at the cost of the qualified person.

[32] Without more, if an attorney simply refused to produce the EPA or the lists and records, a family member or other qualified person would be faced with starting legal proceedings to compel production. We think that an administrative procedure should be provided for the assistance of a "qualified person" in a proper case. This procedure would be as follows:

- a "qualified person" who is denied access to proper lists and records, could request the Public Trustee to direct the attorney to produce the EPA, lists and records, or to produce better lists and records.
- if, in the opinion of the Public Trustee, the attorney had not complied with the `requirements set forth above, the Public Trustee could direct the attorney to provide the Public Trustee with copies of the EPA and the requisite lists and records.
- the Public Trustee, after considering the expressed wishes of the donor, could allow a "qualified person" to inspect the lists and records.

- if the attorney does not provide the EPA and the requisite lists and records either to a "qualified person" or to the Public Trustee, the "qualified person" or the Public Trustee could apply to the Court of Queen's Bench for an order allowing the family member or the Public Trustee to inspect the records.

[33] These requirements would not prevent a dishonest attorney from looting the donor's property and making off with the proceeds. That is something that no legal safeguards that did not involve state administration could do. They would, however, put an attorney on notice that their activities could be scrutinized at any time.

[34] We do not think that these requirements would impose an onerous accounting burden on an attorney. Keeping a list of property taken into control, and keeping a record of transactions involving that property, are minimal accounting requirements that any attorney who is both honest and prudent would meet without being legally required to do so.

b. Persons who should be qualified to receive notices of intention to act and to be entitled to inspect an attorney's accounting records

[35] We have proposed that an attorney should be required to give notice of intention to act to all "qualified persons" known to the attorney and to allow any "qualified person" to inspect the accounting records that the attorney should be required to maintain. We turn to the question: who should be the "qualified person" or persons? The quest should be for persons who are likely to have an interest in protecting a donor against misapplication or misappropriation of the donor's property.

[36] First, we think that a donor's family members are the donor's natural protectors and should therefore have the right to receive the notice and inspect the accounting records. We think that the appropriate family members are a spouse, adult interdependent partner or parent of the donor, or an adult child, brother or sister of the donor. When the *Adult Interdependent Relationships Act* is proclaimed, the list should be extended to include an adult interdependent partner of the donor. If a donor does not say in the EPA who the "qualified persons"

should be, the default position should be that all family members are qualified persons.

[37] Second, we think that the donor should be able to designate a person or persons to receive the notice and have the right to inspect the accounting records. The designation should be made in the EPA. A person so designated would be a "qualified person".

[38] However, not all families are united. In a particular case, a donor may not want one family member, or, indeed, any family member, to be able to intrude on the management of the donor's affairs. We therefore think that the donor should be able to exclude any family member from the class of "qualified persons".

[39] If a donor excludes **all** family members from the right to receive notices and the right to inspect accounting records, without appointing another person or persons to have those rights, the proposed safeguard will not be operative, and an attorney may persuade a donor to do so. However, we think, though not unanimously, that the personal autonomy of donors should be recognized, and that a donor who makes a conscious decision not to have the safeguard should not be compelled to have it.

[40] We think that these proposals strike the most suitable balance between a donor's need for protection and their right to be able to manage their own affairs. It would be possible for an attorney to persuade a donor to designate a person who will not effectively supervise the attorney and to exclude all family members. However, in order to achieve that result, the donor's mind will have to be turned to the question of who should have the protective function and what family members should be excluded from that function. Further, the execution safeguards we have proposed will provide some protection against this eventuality. What risk remains will have to be accepted so that the use of EPAs will not be discouraged and so as to avoid undue intrusion into a donor's right to manage their own affairs.

[41] A donor who does not have any family members to perform the protective function will still have the power to name some else whom the donor trusts. It

would be possible to require a donor to name such a person, but we think that such a requirement would be impractical and unduly intrusive.

RECOMMENDATION No. 2

(1) We recommend that the *Powers of Attorney Act* be amended to provide that an attorney under an EPA must, in addition to all other duties imposed by law:

(a) before or within 30 days after exercising any power or authority under the enduring power of attorney,

(i) (A) if the EPA is a springing power of attorney, or

(B) if the EPA is a continuing power of attorney and the donor has become mentally incapable or infirm,

give notice to every person designated by an EPA to receive notices, and to every family member whose whereabouts are, or ought reasonably to be known to the attorney, that the attorney intends to act or continue to act under the enduring power of attorney, as the case may be;

(ii) prepare, and thereafter maintain and update, a list of the property and rights of the donor of which the attorney takes control;

(iii) commence to maintain, and thereafter maintain and update, a record of all transactions by which the donor deals with property or rights of the donor other than usual small cash transactions, which may be recorded in totals; and

(b) upon request and at reasonable intervals allow any qualified person, at the expense of the qualified person, to inspect and receive or make copies of the EPA and the lists and records that the attorney is required to maintain.

(2) A qualified person for the purposes of this Recommendation is:

(a) a family member of the donor, being a spouse, adult interdependent partner or parent of the donor, or an adult child, brother or sister of the donor, or

(b) a person designated in an EPA

(i) to receive the notice that the attorney proposes to act, or

(ii) to inspect the EPA and the records that an attorney is required to maintain,

as the case may be.

(3) The donor may in the EPA exclude a family member from receiving the notice or inspecting the records, or both, and a family member who is excluded by the EPA is not a qualified person for that purpose.

(4) We recommend that the *Powers of Attorney Act* be amended to provide that:

(a) if an attorney refuses to allow a qualified person to inspect the EPA and the lists and records that the attorney is required to keep, or if the lists and records do not comply with the requirements, the qualified person may request the Public Trustee to direct the attorney to provide copies of the EPA and the lists and records to the Public Trustee.

(b) if in the opinion of the Public Trustee an attorney has not complied with the requirements, the Public Trustee may direct the attorney to provide the Public Trustee with copies of the EPA and the lists and records at the expense of the attorney.

(c) after considering any expressed wishes of the donor, the Public Trustee may allow a qualified person to inspect the copies of the EPA and the lists and records.

(d) The Court may, on the application of the person or the Public Trustee, order the attorney to allow the person, the Public Trustee or other person as the Court deems fit, to inspect the EPA and the lists and records and make copies thereof unless

the attorney furnishes the copies, and, in either case, the Court may order the attorney to pay the cost of making the copies.

G. Provision of Information to the Public

[42] Honest EPA attorneys may go astray because they do not understand their legal obligations or the limits on the uses to which they may put the donor's property. They may go astray merely because they do not understand that it is imperative that they keep proper records, commencing with preparing a statement of the assets that come under their control. These possibilities have led to suggestions that some method should be devised for ensuring that EPA attorneys are given the information that they need in order to carry out their functions properly.

[43] Providing attorneys with information would be useful. It would, however, be only an indirect safeguard against EPA abuse. A legal requirement that information be provided would add to the time and money costs of entering into EPAs and would be difficult to enforce.

[44] However, we think that information about attorneys' duties, as well as information for the guidance of donors, should be publicly available. While lawyers and non-governmental organizations can and do provide such information, we think that the Government should undertake to prepare and provide to the public through appropriate outlets, on a sustained basis, a pamphlet or pamphlets that set out in simple and straightforward form information about EPAs and about attorneys' duties, for the guidance of donors, attorneys, family members, and persons designated by donors. This would also enable family members to present attorneys with officially-sanctioned information about their duties which an attorney could not dispute. We have received comments that information of this kind about Personal Directives has been very helpful to all concerned.

RECOMMENDATION No. 3
We recommend that the Government prepare and provide to the public through appropriate outlets, on a sustained basis, a

pamphlet or pamphlets that set out in simple and straightforward form information about EPAs and about attorneys' duties, for the guidance of donors, attorneys, family members, and persons designated by donors.

H. Transitional Provisions

[45] It would be quite wrong to impose retroactive execution requirements on EPAs that have come into existence before legislative amendments imposing them come into force if the effect would be to render pre-amendment EPAs invalid. The execution safeguards recommended by Recommendation No. 1 can be imposed only on EPAs signed after the amending legislation comes into force.

[46] However, the accounting and inspection safeguards should apply to all EPAs, whether executed before or after the amending legislation comes into force. They should of course apply only prospectively, that is, the duty to prepare a list of property and rights and the duty to maintain a record of all transactions should apply to a pre-existing EPA as if the EPA had been signed on the day the legislation comes into force. While this proposal will impose a new duty on attorneys, we do not think that an attorney can be heard to say that it is unfair to impose obligations to do things which an attorney who is both honest and prudent would have done anyway.

[47] The notice safeguard should also apply to EPAs executed before and after the amending legislation comes into force. However, a notice of intention to act is not appropriate if an attorney is already acting, so that the requirement should not apply in such a case.

RECOMMENDATION No. 4

We recommend that the following transitional provisions be made:

(1) Recommendation No. 1 (requirement of lawyer's certificate or witness's affidavit) should apply only to EPAs signed after the amendments giving effect to our Recommendations come into force.

(2) Recommendation 2(1)(a)(i) (notice of intention to act) should not apply to an EPA signed before the amendments come into force if the attorney has commenced to act under the special EPA powers and the contingency specified in section 5(1) of the Act has occurred.

(3) The remainder of Recommendation 2 (accounting and inspection obligations and related procedures) should apply to all EPAs, whether signed before or after the amendments come into force.

PART IV — Proposals Considered but Not Adopted

A. Introduction

[48] We have considered a number of other proposals which we list below, but have decided not to put them forward as recommendations. They have merit, but we have concluded that, on the whole, the additional protection they would provide is not sufficient to justify the effect they will have on the cost, efficiency or effectiveness of EPAs. We will give specific reasons for not adopting the individual proposals.

B. List of proposals not adopted

1. Signing before qualified person

[49] Manitoba requires that an EPA be signed before a marriage commissioner, police officer, notary, lawyer, Justice of the Peace, or provincial or superior court judge.

[50] Presumably this safeguard is intended to ensure that a donor of an EPA is acting independently. However, it does not require the official to ensure that the donor understands the EPA, and it does not seem likely that all of those listed would necessarily be in a position to give a very helpful explanation of the consequences of an EPA.

2. A statutory information statement signed by donor

[51] Under the 1991 *Powers of Attorney Act*, an Alberta EPA had to contain prescribed information about the meaning and effect of the EPA. This requirement was also deleted from the EPA requirements in 1996, for reasons similar to those behind the deletion of the requirement of the lawyer's certificate (see paragraph 27).

[52] If adopted, an information requirement might help to ensure that a donor is acting independently and has an understanding of the consequences of an EPA. We note, however, that its protection against EPA abuse would only be indirect

and that it would add to the weight of formalities that must be complied with, thus inhibiting to some extent the use of EPAs. We note further that a policy decision was made in 1996 to delete the requirement which appeared in the 1991 *Powers of Attorney Act*, though our understanding is that careful practitioners go over the matters included in the 1991 list with donors who are about to sign EPAs.

3. A physician's certificate of donor's capacity to grant an EPA

[53] Ireland requires a medical practitioner's statement that the donor was capable of understanding the effect of creating an EPA. While such a requirement would no doubt be a safeguard against the execution of EPAs by incapacitated donors, we think that it would be regarded as an unwarranted intrusion into private affairs, as well as adding cost to the adoption of EPAs and inhibiting their use.

4. Triggering event safeguard

[54] A "springing" EPA comes into force only when the contingency provided for in the EPA occurs. This is usually the incapacity or mental infirmity of the donor. In such a case, the donor can, in the EPA, name one or more persons to make a declaration as to when the triggering event occurs. If there is no such provision, or if the person named is not able to act, two medical practitioners may be able to make the declaration of incapacity.

[55] There are two competing considerations here. The first consideration is that a donor should be protected against an unwarranted declaration of incapacity and consequent loss of power to manage their own affairs. This consideration suggests that there should be strong safeguards against an unjustified declaration of mental incapacity. The second consideration is that a donor should be protected against the consequences of their own mental incompetence, which may result in mismanagement or dissipation of their property. This consideration suggests that the need for a declaration should not be allowed to create delays in the effectiveness of EPAs; there have been occasions where getting a donor to two medical practitioners has caused difficulty. We do not think that a case has been made out for a stronger safeguard against an unwarranted declaration that a triggering event has occurred.

5. Accountability safeguards

a. Supervision by a public functionary

[56] A possible additional safeguard would be to give a supervisory function over EPA attorneys to a public functionary. The functionary could be the Public Trustee or some other official. The requirement could be to furnish the official with an annual accounting. The requirement could be defined so that it would not be onerous, that is, the accounting could involve only a copy of the financial records kept by the attorney supported by bank statements or proof of existence of assets. The attorney would be conscious at all times of the need to keep proper records and the need to ensure that his actions would stand up under examination. The New Zealand Law Commission has recommended such a safeguard, and the Law Reform Commission of British Columbia recommended in 1975 and again in 1990 that EPAs be made trusts so that they would come under the supervision of the BC Public Trustee.

[57] Supervision by a public functionary would have merit. It should be a reasonably cost-effective safeguard, and it would make an attorney conscious that their activities will be reviewed by an outside functionary, though there could be some difficulty in ensuring that attorneys would advise the functionary of the existence of the EPA. However, there is likely to be resistance to providing public funding for the benefit of individuals who can, if they choose, take adequate precautions privately, and many EPA users want their affairs kept private. On the whole, we do not think that this safeguard should be adopted.

b. Requirement of more than one attorney

[58] If there are two attorneys, each should be able to guard against abuse of the EPA by the other. The device would, however, be cumbersome, and it is not unlikely that one attorney will delegate much power to the other, so that there will still be potential for abuse.

c. Requirement to pass accounts

[59] The procedural protection that is prescribed for trustees under the *Dependent Adults Act* but not for EPA attorneys is a periodic passing of accounts. The requirement is that a trustee under the *Dependent Adults Act* must file accounts with the Court every two years and must apply to have the accounts

passed. If a similar requirement were imposed on an EPA attorney, the attorney would be conscious at all times of the need to keep proper records and of the need to ensure that their actions would stand up under examination.

[60] The requirement would have the disadvantage of imposing a significant periodic cost on the donor's estate. Further, it would be fully effective only if some arrangement was made to ensure that attorneys complied with it. We do not think that the benefits would justify the cost and trouble that the requirement would impose.

d. Registry of EPAs coupled with supervision

[61] England, Scotland and Ireland require EPAs to be registered with the appropriate court, which then has broad supervisory powers to determine questions arising under EPAs, including a power to revoke an EPA. While bringing in active court supervision would add cost and erect hurdles that would impede the administration of donors' property, it might help to inhibit abuse.

[62] Another possible approach would be to require registration of EPAs in a publicly-maintained registry, coupled with a requirement of payment of registration fees, which would maintain a system of spot audits of attorneys' records. This again would add cost and inhibit the use of EPAs.

[63] Objections to any registration requirement might be expected on grounds of privacy. The requirement would therefore have to be shaped so that it would convey sufficient information to those who need to know, while protecting the essential privacy of the donor and the other persons involved.

[64] The execution of EPAs is a private matter. If a registration requirement is to be effective, it will be necessary to ensure that registration takes place. This might be done by a provision that no one is entitled to deal with an EPA attorney unless the EPA bears the appropriate registration stamp.

[65] We do not think that the benefits to be obtained from a registration requirement justify the extra cost and the derogation from privacy that it would impose and the inhibiting effect it would have on the use of EPAs.

6. Security

[66] A possible safeguard would be a requirement that an EPA attorney provide security, whether on property or by posted bond. This is a logical possibility, but the cost and inhibiting effect would, we think, detract greatly from the cost-effectiveness of EPAs and would be likely to derogate from their use.

PART V — Conclusion

[67] In this Report, we have made recommendations for the establishment of some further legal safeguards against abuse of powers under EPAs. These include either a lawyer's certificate or a witness's affidavit to show that an EPA was signed separately from the attorney and that the donor appeared to understand it. They also include a requirement that an attorney give notice of intention to act; keep at least rudimentary records; and allow inspection of the records. The persons entitled to receive the notice and carry out the inspections would be either family members or persons designated by the donor or both.

[68] These safeguards will not give complete protection against abuse, as complete protection could be given only by a state-administered and state-guaranteed system that would be unacceptable to donors, attorneys and society as a whole. However, we think that they will give significant protection and that they will not impose undue costs and constraints on the use of EPAs.

[69] We have also discussed a number of additional possible legal safeguards and given reasons for thinking that they would either derogate unduly from the cost-efficience and effectiveness of EPAs so that it would not be in the interest of donors to implement them.

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W.N. RENKE
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N.C. WITTMANN

CHAIRMAN

DIRECTOR

APPENDIX A
CONSULTATION

1. Introduction

[1] ALRI engaged in consultation at two stages of our EPA project. First, before deciding whether or not to undertake a project on safeguards against EPA abuse, we asked Alberta legal and estate-related organizations and the Public Trustee for information about cases of EPA abuse. Second, we prepared and distributed Issues Paper No. 5, *Enduring Powers of Attorney*, and engaged in consultation on the Issues Paper.

2. Pre-adoption inquiries

[2] Letters were sent to approximately 290 members of two CBA Alberta sections, the Wills and Estates Section, Edmonton, and the Wills and Trusts Section, Calgary. In addition, information was solicited from the members of the Society of Trusts and Estates Practitioners, Edmonton and Calgary and the members of the Edmonton and Calgary Estate Planning Councils.

[3] We received replies from 21 lawyers. We also received replies from two non-lawyers who are involved in estate planning, both of whom thought that attorneys do responsible jobs, though one thought that attorneys should be provided with rules and guidelines. Three of the lawyers thought that no review of the *Powers of Attorney Act* is needed, and two more thought that a review should be restricted to a consideration of accounting safeguards.

[4] The lawyers who replied mentioned 12 cases of apparent financial abuse of EPAs, including such things as:

- use of donor's money by attorney
- transfer of donor's money or property to attorney
- borrowing money on donor's property for attorney
- prevention of spending of donor's money on donor's maintenance
- attempting to purchase donor's land below market value
- family agreement to distribute donor's property while donor was still alive

[5] Of course, the facts have not been proven in court.

[6] Given the wide experience of those who replied to ALRI's inquiry, and given that EPAs have been with us for ten years, this is not a large number of cases of abuse. It is, however, too large a number to ignore.

[7] Some of the lawyers who responded mentioned more general problems. They have seen cases in which EPA attorneys have used EPAs to exclude other members of the family from information and even contact with the donor, and they have seen cases in which lack of information about the effects of EPAs and the duties of EPA attorneys has led either to misuse of EPAs to effect distribution of a donor's property or to failure to keep proper records.

[8] In response to our request, the Edmonton office of the Public Trustee kept track of cases in which the Public Trustee applied to be appointed as trustee of individuals whose financial affairs were formerly handled under an EPA. There were eight such cases between August 15, 2001, and October 23, 2001, six of which may have involved financial abuse, including such things as:

- failure to make payments to nursing homes for the maintenance of donors
- failure to provide money for necessities and comforts
- transfer of property or money to the attorney

[9] The Public Trustee also advised us that, during the same two-month period, the office was served with six applications for appointments of private trustees in EPA cases, though we do not know whether the facts alleged on those applications would amount to abuse.

[10] The numbers from the Public Trustee, while still anecdotal, were somewhat alarming for a two-months' harvest.

3. Consultation on the merits

a. Consultation carried out

[11] After adopting the project, we engaged in further consultation on the merits, based mostly on Issues Paper No. 5, *Enduring Powers of Attorney*, as follows:

- We sent the issues paper to the following:
  - ALRI's general mailing list, including Alberta law firms.
  - each of CBA Alberta Edmonton and Calgary offices (40 copies each).
  - individual members of the CBA Wills and Estates and Wills and Trusts sections (paper copies) and individual members of the Society of Trust and Estate Practitioners (Calgary) (email copies).
  - each individual who had responded to our earlier request for information as to incidence of EPA abuse.
  - members of the Edmonton Elder Abuse Consultation Team, followed up by a meeting with the Team.

- We sent a memorandum to the participants in a LESA Seminar on Wills and Estates at Banff, April 27 to May 30, and the Director solicited views from the participants.
- We met the Public Trustee and his officials.

b. Responses to Issues Paper from lawyers under general distributions

[12] ALRI received only 9 responses from lawyers following the distributions mentioned in the first three bullets above, though quality was high. The responses may be summarized as follows:

Lawyer No. 1: No abuse seen, no need for safeguards.

Lawyer No. 2: Mentioned one case of abuse. He thought that there should be prior approval of attorney by the Court, the Public Trustee or the Public Guardian and that there should be some control over attorney conduct.

Lawyer No. 3: Leave EPAs alone. They work for majority. Abuse will happen in a small minority with or without safeguards. Don't punish the majority with a cumbersome system and cost.

Lawyer No. 4: Has seen incidents of abuse (only one specifically mentioned, which involved reckless investments). He has had suspicions in other cases. Families don't want acrimony. There must be a requirement of accounting: the family, supervisor of the institution in which the donor is resident, or the Public Trustee. Use the Surrogate Rules accounting requirements. Revive notes to donor. Add page of duties and requirements for attorney, and put a page on Public Trustee's website with examples and instructions, including URL in notes to Attorney. Allow a donor to name an interested person. Where donor still has capacity, still require accounting but more relaxed. Joint accounts with attorney should be included in donor's estate. Abuse occurs, and suspicion and mistrust.

Lawyer No. 5: He had not seen many difficulties with informed consent. He has seen abuses under DAA and EPA where there is a conflict of interest, e.g., where the attorney needs money and can justify borrowing it from the donor at a good interest rate (example under the DAA mentioned.) He has a tendency to think passing of accounts but this may be too cumbersome. (Consider proposing that an EPA be revoked by divorce.)

Lawyer No. 6: He eliminates trigger of doctor's certificate because the local doctor doesn't want to take sides. The safeguards not perfect. Prohibit long-drawn-out EPAs and bills of $100-$300.

Lawyer No. 7: Require a physician to say the donor's condition is now continuous, not repetitive. Require the physician to make the statement on their known history of the diagnosis, or how long condition is likely to have existed (so there won't be incompetence immediately after EPA, which doesn't happen unless there is something like a stroke or accident). There is merit in a Registry: possibly start with a voluntary one. There should be an option for a public official to be named as attorney (lengthy discussion of reasons--he is aware that such a proposal will be resisted). Make education and information available to the public, especially attorneys (public official should be available to help and be proactive).

Lawyer No. 8: Amend legislation to allow LTO registration of all EPAs, even if they don't refer to "property" or "land". Amend the *Powers of Attorney* Act to require regular accounting to an individual: he has used a long term accountant plus copies of accounting to children. Requiring passing of accounts is costly, discouraging many "interested persons": Surrogate Rules requirements are less intrusive. (The vast majority of EPAs are not abused: don't impose costly, intrusive procedure on honest attorneys.) Allow the donor to restrict the persons to whom attorney must account, or even to dispense with accounting. If a donor doesn't choose a person to whom accounting is to be made, perhaps use the priorities under Surrogate Rule 11. There should be a penalty for failing to account, with solicitor and client costs against the attorney. It may be enough for siblings to see a chequing account and bank records. He opposes accounting to the Court or Public Trustee: the *Dependent Adults Act* is intrusive and imposes costs. He mentioned the problem of the donor being unduly influenced to cancel an EPA made by donor who had given $100,000 to sister and niece while under undue influence: there should some mechanism for Court to declare that the EPA has come into effect and the donor no longer has any power to make decisions.

Lawyer No. 9: A good deal of his practice is "elder law". He has only seen 1 case of EPA abuse and that was speculative investments, probably in unawareness of an attorney's limitations and responsibilities. He has seen abuse by use of joint accounts, and

thinks that intrusive safeguards on EPAs is likely to drive people to use joint accounts. He has also has seen abuse of Court trusteeships. He likes the idea of requiring directions to the attorney in EPAs and also the lawyer's certificate, with streamlined court application procedure if there is a technical difficulty with EPA execution. Some donors have no attorney to name: he suggests that the Public Trustee be available. He likes the idea of requiring registration when an EPA is triggered or when a donor loses capacity, provided that banks etc. are instructed that an EPA is ineffective unless registered. He likes the idea of creating a trust to bring in a recognized body of law.

c. Responses from lawyers at Banff seminar

[13] The Director's presentation and memorandum at Banff produced 53 responses from participants in the LESA seminar. 22 of the 53 responses mentioned specific cases of what appears to be EPA abuse. Respondents made the following suggestions:

- independent legal certificate (4 respondents)
- do not require legal certificate (1 respondent)
- require information to donor (1 respondent)
- don't require accounting to government official (2 respondents)
- mandatory accounting to Public Trustee, family and/or will beneficiaries (1 respondent)
- informal accounting requirement in EPA (1 respondent)
- informal accounting requirement (4 respondents)
- some reporting regulations (1 respondent)
- accounting requirement only if there is a problem or suspicious circumstances (1 respondent)
- automatic access to specified family members unless EPA says no (1 respondent)
- interested persons to be entitled to financial information (1 respondent)
- siblings, beneficiaries and guardians to be entitled
- annual report (forms provided) (1 respondent)
- annual reporting to siblings (1 respondent)
- 60 day reporting of short list of assets and transactions to Public Trustee (1 respondent)
- periodic accounting (2 respondents)
- passing of accounts on regular basis (1 respondent)
- court review every 2 years (1 respondent)
- accountability of grantor and attorney to persons interested under *Family Relief Act and Matrimonial Property Act* (1 respondent)
- watchdog to whom interested person can go so as not to have to make court application themself (1 respondent)
- Public Trustee to receive information and investigate (1 respondent)

- public functionary to monitor triggering (1 respondent)
- require two attorneys (2 respondents)
- periodic rotation of attorneys with accounting (1 respondent)
- disqualify bankrupts and impecunious persons from acting as attorneys (1 respondent)
- prohibit transfer of ownership of property (1 respondent)
- require court order for transfer of property (1 respondent)
- no change in asset registration (1 respondent)
- educate attorneys (2 respondents)
- have the attorney sign an undertaking (1 respondent)
- register an EPA when triggered (2 respondents)
- appoint physicians or independent persons to decide on the trigger (1 respondent)
- notice to a person designated by EPA or otherwise when EPA comes into effect (1 respondent)
- provide for the transfer of an EPA (1 respondent)
- ensure good drafting and advise donor to make careful choices (1 respondent)
- mandatory reimbursement if there is abuse, to survive bankruptcy, and provide for disinheritance and removal (1 respondent)
- legislation to allow prompt investigation and action (1 respondent)
- allow the use of EPAs only when property is worth less than a specified amount (1 respondent)
- highlight the attorney's responsibilities in a schedule to the Act (1 respondent)

[14] It will be seen that consultation produced a wide spectrum of views and a wealth of suggestions for consideration.

APPENDIX B
RESEARCH

CANADIAN CASES ON EPAs

***Wilson (Attorney of) (Re)*, [1999] O.J. No. 1274**
***Wilson (Attorney for) v. Wilson*, [2000] O.J. No. 2068**
These two judgments are in the same proceeding.

Colin Wilson, son, exercised a PA following Lenore Wilson's stroke on September 7, 1994. Brother Dennis was unhappy because Colin didn't answer questions and didn't pay Lenore's bills on time. Dennis obtained an order for passing accounts. Colin continued to access accounts and the Court terminated the EPA on May 30, 1996. Colin consented to the termination, but the Court said this was not "cooperation". The 1999 judgment is largely about whether assets in Lenore/Colin's names jointly attracted the presumption of advancement. Held that they did not. not.

Colin breached fiduciary duty, using Lenore's funds for his own benefit, and not keeping proper records. Costs against Colin, apparently solicitor and client.

***Latham (Administrator of) (Re)*, [1999] O.J. No. 2846**
As the donor revoked the PA and brought these proceedings, it seems that this was an ordinary power of attorney, alternatively that it was a continuing power of attorney but no mental incompetence had supervened. Daughter/attorney proceeded to dismantle the estate. Reference to *Kecan v. Sydor* [1997] O.J. No. 3767 where executor breached trust as being much the same. Found that attorney owed donor $80,000. Objection was made to $123,000, but remainder had not yet been dealt with. Costs against attorney.

***E.J.B. (Re)*, [1999] A.J. No. 761**
Two attorneys, both sons. Attorney 1 misused funds before and after the EPA was activated. The mother was vulnerable, and may have been incompetent earlier. Physician's declaration established incompetence. Judgment does not say why Attorney 2 didn't insist in participating in administration. The Court terminated the EPA. Application to be made for trusteeship by Public Trustee, or if Public Trustee did not agree, by Attorney 2.

***Mulville Estate (Re),* [1999] O.J. No. 386 (General Division)**
Husband/attorney did not keep proper records. Used wife's money as his own. Ordered to pass accounts. Accounts passed, subject to damages of $25,000 for

misuse of money. The Court terminated the power of attorney. The Public Trustee and Guardian was appointed interim guardian of the property.

***Gold v. Toronto Dominion Bank*, (2001) 13 B.L.R. (3d) 32**
This was an action against the bank for allowing an attorney under an EPA to transfer $120,000 from the donor's account to the attorney's account. (Original EPA had been lost; a second one wasn't properly executed. Held that the original was still in force.) The bank not liable. (The attorney's estate was a third party in the action.)

LAW REFORM REPORTS AND MATERIALS

1. New Zealand study and report

A 1999 report by a New Zealand agency, Age Concern Auckland, said that an examination of 130 cases of elder abuse in respect of a two-year period showed 40 cases attributable to misuse of an EPA. The study gave five specific examples, which, on the facts given, were clearly cases of abuse by misappropriation. These were as follows:

- attorney (neighbour) embezzled $40,000 from elderly woman's bank account
- attorney (daughter of elderly woman) misappropriated $200,000, spent it on personal things
- attorney (family friend) persuaded elderly woman to give him holiday home ($200,000); cashed bonds without explanation; the woman's will gave almost $1M to the friend
- attorney (son) placed donor in rest home, sold the donor's property without notice, and left NZ with the proceeds; donor had no recollection of granting the EPA
- elderly couple with cognitive impairment and Alzheimer's appointed their child as attorney; attorney did not pay the couple's bills, but wrote cheques for $18,000 for attorney's personal things

The New Zealand Law Commission used the Age Concern report in formulating recommendations for the adoption of additional safeguards in the New Zealand legislation. The Commission also said that a substantial number of submissions on the subject to the Commission supported the need for additional safeguards by specific case histories or offers to provide them.

The following points might be noted:

- New Zealand is not Alberta, and New Zealand statistics may not be replicated in Alberta

- on the other hand, it may be unsafe to assume that Alberta attorneys are less likely to abuse their powers than New Zealand attorneys
- the five specific examples cited by the Law Commission are clearly cases of abuse
- while we do not know the number of files examined, the time period involved, the geographical areas and populations involved, or precisely what was considered abuse, it appears that the number of cases of EPA abuse in Auckland was not negligible

2. Law Commission of Canada research paper *Why it Is So Difficult to Combat Elder Abuse And, in Particular, Financial Exploitation of the Elderly?*
This is a report prepared for the Law Commission of Canada by a law professor and a nursing professor. It was submitted to the LCC in 1999 and is published as a Commission document.

Sec. 9.2 in Part I of the paper refers to studies in which 2%, under one study, and 2.5%, under the other, of elderly populations reported "financial abuse", which appears to be the most common form of elder abuse. It makes the following statement:

> **Statement 1 (Part I, Sec. 9.2)**
> The most common forms of financial exploitation involved coercion, harassment or fraud, while abuse of a power of attorney was the most common form of financial exploitation. Moreover, 20% of all financial exploitation involved real estate transactions (mortgages to be paid by a family member; transfer of assets).

The paper goes on to say:

> **Statement 2 (Part II, sec. 4.2.2.3)**
> Some researchers have found that abuse of the powers granted by powers of attorney, including use of a joint bank account, was one of the most common forms of financial exploitation. Sacks (1996) asked 200 health and welfare agencies and nursing homes to assess the different services that administer the money they dispense. When asked what the most common types of financial exploitation were, respondents identified, first, forgery (89%), followed by money theft (78%), abuse of power by pilfering funds held in a joint account (78%), and abuse of power of attorney (44%).

These passages do not say whether they refer to ordinary powers of attorney or to EPAs or both. It may be that this does not matter, as an attorney who will abuse an ordinary PA is at least as likely to abuse an EPA, where there is no supervision by the donor to inhibit abuse.

The findings of the paper suggest that the number of cases where abuse of EPAs occurs is not negligible.

3. Law Reform Commission of British Columbia

In its Report 110, 1990, *Report on the Enduring Power of Attorney: Fine-tuning the Concept,* the LRCBC repeated its 1975 recommendation that "the appointment of an enduring attorney should be deemed to create a trust for the purposes of section 9 of the Public Trustee Act." The purpose of the recommendation was to give the British Columbia Public Trustee power to investigate and audit an attorney's activities under an EPA where a donor is or may be mentally disordered.

The Commission gave the following reasons for its recommendation:

> We perceive a growing concern with the potential for abuse by those exercising authority under enduring powers of attorney and extending the jurisdiction of the public trustee to include the conduct of enduring attorneys would, at least in some part, meet it. We believe this recommendation is worth emphasizing.

The Commission did not refer to specific cases of abuse.

LEGAL AND MEDIA LITERATURE

Legal literature suggests the possibility of abuse but does not give specific examples. In 1994, a Calgary Herald article referred to two Ontario cases of EPA abuse, and a Financial Post article of the same year suggested that there had been a number of cases of abuse, with one specific example. In December 2000, a CTV W5 program referred to one financial adviser who had defrauded many clients under powers of attorney and another who had also defrauded many clients, though in the latter case it was not said whether a power of attorney was involved. The program also referred to a case in which an elderly woman gave her financial adviser a general power of attorney, which was abused, and the question of her capacity to give an EPA was in question.

APPENDIX C
SAFEGUARDS ADOPTED IN OTHER JURISDICTIONS

This Appendix summarizes the safeguards in the EPA legislation in the following jurisdictions:

1. **Canadian jurisdictions.** Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island and Saskatchewan. It appears that there is no EPA legislation in Quebec or in the 3 territories.
2. **Australian jurisdictions.** The six states and the two territories.
3. **UK. England, Scotland and Northern Ireland.**
4. **New Zealand.**
5. **California.**

The following headings "Execution Safeguards", "Trigger Safeguards" and "Supervisory Safeguards" summarize only the Canadian jurisdictions. Some particulars with respect to the other jurisdictions follow.

Execution safeguards

1. Capacity

Ontario. Donor must know listed things, including possibility that attorney could misuse authority.

Donor does not necessarily have to be able to manage property at time of execution.

2. Writing and signature required

All jurisdictions.

3. Witness required

All jurisdictions.

Alberta. Excludes attorney, person signing for donor, and spouses of donor, attorney and person signing on behalf of donor.

BC. Excludes attorney and attorney's spouse.

Manitoba. Must be marriage commissioner, police officer, notary, lawyer, justice of the peace, or provincial or superior court judge. No explanation by the witness required. Attorney and spouse excluded.

New Brunswick. Excludes donee.

Newfoundland. Excludes attorney and spouse.

Nova Scotia. Excludes attorney and spouse.

Ontario. Excludes attorney and attorney's spouse or partner; grantor's spouse or partner; child or accepted child of grantor.
Prince Edward Island. Excludes attorney and spouse.
Saskatchewan. Excludes attorney and spouse.

4. Lawyer's certificate
Alberta initially required a lawyer's certificate, but the requirement was repealed.

Trigger safeguards

1. Machinery for making declaration of occurrence of event
Alberta. Donor may name one or more persons (including the attorney) on whose written declaration the specified contingency has occurred. If a person is not named, or if the person named cannot act, two medical practitioners may declare that the event has occurred.
Manitoba. Court order on application of Public Trustee, nearest relative or, if court permits, an interested person.
Ontario. Either: an assessment by an "assessor", who is of a class prescribed by regulation, or a certificate of incapacity under Mental Health Act.

Supervisory safeguards

1. Duty to act
An attorney who has accepted the power has a duty to act upon actual or imputed knowledge of incapacity.
Alberta.
Manitoba

2. Duty to protect donor's interests imposed by legislation
Alberta.
Manitoba. Manitoba imposes a statutory standard of care.
Newfoundland. Protect best interests; liability for failure with good faith exception; trustee.

3. Accounting
Alberta. Application to court by interested person.
Manitoba. Duty to provide accounting to named recipient or nearest relative. Court may order.
New Brunswick. Accounting to person having interest in estate, or other permitted person.
Newfoundland. Application to court by interested person.

Nova Scotia. Court on application. Also require attorney to show cause for attorney's failure to do anything that the attorney is required to do.
Prince Edward Island. Person interested in estate, permitted person or Public Trustee may apply. Attorney must pass accounts if order made.

4. Termination by court order

All jurisdictions have some provision for termination by court order, either directly or by appointment of some form of committee or administrator or by removal of attorney.

5. Court substitution of attorney

New Brunswick. Application of Administrator of Estates or person having interest in estate, or other person permitted by court.
Newfoundland. Application of person having interest in estate or other permitted person.
Nova Scotia.
Prince Edward Island. Person interested in estate, permitted person or Public Trustee may apply.

6. Variation of donee's powers

New Brunswick.

7. Filing or registration

Manitoba. Donor or attorney may file with Public Trustee.

UNITED KINGDOM LEGISLATION

England

- EPA must include prescribed explanatory information, Lord Chancellor having power to make regulations.
- Before the attorney can exercise a power under an EPA, the attorney must register the EPA with the Court on notice to the donor and certain persons prescribed by regulation, with provision for objection on grounds of prematurity, fraud/duress, or unsuitability of attorney.
- Application for registration is to be made only when donor is or is becoming mentally incapable. Then the Court has broad powers to make orders or determine questions regarding the EPA. Revocation if court so directs on exercising its powers under Part VII of Mental Health Act 1983. It seems that the "court" is the Court of Protection: s. 13 defines the court as "the authority having jurisdiction under Part VII of the Mental Health Act 1983" and s. 10 refers to the Court of Protection. Part VII is made applicable by s. 10: it looks as if there are "Visitors". Elaborate set of rules prescribed.

Scotland
Similar to English Act.

- Solicitor's certificate that donor understood the effect of the EPA, and no fraud or duress.
- Attorney may be required to be supervised, to submit accounting, or power may be revoked.
- Copy to donor on registration.
- Attorney to keep records of exercise of powers.
- Public Guardian has the function of investigating any circumstances made known to him in which the property or financial affairs of an adult seem to be at risk.

Northern Ireland
Similar to English statute. Registration. Must contain regulation-prescribed explanatory information and statement that information was read to donor.

REPUBLIC OF IRELAND

Similar in concept to the English statute. EPA naming spouse invalidated upon divorce or judicial separation, written separation agreement or protection order against the attorney. Registration required, on notice. Court has broad powers to alter, revoke or manage EPA, including requiring accounting. Under s. 5, the Minister can make regulations ensuring that a power contains adequate information as to effect, and requiring inclusion of statement that donor has read, and a statement by a solicitor that the solicitor is satisfied that the donor understood the effect of creating the power and there is no reason to suspect fraud. Regulations can also include requirement for statement by registered medical practitioner that the donor had the capacity, with the assistance of explanations, to understand the effect.

Regulations

- Require witness other than attorney, and attorney's signature must be witnessed by someone other than the donor and another attorney.
- Require a solicitor's certificate of interview; satisfaction that donor understood the effect of creating an EPA; and document is not result of fraud or undue pressure.
- Medical practitioner's statement that donor was capable of understanding the effect of creating an EPA.
- Notice by donor to at least two people of execution of EPA, including living-together spouse, or, if none, to child or alternatively other relative.

AUSTRALIA

Australian Capital Territory

- Two witnesses neither of whom is the attorney or a relative of the donor or attorney.
- Duty to act as donor would have acted, taking into account need to prevent donor from becoming destitute and maintaining pre-incapacity life style.
- No conflict of interest; keep property separate; keep proper accounts; may be required to provide accounting; liability for breach of duty.
- Power of court to alter or revoke EPA powers.

New South Wales

- Execution attested by prescribed person (not the attorney), who must certify that the witness explained the effect before execution.
- Court can remove and substitute, and can order an accounting.

Northern Territory

- Registration required.
- Witness who is neither the attorney nor a close relative of the attorney.
- Court may
  - order accounting or audit.
  - revoke or alter any of the terms.

Queensland

- Witness.
- Witness must be "eligible".
- Witness must sign certificate that donor had the necessary capacity.
- Duty to exercise power honestly/reasonably diligently. Liable for breach.
- Attorney must
  - keep accurate records.
  - keep property separate.
- Transaction between donor and attorney/relation/business associate presumed induced by attorney's undue influence.

South Australia

- Witnessed by person authorised to take affidavits.
- Liable for failure to act with reasonable diligence to protect donor's interests.
- Offence not to keep accurate records, and may have to provide accounting.
- Beneficiary under donor's will can apply for remedy for disproportionate advantage enjoyed by beneficiary occasioned by attorney's exercise of powers.

Tasmania
- Two non-party witnesses.
- Liability for failure to exercise powers to protect donor's interests.

Victoria
- Two witnesses, attorney excluded.
- Court may revoke power.

Western Australia
- Two witnesses, both authorized to take declarations.
- Liability for failure to exercise reasonable diligence in protection of donor's interests.
- To keep accurate records.
- Endures if instrument declares power continues despite mental incapacity or during period when "Board" declares no capacity.
- Board may order accounting, audit, or vary or revoke EPA.

NEW ZEALAND
- Witness required.
- Court powers to alter, revoke, and give directions, including accounting.
- Court can review attorney's decisions.
- Attorney
  - not to enter into transaction with conflict.
  - keep property separate.
  - keep proper accounts and provide accounting.
  - liable for loss due to breach of duty.

CALIFORNIA
- Notary public or two witnesses other than attorney.
- Warning statement re gravity of EPA.
- Termination of attorney marriage with donor terminates EPA.
- Attorney may revocably delegate mechanics but remains liable.
- Prudent person standard, or reasonable person with skills.
- Act in donor's interest and avoid conflicts.
- Property separate.
- Contact and communication, and follow directions when practicable.
- Record transactions and account.
- Authority revoked if attorney violates fiduciary duty.