ALBERTA LAW REFORM INSTITUTE

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ENDURING POWERS OF ATTORNEY

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ALBERTA LAW REFORM INSTITUTE

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

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PREFACE AND INVITATION TO COMMENT

The Alberta Law Reform Institute is considering whether to prepare a report and recommendations for the adoption of additional safeguards against abuse of Enduring Powers of Attorney ("EPAs"). In order that its consideration may be properly informed, the Institute solicits the comments and advice of the reader on these two questions:

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

After considering the comments and advice received, the Institute will decide whether to prepare a report and recommendations for changes in the Powers of Attorney Act in relation to the safeguards against abuse of EPAs.

Readers are asked to provide comments and advice by **April 30, 2002**. Comments and advice received after that date will be given consideration if practicable, but may be too late to be effectively taken into account.

Comments and Advice in Writing should be made to:

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LIST OF ISSUES

A. Purpose of this Issues Paper

[1] In this Issues Paper, the Alberta Law Reform Institute ("ALRI") solicits the comments and advice of readers on two questions:

- Should the law provide additional safeguards against abuse of Enduring Powers of Attorney ("EPAs")?

- If the law should provide additional safeguards, what should they be?

[2] Detailed lists of issues appear at page vii and at page 22 (for "springing" EPAs) and page 25 (for "continuing" EPAs). We ask each reader who chooses to give comments and advice to give the reasons for them, as this makes them much more useful in deciding what, if anything, should be done.

[3] The reader should note that this Issues Paper is intended to elicit comments and advice, not to restrict discussion. The reader should not feel obliged to restrict their comments and advice to things said and possible safeguards discussed in the paper.

[4] The Issues Paper provides background information and discussion so that the reader's comments and advice may take into account all the relevant considerations.

[5] The kind of abuse with which this Issues Paper is primarily concerned is abuse by an EPA attorney, consisting of misappropriation or misapplication of money or property of the donor of the EPA.

B. Historical Legal Background

[6] A Power of Attorney ("PA") is a formal document by which an individual (the "donor") gives another person (the "attorney") power to enter into legal transactions on behalf of the donor. The power may be limited to one or a few transactions, or it may extend to all transactions that the donor could enter into himself or herself. So long as the attorney acts within the authority granted by the PA, the donor is legally bound by what the attorney does; that is, the attorney can

dispose of the donor's property, create a new legal relationship between the donor and a third party, or change or cancel an existing legal relationship between the donor and a third party.

[7] Until 1991, Alberta law said that a PA remained in force only while the donor was mentally capable of managing their own legal and financial affairs. If the donor became incapable of managing their own affairs, a PA was effectively terminated by law. Under the pre-1991 law, therefore, an individual could not plan for the future management of their legal and financial affairs after their incapacity by giving a PA to a family member or other trusted person.

[8] In 1991, the Legislature enacted the *Powers of Attorney Act*. That Act provides for what it calls "Enduring Powers of Attorney" or "EPAs". These are of two kinds:

(i) A power of attorney that comes into force immediately and continues in force despite the future mental incapacity or infirmity of the donor. (Because an EPA of this kind comes into force immediately and continues in force despite the donor's incapacity, it may be called a "continuing EPA".)

(ii) A power of attorney that takes effect upon the mental incapacity or infirmity of the donor. (Because an EPA of this kind comes to life only upon the donor's mental incapacity, it may be called a "springing EPA".)

The *Powers of Attorney Act* remains in force today.

C. Reason for ALRI's Project on EPA Safeguards

[9] An EPA is a device that

- allows an individual to choose one or more trusted persons to look after the individual's affairs if the individual becomes incapable of doing so.

- avoids expensive and embarrassing court proceedings for the appointment of a trustee to look after the individual's affairs.

- 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.

[10] The downside is that an EPA turns over control of some or all of the donor's property and affairs to another individual, the attorney, whom the donor 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.

[11] The research and inquiries described below show that some attorneys have abused their EPA powers. These cases of abuse, and the fact that abuse is possible, have raised concerns about the effectiveness of the safeguards against abuse that the *Powers of Attorney Act* provides, with consequent suggestions that additional safeguards be adopted or even that EPAs not be permitted. The CBA Alberta Wills and Estates Section has raised concerns about the EPA safeguards. Dr. Don J. Nazimek of Camrose, in a letter to the Minister of Justice with a copy to ALRI, has argued very strongly that, under the present state of the law, EPAs lend themselves to financial abuse of donors. Concerns have been expressed in other jurisdictions as well, and in response some have adopted more safeguards than now exist in Alberta.

[12] Because of these concerns, and because EPAs have now been with us for ten years, we have 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

(i) The interests of an individual 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

(ii) The interest of the individual in being protected against misappropriation of their property by the person or persons whom they appoint to administer their property.

D. Limitations on ALRI's Project

1. Ordinary Powers of Attorney excluded

[13] Although it is possible for an attorney to abuse powers granted by an ordinary Power of Attorney, our project is limited to **Enduring** Powers of Attorney, 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 an EPA is unique in that it is a device that operates when the donor is not capable of supervising the exercise of the powers granted by the EPA. The second is that attempting to regulate ordinary PAs would be a major intrusion into the freedom of individuals to manage their own affairs.

2. Personal Directives excluded

[14] 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 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 have not disclosed enough problems with the operation of Personal Directives to suggest that they should be included in this project, and we do not include them.

E. Existing EPA Safeguards

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

1. Execution safeguards

a. Writing

[16] An EPA must be in writing. 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

[17] An EPA must be signed before a witness who signs in the presence of the donor. 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 EPA abuse.

c. Statement of effect

[18] 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. 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

[19] 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.

[20] A springing EPA comes into effect

(i) When a person named by the EPA for the purpose says that the triggering event (i.e., mental incapacity or infirmity of the donor) has occurred. That is, the donor can name a person or persons whom they trust (including the attorney) to make the decision about the donor's mental incapacity.

(ii) If the EPA does not name a person to make the decision about incapacity, 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 by the requirement that two medical practitioners must concur in the decision before it can take effect.

3. Substantive law safeguard

[21] The *Powers of Attorney Act* imposes a legal duty on an attorney who has accepted an appointment or has acted under a PA. 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

[22] Under the *Powers of Attorney Act* an "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

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

[23] These are useful provisions, but they depend for their 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.

F. Nature and Extent of EPA Abuse

1. Available information

[24] EPAs are private matters. No one knows how many have been signed or how many have come into force. Evidence of abuse is anecdotal, not systematic.

[25] We have conducted some research and made some inquiries to determine whether or not EPA abuse is common enough to suggest that protective measures should be adopted. We will summarize the results of those inquiries.

a. Inquiries to Alberta legal and estate-related organizations

[26] Letters asking for information about cases of EPA abuse 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.

[27] 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.

[28] 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

[29] Not all of these are clearly cases of abuse, and, of course, the facts have not been proven in court.

[30] 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, more than a negligible number.

[31] 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 testamentary purposes or to failure to keep proper records.

b. Inquiries to the Public Trustee

[32] We asked the Public Trustee for information about cases of EPA abuse. In response, 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

[33] 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.

[34] These numbers, while still anecdotal, are somewhat alarming for a two-months' harvest.

c. Law reform materials

i. New Zealand study and report

[35] 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

[36] 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.

[37] 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

ii. Law Commission of Canada research paper

[38] *Why it Is So Difficult to Combat Elder Abuse And, in Particular, Financial Exploitation of the Elderly?* 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.

[39] 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).

[40] 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%).

[41] 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.

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

iii. Law Reform Commission of British Columbia

[43] 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.

[44] 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.

[45] The Commission did not refer to specific cases of abuse.

d. Reported cases

[46] In the last ten years the following cases of abuse of EPAs have been reported in law reports in Canada:

(i) Two 1999 EPA cases in Ontario.

(ii) One 1999 EPA case in Alberta.

(iii) One 1999 case in Ontario involving abuse of a PA that was not an EPA.

(iv) One 2001 B.C. case. (This case did not directly involve abuse, but it was an action against a bank for allowing an attorney to remove money from the donor's account, the implication being that the removal was improper.)

e. Legal and media literature

[47] 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 PA, which was abused, and the question of her capacity to give an EPA was in question.

f. Conclusion as to desirability of review of EPA experience

[48] As we have said earlier, we think that a review of the existing EPA safeguards is justified to determine whether they strike the best possible balance between the interest of an individual in having an efficient and cost-effective device for the administration of their property by persons whom they trust, on the one hand, and, on the other hand, the individual's interest in being protected against the possibility of loss due to abuse of powers by those trusted persons.

G. General Approach to Decisions About Safeguards

[49] As we have said, the purpose of this Issues Paper is to obtain informed comment and advice as to whether the law should provide additional safeguards against abuse of Enduring Powers of Attorney, and, if it should, what those additional safeguards should be.

[50] We suggest that the reader first consider whether there is a sufficient problem of EPA abuse to require any action to be taken. If, in the reader's opinion, the answer is no, that is the end of the reader's inquiry.

[51] If the answer is yes or maybe, the situation becomes more complicated. EPAs give effect to one set of values. Safeguards against EPA abuse are likely to make EPAs less efficient in giving effect to those values. It will be necessary to bear in mind both the EPA values and the values involved in protecting against abuse individuals who are unable to help themselves. So, in relation to each possible safeguard, the reader may want to ask himself or herself

- to what extent would the adoption of this safeguard detract from the efficiency of EPAs?

- to what extent would the adoption of this safeguard add to the protection of EPA donors against the possibility of abuse by EPA attorneys?

[52] On the efficiency side, the reader may wish to bear in mind that

- an EPA attorney is chosen by the EPA donor to look after the donor's affairs, and that choice should be honoured unless there is good reason to override it.

- an EPA is efficient in that it gives the attorney the powers necessary to protect the donor's interests.

- an EPA is cost-effective as it does not require professional or institutional help.

[53] The reader may also wish to consider whether a proposed safeguard will in fact tend to prevent or reduce EPA abuse: there should be a direct relationship between EPA abuse and a proposed safeguard that is adopted to guard against EPA abuse.

[54] The reader may also wish to compare the EPA system with the Dependent Adults system, which is the principal alternative means of administering the property of persons who are unable to manage their own affairs. That is, the *Dependent Adults Act* provides an example of a system that is supervised by the courts, which may be a useful benchmark for consideration of EPAs.

H. Springing EPAs: Possible Safeguards

1. Introduction

[55] We will deal first with **springing** EPAs. They are the device most commonly used to provide for the proper administration of a donor's property in the event of mental incapacity.

[56] We will set out a number of possible safeguards against abuse of springing EPAs that the law might adopt. For the reader's information, Appendix A summarizes the safeguards adopted by a number of other jurisdictions.

2. Information safeguards

a. Safeguards to ensure donor's informed consent

i. Introduction

[57] Even a fully capacitated and informed EPA donor may make a mistake in assessing the reliability of a proposed EPA attorney. Nevertheless, the first safeguard against abuse of springing EPAs is a donor who understands the effect of an EPA and who is able to make an independent decision as to whether to execute an EPA.

[58] First, it must be noted that our inquiries have not elicited reports of cases in which donors were either incapacitated or subject to undue influence in the execution process, so that safeguards that add cost or difficulty to the execution process may not be justified on the grounds that they will avoid cases of incapacity and undue influence.

[59] As noted above, the present Alberta execution safeguards are:

(i) a requirement of writing
(ii) a requirement of a witness who is not a party or a spouse
(iii) a statement of the effect of an EPA

These are, at best, minimal safeguards.

[60] The most that can be done at the execution stage is to ensure that a donor has mental capacity, is acting independently, and understands the consequences of granting an EPA. It may be questioned whether safeguards at this stage will give effective protection against EPA abuse.

[61] It should also be borne in mind that prescribing more formalities increases the chance that one or more of them may be overlooked. If the consequence of failing to comply with a formality is that an EPA is invalidated, the wishes of donors may be defeated.

[62] The next section discusses execution safeguards that might be considered for springing EPAs.

ii. Specific safeguards

(a) Witness qualifications

[63] Manitoba requires signing before a marriage commissioner, police officer, notary, lawyer, JP, or provincial or superior court judge.

[64] Presumably this safeguard is intended to ensure that a donor of an EPA is acting independently. It should be noted that it does not require that the effect of an EPA be explained to a donor, 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.

(b) Lawyer's certificate

[65] Under the 1991 *Powers of Attorney Act*, an Alberta EPA had to be signed before a lawyer who was to be sure that the donor understood the EPA. This 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 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 was dropped for EPAs.

[66] If adopted, a requirement of a lawyer's certificate should help to ensure that a donor has capacity, is acting independently, and has an understanding of the consequences of an EPA. Its protection against EPA abuse would be indirect only, and it would involve financial and time costs in the adoption of EPAs.

(c) A statutory information statement signed by donor

[67] 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.

[68] If adopted, an information requirement should help to ensure that a donor is acting independently and has an understanding of the consequences of an EPA. Its protection against EPA abuse would be indirect only.

[69] The information requirement could include a statement that it is desirable for the donor to establish a mechanism for the monitoring of the activities of the attorney, for example, a provision requiring the attorney to provide a periodic accounting to a relative.

[70] An information requirement would be much more effective if it were coupled with a requirement of a lawyer's certificate. The lawyer could check to see that the donor had considered all the items of information included in the requirement.

(d) Physician's certificate of donor's capacity to grant an EPA

[71] 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.

b. Information for attorneys

[72] An honest EPA attorney 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.

[73] This information might include:

(i) a statement that an attorney is under a legal duty to protect the donor's interests which somewhat resembles the duty of a trustee, and information as to the content of that duty, including, where applicable, information about the power to provide for the maintenance, education, benefit and advancement of the donor's spouse and dependent children

(ii) a short list of "best practices", that is, steps that an attorney should take in order to carry out their duties, including keeping proper records

[74] Consideration might be given to allowing an attorney to have access to the donor's will if the donor becomes mentally incompetent, so that the attorney may have regard to the donor's testamentary intentions in making decisions on the donor's behalf.

[75] The private nature of the process for the granting of EPAs makes it difficult to devise efficient ways of delivering the information to attorneys. It would be possible to integrate information for EPA attorneys with information for donors at the execution stage. That is, whatever provision is made for the better information of EPA donors could also be made for the better information of EPA attorneys, whether by way of lawyers' explanations, the signing of statutory information statements, or by some other method.

[76] Information requirements are only indirect safeguards against abuse, and they would add to the time and money costs of entering into EPAs.

3. Triggering event safeguards

[77] 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.

[78] There are two competing considerations here. The first is that a donor should be protected against an unwarranted declaration of incapacity and consequent loss of power to manage their own affairs. This suggests that there should be strong safeguards against an unjustified declaration. The second is that a donor should be protected against the consequences of their own incompetence, which may result in mismanagement or dissipation of their property. This 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.

4. Accountability safeguards

a. General discussion

[79] No doubt, it is desirable to avoid appointing dishonest or incompetent attorneys, and execution safeguards are directed towards that end. But even the best informed and most capacitated and independent donor may be mistaken about the moral qualities of a trusted EPA attorney or the attorney's ability to withstand temptation. The strongest case for some form of protection is at the accountability end.

[80] The *Powers of Attorney Act* requires an attorney who has accepted an EPA attorneyship to carry out their duties and to safeguard the donor's interests. So the substantive law is all right. But the only procedural safeguard at the moment is that an "interested person" may apply to the Court of Queen's Bench for an order requiring an attorney to bring in and pass their accounts under the EPA, or for an order terminating the attorneyship. If a termination order is granted, the court may require the applicant to apply for a trusteeship under the *Dependent Adults Act*, and may in the meantime appoint an interim trustee.

[81] The "interested person" procedure may be very useful in a particular case. However, its effectiveness is dependent on there being a person whom the Court will regard as being legitimately "interested" in the donor's affairs and who is willing to accept the cost and time burdens of bringing a Court application. Indeed, it is rather difficult to see how an "interested person" would in many cases go about getting information which would persuade a court to order a passing of accounts, unless there is some pretty blatant abuse going on.

[82] It must be recognized that any device that involves putting one private individual in control of another individual's property will expose the latter to the possibility of abuse by the former. That is to say that no device short of state administration, supported by a state guarantee against misappropriation, will provide absolute protection to a person who is unable to manage their own affairs. An EPA attorney who is prepared to loot the donor's property and decamp with it will be able to do so, and an attorney who is sufficiently skillful will be able to

hide misappropriation from an outside supervisor. The same is true of a trustee under the *Dependent Adults Act*. We doubt that serious consideration would be given to a proposal of state administration, or even a requirement of administration by a regulated trust company, and we do not propose to raise either as a serious proposal, though we would be pleased to receive comment on the subject.

b. Possible accountability safeguards

[83] The following accountability safeguards might be considered if ALRI undertakes a project:

i. Supervision by a public functionary

[84] A possible safeguard would be to give a supervisory function 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. Such a system seems likely to be the most effective and cost-efficient safeguard against everyone but the decamping looter. The New Zealand Law Commission has recommended such a safeguard, unless the NZ Family Court structure could be appropriately revised, which seems unlikely, and the LRCBC recommended in 1975 and again in 1990 that EPAs be made trusts for the purpose of bringing them under the supervision of the BC Public Trustee.

[85] It should be noted, however, that an extensive new obligation should not be imposed on the Public Trustee's Office or any office unless the office is given adequate resources to discharge the obligation.

[86] If supervision by a public functionary were to be recommended, some means should be provided of ensuring that the existence of an EPA is communicated to the functionary at the time of the triggering event.

ii. Accounting to a relative

[87] Another possible safeguard would be to require an EPA attorney to provide a periodic accounting to the donor's closest relative (other than the attorney) or to anyone interested in the donor's estate. Manitoba does the first. New Brunswick does the second.

[88] The requirement need not be onerous. It would be cheap. It would have much of the benefit of supervision by a public official but would not require a publicly-funded system of supervision. It would be effective in a particular case only if there is some person who meets the statutory qualification and who is interested enough to insist upon receiving the accounting. It would, of course, have to be designed so that it would be an instrument of enlightenment and containment, not an instrument of harassment of attorneys. There may be cases in which a donor of an EPA would not want any other family members to be involved.

[89] One problem area associated with EPAs seems to be that a family member-attorney may use an EPA to keep everyone else off the turf, and a requirement of accounting to another family member would stop the attorney from doing so. It would not, of course, be useful in cases in which there is no vigilant person around.

iii. Requirement of more than one attorney

[90] If there are two attorneys, each should be able to guard against abuse of the EPA by the other. The device may, 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.

iv. Requirement to pass accounts

[91] 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.

[92] 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.

v. Registry of EPAs

[93] 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.

[94] 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.

[95] 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.

[96] 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.

vi. Security

[97] A possible safeguard would be a requirement that an EPA attorney provide security, whether on property or by posted bond. This is mentioned because it is a logical possibility, but both the desirability and the practicality of recommending the establishment and enforcement of such a safeguard are doubtful.

I. Conclusion with Respect to Springing EPAs

[98] Springing EPAs are devices which are intended to allow people to choose those who will look after their affairs and themselves in the event of mental incapacity; to avoid expensive and embarrassing court proceedings; and generally

to provide a cost-effective and efficient administration of a person's financial and personal affairs by attorneys and agents of their choice.

[99] On the other hand, springing EPAs give extensive powers to the trusted persons. There is no effective way of ensuring that donors of EPAs will choose attorneys who are honest and responsible. Even if a choice is apparently a good one at the time it is made, there is little to protect the donor against the pillaging of the donor's property, and the attorney is likely to have much to gain from the pillaging.

[100] The *Powers of Attorney Act* emphasizes the freedom of choice, cost-effectiveness and efficiency factors very strongly. This emphasis was increased by the 1996 deletion of the initial requirements of solicitors' certificates and statutory information in relation to EPAs. Under the Act as it stands, the only effective safeguard at any stage is the power of an "interested person" to apply to the court for an accounting or for the termination of an EPA. The effectiveness of this safeguard is dependent upon there being an "interested person" who is well-enough informed, sufficiently risk-friendly and well-enough disposed, whether through good feeling or desire to protect expectations from the donor's or maker's estate, to bring on a court application.

[101] We have not made an inquiry into the relative incidence of abuse of springing EPAs and trusteeships under the *Dependent Adults Act.* We have had some anecdotal suggestions that the experience is not dissimilar, that is, that, despite the closer Court supervision under the *Dependent Adults Act,* financial abuse by trustees occurs.

J. List of Issues with Respect to Springing EPAs

ISSUE No. 1
Does the incidence or possibility of abuse of springing EPAs make it desirable for the law to adopt an additional safeguard or safeguards against abuse?

ISSUE No. 2

If it is desirable for the law to adopt an additional safeguard or safeguards against abuse of springing EPAs, which of the following safeguards should be adopted:

Safeguards to ensure donor's informed consent

1. **Requirement of special qualifications for a witness to a springing EPA.**
2. **Requirement of a lawyer's certificate that the EPA has been explained to the donor.**
3. **Requirement of an information statement signed by the donor to be included in or attached to a springing EPA.**
4. **Physician's certificate that the donor is capable of understanding the effect of creating a springing EPA.**

Information for attorneys

Requirement that EPA attorneys be given information as to their duties, whether by such means as lawyers' certificates, statutory information statements, or otherwise.

Triggering event safeguards

Variation of the present default provision for a declaration by two physicians that the donor of an EPA is mentally incompetent or infirm.

Accountability safeguards

1. **Supervision by a public functionary.**
2. **Accounting to a relative.**
3. **A requirement of more than one attorney.**
4. **A requirement to bring accounts to the Court periodically and have them passed.**
5. **A requirement of registration of springing EPAs in a public-maintained registry, with or without additional Court supervision.**
6. **A requirement that the attorney post security.**

Other safeguards

Should a safeguard or safeguards not discussed above be adopted?

K. Continuing EPAs: Possible Safeguards

[102] The basic purpose of a continuing EPA, that is, an EPA that **continues after** mental incompetence is, in part, the same as the basic purpose of an EPA that **comes into effect upon** mental incompetence: it is to provide for the cheap and efficient administration of the donor's affairs by a trusted attorney. Many of the same considerations therefore apply.

[103] There are, however, differences between the situation under a **continuing** EPA and the situation under a **springing** EPA:

- until mental incapacity supervenes, the situation under a continuing EPA is different from the situation under a springing EPA because the donor is able to manage their own affairs, and it may be thought that they should be left alone to do so. On this view, no state interference is justified while the donor remains mentally capable.

- the supervening mental incapacity of the donor does not affect the validity of a continuing EPA, which is valid both before and after the mental incapacity. There is therefore no practical compulsion on the attorney to bring attention to the fact of mental incapacity, so that a continuing EPA is even more private than a springing EPA.

[104] We suggest that the reader who thinks that a specific safeguard should be adopted with respect to a springing EPA give consideration to the similarities and differences between a continuing-EPA situation and a springing-EPA situation, and consider whether the adoption of the same safeguard is justified or desirable for continuing EPAs. If disposed to recommend the adoption of the same safeguard, the reader should consider whether the safeguard should apply from the time when a continuing EPA is granted, or whether it should apply from the time when the donor loses mental capacity. If the latter, consideration should also be given to ways of bringing the safeguard into effect on the donor's mental incapacity.

L. List of Issues with Respect to Continuing EPAs

ISSUE No. 3
Does the incidence or possibility of abuse of continuing EPAs make it desirable for the law to adopt an additional safeguard or safeguards against abuse?

ISSUE No. 4
If it is desirable for the law to adopt an additional safeguard or safeguards against abuse of continuing EPAs, which of the safeguards that should be adopted for springing EPAs should also be adopted for continuing EPAs?

APPENDIX A
SAFEGUARDS UNDER EPA LEGISLATION

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. 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.
- Must be “eligible”.
- 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.