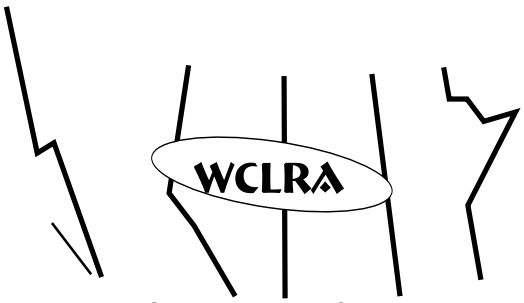

Western Canada Law Reform Agencies

Enduring Powers of Attorney: Areas for Reform

Final Report

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WESTERN CANADA LAW REFORM AGENCIES

The consortium of Western Canada Law Reform Agencies (WCLRA) was born out of a common desire to encourage harmonization of the laws of the four western provinces in areas where uniformity would be beneficial. In pursuit of this desire, the four western Canadian law reform agencies – the Alberta Law Reform Institute, the British Columbia Law Institute, the Manitoba Law Reform Commission and the Law Reform Commission of Saskatchewan – have agreed to work on joint reform projects.

The Alberta Law Foundation provided funding for the initiative that led to the creation of the consortium. WCLRA member agencies may be contacted at:

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This and other WCLRA publications are available to view or download on the websites of each of the four western law reform agencies.

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Manitoba:

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Community Legal Education Association
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Lions Manor
Long Term Care Association
Manitoba Bar Association, Elder Law Section
Manitoba Bar Association, Wills and Estates Section
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Seniors and Healthy Aging Secretariat
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British Columbia Seniors Services Society
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Margaret Hall prepared the consultation paper. Margaret Shone, Q.C., Sheryl Pearson and Debra Hathaway undertook the work of the final report.

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EXECUTIVE SUMMARY

Western Canada Law Reform Agencies (WCLRA) consists of the British Columbia Law Institute, the Alberta Law Reform Institute, the Law Reform Commission of Saskatchewan and the Manitoba Law Reform Commission. In its first report, WCLRA recommends uniformity of certain key provisions in each western province's statute governing enduring powers of attorney (EPAs). Apart from these proposed uniform provisions, it is intended that each province's statute will remain unique. The areas in which WCLRA proposes uniformity are: recognition of EPAs, duties of attorneys under EPAs and safeguards against misuse of EPAs.

Recognition of EPAs

WCLRA recommends that each western province authorize both continuing EPAs (powers of attorney which are in effect before the donor's mental incapacity and which continue afterwards) and springing EPAs (powers of attorney which first come into effect on the donor's mental incapacity and continue afterwards).

Each province should also have a standard provision for recognition of EPAs made in other jurisdictions. Donors commonly move from one province to another or have property in more than one province. Recognition should be extended to a foreign EPA if it meets the formal requirements of the recognizing province's statute, or if the EPA was made under and meets the formal requirements of the jurisdiction where it was made or where the donor was habitually resident at the date of its making.

To promote greater ease of recognition, WCLRA recommends that the statute of each western province contain uniform formal requirements for making an EPA. When an EPA is made, the donor must have the mental capacity to understand its nature and effect. The EPA must be in writing and must contain an express statement that the attorney's authority continues in effect during, or comes into effect on, the donor's mental incapacity. It must be signed by the donor while physically apart from the attorney. The donor must sign in the presence of one witness or, in the witness's absence, the donor may sign and then subsequently

acknowledge the donor's signature when the witness is present. A proxy may sign on behalf of a donor who is physically incapable of signing and who directs the proxy to sign in the donor's presence. The proxy's signature must be witnessed in the usual way. Ineligible witnesses are the attorney, the attorney's spouse, the donor's spouse and any proxy who signs on behalf of the donor. The witness is required to sign a witness statement setting out that the formal requirements of signing and witnessing have been met.

Recognition of EPAs both within and between provinces would also be facilitated by use of a standard form EPA. While use should not be mandatory, the form should be made available under each province's regulations. WCLRA recommends a simple form containing specified elements, including a list of the uniform statutory attorney duties (discussed next).

Duties of attorneys under EPAs

The statutes of the western provinces currently provide only limited guidance about the duties of attorneys who act for mentally incapable donors. This causes confusion and uncertainty about the nature and scope of those duties. A uniform statutory list of attorney duties would help donors and attorneys be more aware of the duties that arise under EPAs. WCLRA recommends a list of seven attorney duties. When the donor becomes mentally incapable, an attorney under an EPA must:

- act honestly, in good faith, and in the best interests of the donor;
- take into consideration the known wishes of the donor and the manner in which the donor managed the donor's affairs while competent;
- use assets for the benefit of the donor;
- keep the donor's property and funds separate, except as permitted by statute (co-mingling will be allowed only where there existed before the donor's mental incapacity an established pattern of co-mingling involving that asset);
- keep records of financial transactions;
- provide details of financial transactions on request; and
- give Notice of Attorney Acting.

While an attorney's duty to keep records of financial transactions is active, ongoing and mandatory, the attorney's duty to provide details is passive and arises only on the request of specified persons. Immediate family members and anyone designated by the donor in the EPA can request those details at reasonable intervals and, if necessary, can obtain a court order for production. Any other interested person may ask a designated public official (such as a Public Guardian and Trustee) to deal with the attorney or court to obtain financial information. To qualify as an "interested person," the person or institution must establish a need to know in the best interests of the donor.

WCLRA also recommends a legislated standard of care against which attorneys will be measured (that of a prudent person in comparable circumstances, including having comparable experience and expertise). If the EPA expressly authorizes remuneration and states the basis for it, an attorney may be paid for so acting. All attorneys will be able to claim reimbursement for reasonable expenses properly incurred in so acting. To encourage an available pool of willing attorneys, the provincial statutes should clarify that an attorney who complies with all duties and other obligations need not fear personal liability for loss or damage to the donor's property or financial affairs.

To promote knowledge of attorney duties among attorneys, donors and the public, each western province should develop and widely distribute public EPA education materials and best practices for lawyers and lay persons.

Safeguards against misuse of EPAs

Misuse of an EPA by an attorney can occur inadvertently (through ignorance) or deliberately (through intentional wrongdoing). WCLRA's recommendations in this area are designed to help safeguard against both forms of misuse by bringing an attorney's conduct out into the open and by keeping other people in the donor's life informed about the attorney's actions. This greater transparency and scrutiny will allow action to be taken when misuse is suspected.

When an attorney commences acting for a mentally incapable donor, the attorney will have to issue a document called Notice of Attorney Acting, in which

the attorney will acknowledge and accept the attorney duties under the EPA and confirm that the attorney is now handling the mentally incapable donor's affairs. The Notice must be given within a reasonable time to any person designated by the donor in the EPA to receive that notice or, if none is designated, to the donor's immediate family. "Immediate family" consists of the donor's spouse (including an opposite or same sex partner in a marriage-like arrangement), adult children (including step-children and adopted children), parents and adult siblings. In the EPA, the donor can exclude any immediate family member by name from receiving the Notice but the donor cannot waive the general duty to give notice. If there is no one to receive notice, the attorney must give the Notice to a designated public official.

Any person who has concerns about misuse will be able to report those concerns to a designated public official, who will have the discretion to investigate the situation. Investigation should occur where the public official has grounds to believe that an attorney has breached any of the attorney duties. Statutory protection is recommended for those who, in good faith, report misuse or participate in an investigation. The public official will have the power to freeze accounts for up to 30 days, obtain information from financial institutions, examine records in anyone's possession and obtain warrants for search and seizure. The public official can also apply to court to terminate the EPA or appoint a new attorney. Financial institutions will have the power to freeze accounts for up to 5 days where they have reasonable grounds to suspect misuse and will also have the concurrent duty to report it to the public official.

Finally, WCLRA recommends a series of transitional provisions to ensure fair application of the proposed statutory changes to both new and existing EPAs.

LIST OF RECOMMENDATIONS

(f) provide details of financial transactions upon request; and
(g) give Notice of Attorney Acting.

(4) In carrying out the duties, the attorney
(a) shall be held to the standard of care of a prudent person in comparable circumstances (including having comparable experience and expertise);
(b) shall not receive remuneration from the donor for acting as the attorney unless the EPA expressly authorizes the remuneration and states the basis for it; and
(c) can be reimbursed from the donor's property for reasonable expenses properly incurred in acting as the attorney.

(5) An attorney is not personally liable for loss or damage to the donor's property or financial affairs, if the attorney complies with
(a) the provisions of the EPA under which the attorney acts;
(b) the attorney's duties, as set out in the Act and any order of a court;
(c) any directions of a court given under the Act; and
(d) any other duty that may be imposed by law.. 40

Recommendation No. 8: Specific requirements of the duty to account

(1) The accounting requirements of the western provinces should be harmonized.

(2) The duty of an attorney to keep records of financial transactions is active, ongoing and mandatory. The duty includes making an inventory of the property brought under the attorney's control and keeping track of all subsequent transactions with respect to that property, with documented proof.

(3) The duty of an attorney to provide details of the financial transactions is passive, arising only upon the request of specified persons. The duty would be met by providing a summary statement of the property brought under the attorney's control and subsequent financial transactions with respect to that property, and by giving the persons who are entitled to know the details an opportunity to examine the records themselves.

(4) Immediate family members and any persons designated by the donor will be entitled to request details of the financial transactions at "reasonable intervals." The donor may exclude by name in the EPA any immediate family member who the donor does not want to receive details.

(5) Where an immediate family member or designated person and the attorney disagree about what constitutes a reasonable interval, the immediate family member or designated person is entitled to make a court application for an order directing the attorney to provide details of the financial transactions.

(6) All other interested persons should be entitled to ask a public official (the Public Trustee, Public Guardian and Trustee or other public official, as appropriate to the province) to direct the attorney to provide details of the financial transactions or to apply to court for an order so directing.

Recommendation No. 13: Reporting suspected misuse of an EPA

(1) Each of the four western provinces should designate a public official to receive reports of concerns about the conduct of an attorney under an EPA.

(2) The reporting of concerns should be voluntary.

(3) A person who reports in good faith should be protected. No action or other proceeding may be brought against a person who reports misuse or participates in an investigation unless the person acted maliciously or without reasonable and probable grounds.

(4) The public official charged with receiving reports should have the discretion to investigate any suspected EPA misuse.

(5) Investigation should occur where the public official has grounds to believe that the donor of the EPA has been declared incapable and the attorney has breached one or more of the attorney duties listed in the EPA statute.

(6) The public official should have investigation powers and authority similar to those found in sections 40.6, 40.7, 40.8 and 40.9 of *The Public Guardian and Trustee Act*, S.S. 1983, c. P-36.3. These include the authority:

> (a) to suspend the withdrawal or payment of funds from a person's account for up to 30 days and to require the financial institution to provide relevant financial information;
>
> (b) to authorize payments from an account that has been suspended;
>
> (c) to examine any record in the possession of any person and request any information and explanations necessary to the investigation; and
>
> (d) apply for a warrant to enter and search premises for the record and seize and take possession of it.

(7) The public official should have authority to bring a court application to terminate the EPA or appoint a new attorney; this authority should stand alongside the right of private persons to bring a court application to terminate an attorney appointed under an EPA.

(8) The public official named to receive reports should undertake an educative and supportive role in order to prevent the occurrence of EPA misuse.

(9) Financial institutions should have authority and duties similar to those found in section 40.5 of *The Public Guardian and Trustee Act*, S.S. 1983, c. P-36.3. This includes:

> (a) the authority to suspend the withdrawal or payment of funds from an account for up to 5 days where the financial institution has reasonable grounds to believe that an attorney under an EPA is acting for a donor who has been declared incapable of managing property and the attorney has breached one or more of the attorney duties listed in the EPA statute;
>
> (b) the discretion to allow payments to be made from the suspended account; and
>
> (c) the duty to immediately advise the public official named to receive reports of the suspension, the reasons for the suspension and any

Recommendation No. 14: Transitional provisions

(1) EPAs that were validly made under the existing law should continue in effect under the new law.

(2) The new "foreign EPA" recognition criteria should apply to existing EPAs.

(3) The attorney duties under the new law should apply to an attorney under an existing EPA where the attorney is acting for a mentally incapable donor when new law takes effect. This includes the duty to give Notice of Attorney Acting within a reasonable period after the new law is introduced. Concerning the duty to provide details of financial transactions upon request, each of the four western provinces should determine whether any differences in the details of fulfilling this duty under the new law are of such significance with respect to the donor's likely expectations that the existing law, or some part of it, should continue to apply to existing EPAs in that jurisdiction.

(4) The duty to give Notice of Attorney Acting should apply to an attorney appointed under an existing EPA where the donor becomes mentally incapable after the new law takes effect.

(5) An attorney appointed under an existing EPA should meet the standard of care set out in the new law when carrying out duties to a donor who is mentally incapable when, or becomes mentally incapable after, the new law takes effect.

(6) The new attorney remuneration provision should not apply to existing EPAs. A transitional provision will validate any existing EPA which expressly authorizes remuneration even if it does not meet the new criteria. However, the new provision allowing attorneys to claim reasonable expenses properly incurred will apply to all attorneys, whether acting under a new or existing EPA.

(7) The liability provision will apply to all attorneys, whether acting under a new or existing EPA.

(8) Prior to the new law taking effect, each of the western provinces should undertake an extensive public education process in order to inform all attorneys (both those appointed under the existing law and those appointed under the new law), lawyers and the public at large of the new law's details.

(9) The new measures for reporting and investigating suspected EPA misuse should apply to existing as well as new EPAs. These measures should be established before the new law takes effect. 81

GLOSSARY OF TERMS USED IN THIS DOCUMENT

Enduring power of attorney or **EPA** means a power of attorney which complies with the formal requirements in legislation and contains a statement indicating that

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

Continuing power of attorney or **continuing EPA** means an enduring power of attorney which is to continue notwithstanding any mental incapacity of the donor that occurs after the making 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 of the donor.

Non-enduring power of attorney means a power of attorney that ceases to have effect on the mental incapacity of the donor.

Donor means the person who grants a power of attorney to another.

Attorney means the person to whom the authority to manage some or all of another person's property and affairs is granted under a power of attorney.

Attorney authority establishes the parameters of the powers an attorney can exercise under an EPA. It defines when an attorney *can* act and what an attorney *can* do.

Attorney duties constitute the minimum legal expectations of attorneys exercising their powers. They define *how* an attorney should act and what an attorney *must* do.

Misuse means a breach of duty by an attorney or an action outside the scope of the attorney's authority, and includes both deliberate and inadvertent breaches and actions.

Immediate family member means the donor's spouse, adult child (including a step-child and adopted child), parent and adult sibling.

Spouse includes an opposite or same sex partner in a marriage-like relationship.

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Manitoba

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CHAPTER 1.
INTRODUCTION

I. MEANING OF "ENDURING POWER OF ATTORNEY" (EPA)

[1] What is a power of attorney? A power of attorney can be described as:[1]

> ... 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.

A power of attorney is recognized at common law. However, at common law, "a power of attorney became invalid if the donor became mentally incapable of looking after their affairs. ... A person therefore could not arrange for the administration of their affairs if they should become mentally incapable."[2] For the sake of differentiation, we refer to this historically recognized power of attorney as a *non-enduring power of attorney*.

[2] An EPA is a variation on the non-enduring power of attorney. It is a creature of legislation and permits a donor to grant a power of attorney that *continues* in force despite the donor's later mental incapacity, or that *springs* into force on the donor's mental incapacity.[3] The *continuing power of attorney* and the *springing*

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[1] Alberta Law Reform Institute [ALRI], *Enduring Powers of Attorney: Safeguards Against Abuse*, Final Report No. 88 (Edmonton: Alberta Law Reform Institute, February 2003) [ALRI Final Report 88] at para. 3. Note that the Saskatchewan statute differentiates between a "property attorney" and "personal attorney;" see *The Powers of Attorney Act, 2002*, S.S. 2002, c. P-20.3, s. 2(1) [*Saskatchewan Act*]. Manitoba, Alberta and British Columbia do not provide for personal decisions (e.g. decisions relating to the donor's health and personal care) in their power of attorney legislation. Provision for personal decisions is made elsewhere. In Alberta see the *Personal Directives Act*, R.S.A. 2000, c. P-6; in Manitoba see the *The Health Care Directives Act*, C.C.S.M. c. H27; in British Columbia see the *Representation Agreement Act*, R.S.B.C. 1996, c. 405.

[2] ALRI Final Report 88, *ibid.* at para. 4. To this day, a power of attorney that is not an EPA becomes invalid if the donor becomes mentally incapacitated.

[3] Most of the four western provinces' legislation explicitly allows an enduring power of attorney to spring into effect at a specified future date or on the occurrence of a specified contingency other than the donor's mental incapacity. In Alberta see the *Powers of Attorney Act*, R.S.A. 2000, c. P-20, s. 5(1)

(continued...)

power of attorney[4] are EPAs because they both operate during the donor's mental incapacity.[5]

[3] The objective of EPA legislation is to provide a relatively simple yet effective method by which an individual can arrange for the administration of the individual's property and affairs by one or more trusted persons in the event that the individual becomes mentally incapable of personally doing so sometime in the future. The advantages of an EPA include the following:[6]

- 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; and
- it provides an efficient and cost-effective way of administering the individual's property.

[4] All powers of attorney expose donors to risks respecting the management of their property. An attorney's duties are broadly similar under both non-enduring

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[3] (...continued)
[*Alberta Act*]; in Manitoba see *The Powers of Attorney Act*, C.C.S.M. c. P97, s. 6(1) [*Manitoba Act*]; *Saskatchewan Act*, *supra* note 1, s. 9. In British Columbia, the *Power of Attorney Act*, R.S.B.C. 1196, c. 370 [*B.C. Act*] does not explicitly authorize springing powers of attorney, but case law supports their existence. Springing EPAs are explicitly authorized in recent amendments made to the B.C. Act, which are awaiting proclamation: *Adult Guardianship and Planning Statutes Amendment Act, 2007*, S.B.C. 2007, c. 34, s. 38 creating new ss. 10 and 14(a) [*B.C. Unproc. Ams.*]. This report deals only with the contingency of mental incapacity, "though if another contingency has already occurred the power of attorney may, if it includes the appropriate provision, be a continuing EPA": ALRI Final Report 88, *ibid.* at para 10.

[4] Note that the language to describe the two types of enduring power differs from one jurisdiction to another. For example, the Saskatchewan legislation speaks of an enduring power of attorney and a contingent power of attorney. Saskatchewan's enduring power of attorney is equivalent to a continuing power of attorney referred to in this report. Saskatchewan's contingent power of attorney corresponds to a springing power of attorney.

[5] Mental incapacity is not the only contingency that may give rise to a springing power of attorney. For example, a power of attorney may be set up to come into effect if the donor leaves the jurisdiction. However, such other contingencies relate to non-enduring powers and therefore fall outside the subject of this report.

[6] ALRI Final Report 88, *supra* note 1 at para. 5.

powers of attorney and EPAs and similar risks attend both types of power. However, the risks are likely to arise more frequently and be more difficult to resolve in EPAs where the donor is no longer capable of managing the donor's own property and affairs or of supervising the attorney. Three examples illustrate the increased risk.

[5] First, a person with whom the attorney is dealing may refuse to recognize the validity of an EPA. If the donor is capable, the donor can confirm to the third party that the power of attorney exists, which may be sufficient to reassure the third party in some cases. If the document creating the power of attorney does not meet the technical requirements for recognition in a particular jurisdiction or by a particular financial institution, a capable donor can still create a new document that meets those requirements. In contrast, a donor who is no longer capable can neither confirm the existence of an EPA nor create a new document to correct defects or meet unanticipated requirements. Mechanisms are needed to facilitate recognition.

[6] Second, an EPA turns over control of some or all of a donor's property and affairs to another individual, the attorney. An attorney may misuse the attorney's powers by using the donor's assets for purposes other than the donor's benefit:[7]

> 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.

Whereas a capable donor can supervise the exercise of the power by the attorney and take steps to prevent misuse of the power, a mentally incapable donor cannot effectively do so. Alternative means of overseeing the attorney's conduct are needed where the donor is mentally incapable.

[7] Third, a person dealing with an attorney may have concerns about the propriety of an attorney's actions. Where the donor is capable, the person can contact the donor to verify that the attorney is acting under and in accordance with the power. Where the donor of an enduring power is not capable, this avenue of

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[7] *Ibid*. at para. 6.

inquiry is not available. Persons dealing with an attorney need a way to obtain an effective response to their concerns about the exercise of powers under an EPA.

[8] The importance of protecting the donor from the risk of misuse of the power of attorney is a theme that threads its way through this report. EPA legislation should provide safeguards against the risks but the safeguarding mechanisms should not be so onerous that they will unduly inhibit the use of EPAs. A balance must be struck between achieving ease of access to EPAs by providing a simple method for their creation and facilitating increased recognition by imposing strict formal requirements so that persons with whom the attorney conducts transactions can be reassured of the EPA's validity. Similarly, a balance must be struck between placing realistic expectations on attorneys who are likely to be spouses, relatives or close friends of the donor, and imposing onerous measures designed to ensure the accountability of attorneys for their acts. Further, a balance must be struck between respecting the privacy of donors and attorneys in the relationship they establish, and employing public mechanisms to prevent the misuse of EPAs.

[9] Some attorneys may deliberately breach their duties or act outside the scope of their authority with full knowledge that they are doing so. Other attorneys may inadvertently breach their duties or act outside the scope of their authority simply because they are not fully aware of the legal obligations and restrictions that apply when dealing with the donor's property and financial affairs. In this report, we use the broad term "misuse" to encompass both deliberate and inadvertent wrongful acts by attorneys. Anecdotal evidence shows that both kinds of misuse occur. Our recommendations seek to address misuse, whether deliberate or inadvertent, by creating mechanisms that can bring an attorney's conduct out into the open and that can keep other people in the donor's life informed.

II. EXISTING LEGISLATION

[10] EPA legislation has now become an established feature of most common law jurisdictions. All four western provinces have enacted legislation permitting the making of EPAs. The legislation in Alberta, Manitoba and Saskatchewan explicitly

provides for both continuing and springing EPAs. The British Columbia legislation, which predates the EPA legislation in the other western provinces, currently provides only for continuing EPAs. However, British Columbia case law supports the existence of springing EPAs.[8] The B.C. Act will soon explicitly authorize springing EPAs as well, once recent amendments are proclaimed.

[11] **Alberta** first enacted its *Powers of Attorney Act* in 1991.[9] The Act is based on recommendations made by the Alberta Law Reform Institute in its Final Report No. 59 on *Enduring Powers of Attorney*, issued in 1990.[10] In 2003, after more than a decade of experience with the Act, the Alberta Law Reform Institute issued a follow-up report. Final Report No. 88 on *Enduring Powers of Attorney: Safeguards Against Abuse* contains recommendations for the inclusion of additional safeguards against misuse of EPAs.[11]

[12] **British Columbia** first enacted its *Powers of Attorney Act* in 1979.[12] The Act is based on recommendations made by the British Columbia Law Institute (then the Law Reform Commission of British Columbia) in its Report No. 22 on the *Law of Agency, Part 2: Powers of Attorney and Mental Incapacity,* issued in 1975.[13] In 1990, the British Columbia Law Institute issued a further report on the topic, Report No. 110, entitled *The Enduring Power of Attorney: Fine-tuning the*

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[8] *Parnall (Attorney for) v. British Columbia (Registrar of Land Titles)*, [2004] 236 D.L.R. (4th) 433, 2004 BCCA 100.

[9] *Alberta Act*, *supra* note 3.

[10] ALRI, Final Report No. 59 (Edmonton: Alberta Law Reform Institute, December 1990); see also ALRI, *Enduring Powers of Attorney*, Report for Discussion No. 7 (Edmonton: Alberta Law Reform Institute, February 1990) [ALRI Report for Discussion No. 7].

[11] ALRI Final Report 88, *supra* note 1.

[12] *B.C. Act*, *supra* note 3.

[13] Law Reform Commission of British Columbia [LRCBC], *Law of Agency, Part 2: Powers of Attorney and Mental Incapacity*, Report No. 22 (Vancouver: Law Reform Commission of British Columbia, May 1975).

Concept.[14] The 2002 *McClean Report* also reviewed this area on behalf of the government.[15] The *British Columbia Act* has recently been extensively revised by amendments that are currently awaiting proclamation.[16]

[13] **Manitoba** initially enacted *The Powers of Attorney Act* in 1980.[17] The Act was based on recommendations made by the Manitoba Law Reform Commission in its Report No. 14 entitled *Special Enduring Powers of Attorney*, issued in 1974. The Commission followed up with Report No. 83, *Enduring and Springing Powers of Attorney*, in 1994. The 1980 Act was subsequently repealed and replaced in 1996.[18] The current Act incorporates many of the recommendations of the Commission's more recent report.[19]

[14] **Saskatchewan** first authorized EPAs in 1983. In 2002, Saskatchewan enacted its current legislation, *The Powers of Attorney Act, 2002*.[20] This Act is based on work of the Law Reform Commission of Saskatchewan contained in a consultation paper entitled *Enduring Powers of Attorney*, issued in 2001.[21] The Act was developed by the provincial Legislative Working Committee re Adult Guardianship and the Financial Abuse of Vulnerable Adults, of which the Law Reform Commission of Saskatchewan is a member.

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[14] LRCBC, *The Enduring Power of Attorney: Fine-tuning the Concept*, Report No. 110 (Vancouver: Law Reform Commission of British Columbia, February 1990).

[15] A.J. McClean, Q.C., *Review of Representation Agreements and Enduring Powers of Attorney* (2002), available on line: <www.ag.gov.bc.ca/public/McClean-Report.pdf>.

[16] *B.C. Unproc. Ams.*, *supra* note 3, ss. 34-39.

[17] The Powers of Attorney Act, S.M. 1980, c. 4.

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

[19] *Manitoba Act, supra* note 3, assented to November 19, 1996, proclaimed in force April 7, 1997 and amended in 2002 and 2005.

[20] *Saskatchewan Act*, *supra* note 1.

[21] Law Reform Commission of Saskatchewan, *Consultation Paper on Enduring Powers of Attorney* (2001), online: The Law Reform Commission of Saskatchewan <http://www.lawrformcommission.sk.ca> [LRCS Consultation Paper].

[15] While the purpose of the legislation in each province is similar, the provisions differ in matters of detail. We will draw attention to the differences, where relevant, in the succeeding chapters of this report. The formal requirements for granting an EPA, the provisions that govern the determination that the donor has lost capacity, the specification of duties that an attorney owes and the measures designed to hold attorneys accountable for their actions all help to protect the donor and ensure the exercise of the EPA for the donor's benefit.

III. SCOPE OF THIS PROJECT

[16] This is WCLRA's final report on *Enduring Powers of Attorney: Areas for Reform*. As the title indicates, the report is selective in content. WCLRA supports the view that EPAs provide a useful alternative to court-ordered property management for incapacitated persons. EPAs promote the exercise of individual autonomy by enabling an individual to make personal plans for the management of the individual's property and affairs, and this should be encouraged.

[17] Our report deals with issues in three areas: the recognition of EPAs; the duties of attorneys under EPAs; and the safeguards against misuse of EPAs. WCLRA selected these areas for attention based on the experience with EPAs that has accumulated in each of the four western provinces and on trends in EPA legislation in other common law jurisdictions. WCLRA recommends uniformity of certain key provisions within each of these areas. Apart from these uniform provisions, each jurisdiction would remain free to deal individually with other matters in their EPA statutes. We are not proposing that every EPA statute be identical in all ways. Statutory differences will continue, apart from the recommended uniform provisions.

[18] The discussion of issues and the recommendations contained in this report are the product of an extensive process of consultation in each of the four western provinces followed by intensive consideration of the policy matters by WCLRA.

[19] The process consisted of the following steps:

- in April 2004, WCLRA published a consultation paper entitled *Enduring Powers of Attorney: Areas for Reform*;[22]
- between May 2004 and March 2005, Committee members consulted the legal profession (and in some instances, the judiciary), government bodies and the public in their respective provinces on the issues raised in this paper;
- in June 2005, the Committee met several times by teleconference to decide on tentative recommendations for reform;
- in July and August 2005, focus groups held on a provincial basis were convened to respond to and comment on the proposed reforms;
- in fall 2005, the Committee reviewed its tentative recommendations and agreed on a set of proposed reforms;
- in October 2005, the proposed reforms were presented at the Canadian Conference on Elder Law held in Vancouver, BC.;
- in 2006-2007, a draft report was prepared and circulated to the four member agencies for their review and input. The Committee met again by teleconference to discuss the agencies' input, resulting in some adjustments and fine-tuning of the draft report;
- in 2008, a final draft report was prepared and circulated to the four member agencies. Following its approval by each agency, this report was published and now concludes the WCLRA project.

[20] WCLRA recommends that the proposals made in this report be adopted in legislation as soon as possible.

[22] WCLRA, *Enduring Powers of Attorney: Areas for Reform*, Consultation Paper #1 (April 2004) [WCLRA Consultation Paper].

CHAPTER 2.
RECOGNIZING AN EPA

I. PROVISION FOR CONTINUING AND SPRINGING EPAS

A. Existing Law

[21] As seen in Chapter 1, the legislation in Alberta, Manitoba and Saskatchewan explicitly provides for both continuing and springing EPAs.[23] A continuing power of attorney takes effect prior to the donor's incapacity and continues in effect after the donor's incapacity. A springing power of attorney is dormant until triggered by the donor's incapacity. Both types of power allow an attorney to make property and financial decisions on behalf of an incapacitated donor. The legislation in British Columbia currently provides for continuing EPAs but not for springing EPAs. In that province, springing EPAs are recognized due to case law. This legislative situation will change once recent amendments are proclaimed that will explicitly recognize both continuing and springing EPAs.[24]

B. Discussion of Issues

[22] The trend in EPA legislation is to provide for both continuing and springing EPAs. Enacting consistent provisions in each of the four western provinces would dispel any uncertainty about the recognition in British Columbia of springing EPAs made within or outside British Columbia and the recognition outside British Columbia of springing EPAs made within British Columbia.

[23] WCLRA recommends that, for the sake of consistency, the legislation in all four western provinces should provide for both continuing and springing powers of attorney. We therefore support proclamation of the new British Columbia provision to that effect.

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[23] *Supra* note 3.

[24] *B.C. Unproc. Ams., supra* note 3, s. 38 creating new s. 14.

Recommendation No. 1: Statement of enduring effect

All four western provinces should legislatively provide for both springing and continuing EPAs.

II. CRITERIA FOR RECOGNITION

A. Existing Law

[24] The power of attorney legislation in Manitoba, Saskatchewan, and Alberta provides for the recognition of "foreign EPAs," that is, EPAs made according to the law of another jurisdiction. For recognition, the EPA must be valid under the law of the jurisdiction where it was made and the attorney's authority must not be terminated by the mental incapacity of the donor occurring after the making of the document.[25]

[25] The British Columbia legislation does not currently include a provision for the recognition of foreign EPAs. Because British Columbia was the first province to adopt EPA legislation, it is likely that the issue of foreign recognition was not originally considered. Despite the absence of a legislative provision, some British Columbia institutions may recognize foreign EPAs, but the law provides little certainty regarding recognition. The law will change when recent amendments to the British Columbia Act are proclaimed which will recognize foreign EPAs under a provision similar to that of the other western provinces.[26]

B. Discussion of Issues

[26] The non-recognition of EPAs from one province to another impinges on the mobility rights of persons who rely on EPAs. Because the formalities and content

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[25] *Manitoba Act*, *supra* note 3, s. 25 and *Saskatchewan Act, supra* note 1, s. 13 both provide that the foreign EPA must itself state that the attorney's authority continues despite the donor's mental incapacity. *Alberta Act*, *supra* note 3, s. 2(5) uses broader wording to provide that this effect must result from the foreign law (rather than having to be contained in the individual EPA).

[26] *B.C. Unproc. Ams., supra* note 3, s. 38 creating a new s. 38 in the *B.C. Act*. The new provision uses broader wording, as in Alberta.

of EPAs are not uniform across provinces, an attorney may encounter difficulties dealing with the donor's affairs when the donor owns property in, or moves to, a province other than the province where the EPA was made. Persons or institutions with whom the attorney needs to transact business may refuse to recognize the foreign EPA. Some donors may have the foresight to prepare two separate EPAs – one that complies with the formalities of the originating jurisdiction and one that complies with the formalities of the jurisdiction they will end up in. However, this precaution is unlikely to be carried out unless a lawyer has been involved in the preparation of the initial EPA and knows that the donor has property in another jurisdiction or anticipates that the donor is likely to move to another jurisdiction. Unlike the donor of a non-enduring power of attorney, a donor who is incapacitated cannot cure the defect by making a new EPA.

[27] For the EPA recognition provisions legislated in Alberta, Manitoba and Saskatchewan to apply, an institution must determine whether the EPA was validly made in the originating jurisdiction. Institutional policies on recognition vary. Many of these differing institutional requirements detract from the advantage of simplicity claimed for EPAs and the legislation providing for EPA recognition. Some financial institutions (banks, insurance companies and the like) review EPAs in-house to determine their validity. Other institutions require an opinion from a solicitor in the originating jurisdiction regarding the validity of the EPA. Some institutions will only recognize EPAs that use their own standard in-house forms. Institutional policy may be set at a provincial level, rather than a regional or national level, leading to variations in the policy and operations from province to province.

[28] Additional impediments to recognition across the western provinces can also be attributed to the current absence in British Columbia of legislative provisions recognizing foreign EPAs or allowing the making of springing EPAs.

[29] The problem of formal differences *within* jurisdictions further compounds the issue of recognition *between* jurisdictions. For instance, in Alberta, the Land Titles Office requires specific wording in an EPA before it will be accepted. In Manitoba, a consent or release under *The Homesteads Act* may be executed by an

attorney only if the power of attorney expressly authorizes the attorney to do so, and specific execution formalities are required. These types of provisions inhibit effective recognition of EPAs generally and whatever narrow purpose they might serve in the context of individual legislation needs to be reconsidered in light of broader considerations.

[30] WCLRA is of the view that the EPA legislation in all four western provinces should contain a uniform recognition provision. For maximum clarity in such a recognition provision, we recommend a wording modelled on a provision developed by the Uniform Law Conference of Canada for the recognition of health care directives made extra-territorially.[27] Adapted to our purpose, the provision would require recognition to be given to an EPA that meets the formal requirements of legislation in any one of three jurisdictions: the jurisdiction where recognition is sought, the jurisdiction where the EPA was made, or the jurisdiction where the donor was habitually resident at the time the EPA was made. It would read as follows:[28]

> An [enduring power of attorney], whether it is made in [enacting jurisdiction] or not, has the same effect as though it were made in accordance with this Act if,
>
> (a) it meets the formal requirements of this Act; or
>
> (b) it was made under and meets the formal requirements established by the legislation of
>
> (i) the jurisdiction where the [enduring power of attorney] was made, or
>
> (ii) the jurisdiction where the person who made the [enduring power of attorney] was habitually resident at the time the [enduring power of attorney] was made.

To enhance clarity, references in existing legislation to the "place of execution" should be modified to refer to the "place where the EPA was made."

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[27] *Advance Directives in Health Care* (April 1996), online: Uniform Law Conference of Canada <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1h2>.

[28] *Ibid.*, s. 2.

Recommendation No. 2: Criteria for recognition

(1) Each of the four western provinces should enact the following provision for the recognition of EPAs:

> An enduring power of attorney, whether it is made in [enacting jurisdiction] or not, has the same effect as though it were made in accordance with this Act if,
> (a) it meets the formal requirements of this Act; or
> (b) it was made under and meets the formal requirements established by the legislation of
> > (i) the jurisdiction where the enduring power of attorney was made, or
> > (ii) the jurisdiction where the person who made the enduring power of attorney was habitually resident at the time the enduring power of attorney was made.

(2) The words "place where the EPA was made" should replace the words "place of execution" in existing EPA recognition provisions.

III. UNIFORM FORMALITIES

A. Existing Law

[31] As stated previously, the foreign EPA recognition provisions in Alberta, Manitoba and Saskatchewan have two components.[29] First, the EPA must be valid according to the law of the place where it is made. Second, the EPA's effect must not be terminated by the donor's subsequent mental incapacity. The forthcoming British Columbia provision is similar.

B. Discussion of Issues

[32] Making the formal requirements uniform across the western provinces would help ensure that EPA instruments made in one province will be recognized in another.

[29] *Manitoba Act*, *supra* note 3, s. 25; *Saskatchewan Act, supra* note 1, s. 13; *Alberta Act*, *supra* note 3, s. 2(5).

[33] When considering what formal requirements should be imposed, it is important to remember the purpose of EPAs. The EPA is designed for private use. It serves as an alternative to court-ordered administration of the property and affairs of a person who lacks capacity to manage the person's own affairs. As stated by the Law Reform Commission of Saskatchewan:[30]

> Enduring powers of attorney have become an important option for individuals faced with the prospect that they may become incapable of managing their own affairs. Enduring powers of attorney permit an individual to nominate a friend, advisor, or family member to take responsibility for financial decisions in the event of incompetency. In appropriate cases, it is a private, relatively non-intrusive, and inexpensive alternative to court appointment of a property guardian.

[34] The private, family or friend-centred character of EPAs opens up the potential for the misuse of powers by an attorney. Attaching formalities to the making of an EPA helps to protect the interests of the donor. The formalities provide a degree of assurance that the donor is capable of making the EPA and is acting voluntarily (not under undue influence or coercion) in making the EPA. They also increase the likelihood of recognition by institutions who may take comfort in knowing that the donor was conscious of the requirements for making an EPA and capable of fulfilling them.

[35] The objective is to make the document as useful as possible. Formal requirements that are too onerous may reduce the use of EPAs. For example, the provision for a lawyer certificate requires donors to obtain the services of a lawyer. Where this provision is in place, non-lawyers, including donors acting on their own, are not able to make EPAs. Another risk is that individuals will make and rely on EPAs that fail because they do not meet the formal requirements. Conversely, if the formal requirements are too relaxed, the prevalence of invalid EPAs may increase, the risk of misuse will be heightened, and the incidence of non-recognition will rise.

[36] WCLRA recommends that the uniform recognition provision should be supported by common formal requirements for the making of an EPA. In our view,

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[30] *Supra* note 21 at 4.

common formal requirements will facilitate the inter-jurisdictional recognition of EPAs and end the practice of requiring an opinion letter from a solicitor in the originating jurisdiction confirming the EPA's conformity with the formality requirements of the originating jurisdiction. We make recommendations for common formal requirements under Parts I, IV and V of this chapter.

Recommendation No. 3: Uniform formalities

The four western provinces should adopt common formal requirements for the making of EPAs.

IV. FORMAL VALIDITY

A. Existing Law

[37] The formalities for EPAs can vary from province to province. The legislation in all four western provinces requires EPAs to be in writing.[31] Similarly, all four jurisdictions require that an EPA contain an express statement that the attorney's authority continues in effect during, or comes into effect on, the donor's mental incompetence.[32] Legislation in Alberta, Manitoba and Saskatchewan requires the EPA to be authorized by the donor at a time when the donor has capacity,[33] and signed by the donor in the presence of a witness.[34] If that witness is not a lawyer, however, Saskatchewan requires two witnesses. Where the donor is incapable of

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[31] *Alberta Act*, *supra* note 3, s. 2(1)(b)(i); *Manitoba Act*, *supra* note 3, s. 10(1)(a); *Saskatchewan Act*, *supra* note 1, s. 11(1)(a); *B.C. Act*, *supra* note 3, s. 8(1). This requirement will continue under the amended B.C. legislation: *B.C. Unproc. Ams., supra* note 3, s. 38 creating new s. 16(1).

[32] *Alberta Act, ibid.*, s. 2(1)(b)(iii); *Manitoba Act, ibid.*, s. 10(1)(d); *Saskatchewan Act, ibid.*, ss. 3, 9 (the mandatory presence of the statement is necessarily implied from the Act); *B.C. Act, supra* note 3, s. 8(1)(a). This requirement will continue under the amended B.C. legislation: *B.C. Unproc. Ams.*, *ibid.*, s. 38 creating new s. 14.

[33] *Alberta Act*, *ibid*., ss. 2(1), 3; *Manitoba Act*, *ibid*., s. 10(3); *Saskatchewan Act*, *ibid*., s. 4. The provisions in Alberta and Saskatchewan specify that the donor must be an adult. In B.C., the requirement that the donor have capacity stems from the law of agency.

[34] *Alberta Act*, *ibid*., s. 2(1)(b)(i)(A); *Manitoba Act*, *ibid*., s. 10(1); and *Saskatchewan Act*, *ibid*., s. 12. The *Manitoba Act* also allows a donor to acknowledge the donor's signature in the presence of a witness.

signing (in Alberta, because of physical inability; in Manitoba, because of inability to read or sign), the EPA may be signed by a proxy at the donor's direction and in the donor's presence.[35] The British Columbia legislation is currently silent with respect to the donor's capacity, but states that an EPA must be signed by the donor and a witness.[36] When the enacted amendments are proclaimed, the British Columbia Act will also deal with capacity, signature by the donor in front of two witnesses (unless the witness is a lawyer or notary, in which case one witness is enough) and proxy signing if the donor is physically incapable of signing.[37]

[38] The provisions on witnesses differ widely. Alberta and Manitoba require the witness to sign in the presence of the donor.[38] In British Columbia, the donor's signature must be witnessed by someone other than the attorney or the attorney's spouse.[39] In the future, this list of ineligible witnesses will expand to include the attorney's child, parent, employee or agent, a minor and a person "who does not understand the type of communication used by the [donor], unless the person receives interpretive assistance to understand that type of communication."[40] As well, witnesses will have to sign in the donor's presence.[41] In Alberta, an EPA must be signed before a witness who is not the attorney, the donor's signing proxy or the spouse or adult interdependent partner of the attorney, donor or donor's signing proxy.[42] In Saskatchewan, a valid EPA must either be witnessed by a lawyer and accompanied by a legal advice and witness certificate,[43] or it must be

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[35] *Alberta Act*, *ibid*., s. 2(1)(i)(B); *Manitoba Act*, *ibid*., s. 10(2); and *Saskatchewan Act*, *ibid*., ss. 11(1)(b)(ii), 11(2).

[36] *B.C. Act, supra* note 3, s. 8(1)(b).

[37] *B.C. Unproc. Ams.*, *supra* note 3, s. 38 creating new ss. 12 and 16.

[38] *Alberta Act*, *supra* note 3, s. 2(1)(b)(ii); *Manitoba Act*, *supra* note 3, ss. 10(1)(c), 10(2)(b).

[39] *B.C. Act*, *supra* note 3, s. 8(1)(b).

[40] *B.C. Unproc. Ams., supra* note 3, s. 38 creating new s. 16(6).

[41] *B.C. Unproc. Ams.*, *ibid*., s. 38 creating new s. 16(1).

[42] *Alberta Act*, *supra* note 3, s. 2(4).

[43] *Saskatchewan Act*, *supra* note 1, s. 12(1)(a).

witnessed by two adults who are not the attorney or family members of the attorney or donor and must be accompanied by witness certificates.[44] Manitoba lists those persons who are qualified to act as witnesses.[45] On the list are: an individual who is qualified to solemnize marriages; a superior court judge, a justice of the peace or provincial judge; a medical practitioner; a notary public; a lawyer; a member of the RCMP or a municipal police force. The attorney and the attorney's spouse or common-law partner are excluded as witnesses.[46]

B. Discussion of Issues

1. Donor capacity and attorney eligibility

[39] Current provisions concerning donor capacity should be uniform among the four western provinces. When an EPA is made, the donor must have the mental capacity to understand the nature and effect of the EPA.

[40] In the area of eligibility requirements for attorneys, WCLRA is not recommending uniformity. Each province should continue to deal with this issue as it sees fit.[47] For example, these requirements currently include being an adult at the time the EPA is signed (Manitoba, Alberta and Saskatchewan), being mentally competent and not being an undischarged bankrupt (Manitoba and Saskatchewan), not having a relevant criminal record (Saskatchewan),[48] and not being a paid caregiver of the donor (Saskatchewan and British Columbia unproclaimed amendments) unless the caregiver is a spouse or near relative (British Columbia unproclaimed amendments).

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[44] *Ibid.*, s. 12(1)(b).

[45] *Manitoba Act*, *supra* note 3, s. 11(1).

[46] *Ibid*., s. 11(2).

[47] *Manitoba Act, supra* note 3, s. 16; *Alberta Act, supra* note 3, s. 2(2); *Saskatchewan Act, supra* note 1, s. 6(1); *B.C. Unproc. Ams., supra* note 3, s. 38 creating new s. 18(1)-(3).

[48] An attorney with a criminal record can nevertheless act if the attorney has been pardoned or if the donor (while capable) has acknowledged the conviction in writing and given written consent to the attorney acting: *Saskatchewan Act, supra* note 1, s. 6(2).

2. Express statement in an EPA

[41] The four western provinces should continue to have uniform provisions requiring an EPA to contain an express statement that the attorney's authority continues in effect during, or comes into effect on, the donor's mental incompetence.

3. Writing and signing by donor

[42] The following requirements should be uniform:

- the EPA must be in writing and signed by the donor in the presence of the required number of witnesses (see discussion under next heading);
- the donor may also acknowledge the donor's signature if signing has occurred in the absence of any witness; and
- a proxy may sign on behalf of the donor if the donor is physically incapable of signing and directs the proxy to sign the EPA in the donor's presence. The proxy's signature must be witnessed in the usual way. The proxy cannot also be a witness.

[43] WCLRA recommends that the donor be required to sign the EPA while physically apart from the attorney (in other words, the attorney must not be in the room when the donor signs the EPA). During consultation, some legal practitioners expressed concern about this requirement, given that many attorneys are spouses of the donors and it is not their practice to separate husbands and wives. However, most practitioners indicated that they could adapt to this change in practice.

[44] For the particular benefit of non-lawyers who prepare EPAs, the requirement that the donor must sign while physically apart from the attorney must be highlighted in the best practices directives which (later in this report) we recommend be made available to those who prepare EPAs. The importance of this requirement must also be stressed in the directives by accompanying advice that failure to comply will invalidate the EPA.

4. Witnessing

[45] Witnesses, who must be present when the document is signed, serve a number of roles. As a strict matter of law, the role is "limited to authenticating the signature on a document."[49] But witnesses to the making of EPAs serve other functions. The Alberta Law Reform Institute identifies four purposes. Witnesses:[50]

- confirm the absence of physical duress;
- confirm the identity of the donor and minimize the risk of forgery;
- may serve to impress upon the donor the seriousness of the proposed action; and
- provide evidence of authenticity to third parties relying on the EPA.

The Law Reform Commission of Saskatchewan identifies two additional functions. Witnesses:[51]

- may discourage a fraudulent prospective attorney by forcing the attorney to justify the attorney's actions to the witnesses; and
- can protect the donor from manipulation because they must be satisfied that the donor is acting freely and competently.

Witnesses might also:

- attest to the apparent capacity of the donor to sign.

[46] What degree of protection should be imposed? We will discuss four alternatives: lawyer certificate, more than one witness, witness statement or affidavit, and restricting persons who can act as witnesses.

a. Lawyer certificate

[47] The Saskatchewan legislation provides that an EPA is not valid unless it meets one of two execution requirements – (1) it is witnessed by a lawyer and accompanied by a lawyer certificate in the prescribed form (called in Saskatchewan a "legal advice and witness certificate") or (2) it is witnessed by two

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[49] LRCS Consultation Paper, *supra* note 21 at 16.

[50] ALRI Report for Discussion No. 7, *supra* note 10 at 40.

[51] LRCS Consultation Paper, *supra* note 21 at 16.

independent adults and accompanied with a witness certificate.[52] No other western province currently requires a lawyer certificate. Alberta previously required a lawyer certificate, but this requirement was removed in order to harmonize the formal requirements for EPAs and personal directives.[53]

[48] The Saskatchewan regulations prescribe the form for a "legal advice and witness certificate".[54] The lawyer who completes the form must attest to having

- been consulted by the donor regarding the making of an EPA;
- prepared the donor's EPA in accordance with the donor's instructions;
- explained the nature and effect of an EPA and reviewed the provisions of the donor's EPA with the donor;
- witnessed the signing of the EPA by the donor; and
- held the opinion that the donor was an adult who could understand the nature and effect of an EPA when signing it.

The lawyer's opinion that the donor was acting voluntarily in granting an EPA could be added to this list.

[49] There are a number of arguments both in favour of and against a requirement for a lawyer certificate. Of the four options being discussed, a lawyer certificate would provide the greatest level of assurance that the EPA meets the formal requirements for validity in the jurisdiction where it was made. Financial or other institutions dealing with the attorney would be less likely than they are now to question the EPA's validity and to require a lawyer's opinion regarding the validity of an EPA made outside the province. The certificate would give some assurance that the donor has capacity to sign the EPA because lawyers are accustomed to satisfying themselves of a client's legal capacity to transact the business at hand. Requiring the lawyer to attest to holding the opinion that the donor has signed the EPA voluntarily would safeguard against the likelihood of undue influence.

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[52] *Saskatchewan Act, supra* note 1, s. 12(1)(a) and (b).

[53] See the *Personal Directives Act*, *supra* note 1.

[54] *The Powers of Attorney Regulations*, R.R.S. 2000, c. P-20.3, Reg. 1, s. 3(d), Form D.

[50] There are also compelling arguments against requiring a lawyer certificate for the valid making of an EPA. Most notably, mandating a lawyer certificate adds complexity to what should be a relatively simple process for giving a person authority to manage the donor's affairs in the event of mental incapacity. Requiring a lawyer certificate might discourage some would-be donors from making an EPA. There is also a risk that the public might see a requirement for a lawyer certificate as a cash grab for lawyers.

[51] On balance, WCLRA does not favour requiring a lawyer certificate as a formality for the making of an EPA.

b. One witness or two?

[52] British Columbia, Alberta and Manitoba require one witness to the signing of an EPA. Saskatchewan requires two witnesses, although a single witness is allowed if that witness is a lawyer. (British Columbia will also move to this model when its new amendments come into force.) The two-witness requirement is in line with the formalities for making a will.[55] However, WCLRA is not convinced that two witnesses would be significantly more effective than one witness in serving the purposes of a witness requirement in the making of an EPA.[56] As such, WCLRA recommends the adoption of a one-witness rule.

c. Witness statement or affidavit

[53] WCLRA endorses the requirement that a witness be present when an EPA is signed. Evidence of the witnessing may take the form of a witness statement or a witness affidavit. A witness statement need only be signed by a witness whereas a witness affidavit must be sworn before a Commissioner for Oaths or a Notary Public.

[54] A witness affidavit requirement is not particularly onerous. However, its utility, relative to a witness statement, is unclear. For one thing, a sworn affidavit

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[55] All four western provinces require two witnesses to attest to and sign the will in the presence of the testator: *Wills Act*, R.S.B.C. 1996, c. 489, s. 4; *Wills Act*, R.S.A. 2000, c. W-12, s. 5; *The Wills Act*, C.C.S.M. c. W150, s. 4; *The Wills Act, 1996,* S.S. 1996, c. W-14.1, s. 7.

[56] See ALRI Report for Discussion No. 7, *supra* note 10 at 40-41.

does not ensure that a donor understands everything in the document any more than a witness statement does, although the added level of formality certainly compels the diligence of a witness in relation to the statements being made. In WCLRA's view, the extra layer of formality required by an affidavit would not significantly increase the protection provided.

[55] WCLRA supports the adoption of a witness statement as a formal requirement for the completion of an EPA. The witness statement will help to ensure that the witness has considered the basic witness requirements.

d. Content of witness statement

[56] How active a role should witnesses have in order to provide protection against misuse at the time an EPA is made? The witness can state facts that support the witness's eligibility to be a witness. (Eligibility requirements are discussed under the next heading). The witness can state that the witness saw the donor (or the donor's proxy in the donor's presence) sign the EPA, and that the donor signed the EPA while physically apart from the attorney.

[57] A witness is not in a position to determine that the donor has legal capacity to make the EPA or that the donor was acting voluntarily rather than under undue influence or coercion. Nevertheless, the witness can state that the donor appeared to understand the nature of the EPA and to be entering into the arrangement voluntarily.

[58] WCLRA recommends that the witness statement include all of these matters.

e. Eligibility to witness

[59] To be a witness, a person must be an adult with capacity. Beyond this fundamental requirement, what restrictions, if any, should be placed on persons who can act as witnesses to the signing of an EPA? As we have seen, in British Columbia, the witness must currently be someone other than the attorney or the attorney's spouse.[57] This list of ineligible witnesses will be expanded to include the attorney's child, parent, employee or agent, a minor and a person who does not

[57] *B.C. Act*, *supra* note 3, s. 8(1)(b).

understand the type of communication used by the donor, unless interpretive assistance is received.[58] In Alberta, the witness must not be the attorney, the donor's signing proxy or the spouse or adult interdependent partner of the attorney, donor or donor's signing proxy.[59] In Saskatchewan, a witness must not be the attorney or family members of the attorney or donor.[60] In Manitoba, the witness must belong to a listed category of witnesses who are qualified to act as witnesses.[61] The attorney and the attorney's spouse or common-law partner are excluded as witnesses.[62]

[60] WCLRA found little support for the adoption of a restricted list of persons who can function as witnesses to the signing of an EPA. In WCLRA's view, the enactment of restrictive categories of persons who may be witnesses places a barrier in the way of EPA accessibility and may hinder EPA use. The persons who should be prohibited from acting as witnesses are the attorney, the attorney's spouse and the donor's spouse. Our use of the word "spouse" includes an opposite or same sex partner in a marriage-like relationship.

Recommendation No. 4: Formal validity – donor capacity, express statement in written EPA and donor's signature

(1) When an EPA is made, the donor must have the mental capacity to understand the nature and effect of the EPA.

(2) An EPA must be in writing and must contain an express statement that the attorney's authority continues in effect during, or comes into effect on, the donor's mental incompetence.

(3) An EPA must be signed by the donor in the presence of a witness, but must be signed while physically apart from the attorney.

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[58] *B.C. Unproc. Ams., supra* note 3, s. 38 creating new s. 16(6).

[59] *Alberta Act*, *supra* note 3, s. 2(4).

[60] *Saskatchewan Act*, *supra* note 1, s. 12(1)(b) and *The Powers of Attorney Regulations*, *supra* note 54, s. 3(e), Form E.

[61] *Manitoba Act*, *supra* note 3, s. 11(1).

[62] *Ibid*., s. 11(2).

(4) If the donor signed the EPA in the absence of a witness, the donor may subsequently acknowledge the donor's signature in the presence of the witness.

(5) A proxy may sign on behalf of the donor if the donor is physically incapable of signing and directs the proxy to sign the EPA in the donor's presence. The proxy's signature must be witnessed in the usual way. The proxy cannot also be a witness.

Recommendation No. 5: Formal validity – witnesses

(1) One witness is required to be present when an EPA is signed.

(2) The attorney, the attorney's spouse and the donor's spouse are ineligible to act as a witness ("spouse" includes an opposite or same sex partner in a marriage-like relationship).

(3) The witness is required to sign a witness statement setting out that

(a) the EPA was signed by the donor (or the donor's proxy in the donor's presence);
(b) the EPA was signed by the donor while physically apart from the attorney;
(c) the donor appeared to understand the nature of the document;
(d) the donor appeared to agree voluntarily to sign the document; and
(e) the witness is not the attorney, the attorney's spouse or the donor's spouse.

V. STANDARD FORM EPA

A. Existing Law

[61] The current law does not prescribe a standard form EPA for use in the four western provinces.

B. Discussion of Issues

[62] Providing a standard form EPA would likely increase EPA recognition both within and between provinces. In comparison with individually-fashioned EPAs, the validity of EPAs that have a uniform appearance and include the specific formalities common to all jurisdictions is less likely to be called into question.

[63] WCLRA recommends the adoption of a standard form EPA. The standard form should be contained on one page. Its use should be encouraged but not mandatory. Where necessary to accommodate the unique circumstances or needs of donors, it should be possible to add to the standard form. The statutory form should be available through the EPA regulations in each province and should include the following six elements:

- the date;
- the donor's name and identifier (date of birth or most recent address);
- the name(s) of the appointed attorney(s);
- the donor's option for a continuing EPA or a springing EPA;
- the statutory list of attorney duties (as recommended in Chapter 3); and
- a grant of authority in general terms (such as "the attorney may do anything that the donor may lawfully do by an agent in relation to the donor's financial affairs"),[63] with space for the donor to personalize it by defining and limiting the authority to suit the donor's specific needs.

[64] Non-standard form EPAs should continue to be permitted. That is to say, a donor who prefers not to use the standard form EPA should be at liberty to make the donor's own comprehensive EPA which will be recognized as valid if it satisfies the formal requirements.

Recommendation No. 6: Standard form EPA

A non-mandatory standard short form EPA should be adopted by regulation in each of the four western provinces. It should include the following elements:

(a) the date;
(b) the donor's name and identifier (date of birth or most recent address);
(c) the name(s) of the appointed attorney(s);
(d) the donor's option for a continuing EPA or a springing EPA;
(e) the statutory list of attorney duties; and
(f) a grant of authority in general terms, with space for the donor to personalize it by defining and limiting the authority to suit the donor's specific needs.

[63] This wording is drawn from *B.C. Unproc. Ams., supra* note 3, s. 38 creating new s. 13(1)(b).

CHAPTER 3.
CLARIFYING ATTORNEY DUTIES UNDER AN EPA

I. CHARACTERIZATION OF ATTORNEY ROLE

[65] An EPA gives the attorney power and authority to act in the place of the donor. The grant of power may be general or specific. Essentially, a general power embodies the full range of powers which a capable donor could exercise if managing the donor's own property and affairs. A specific power is limited to the authority specified by the donor in the EPA document.

[66] The role of an attorney acting under a power of attorney has been variously characterized as that of an agent, trustee or fiduciary. The powers, authority and duties associated with each of these terms is the subject of a mass of case law. The role of the attorney does not fit squarely into any single one of them. The case law leaves uncertainty about how an attorney is most accurately legally characterized.

[67] The duties probably lie closest to the concept of fiduciary, although as the Law Reform Commission of Saskatchewan comments "[t]here is surprisingly little authority directly applying the law of fiduciary relationships to powers of attorney."[64] Explaining the role of a fiduciary, the Law Reform Commission of Saskatchewan states that, in law, a fiduciary is "a person who undertakes to act in the interests of another person."[65] The duty, in general terms, is clear:[66]

> A fiduciary relationship is one in which there is a duty on the fiduciary to act solely for the benefit of another or others with respect to any property that is the subject matter of the relationship. This duty has often been described as the duty of loyalty.

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[64] LRCS Consultation Paper, *supra* note 21 at 10.

[65] *Ibid*.

[66] *Ibid*.

Other duties include duties to act and duties to account. We will say more about the components of fiduciary duties, duties to act and duties to account later in this chapter.

[68] Trustees are a form of fiduciary. That is to say, trustees owe fiduciary duties. However, WCLRA identified problems with characterizing the attorney as a trustee. The trust document which establishes the duties of the trustee automatically creates distance between the trustee and the settlor. Some of the duties of attorneys are trust-like, but attorneys usually have a more personal relationship with the donor. A distinguishing characteristic of an EPA is that it enables the donor to fashion a personalized scheme of attorney empowerment, including allowing the attorney to make decisions that are in line with the decisions the donor would have made had the donor been capable. Although it may include some of the duties of trustees, legislation describing the attorney's role should not import the hard edge of the duties of trustees.

[69] Attorneys appointed under non-enduring powers of attorney assume an agency role. As explained by the Law Reform Commission of Saskatchewan:[67]

> In law, the attorney is the grantor's agent. According to *Halsbury's Laws of England,* an agency terminates "where either party becomes incapacitated [sic] of continuing a contract by reason of death, bankruptcy, or unsoundness of mind". As a matter of policy, this rule complements the authority of a grantor to revoke a power of attorney.

However, good reason exists to distinguish the role taken by attorneys under non-enduring powers of attorney from the role taken by attorneys under an EPA. The Law Reform Commission of Saskatchewan points out that non-enduring powers of attorney tend to be used for limited purposes on a short-term basis:[68]

> Ordinary powers of attorney are usually used when it is convenient to have an agent negotiate and close a transaction, or when the grantor is out [of] the country and needs someone to manage affairs. Most ordinary powers are used for limited purposes, and usually do not remain in effect for long periods of time. Issues of capacity and the scope of the attorney's obligations are not often apt to arise in these cases.

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[67] *Ibid.* at 5-6.

[68] *Ibid*. at 6.

EPAs, on the other hand, tend to be used for general purposes on a long-term basis. They endure for the period of the donor's incapacity, which may never be reversed. Although the attorney's role may include some of the duties of agents, legislation describing that role should not describe attorneys as agents.

[70] Because EPAs are often drafted without lawyers, the language used in legislation should be meaningful and informative to donors, attorneys, and family members of donors. WCLRA recommends that any statutory list of attorneys duties use plain language to describe the specific legal duties of attorneys. The legislation should not legally characterize attorneys as fiduciaries, trustees or agents.

[71] Attorney *duties* should be distinguished from attorney *authority*. The duties form the basis of the minimum legal expectations of attorneys exercising their powers. The authority establishes the limits of the powers an attorney can exercise under an EPA. Attorney duties are concerned with *how* that attorney acts and what an attorney *must* do (for example, the necessity to act in good faith). Attorney authority is concerned with when an attorney *can* act and what an attorney *can* do (for example, the ability to do anything on behalf of the donor that the donor may lawfully do by an attorney).[69]

[72] This chapter is concerned with minimum duties which all attorneys must carry out. In some, but not all instances, the donor may modify or waive the minimum duty by including a specific direction in the EPA.

[73] One further point should be made by way of introduction. The existing legislation does not distinguish between the duties of attorneys under non-enduring powers of attorney and the duties of attorneys under EPAs. These duties are much the same. However, an important difference exists. The donor under a non-enduring power of attorney is able to monitor the attorney's conduct and alter or revoke the power if necessary. The donor of an EPA who has become mentally incapacitated cannot take these steps. Therefore, more duties may need to be

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[69] See the *Alberta Act*, *supra* note 3, s. 7.

imposed on attorneys who manage the property and affairs of donors who are incapable. Our recommendations are limited to EPAs.

II. CONTENT OF ATTORNEY DUTIES

A. Existing Law

[74] The legislation in British Columbia, Alberta, Manitoba and Saskatchewan does not currently provide attorneys with detailed guidance with respect to their duties.

[75] Saskatchewan is, at the moment, the only province with legislation that directly speaks to an attorney's duties. The legislation in that province stipulates that an attorney:[70]

> ... shall exercise his or her authority
>
> (a) honestly;
>
> (b) in good faith;
>
> (c) in the best interests of the [donor]; and
>
> (d) with the care that could reasonably be expected of a person of the attorney's experience and expertise.

Saskatchewan also requires the attorney, wherever possible, to "take into consideration the wishes of the [donor]" in carrying out duties under an EPA.[71] Saskatchewan does not permit delegation.[72]

[76] In Alberta, the power must be exercised "to protect the donor's interests."[73] Moreover, the attorney must abide by sections 2 to 8 of the *Trustee Act*[74] when

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[70] *Saskatchewan Act*, *supra* note 1, s. 15(1).

[71] *Ibid.*, s. 15(2).

[72] *Ibid.*, s. 14(3).

[73] *Alberta Act*, *supra* note 3, s. 8.

[74] R.S.A. 2000, c. T-8.

exercising a power of investment under an EPA.[75] Those sections set out the powers and duties of trustees with respect to the investment of trust funds. Section 4 shields from liability a trustee who has exercised "reasonable skill and prudence" in making a decision or choosing a course of action and who has complied with the listed powers and duties.

[77] Manitoba sets two standards of care, one for an attorney who is not compensated, and another for an attorney who is compensated. An attorney who is not compensated "shall exercise the judgment and care that a person of prudence, discretion and intelligence would exercise in the conduct of his or her own affairs."[76] An attorney who is compensated "shall exercise the judgment and care that a person of prudence, discretion and intelligence in the business of managing the property of others is required to exercise."[77]

[78] Both Alberta and Manitoba impose a duty on attorneys to act. The duty arises when an attorney, having acted in pursuance of an enduring power of attorney or having indicated acceptance of the appointment, knows or reasonably ought to know, that the donor is incapable of managing (in Manitoba, "mentally incompetent"; in Alberta, "unable to make reasonable judgments").[78] Such a provision tries to prevent the problems that can arise if an attorney simply quits acting when the donor is incapable of appointing another attorney.

[79] Alberta, Manitoba and Saskatchewan have made legislative provision for a duty to account.[79] We discuss the duty to account in Part III of this chapter.

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[75] *Alberta Act*, *supra* note 3, s. 7.1.

[76] *Manitoba Act*, *supra* note 3, s. 19(2).

[77] *Ibid.*, s. 19(3).

[78] *Manitoba Act*, *supra* note 3, s. 19(1); *Alberta Act*, *supra* note 3, s. 8.

[79] *Alberta Act*, *supra* note 3, s. 10; *Manitoba Act*, *supra* note 3; *Saskatchewan Act*, *supra* note 1, s. 18.

[80] The British Columbia legislation is currently silent about the duties and obligations of an attorney. However, this will change when the recently enacted but unproclaimed amendments come into force. The amended Act will provide that:[80]

> An attorney must
> (a) act honestly and in good faith,
> (b) exercise the care, diligence and skill of a reasonably prudent person,
> (c) act within the authority given in the enduring power of attorney and under any enactment, and
> (d) keep prescribed records and produce the prescribed records for inspection and copying at the request of the [donor].

[81] The amended Act will specify other duties as well. There will be an explicit duty not to co-mingle assets.[81] When dealing with the donor's financial affairs, the attorney must also

- act in the donor's best interests;
- give priority to meeting the donor's personal care and health care needs;
- invest assets only in accordance with the *Trustee Act* unless otherwise authorized by the EPA;
- foster the donor's independence and participation in decision-making;
- not unnecessarily dispose of property that the attorney knows is subject to a specific provision in the donor's will; and
- try to keep the donor's personal effects at the donor's disposal.[82]

[82] Notwithstanding the limited amount of guidance currently found in the legislation of the western provinces, the duties of attorneys across the region are quite similar. This is in part due to the fact that the duties of attorneys are analogous to those of a fiduciary and are similarly governed by equitable doctrines. As noted in the introduction to this chapter, attorneys are also sometimes characterized as trustees or agents and bestowed with the duties and obligations of

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[80] *B.C. Unproc. Ams., supra* note 3, s. 38 creating new s. 19(1).

[81] *Ibid.*, s. 38 creating new s. 19(4).

[82] *Ibid.*, s. 38 creating new s. 19(2) and (3).

those designations. The uncertainty about the duties of attorneys associated with these designations is likewise common across the provinces.

B. Discussion of Issues

1. Uniform list of duties

[83] As just discussed, the legislation in three of the four western provinces does not currently identify the duties incumbent on attorneys who act for incapacitated donors. The absence of legislative guidance causes confusion and uncertainty about the nature and scope of these duties. Including a list of duties in the EPA legislation would go a long way toward ensuring that both donors and attorneys are aware of the duties that arise under EPAs. Uniformity of these duties across the western provinces would reduce uncertainty.

[84] WCLRA recommends that the four western provinces adopt a uniform list of duties, and that this list be included in the EPA legislation in each province. While Manitoba and Alberta place a positive duty on an attorney to act, WCLRA does not recommend uniform adoption of that requirement.

2. The duties

[85] What duties should be listed in the legislation? A composite list of duties consisting of statutory and common law duties from the western jurisdictions was assembled and set out in the Consultation Paper.[83] The list consists of the following nine duties:

- act honestly, in good faith, and in the best interests of the donor;
- act with the standard of care of a prudent person with the attorney's experience and expertise;
- act within the authority granted by the power of attorney;
- keep proper records;
- no personal benefit in carrying out the functions of an attorney;
- no co-mingling of donor and attorney property, except where there is already an interest in the same asset;

[83] WCLRA Consultation Paper, *supra* note 22 at 5-6.

- make full disclosure to the donor of any interests that may conflict with the attorney's responsibilities under the power of attorney;
- provide maintenance, education or other benefits for the donor's spouse or dependent children; and
- take into consideration the wishes of the donor, to the extent possible, in carrying out the attorney's obligations.

[86] This list is not necessarily an exhaustive list of the duties assumed by attorneys. The relationship created by an EPA may give rise to additional special duties. Nonetheless, the list serves as a useful starting point in considering the attorney duties that should be specified. Consultation on this list prompted a number of comments and conclusions about its comprehensiveness, accuracy, and clarity.

a. Duty #1: Analogous fiduciary duty

[87] WCLRA takes the position that the analogous fiduciary duty of attorneys is best reflected in the plain language of a duty to act honestly, in good faith, and in the best interests of the donor.

b. Duty #2: Standard of care

[88] The duty to meet a specified standard of care applies to the performance of each of the duties that is listed in the legislation. We therefore discuss the standard of care under Heading 3 which follows this discussion of duties.

c. Duty #3: Acting within authority granted

[89] WCLRA eliminated from the list the duty to act within the authority granted by the power of attorney. This duty is not sufficiently descriptive or informative to be included.

d. Duty #4: Keeping proper records

[90] The duty to keep proper records is discussed in Part III of this chapter. WCLRA did not find the concept of "accounting" particularly helpful in the context of EPAs because it implies an overly technical process. Instead, WCLRA would reframe the duty of an attorney to "account" into two separate duties: (1) the

duty to keep records of financial transactions made under the EPA; and (2) the duty to provide details of financial transactions in specified circumstances.

e. Duty #5: No personal benefit

[91] The "no personal benefit" duty generated significant concern. Although it is obvious that attorneys ordinarily should not use the donor's property for their own benefit, it was suggested that strict compliance with this rule may be unrealistic, and even unjust. For instance, the duty may be impossible to meet where household expenses are shared because the donor and attorney are spouses, or because the attorney lives with the donor as the donor's caregiver. Indeed, it may be at times unavoidable for the attorney to derive some personal benefit as a side effect to maintaining a beneficial lifestyle for the donor.

[92] In order to avoid the difficulties of expressing this rule as a prohibition accompanied by all the possible exceptions to it that might exist, WCLRA proposes instead to express this rule as a *positive duty* on the attorney to "use assets for the benefit of the donor." If desired, a donor could carve out exceptions in the EPA giving the attorney the authority to depart from this rule.

[93] A donor could also confer authority on an attorney to borrow money from a financial institution in the attorney's name. Historically, financial institutions have been put in the awkward position of having to determine whether the attorney has a valid purpose for borrowing money and in whose interest the money is being borrowed. WCLRA's proposal concerning a positive duty default rule is consistent with present practice in that financial institutions often refuse to permit borrowing unless the EPA specifically provides for it.

[94] While, technically, a duty to use assets for the benefit of the donor could be conceptually subsumed under the larger duty of acting in the donor's best interests, there is much practical value in focussing an attorney's attention on the specific concept that the donor's assets exist for the benefit of the donor, not the attorney. To reinforce these important boundaries, each province's public education materials (the preparation and distribution of which are recommended later in this report) should elaborate on what types of spending behaviour would and would not

be acceptable, using concrete examples. For instance, "using assets for the benefit of the donor" could probably encompass the attorney accompanying the donor on a usual holiday trip at the donor's expense, but would not extend to the attorney arranging a trip for the two of them to a location or for a period of time that the donor would not have personally arranged if competent. Similarly, "using assets for the benefit of the donor" could probably encompass the attorney hiring the attorney's child at a fair market price to shovel the donor's walk in the winter, but would not extend to the attorney buying a snowblower for the child to use so that the attorney could really use the snowblower to clear snow at the attorney's house.

f. Duty #6: No co-mingling

[95] Concerns similar to those about the "no personal benefit" duty were raised in relation to a duty not to co-mingle assets. Absolute adherence to such a duty is unrealistic and could be unjust in cases where, for example, the donor and attorney are spouses or have otherwise established a joint living pattern before the EPA came into effect. But apart from those scenarios, co-mingling is a serious matter because it blurs attorney accountability in key areas like the duty to keep records, the duty to use assets for the benefit of the donor and the over-arching duty to act honestly, in good faith and in the best interests of the donor. The dangers of co-mingling need to be expressed as a specific duty so that attorneys know from the start that co-mingling is a potential breach of duty.

[96] WCLRA recommends that the statutory list of attorney duties include the duty to keep the donor's property and funds separate, except as permitted by statute. The exceptions would be contained in a more detailed statutory provision, which could be expressed as follows:

> An attorney must not co-mingle any property or fund of the donor with any property or fund of the attorney but must hold each legally separate from the other, except where
>
> (a) the property was jointly owned or otherwise co-mingled by the donor and attorney before the donor became mentally incapable, or is purchased with the proceeds of disposition of such property after the donor became mentally incapable, or
>
> (b) the property or fund is subject to an established pattern of co-mingling by the donor and attorney which started before the donor became mentally incapable.

Under this provision, a donor and attorney who are spouses could continue to jointly hold their house, car and bank account as usual. But any attorney who does not already have an established pattern of co-mingling with the donor would be prohibited from starting once the EPA comes into effect.

g. Duty #7: Disclosure of conflicts

[97] Concern was expressed that the duty to avoid conflict was not explicit enough and that a conflict would be hard to define in some circumstances. Trying to give this duty substance would necessitate an extremely elaborate provision with many exceptions. WCLRA does not propose to express this concept as a separate duty. We believe that problems in this area would be adequately addressed by the attorney's duty to "use assets for the benefit of the donor."

h. Duty # 8: Maintenance for donor's dependents

[98] Because an attorney acts for the donor, the attorney should fulfill the donor's legal obligations of maintenance owed to a spouse or dependent children in accordance with the donor's instructions in the EPA or the donor's duty as quantified by contract or court order. The Manitoba, Saskatchewan and Alberta Acts each have a wider provision which, in varying terms, allows an attorney (at the attorney's discretion) to provide financial support to the donor's family (including to the attorney if all other prerequisites are met).[84] Such support obligations would not necessarily be quantified by contract or court order. The British Columbia Act does not currently address this area nor is it explicitly provided for in the unproclaimed amendments. However, an attorney's authority to provide such support is implicit in the unproclaimed provision that the EPA may authorize the attorney to do anything which the donor could lawfully do by an

[84] Manitoba speaks of satisfying a "legal obligation" of the donor to maintain and support "another person" which can include the attorney: *Manitoba Act, supra* note 3, s. 23. Saskatchewan allows the attorney to provide for the "maintenance, education or benefit" of the donor's "spouse and dependent children" which can include the attorney if the attorney is also the donor's spouse: *Saskatchewan Act, supra* note 1, s. 16(1). Alberta talks of the "maintenance, education, benefit and advancement" of the donor's spouse, adult interdependent partner and dependent children" which can include the attorney in any of those categories: *Alberta Act, supra* note 3, s. 7(b). Each of these statutory provisions vests discretion in the attorney and is subject to the terms of the EPA.

agent.[85] Therefore, express authorization in the EPA could empower an attorney to provide such maintenance.

[99] WCLRA recognizes that this is an important issue with which attorneys must deal and believes that each western province has dealt with the area in a sufficient way. WCLRA does not recommend a uniform provision here.

i. Duty #9: Preservation of donor's testamentary intentions

[100] During the consultation process a suggestion was made that a duty to "preserve the donor's testamentary intentions" should be added to the list of statutory duties. While specification of this duty would assist attorneys in governing their actions so they are consistent with the donor's final wishes, WCLRA rejects this proposed duty on the basis that it would require an attorney to have a copy of the donor's will and this would be an unjustified intrusion into the donor's privacy. If the donor's testamentary wishes happen to be known by the attorney, the attorney should of course respect those wishes. But we are not prepared to place a mandatory obligation on an attorney to locate and abide by the donor's will nor are we prepared to vest an attorney with the right to know the terms of the donor's will.

3. The standard of care

[101] To what standard of care should an attorney be held in carrying out duties? One perspective is that most attorneys are volunteers and therefore the duties and standard of care should not be prohibitive. Another perspective is that it is necessary to prevent misuse and that even if there is a duty to act honestly, a standard of care is still necessary. In the Consultation Paper, we listed "the duty to act with the standard of care of a prudent person with the attorney's experience and expertise." The prudent person provision parallels the wording in the *Trustee Act.*[86] In the *Trustee Act*, "prudent" refers to financial investments. In the context of EPAs, "prudent" probably has broader implications.

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[85] *B.C. Unproc. Ams., supra* note 3, s. 38 creating new s. 13(1)(b).

[86] *Supra* note 74. See e.g. the *Alberta Act*, *supra* note 3, s. 7.1.

[102] WCLRA believes that a standard of care should be legislated. In WCLRA's view, the appropriate standard is that of a prudent person in comparable circumstances (including having comparable experience and expertise). This standard allows for adjustments in the expectations placed on attorneys by reason of differences in their backgrounds and abilities.

4. Remuneration of attorney

[103] WCLRA supports the creation of a suitable mechanism to permit reasonable remuneration of an attorney and to allow an attorney to recover any reasonable expenses incurred while so acting. The benefit to donors is that such a mechanism will encourage an available pool of attorneys willing to act during their incapacity. An attorney who cannot claim remuneration or expenses may not agree to act in the first place or may resign after commencing to act, which is an especially undesirable outcome if the donor is incompetent.

[104] It is crucial that any mechanism for remuneration must be under the strict control of the donor. The basic rule should be that an attorney is not entitled to remuneration unless the EPA both expressly authorizes remuneration and states the basis for it. In the absence of either of these two specifications in the EPA, an attorney will not receive remuneration from the donor for those services.

[105] However, in the case of out-of-pocket expenses incurred by the attorney, reimbursement should not be dependent on the terms of the EPA. WCLRA recommends a uniform statutory provision stating that an attorney can be reimbursed from the donor's property for reasonable expenses properly incurred in acting as the attorney. The attorney's duty to keep records will necessitate the production of proper receipts for any expenses claimed before reimbursement can be made.

5. Liability of attorney

[106] Another measure to facilitate the use of EPAs by encouraging the availability of a pool of willing attorneys is to make it clear in the statute that, so long as the attorney complies with all duties and obligations, there is no fear of personal liability. This is not currently legislated in the four western provinces (although

Alberta indemnifies an attorney acting on the opinion, advice or direction of a court so long as the court order was not obtained by fraud, wilful concealment or misrepresentation).[87] However, British Columbia has recently enacted an unproclaimed provision that an attorney who complies with all duties and directions of a court will not be personally liable for any loss or damage to the donor's property.[88] The advantage of such a provision is that it can reassure potential attorneys but also discourage a cavalier attitude by making it clear that all duties must be complied with.

[107] Using the British Columbia provision as a model, WCLRA recommends that each province have a uniform provision in the following terms:

> An attorney is not personally liable for loss or damage to the donor's property or financial affairs, if the attorney complies with
>
> (a) the provisions of the EPA under which the attorney acts;
>
> (b) the attorney's duties, as set out in the Act and any order of a court;
>
> (c) any directions of a court given under the Act; and
>
> (d) any other duty that may be imposed by law.

Recommendation No. 7: Content of attorney duties, standard of care, remuneration and liability of attorney

(1) Each of the western provinces should enact a statutory list of duties that are specific to attorneys acting under EPAs.

(2) The duties should be stated in plain language. The legislation should not characterize attorneys as fiduciaries, trustees or agents.

(3) The following list of duties, which moves from general to specific, should be adopted as the statutory list of duties that will arise upon the incapacity of the donor where the attorney has consented or commenced to act [*see* Recommendation No. 11]:

(a) act honestly, in good faith, and in the best interests of the donor;
(b) take into consideration the known wishes of the donor and the manner in which the donor managed the donor's affairs while competent;
(c) use assets for the benefit of the donor;
(d) keep the donor's property and funds separate, except as permitted by statute;

[87] *Alberta Act, ibid.*, s. 9(2) and (3).

[88] *B.C. Unproc. Ams., supra* note 3, s. 38 creating new s. 22.

(e) keep records of financial transactions;*
(f) provide details of financial transactions upon request;* and
(g) give Notice of Attorney Acting.*

(4) In carrying out the duties, the attorney
(a) shall be held to the standard of care of a prudent person in comparable circumstances (including having comparable experience and expertise);
(b) shall not receive remuneration from the donor for acting as the attorney unless the EPA expressly authorizes the remuneration and states the basis for it; and
(c) can be reimbursed from the donor's property for reasonable expenses properly incurred in acting as the attorney.

(5) An attorney is not personally liable for loss or damage to the donor's property or financial affairs, if the attorney complies with
(a) the provisions of the EPA under which the attorney acts;
(b) the attorney's duties, as set out in the Act and any order of a court;
(c) any directions of a court given under the Act; and
(d) any other duty that may be imposed by law.

*See Part III of this chapter for further discussion of the duties in Recommendation 7(3)(e) and (f). See Chapter 4 for the discussion leading to Recommendation 7(3)(g), which is included here for the sake of completeness.

III. SPECIFIC REQUIREMENTS OF THE DUTY TO ACCOUNT

A. Existing Law

[108] Manitoba, Saskatchewan and Alberta have made legislative provision for a duty to account. The legislative provisions are similar, but there are some variations in the scope of the duties. For instance, in Manitoba, there is an active duty to submit accounts on demand to any person named as a recipient in the EPA. If there is no named recipient or the recipient is the attorney, attorney's spouse or common law partner or is deceased or mentally incompetent, the attorney must account annually to the nearest relative.[89] In Saskatchewan, the default duty to provide accounts is passive and need only be done on demand to a named person,

[89] *Manitoba Act*, *supra* note 3, s. 22(1). In this context, the nearest relative excludes the attorney and the attorney's spouse or common law partner, so the next relative on Manitoba's declining list will receive the accounting: ibid., s. 22(2).

relative, or supervisory body.[90] In Alberta, there is no default duty to *provide* accounts, although there is a duty to *keep* accounts. Alberta requires an attorney to produce an accounting only upon order of the court. The Alberta Law Reform Institute has recommended the adoption of a duty to provide accounts to "qualified persons" at their request.[91]

[109] The British Columbia Act does not currently impose any duty to account. Unproclaimed amendments require an attorney to keep records and to produce them for inspection and copying at the request of the donor.[92] This duty to account will not mean much once the donor is mentally incompetent. No relative is statutorily invested with the right to an accounting. The attorney is authorized to release information to comply with a requirement of the Public Guardian and Trustee, presumably during an investigation, but this does not amount to a duty to produce records.[93] If the attorney does not voluntarily produce the needed information, the Public Guardian and Trustee could obtain a court order for account information to be released.[94]

B. Discussion of Issues

1. Uniform requirements

[110] WCLRA takes the view that, along with the other listed duties, the accounting duties of attorneys should be made uniform across the western provinces. The recommendation to make the accounting requirements uniform is consistent with the recommendations to standardize the formalities that attend the making of EPAs and other attorney duties.

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[90] *Saskatchewan Act*, *supra* note 1, s. 18.

[91] ALRI Final Report 88, *supra* note 1 at 14. "Qualified person" is defined as "(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" at 15.

[92] *B.C. Unproc. Ams., supra* note 3, s. 38 creating new s. 19(1)(d).

[93] *Ibid.*, s. 38 creating new s. 33(b).

[94] *Ibid.*, s. 38 creating new s. 36(4).

2. Two duties

[111] As stated earlier in this Report, WCLRA recommends separating the duty to account into two components: (1) the duty to keep records of financial transactions and (2) the duty to provide details of financial transactions upon request. The duty to keep records would include making an inventory of the donor's property that comes under the attorney's control and keeping track of all subsequent transactions with respect to that property, with documented proof. The duty to provide details would be met by providing a summary statement of the property brought under the attorney's control and the financial transactions with respect to that property, and giving the persons who are entitled to know the details an opportunity to examine the records themselves. *The Powers of Attorney Regulations* in Saskatchewan provide a helpful form for creating a summary statement.[95]

3. Passive or active duties?

[112] The duty to account may be passive or active. As noted above, Manitoba has adopted an active duty to account (automatic duty to provide accounts annually to specified persons) while Saskatchewan and Alberta (and in the future, British Columbia) have adopted passive duties to account (requirement to provide accounts only upon request).

[113] It is WCLRA's view that the attorney should have an ongoing duty to keep records of financial transactions under an EPA. This is an active duty. It should be mandatory and the donor should not be able to opt out of it. In contrast, the duty to provide details of the financial transactions should be passive. That is to say, it should arise only upon request by specified persons. WCLRA believes that this combination of duties strikes a sensible balance between provision for adequate oversight of the attorney's activities and what it is reasonable to expect of a voluntary attorney.

4. Request for details of financial transactions

[114] WCLRA recognizes the importance of ensuring the transparency of the attorney's activities under an EPA. Permitting persons to request details of the

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[95] *The Powers of Attorney Regulations*, supra note 54, s. 3(h), Form H.

financial transactions conducted by the attorney provides a degree of protection to the donor. Permitting this means of scrutiny is also likely to ease any concerns or suspicions held by interested persons.

[115] In responding to the question of who should be entitled to request details of financial transactions from the attorney, WCLRA thought about "who needs to know?" The donor's immediate family members are the persons most likely to be interested in or concerned about the attorney's activities. In Chapter 4, we recommend that all of the donor's immediate family members receive a notice informing them that the donor is mentally incapable of handling the donor's own affairs and that the attorney is acting in the donor's stead (Notice of Attorney Acting). Immediate family members are the donor's spouse, adult child (including a step-child and adopted child), parents and adult siblings. WCLRA recommends as well that all of the donor's immediate family members should be entitled to obtain information about the attorney's activities under the EPA. In addition, if the EPA names other specific persons to receive the Notice of Attorney Acting, those persons should also be entitled to request details of the financial transactions. These would be the default positions. The donor should be able to modify the default entitlement in the EPA by naming any persons who are entitled to request details of the financial transactions and also by limiting the members of the immediate family who are entitled to make the request, even excluding them entirely. We stress, however, that any exemption of an attorney from the duty to provide details of financial transactions does not and cannot exempt the attorney from the mandatory duty to keep records of all financial transactions.

[116] Beyond immediate family members, other persons or institutions may have an interest or "need to know" about the financial transactions under an EPA. They may be caregivers, concerned friends, extended family members or financial institutions. WCLRA recognizes the legitimacy of such an interest. However, extending the right to request details of financial transactions to a broad group of persons may lead to an overwhelming number of requests to the attorney. Although WCLRA thinks this risk is slight, some of these requests may constitute a deliberate attempt to harass a well-meaning attorney.

[117] In an effort to balance the need for attorney accountability with the imposition of reasonable expectations on the attorney, WCLRA recommends that the right to request details of financial transactions directly from the attorney should be limited to immediate family members or persons named by the donor. All other "interested persons" should be entitled to ask a public official (*e.g.*, in some provinces, the Public Trustee; in others, the Public Guardian and Trustee) to direct the attorney to provide details of financial transactions or to apply to court for an order so directing. In order to qualify as an interested person for the purpose of obtaining the details, the person or institution should establish a need to know in the best interests of the donor.

5. Frequency of requests

[118] The proposal limiting the list of persons who are entitled to request details of financial transactions will help to mitigate potentially harassing and onerous requests of the attorney. However, frequent requests for details by immediate family members may also overburden an attorney, especially an attorney who is acting voluntarily, and discourage the attorney from continuing to act. The spectre of frequent requests by immediate family members may also discourage potential attorneys from accepting appointments in the first place.

[119] WCLRA recognizes that the entitlement of immediate family members to request details of financial transactions serves an important supervisory function with respect to the attorney's activities. However, WCLRA also recognizes the need to balance this function with the imposition of reasonable expectations on attorneys. WCLRA considered, but discarded, the idea of setting fixed intervals such as annual or bi-annual time periods between which requests could not be made. Fixed intervals would not accommodate circumstances that warrant more frequent inquiry. Further, fixed intervals may encourage requests for details of financial transactions whether they are necessary or not. WCLRA favours the imposition of flexible limits and recommends that requests be permitted to be made at "reasonable intervals." The concept of "reasonable intervals" is not prescriptive. It accommodates more or less inquiry depending on the circumstances and the need for more or less scrutiny.

[120] WCLRA does not propose a statutory definition of reasonable intervals and instead suggests that the attorney and immediate family members establish what is reasonable among themselves. Where disagreement exists, immediate family members should be able to make a court application for an order directing the attorney to provide details of financial transactions.

Recommendation No. 8: Specific requirements of the duty to account

(1) The accounting requirements of the western provinces should be harmonized.

(2) The duty of an attorney to keep records of financial transactions is active, on-going and mandatory. The duty includes making an inventory of the property brought under the attorney's control and keeping track of all subsequent transactions with respect to that property, with documented proof.

(3) The duty of an attorney to provide details of the financial transactions is passive, arising only upon the request of specified persons. The duty would be met by providing a summary statement of the property brought under the attorney's control and subsequent financial transactions with respect to that property, and by giving the persons who are entitled to know the details an opportunity to examine the records themselves.

(4) Immediate family members and any persons designated by the donor will be entitled to request details of the financial transactions at "reasonable intervals." The donor may exclude by name in the EPA any immediate family member who the donor does not want to receive details.

(5) Where an immediate family member or designated person and the attorney disagree about what constitutes a reasonable interval, the immediate family member or designated person is entitled to make a court application for an order directing the attorney to provide details of the financial transactions.

(6) All other interested persons should be entitled to ask a public official (the Public Trustee, Public Guardian and Trustee or other public official, as appropriate to the province) to direct the attorney to provide details of the financial transactions or to apply to court for an order so directing.

(7) In order to qualify as an interested person for the purpose of obtaining details of the financial transactions, the person or institution must establish a need to know in the best interests of the donor.

IV. INCLUSION OF DUTIES IN STANDARD FORM EPA

[121] One way of increasing attorneys' knowledge of their duties would be to include the proposed statutory list of duties in the standard form EPA. This would make the duties readily apparent to attorneys when they receive a copy of the EPA. Some of the persons consulted expressed concern that including the list of duties in the short form EPA would make the standard form too cumbersome. However, the statutory list of duties as recommended by WCLRA is actually fairly compact (see Recommendation 7(3)(a)-(g)) and should not unduly lengthen the form. Because the list will appear in the statute and in the Notice of Attorney Acting, it would create a discordant gap if the standard form EPA were silent on this crucial matter. Including the list in the EPA form makes the emphasis on the attorney's duties more seamless for all involved, including third parties.

[122] While it is preferable that an EPA include the statutory list of attorney duties, doing so is not an execution requirement necessary for validity of the document. As discussed in the previous chapter, the use of the standard form EPA is encouraged but not mandatory. Therefore, if a donor uses another format which does not reproduce the statutory list of attorney duties, it is not fatal to the validity of the EPA.

Recommendation No. 9: Inclusion of duties in standard form EPA
The standard form EPA will include a list of the statutory attorney duties.

V. KNOWLEDGE OF DUTIES

[123] In reality, most attorneys and donors are unlikely to look at the legislation in order to find out what the attorney duties are. Even including the list in the standard form EPA and the Notice of Attorney Acting is not, in itself, all that must be done to educate attorneys and donors. For the recommendations about attorney duties to be effective, it will be necessary to create educational mechanisms. The purpose of such educational mechanisms will be to provide practical information

concerning the valid execution of EPAs, the nature of attorney duties and how to effectively perform those duties.

[124] WCLRA canvassed various educational methods, including the preparation of public educational materials for the benefit of attorneys, as well as the development of "best practices" for lawyers and persons other than lawyers who prepare EPAs. WCLRA recommends that education materials and best practice directives be developed and made readily available. Broad education about EPAs will help to promote diligence and prudence in the making of EPAs without adding a layer of formalities. The practice directives should encourage donors to confirm the willingness of the attorney to act before appointing the attorney. This will help to avoid situations where the EPA is rendered ineffective because an appointed attorney is unwilling to act and the donor, now mentally incapacitated, is incapable of appointing a new attorney. As mentioned earlier in this Report, the practice directives should also alert the makers of EPAs to comply with such mandatory formalities as having the donor sign the EPA while physically apart from the attorney.

[125] Public education materials should educate attorneys about their duties, with simple instructions about keeping records, creating summary statements of the financial transactions, and providing opportunities for the inspection of the records. Public education materials should also provide information about the right of immediate family members to request details of the financial transactions and give guidance on the meaning of "reasonable intervals" for the purpose of making such requests. As discussed earlier in this Report, these materials should also provide concrete guidance on the types of behaviours that meet or breach the attorney's duties, such as the duty to use assets for the benefit of the donor.

[126] WCLRA suggests that public education materials and best practice directives be prepared by a task force coordinated by the Public Trustee, Public Trustee and Guardian or Law Society of each province. Task force members could include representatives of each province's Public Trustee, Public Trustee and Guardian, Law Society, Bar Association, other professional practice associations (such as estate planning organizations), public legal education associations and other

interested professionals and organizations. Print and electronic dissemination of these materials and directives could occur through the offices and websites of the Public Trustee, Public Trustee and Guardian and Law Society in each province.

Recommendation No. 10: Knowledge of duties

Public EPA education materials and best practices for lawyers and lay persons should be developed and made widely available on-line and through the office of a public official or appropriate organization (*e.g*, Public Trustee, Public Guardian and Trustee, Law Society, as appropriate) in each province.

CHAPTER 4.
PREVENTING MISUSE OF AN EPA

I. INTRODUCTION

[127] One of the objectives of this project is to safeguard against the misuse of authority by attorneys under EPAs. As stated in Chapter 1, misuse encompasses both deliberate and inadvertent wrongful acts by attorneys. Anecdotal evidence shows that both kinds of misuse occur. Our recommendations seek to address misuse, whether deliberate or inadvertent, by creating mechanisms that can bring an attorney's conduct out into the open and that can keep other people in the donor's life informed.

[128] In Chapter 2, we saw that the formalities which attend the signing of an EPA help to ensure that the donor is not being coerced by the attorney into granting the EPA. That is a first step toward the prevention of misuse.

[129] A second precaution would be to ensure that the attorney named in an EPA knows in advance of the donor's intention to grant the authority and has indicated a willingness and ability to act. Obtaining the attorney's consent in advance would help accomplish the donor's intention of turning the management of the donor's property and affairs over to a private attorney of the donor's choice rather than a court-appointed attorney or a private trustee. As noted previously, if the attorney chosen by the donor declines the appointment after the donor has become mentally incapable, it will be too late for the donor to make an EPA appointing another attorney.

[130] A third measure would be to ensure that attorneys are informed about the nature and scope of their duties under an EPA. Increased awareness by attorneys of their duties is likely to decrease the risk of misuse of authority because informed attorneys are likely to be vigilant attorneys.

[131] A fourth measure would be to increase the means of scrutinizing an attorney's activities. The importance of scrutinizing attorney activities is directly related to the capacity of the donor. Under a non-enduring power of attorney, the donor is capable, in principle at least, of personally monitoring the activities of the attorney. Conversely, under an operative EPA, the donor lacks the capacity to monitor the activities of the attorney. This heightens the opportunity for, and potential risk of, the misuse of authority. More monitoring mechanisms are therefore necessary.

[132] Increasing the awareness of donors, family members and other interested persons about the attorney's duties is likely to increase the accountability of attorneys by reducing the opportunity for misuse. In Chapter 3, we discussed imposing a duty on attorneys to maintain financial records and to disclose the information to immediate family members who request details of the financial transactions, or to others through a request by a public official such as the Public Trustee or court order. In this chapter, we discuss other means of extending the effective scrutiny of attorney activities.

[133] To the extent that scrutiny of the attorney's activities results in additional attorney duties, the measures for scrutiny must be carefully balanced against the risk of reduced use of EPAs as a means of estate planning.

II. KNOWLEDGE AND ACCEPTANCE OF DUTIES BY ATTORNEY

A. Existing Law

[134] The EPA formalities do not require the donor to obtain the consent of the attorney before appointing an attorney. For this reason, an attorney may not even be aware of being appointed. Lack of consent compounds the problem because no amount of awareness will give effect to the EPA if the named attorney is unable or unwilling to act.

B. Discussion of Issues

[135] WCLRA considered several ways to prevent the problem of unaware or unwilling attorneys. One option would be to require attorneys to sign a statement, as part of the valid making of an EPA, indicating that they understand and are willing to accept the duties and obligations of acting as an attorney. Another option would be to require donors to confirm in the EPA that the attorney has agreed to act. Still another option would be to require a lawyer certificate which indicates that the named attorney understands and has consented to the duties.

[136] A number of arguments may be made in favour of requiring a formal attorney acknowledgment of duties as part of the making of an EPA. First, it would ensure that attorneys consent to the appointment and will reduce the likelihood of an attorney refusing to act after the donor has become incapacitated and it is too late to appoint a different attorney. Second, it would ensure that attorneys are informed of the accompanying obligations and that they accept those obligations. Third, the existence of an acknowledgement would go a long way to address the problems associated with criminal prosecutions of EPA theft by establishing intention.[96] From this perspective, a requirement for an attorney acknowledgment would have the effect of reducing both inadvertent and intentional misuse.

[137] On the other hand, many arguments may be made against requiring a formal attorney acknowledgment of duties. First, requiring an attorney formally to accept the appointment would cause inconvenience and added expense to the donor. Second, legal uncertainties might arise with respect to the potential effect on

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[96] An Alberta Crown prosecutor noted two reasons why EPA fraud is very difficult to prosecute under the *Criminal Code*. First, a power of attorney does not result in a trust. As a result, no breach of trust arises in the case of fraud. Second, section 331 of the *Criminal Code* (theft by person holding power of attorney) is difficult to establish because the Crown must be able to prove beyond a reasonable doubt that the attorney not only misused the attorney's powers, but that the attorney did so intentionally. The intention requirement makes prosecution difficult because the wording in EPAs is often very broad and in many cases no one has explained to the attorney the restrictions related to expenditures. The knowledge and awareness of attorney duties would assist in the evidence gathering process for criminal prosecutions by fixing a certain amount of knowledge upon an attorney who flagrantly misuses any power. As noted by the crown prosecutor, the only sure way to maximize the prospect of a successful prosecution is to have a higher degree of participation by the attorney in the process, such as swearing an affidavit or signing an acknowledgement that the attorney understands the duties and the risk that misuse of the attorney's authority could lead to criminal prosecution.

validity where the acknowledgment is not signed in a timely fashion, for instance where there is a material change in the donor's circumstances after the donor has signed an EPA but before the attorney gives consent and acknowledgment. Third, neither consent nor the acknowledgment of duties would deter an unscrupulous attorney from misappropriating a donor's property. Fourth, there may be more convenient and effective ways to inform attorneys of their duties and promote compliance other than by conditioning the validity of the EPA on the attorney's consent and acknowledgment.

[138] WCLRA concluded that the attorney's acknowledgement should not form part of the formal requirements for making an EPA. The problem of lack of attorney awareness and acceptance of the attorney's appointment should be dealt with through public education to encourage the attorney's advance informed consent.

[139] A better time for the attorney to acknowledge the duties would be when the donor becomes incapacitated. At this time, the attorney should inform members of the donor's immediate family that, under a continuing EPA, the attorney is now acting for an incapacitated donor, and under a springing EPA, the attorney has commenced acting because the donor no longer has capacity. The attorney acknowledgement should form part of the Notice of Attorney Acting which WCLRA recommends in the next section of this report. The requirement for this notice will ensure that the attorney and immediate family members are aware of the attorney duties while not adding additional formalities to the making of the EPA.

Recommendation No. 11: Knowledge and acceptance of duties by attorney

The attorney should acknowledge and accept the duties under an EPA in the Notice of Attorney Acting.

III. GIVING NOTICE OF ATTORNEY ACTING

A. Existing Law

[140] Alberta, Manitoba and Saskatchewan make provision for determining the donor's incapacity. The donor may name one or more persons on whose written declaration the donor's lack of capacity is deemed to have occurred.[97] In Alberta and Manitoba, the attorney may be a declarant; in Saskatchewan, the attorney and family members of the attorney cannot be declarants.[98] Where there is no declarant, the legislation provides a default method which, in Alberta and Manitoba, calls for the written declaration of two medical practitioners.[99] The legislation in Saskatchewan calls for the written declaration of two members of a prescribed group.[100] The prescribed group includes: medical practitioners, psychologists, psychiatric and other nurses, occupational therapists, social workers, and speech-language pathologists.[101] Alberta, Manitoba and Saskatchewan allow disclosure of the donor's health information to declarants or the appropriate professionals for the purpose of determining the donor's mental capacity.[102]

[141] Once proclaimed, British Columbia's approach will require that, if all or part of an EPA comes into effect after a specified event occurs, the donor must state in the EPA how and by whom the event is to be confirmed.[103] There appears to be no prohibition on the named attorney or a family member being the confirming person. If confirmation of the donor's incapacity is required and the confirming person cannot or refuses to act, a single qualified health care provider may confirm

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[97] *Alberta Act*, *supra* note 3, s. 5(2); *Manitoba Act*, *supra* note 3, s. 6(2); *Saskatchewan Act*, *supra* note 1, s. 9.1(1).

[98] *Alberta Act*, *ibid*., s. 5(3); *Manitoba Act*, *ibid.*, s. 6(3); *Saskatchewan Act*, *ibid*.

[99] *Alberta Act*, *ibid*., s. 5(4); *Manitoba Act*, *ibid.*, s. 6(4).

[100] *Saskatchewan Act*, *supra* note 1, s. 9.2(2).

[101] *The Powers of Attorney Regulations*, *supra* note 54, s. 4.

[102] *Alberta Act*, *supra* note 3, s. 6; *Manitoba Act*, *supra* note 3, s. 6(5); *Saskatchewan Act*, *supra* note 1, s. 9.3.

[103] *B.C. Unproc. Ams., supra* note 3, s. 38 creating new s. 26(2).

whether the donor is incapable.[104] Anyone responsible for confirming incapacity is entitled to receive any information necessary to carry out that assessment.[105]

B. Discussion of Issues

1. Duty to notify

[142] A continuing EPA gives an attorney financial decision-making authority while the donor still has capacity. If the donor loses capacity, the attorney's duties persist and additional duties arise. Indeed, this is the hallmark characteristic of an EPA. With the loss of capacity, the EPA can be said to have irrevocably "sprung" because the donor loses the ability in law to make financial decisions and the attorney assumes exclusive decision-making authority over the donor's property and financial affairs. A springing EPA provides that the donor's incapacity triggers the attorney's exclusive decision-making authority over the donor's property and financial affairs. Regardless of the means by which an attorney comes to assume exclusive authority, the question arises: how are family members and other interested persons to know when an EPA springs?

[143] Alberta, Manitoba and Saskatchewan do not provide a mechanism to signal to family members, financial institutions, caregivers or other interested parties the point in time when a donor becomes incapable and the attorney begins acting in the absence of the donor's scrutiny. In the case of a springing EPA, this may be somewhat self-evident because the attorney would presumably not be acting if the contingency of mental incapacity had not yet occurred. In the case of a continuing EPA, there is no bright line to signal this point in time.

[144] The British Columbia Act does not currently have such a notification mechanism either. When the recent amendments are proclaimed, the attorney will be obliged to sign the EPA in front of two witnesses before being able to act under it.[106] But there is no obligation to date that signature, so this requirement cannot

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[104] *B.C. Unproc. Ams., supra* note 3, s. 38 creating new s. 26(3).

[105] *Ibid.*, s. 38 creating new s. 32(3).

[106] *Ibid.*, s. 38 creating new s. 17(i).

really serve as conclusive evidence of when the attorney commences action. There is also no other obligation on an attorney to give separate written or oral notice to family members that the attorney has commenced acting.

[145] The point in time when the donor is declared to lack capacity to manage financial affairs and the attorney begins acting without the donor's supervision is a good point at which to let family members, and possibly other persons, know that the attorney is now acting independently. Doing so will place the attorney's actions under the scrutiny of a select group of persons.

[146] WCLRA recommends that the four western provinces adopt a statutory provision requiring the attorney to serve a document called a Notice of Attorney Acting following a determination that the donor lacks capacity to manage property and affairs. In this context, "acting" refers to actions of the attorney following a determination that the donor lacks capacity. The notice requirement should apply to both continuing and springing EPAs.

2. Persons entitled to notice

[147] In determining who should reasonably receive the Notice of Attorney Acting, consideration must be given to balancing the reasonable expectations of attorneys, donor autonomy and protection against misuse. Arguably, if the number of persons to whom notice must be given is too expansive, attorneys will not accept appointments as attorneys and EPAs will cease to be an effective tool for estate planning. Conversely, if too few persons receive notice, there may be insufficient scrutiny of the attorney's actions. While it may be thought that a notice requirement would put the attorneys under an unnecessary microscope or subject them to attack from family members, WCLRA believes it more likely that, because notices will contribute to the transparency of attorney activities, attorneys will be less vulnerable to attack by uninformed persons who are kept in the dark.

[148] WCLRA considered three categories of persons who might be eligible to receive the Notice of Attorney Acting: the donor's designate; persons on a statutory list; and the donor.

a. Donor's designate

[149] The identification of persons to receive notice could be left to the discretion of the donor. WCLRA views donor autonomy as paramount and recommends that, in the EPA, the donor should be able to identify one or more persons to whom notice should be given.

b. Statutory list

[150] A statutory list could prescribe the persons to whom notice should be given for all purposes, or in default of the designation of persons by the donor.

[151] Who would be included in a statutory list? Given that the purpose of the Notice of Attorney Acting is to alert others to the attorney's actions and to put in place an informal mechanism for scrutiny, the persons on the statutory list should be the persons most likely to be interested in the attorney's activities. The persons most likely to be interested in the attorney's activities are the donor and family members of the donor.

[152] **Donor's family**. WCLRA gave significant consideration to the question of which family members should be included and eventually agreed on immediate family members. "Immediate family member" means the donor's spouse, adult child (including a step-child and adopted child), parent and adult sibling. "Spouse" includes an opposite or same sex partner in a marriage-like arrangement.

[153] **Donor**. Although the donor may be incapacitated at the time notice is given, WCLRA is of the opinion that the donor should also receive notice. Including the donor will minimally safeguard donor autonomy.

c. Public official

[154] Should Notice of Attorney Acting be given to the Public Guardian and Trustee, Public Trustee or a similar public official in the province in which the attorney exercises duties? During consultation, two points of view emerged. Some participants were of the opinion that notice would enable a public official to take an active role in overseeing the exercise of authority by an attorney. Of course, notice alone would serve no functional purpose. Notice would have to be accompanied by the imposition of obligations on the public official. Other

participants took the position that the whole point of giving the Notice of Attorney Acting to persons designated by the donor or to family members is to retain the private nature of EPAs and to respect donor autonomy.

[155] WCLRA generally favours retaining the private nature of EPAs. In WCLRA's view, donor privacy and autonomy should be respected unless the circumstances require otherwise. Although giving a Notice of Attorney Acting to a public official would help to formalize the notice process and effectively create a public record of the existence of the EPA and its status, the existence of such a public record may constitute an unjustified intrusion into the private arrangements of donors. For that reason, WCLRA does not support a regime that requires automatic notice to a public official.

[156] This having been said, WCLRA recognizes the need for a Notice of Attorney Acting to be given to a public official where the donor has not specified anyone to receive notice, has eliminated by name all immediate family members as notice recipients, or where the donor has no immediate family members. In those situations, the public official must be given the Notice of Attorney Acting as an alternative to notice to family members to ensure the attorney's accountability for carrying out the statutory duties.

3. Time period for notice

[157] During consultation, some participants favoured imposing a time frame within which notice must be given. They suggested 30 or 45 days from the date the donor is declared to lack capacity. Other participants preferred a more flexible response. They recognized the reality that the donor's incapacity will likely come on gradually. That is to say, incapacity is unlikely to occur on a specific date, although a declaration of incapacity will contain a date. Differing circumstances may attend the attorney's assumption of duties under the EPA and, initially at least, attorneys are likely to have differing levels of knowledge about their duties, including the duty to give notice.

[158] WCLRA favours an approach that recognizes these different possibilities. WCLRA proposes that the Notice of Attorney Acting be given within a

"reasonable period" after the donor becomes incapacitated and the attorney assumes exclusive responsibility for managing the donor's financial affairs.

4. Mandatory or discretionary notice?

a. In general

[159] In WCLRA's opinion, the duty to give Notice of Attorney Acting should be mandatory. Where the statutory list is operative, reasonable efforts must be made to give notice to all immediate family members in the listed categories.

b. Opting out by donor

[160] WCLRA takes the view that the donor should not be able to waive or opt out of the mandatory notice requirement by expressly relieving the attorney from the duty to give Notice of Attorney Acting. Any ability to waive or opt out of this requirement could encourage duress on the donor since not having to give notice facilitates the secrecy conducive to misuse of the EPA. However, a donor should be free to specify by name in the EPA any immediate family member who should *not* receive notice. If the donor eliminates all immediate family members and does not specify anyone else to receive notice, then the attorney must give the Notice of Attorney Acting to the appropriate public official as discussed earlier in this chapter.

5. Failure to give notice

[161] Several options were canvassed as possible penalties for the failure of an attorney to give Notice of Attorney Acting within a reasonable period of time. One option would be to impose a statutory penalty or fix statutory damages for breach of this duty. The consultation produced little support for the idea of a fine for statutory breach because of the difficulty with enforcement. Concern was also raised about levying a fine against an uninformed spouse attorney who has never dealt with financial matters before and who does not know of the requirement to give notice. Another option would be to require the attorney to restore any money expended or assets dissipated outside of the reasonable period for giving notice. A further option would be for the legislation to specify that the attorney risks personal liability for financial transactions made outside the reasonable notice period.

[162] WCLRA agrees that it would be difficult to impose a specific statutory penalty in many cases. We prefer instead that any failure to give Notice of Attorney Acting be dealt with by the general law. An attorney's failure to give Notice of Attorney Acting is a breach of the attorney's statutory duties and a court could hold the attorney personally liable for any resulting harm to the donor's financial interests. In addition, Manitoba and British Columbia each have a general offence provision which penalizes the failure to comply with any legislation with a small fine, imprisonment or both.[107]

[163] In the next section of this chapter, we recommend a means for interested persons to report an attorney's transgressions to a public official who may launch an investigation and intervene if and as necessary. Breaching the duty to give Notice of Attorney Acting within a reasonable period could be reported and lead to an investigation.

6. Content of notice

a. List of statutory duties

[164] In Chapter 3, we recommended including a list of the attorney's statutory duties in the standard form EPA. WCLRA also recommends that those duties be listed in the Notice of Attorney Acting. Doing so after the donor has lost capacity will ensure that the list of duties comes to the attention of both the attorney and those persons who are entitled to receive notice.

b. Acknowledgment and acceptance of duties

[165] In Chapter 3, we recommended against requiring an attorney to sign an acknowledgment and acceptance of duties as part of the formalities for making an EPA. Instead, WCLRA recommends that an attorney sign an acknowledgment and acceptance of duties as part of the Notice of Attorney Acting. This will provide a level of assurance that the attorney is aware of the attorney's duties and accepts the responsibility of acting as an attorney. An acknowledgment by the attorney will also provide some assurance to those who receive a copy of the notice that the attorney is informed and willing to act.

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[107] *The Summary Convictions Act*, C.C.S.M. c. S230, s. 4; *Offence Act*, R.S.B.C. 1996, c. 338, ss. 4, 5.

7. Standard form notice

[166] WCLRA recommends the adoption, but not the mandatory use, of a standard form Notice of Attorney Acting. A standard form would help ensure that the statutory list of duties is included in the notice and that the attorney acknowledges and accepts the duties by signing the notice. Like the proposed standard form EPA, the standard form could be adopted in each of the four western provinces by way of regulation. However, mandatory use of the standard form Notice of Attorney Acting is not essential. Although there are implications for failing to conform to the requirements of the Notice of Attorney Acting, the failure to conform will not affect the validity of the EPA.

8. Registering notice

[167] One difficulty with EPAs (particularly springing EPAs) is that persons with whom a donor transacts business may not know that the donor has lost capacity, that the privileges usually associated with legal ownership have now effectively shifted to the attorney, and that the attorney is now responsible for managing the donor's affairs. Under the land titles system of the western provinces, there is apparently no administrative means of noting on the land title that the donor is precluded from dealing with property.[108] Banks and other financial institutions may face a similar problem.

[168] Requiring attorneys to serve a Notice of Attorney Acting when the donor loses capacity will partially alleviate this problem by expanding the number of persons who know that the attorney has taken over.

[169] Another response would be to establish a public registry of Notices of Attorney Acting. A registry would serve a number of practical functions. It would name the attorney responsible for financial transactions under the EPA. It would say when an attorney began to act in the donor's incapacity. It would assist interested persons to ascertain whether the EPA under which an attorney is acting

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[108] We do not propose a uniform solution but note Manitoba's solution to an analogous situation in that a spouse with a homestead (dower) interest can register a notice against title to prevent any dealings with the land until the notice is vacated or discharged: *The Homesteads Act*, C.C.S.M. c. H80, s. 19.

is the donor's most recently made EPA. It would provide a concrete record of when notice was given. It could enable financial and other institutions to inquire into the current status and validity of an EPA and an attorney's authority.

[170] In spite of these practical functions, establishing a public registry would require answers to be found to a number of difficult questions, for example:

- Should access be open to the public at large or should it be restricted to persons in particular categories?
- Should registration be mandatory or voluntary?
  During consultation, some persons consulted viewed compulsory registration as a draconian measure which does not accord with the philosophy of minimalist intervention. Other persons questioned the usefulness of a voluntary, and therefore incomplete, registry.
- Is this intrusion into donor autonomy and privacy justified?
- What effect might a registry have on the use of these instruments?

[171] Although the mechanics of implementing a registry in at least some of the provinces is not a major barrier, WCLRA recommends against the adoption of a public registry for registering Notices of Attorney Acting.

Recommendation No. 12: Giving Notice of Attorney Acting

(1) The attorney must give a Notice of Attorney Acting to designated persons within a reasonable period of time after the donor is declared to lack capacity and the attorney assumes exclusive responsibility for managing the donor's financial affairs.

(2) The donor can designate by name in the EPA any person or persons to receive the Notice of Attorney Acting.

(3) Where the donor does not name anyone, the Notice of Attorney Acting must be given to the donor's immediate family members, which means the donor's spouse (including an opposite or same sex partner in a marriage-like arrangement), adult child (including a step-child and adopted child), parent and adult sibling. The attorney must make reasonable efforts to give notice to all immediate family members in the listed categories.

(4) The donor cannot waive the attorney's duty to give Notice of Attorney Acting, but can designate by name in the EPA any immediate family member who should not receive the Notice of Attorney Acting.

(5) If there is no person to whom the attorney can give notice, the attorney must give Notice of Attorney Acting to the appropriate public official.

(6) The attorney must also give Notice of Attorney Acting to the donor.

(7) The Notice of Attorney Acting must list the attorney's statutory duties.

(8) The attorney must acknowledge and accept the duties by signing the Notice of Attorney Acting prior to giving notice.

(9) Regulations should provide a standard form Notice of Attorney Acting; however, use of the standard form should not be mandatory.

IV. REPORTING SUSPECTED MISUSE OF AN EPA

[172] In the introduction to this chapter, we spoke of a need to increase the measures for scrutinizing an attorney's activities when a donor has lost capacity. The Notice of Attorney Acting will place immediate family members in a position to exercise scrutiny and to request details of the financial transactions from the attorney when they want more information. WCLRA has recommended that other interested persons be entitled to ask a public official such as the Public Trustee or Public Guardian and Trustee to request details of the financial transactions from the attorney. We have not talked about other avenues for interested persons to follow if they suspect attorney misuse of the EPA. That is the subject of this section.

A. Existing Law

[173] In British Columbia, an interested person may direct concerns to the Public Guardian and Trustee.[109] Action will be taken if there is a risk of dissipation of financial assets or property. However, the Public Guardian and Trustee has a large workload and resources are a problem. The Public Guardian and Trustee's discretion about whether to investigate a situation will continue under the amended Act, once proclaimed. However, the category of those who can complain to the

[109] *Public Guardian and Trustee Act*, R.S.B.C. 1996, c. 383, s.17.

Public Guardian and Trustee will be widened to include "any person."[110] In Manitoba, *The Powers of Attorney Act* allows the Public Trustee (among others) to apply to court concerning an enduring power of attorney[111] but, in practice, the Public Trustee does not investigate complaints or allegations about attorneys unless or until the Public Trustee is itself appointed as committee, substitute decision maker or attorney. Without such appointment, the Public Trustee has no jurisdiction to compel anyone to provide information about an accounting. In Saskatchewan, a designated individual or an adult family member may request an accounting from the attorney. If the attorney does not comply, any interested person may request that the Public Guardian and Trustee direct the attorney to make an accounting.[112] In 2001, Saskatchewan introduced provisions in *The Public Guardian and Trustee Act* for the protection of vulnerable adults who are suspected of being subjected to financial abuse (discussed in greater detail below). Currently, in Alberta, the only avenue open to an interested person is to bring a court application for an order compelling an accounting or an order terminating the EPA. A person may call the Public Trustee with concerns but the Public Trustee does not have the authority to investigate. The Public Trustee will act only if sufficient evidence of misuse is provided and no other person is able or willing to do anything. In its Report No. 88, the Alberta Law Reform Institute specifically rejected the idea of a public reporting scheme because of the expense and the probable desire of some donors and attorneys to keep their affairs private.[113] Instead, the Alberta Law Reform Institute proposed a model similar to Saskatchewan's under which a qualified person can request an accounting from the attorney and, where that fails, can advise the Public Trustee who may, in turn, takes steps to compel the production of accounting records. Alberta sees the Public Trustee as an avenue of last resort.

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[110] *B.C. Unproc. Ams., supra* note 3, s. 38 creating new ss. 34-35.

[111] *Manitoba Act, supra* note 3, s. 24(2).

[112] *Saskatchewan Act, supra* note 1, s.18.

[113] ALRI Final Report No. 88, *supra* note 1 at paras. 56-57.

[174] In 2001, Saskatchewan created a good model of how to respond to suspected financial abuse of vulnerable adults. With amendments that are unique among the provinces, Saskatchewan's *Public Guardian and Trustee Act*[114] (see Appendix A to this Report) introduced three response mechanisms: (1) the freezing of funds by a financial institution; (2) the freezing of funds by the Public Guardian and Trustee; and (3) the investigation by the Public Guardian and Trustee of allegations of wrongdoing. The legislation applies broadly. The net includes the misuse of EPA powers and authority.

[175] **Freezing of funds by a financial institution**. A financial institution may suspend the withdrawal or payment of funds from a person's account for up to five business days.[115] To do so, the financial institution must have reasonable grounds to believe that the person is a vulnerable adult who is being subjected to financial abuse, or is unable to make reasonable judgments about estate matters and the estate is likely to suffer serious damage or loss.[116] Immediately upon suspending the withdrawal or payment of funds, the financial institution must advise the Public Guardian and Trustee of the suspension, the reasons for it, and any financial information it holds.[117] The suspension notwithstanding, the financial institution may allow payments that it thinks appropriate to be made[118] (for example, rent). "Financial institution," "financial abuse," and "vulnerable adult" are all defined in the Act.

[176] **Freezing of funds by the Public Guardian and Trustee**. The Public Guardian and Trustee has authority to require a financial institution to suspend the withdrawal or payment of funds from a person's account for up to 30 days.[119] To

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[114] *The Public Guardian and Trustee Act*, S.S. 1983, c. P-36.3, ss. 40.5-40.9 as am. by S.S. 2001, c. 33, s. 19.

[115] *Ibid*., s. 40.5(2).

[116] *Ibid*.

[117] *Ibid*., s. 40.5(3).

[118] *Ibid*., s. 40.5(4).

[119] *Ibid*., s. 40.6(1).

do so, the Public Guardian and Trustee must (a) have reasonable grounds to believe that the person is a vulnerable adult and (b) have received an allegation that the person is being subjected to financial abuse, or is unable to make reasonable judgments about estate matters and the estate is likely to suffer serious damage or loss.[120] The suspension notwithstanding, the Public Guardian and Trustee may authorize the financial institution to allow certain payments that it thinks appropriate.[121]

[177] **Investigation by the Public Guardian and Trustee**. The Public Guardian and Trustee has authority to investigate the allegations described in the previous paragraph.[122] In doing so, the Public Guardian and Trustee may examine records "in the possession" of the vulnerable adult or any other person. The Public Guardian and Trustee may also request information and explanations necessary to the investigation from any person.[123] The person to whom the request is made is required to make the records available and to provide the information and explanations requested.[124] The Public Guardian and Trustee may make copies of a record that has been examined, and a copy certified by the Public Guardian and Trustee is admissible in evidence as if it were the original.[125] Where a person refuses or neglects to produce a record required, the Public Guardian and Trustee may obtain a warrant that allows premises to be entered and searched and the record to be seized.[126]

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[120] *Ibid*.

[121] *Ibid*., s. 40.6(2).

[122] *Ibid*., s. 40.7(1).

[123] *Ibid*., s. 40.7(2).

[124] *Ibid*., s. 40.7(3).

[125] *Ibid*., s. 40.8(1)-(2).

[126] *Ibid*., s. 40.9.

B. Discussion of Issues

[178] Interested persons such as banks and other financial institutions, caregivers in private settings or long-term care facilities, and members of the donor's extended family or friends may have concerns about the way in which an EPA is being used. An incapacitated donor cannot verify that the attorney is acting within the authority granted and the existing law provides limited recourse to deal with their concerns.

[179] Financial institutions with suspicions about transactions do not want to expose themselves to liability for cooperating with an attorney who is misusing the authority granted under an EPA. Confidentiality constraints may prevent them from disclosing their concerns to a family member. Financial institutions do not generally see themselves as the appropriate bodies to initiate cumbersome court proceedings to apply for termination of an EPA and court appointment of a trustee. Even if they wanted to, it is questionable whether they would qualify as an "interested person" capable of bringing an application to produce an accounting or to terminate an EPA.[127] Where financial institutions have not already recognized the EPA, they may choose to deny its validity simply because they have nowhere to turn. Where the EPA is in effect, they may simply freeze the account until someone else sorts it out.

[180] To whom should interested persons turn with their concerns? The consultation process produced widespread support for the formation of a supervisory body to receive reports of concerns and to investigate allegations of EPA misuse. We discuss possible characteristics of a reporting scheme in the paragraphs that follow.

1. Uniform reporting scheme

[181] The public and private infrastructure differs from province to province. For this reason, WCLRA takes the position that it is not necessary to recommend that the western provinces take a uniform approach to the provision of a supervisory

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[127] In Alberta, e.g., the *Dependent Adults Act,* R.S.A. 2000, c. D-11, s. 1(1), defines an "interested person" to mean: "(i) the Public Trustee, (ii) the Public Guardian, or (iii) any other adult person who is concerned for the welfare of the person in respect of whom a guardianship order or trusteeship order is sought or has been obtained."

body. However, the method provided should share certain features in common. We consider what features are essential in the following paragraphs.

2. Receiving reports

a. Public or private

[182] The construction of a reporting scheme involves the consideration of many issues. A reporting scheme could be public or private. As in Saskatchewan, most conceptions of a public scheme are built around the Public Trustee or Public Guardian and Trustee, although because of this office's role in estate administration, another arm of government may be better suited to carry out the investigative function. Under one conception of a private reporting scheme, each EPA donor would identify a "trouble-shooter" for concerned persons to call. The trouble-shooter approach: (1) would provide a mechanism for reporting suspicious transactions; (2) may function to make the attorney feel more accountable; and (3) would address the confidentiality and privacy constraints faced by financial institutions when dealing with suspicious transactions. The trouble-shooter could be an immediate family member who is already entitled to request details of the financial transactions from the attorney.

[183] The weight of opinion during consultation favoured a public reporting scheme. WCLRA recommends that each province designate a public official to respond to concerns about EPA misuse.

b. Differences based on complainant

[184] Separate reporting schemes could be devised for different categories of complainant. For example, the reporting scheme for financial institutions might differ from the reporting scheme for other persons. Financial institutions could be required to create an internal monitoring system to filter out and resolve simple problems, leaving only the serious problems to be dealt with by a public body.

c. Mandatory or voluntary reporting

[185] WCLRA considered whether reporting should be mandatory or voluntary. Instead of making the obligation to report universally mandatory, it would be possible to make it mandatory only for specified "gatekeepers" such as financial

institutions. There would, of course, be a question about what criteria should form the basis for imposing a mandatory obligation to report misuse. This could be an alleged breach of a statutory duty by an attorney.

[186] WCLRA concluded that the reporting of concerns should be voluntary. Establishing the facts to support enforcement of a mandatory duty to report would be cumbersome. Moreover, persons dealing with an attorney should not bear this heavy a burden.

d. Protection for those who report misuse

[187] To encourage people to report suspected attorney misuse of an EPA, WCLRA recommends that there be statutory protection for those who, in good faith, report misuse or participate in an investigation. People should not be intimidated against speaking out by the threat of being sued. Such statutory protection is commonly given to those who report wrongdoing against vulnerable persons, such as reporting child abuse.[128] Currently, the four western provinces do not offer this protection in the case of EPA misuse (not surprisingly, since most EPA statutes do not create a reporting scheme). This protection will, however, soon be available in British Columbia when its new amendments to the *Power of Attorney Act* are proclaimed. Persons who report misuse or participate in an investigation will be protected from any action for damages "[u]nless the person acts falsely and maliciously".[129]

[188] WCLRA proposes a uniform provision along the following lines:

> No action or other proceeding may be brought against a person who reports misuse or participates in an investigation unless the person acted maliciously or without reasonable and probable grounds.

Consistent with this, a person can make a report if the person has reasonable and probable grounds to think that attorney misuse of an EPA has occurred or is occurring. The ability to report misuse while being protected from lawsuit should not be available where the person is acting on unreasonable and improbable

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[128] See e.g. *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12, s. 4(4).

[129] *B.C. Unproc. Ams., supra* note 3, s. 38 creating new s. 34(4).

grounds or out of malice. While attorneys need to be subject to scrutiny, they do not need to be subject to wild accusations or harassment.

e. Broad or narrow access

[189] The legislation setting up the reporting scheme could be broadly applicable, as it is in Saskatchewan, or limited in context to EPAs.

[190] WCLRA acknowledges that a need exists for a broad approach to deal with the financial misuse of the property of mentally incapable persons in general, and we are attracted to the Saskatchewan model. However, the task of setting up a general reporting scheme lies outside the scope of this report. Therefore, WCLRA's recommendations are intended to apply only to EPAs.

f. Private remedies

[191] WCLRA holds the view that a public reporting scheme should not preclude qualified and interested persons from making private applications to terminate an attorney appointed under an EPA. In other words, both parallel public and private procedures should be available to remedy situations of suspected misuse.

3. Investigating reports

[192] What duties should be imposed on the public official charged with receiving reports? Should the public official have a mandatory obligation to investigate allegations of financial wrongdoing by attorneys?

[193] WCLRA sees mandatory investigative obligations as undesirable. The public official charged with receiving reports of suspected EPA misuse needs to balance the demand with available resources, staff and time. Therefore, the decision to investigate should be left to the discretion of the public official. However, investigative emphasis should be placed on all serious allegations. In particular, the public official should investigate where the donor of the EPA has been declared incapable and the public official has grounds to believe that the attorney has breached one or more of the attorney duties listed in the EPA statute.

[194] What powers and authority does the public official need to facilitate investigations? The Saskatchewan provisions authorize the Public Guardian and Trustee to suspend the withdrawal or payment of funds from a person's account for up to 30 days and require the financial institution to provide relevant financial information. They also allow the Public Guardian and Trustee to authorize payments from the account where appropriate. In conducting an investigation, the Public Guardian and Trustee is entitled to examine any record in the possession of any person and request any information and explanations necessary to the investigation. If a person fails to produce a record that the Public Guardian and Trustee requires, the Public Guardian and Trustee may apply for a warrant to enter and search premises for the record and seize and take possession of it.

[195] WCLRA recommends that the public official named to receive reports of financial misuse under an EPA have powers similar to those given in Saskatchewan.

[196] WCLRA further recommends that legislation authorize the public official to bring a court application to terminate the EPA or to appoint a new attorney.

[197] In addition to a role investigating reports of suspected wrongdoing by attorneys, WCLRA envisions that the public official responsible to receive reports should play an educative and supportive role in order to prevent the occurrence of EPA misuse.

4. Authority of financial institutions to freeze accounts

[198] The Saskatchewan reporting provisions allow a financial institution to suspend the withdrawal or payment of funds from a person's account for up to five business days where it suspects financial wrongdoing. A financial institution that suspends activity in an account must immediately advise the Public Guardian and Trustee of the suspension, the reasons for it and any financial information held by it respecting the person involved. Notwithstanding the suspension, the financial institution has discretion to allow appropriate payments to be made.

[199] During consultation, some participants expressed misgivings about the loose restrictions around freezing accounts under the Saskatchewan provisions and the potential liability of financial institutions who suspend accounts. However, other participants did not anticipate an increased risk of liability if the action is taken and report made in good faith.

[200] WCLRA recommends the enactment by all western provinces of provisions similar to those in Saskatchewan. The ability of a financial institution to suspend the withdrawal or payment of funds from an account should arise where the financial institution has reasonable grounds to believe that an attorney under an EPA is acting for a donor who has been declared incapable of managing property and the attorney has breached one or more of the attorney duties listed in the EPA statute. On making its accompanying report to the public official, the financial institution will be protected against lawsuit on the same terms as any other person who reports misuse or participates in an investigation.

Recommendation No. 13: Reporting suspected misuse of an EPA

(1) Each of the four western provinces should designate a public official to receive reports of concerns about the conduct of an attorney under an EPA.

(2) The reporting of concerns should be voluntary.

(3) A person who reports in good faith should be protected. No action or other proceeding may be brought against a person who reports misuse or participates in an investigation unless the person acted maliciously or without reasonable and probable grounds.

(4) The public official charged with receiving reports should have the discretion to investigate any suspected EPA misuse.

(5) Investigation should occur where the public official has grounds to believe that the donor of the EPA has been declared incapable and the attorney has breached one or more of the attorney duties listed in the EPA statute.

(6) The public official should have investigation powers and authority similar to those found in sections 40.6, 40.7, 40.8 and 40.9 of *The Public Guardian and Trustee Act*, S.S. 1983, c. P-36.3. These include the authority:

(a) to suspend the withdrawal or payment of funds from a person's account for up to 30 days and to require the financial institution to provide relevant financial information;

(b) to authorize payments from an account that has been suspended;

(c) to examine any record in the possession of any person and request any information and explanations necessary to the investigation; and
(d) apply for a warrant to enter and search premises for the record and seize and take possession of it.

(7) The public official should have authority to bring a court application to terminate the EPA or appoint a new attorney; this authority should stand alongside the right of private persons to bring a court application to terminate an attorney appointed under an EPA.

(8) The public official named to receive reports should undertake an educative and supportive role in order to prevent the occurrence of EPA misuse.

(9) Financial institutions should have authority and duties similar to those found in section 40.5 of *The Public Guardian and Trustee Act*, S.S. 1983, c. P-36.3. This includes:

(a) the authority to suspend the withdrawal or payment of funds from an account for up to 5 days where the financial institution has reasonable grounds to believe that an attorney under an EPA is acting for a donor who has been declared incapable of managing property and the attorney has breached one or more of the attorney duties listed in the EPA statute;
(b) the discretion to allow payments to be made from the suspended account; and
(c) the duty to immediately advise the public official named to receive reports of the suspension, the reasons for the suspension and any financial information held by the financial institution respecting the person involved.

CHAPTER 5.
TRANSITIONAL PROVISIONS

I. INTRODUCTION

[201] One matter remains to be addressed and that is the effect of the reforms on existing EPAs. Four situations are possible:

- the existing EPA may be a continuing EPA under which the donor's property is being managed by an attorney while the donor is capable of managing the donor's own affairs;
- the existing EPA may be a springing EPA which has not yet sprung because the donor is capable of managing the donor's own affairs;
- the existing EPA may be a continuing EPA under which the donor's property is being managed by an attorney because the donor has been declared incapable of managing the donor's own affairs; or
- the existing EPA may be a springing EPA under which the donor's property is being managed by an attorney because the donor has been declared incapable of managing the donor's own affairs.

The issue of the applicability of the reforms to existing EPAs is particularly sensitive in the third and fourth situations where the donor does not have capacity to rewrite the existing EPA in order to bring it into conformity with the new law.

[202] We will consider the application of the reforms in six areas: (1) the procedural formalities that attend the making of an EPA; (2) the criteria for EPA recognition; (3) the attorney's duties under an EPA; (4) the standard of care to which the attorney is held in carrying out duties; (5) ensuring that the attorney knows what the duties are; and (6) avenues for reporting suspected misuse of an EPA.

[203] In general, WCLRA takes the view that the new law should apply unless a strong reason exists to preserve the existing law. A key consideration throughout will be the effect of the reforms on the donor's expectations under the law that

existed at the time the EPA was made. Would the existing law have raised expectations in the donor that are significantly different from the expectations associated with the new law? If not, the new law should apply to existing as well as newly-made EPAs. Of course, at times under both the existing and new law, the donor's specific direction in the EPA would override the default position set out in legislation.

II. DISCUSSION OF ISSUES

A. Procedural Formalities Attending the Making of an EPA

[204] It would be possible, but impractical, to require donors who are mentally capable when the new law takes effect to enter into a new EPA. Donors who have lost mental capacity would not be able to do this. To achieve consistency in the treatment of existing EPAs, WCLRA recommends that the new procedural formalities should apply only to EPAs made after the amendments take effect. EPAs that are valid under the existing law should continue in effect.

B. "Foreign EPA" Recognition Criteria

[205] In essence, our recommendation concerning the recognition of "foreign EPAs" clarifies the existing recognition law. Therefore, the new law should apply to all EPAs no matter when they were made. "Enduring power of attorney" must be defined as we have indicated in the Glossary of Terms to this report to ensure that any foreign EPA must expressly state that the attorney's authority is not terminated by the donor's mental incapacity occurring after the making of the document .

C. Attorney Duties Under an EPA

[206] Under our recommendations, these duties arise upon the mental incapacity of the donor where the attorney has consented or commenced to act. We will look at the duties one by one.

1. Act honestly, in good faith, and in the best interests of the donor

[207] This duty applies to existing EPAs. It is therefore appropriate to apply the new law to all EPAs.

2. Take into consideration the wishes of the donor and the manner in which the donor managed affairs while competent

[208] Under the existing law, the attorney would have this duty where the wishes of the donor are expressed in the EPA. In other circumstances, the existence of a duty under the existing law may be less clear. Would the donor have expected the attorney to carry out the wishes as made known to the attorney or signalled implicitly by the manner in which the donor managed personal financial affairs while competent? WCLRA believes that such an expectation is consistent with the objectives of existing EPAs which allow donors to choose a trusted person to manage their financial affairs rather than a stranger or court-appointed individual. WCLRA recommends that the new law apply to all EPAs, whether made before or after the new law takes effect.

3. Use assets for the benefit of the donor

[209] This wording has been proposed to give positive expression to two existing attorney duties: the duty not to benefit personally in carrying out the functions of an attorney and the duty to make full disclosure to the donor of any interests that may conflict with the attorney's responsibilities under the power of attorney. The recommendation carries forward the intent of these existing duties. For this reason, WCLRA recommends that the new law should apply to all EPAs.

4. Keep the donor's property and funds separate, except as permitted by statute

[210] This duty is a restatement of an existing duty and, as such, should apply to all EPAs.

5. Keep records of financial transactions

[211] This duty would be covered by the duty to account that applies to existing EPAs. The new law should apply to all EPAs.

6. Provide details of financial transactions upon request

[212] This duty may vary somewhat from the duty under existing EPA legislation. There may be differences in the persons who are entitled to obtain details. For example, in Saskatchewan, the nearest relative is entitled to an accounting in addition to a person named by the donor. Should the nearest relative lose this entitlement when the amendments come into force? There may be differences in the circumstances in which the attorney is required to give an accounting, and its frequency. For example, in Manitoba, the attorney must account annually to the nearest relative, if the EPA does not designate a recipient or the recipient is disqualified. Would applying the new law impinge upon the donor's expectations to such an extent that the existing law should be preserved?

[213] As a general matter, WCLRA would apply the duty as framed under the new law. However, each of the four western provinces should determine whether any differences between the new law and the existing law are of such significance with respect to the donor's likely expectations that the existing law, or some part of it, should continue to apply to existing EPAs.

7. Give Notice of Attorney Acting

[214] This provision is new and applies to both continuing and springing EPAs. It comes into play when the donor loses capacity to manage the donor's own financial affairs. The purpose is to inform any person named by the donor (or, if no one is named, the donor's immediate family members or, if none, a public official) that the donor lacks capacity and the attorney has begun to act without the donor's scrutiny. The Notice of Attorney Acting lists the attorney's duties in order to bring them to the attention of the attorney and the persons who are entitled to receive notice. The notice must contain the attorney's signed acknowledgment and acceptance of the duties associated with the responsibility of acting as an attorney, thereby giving the recipients some assurance that the attorney knows about the duties and is willing to fulfil them.

[215] Where the donor does not lose mental capacity until after the new law takes effect, WCLRA recommends that the attorney should be required to give Notice of Attorney Acting in accordance with the new law. That is to say, the duty should be

the same for attorneys regardless of their appointment under the existing or new law. But, should an attorney acting for a donor who lost mental capacity before the new law comes into force be required to give notice? This may appear to be an extraneous step, especially where the attorney has been acting for a long time with the knowledge of the donor's family and other persons of importance to the donor. However, notice is a crucial element of WCLRA's proposed reforms. It ensures that the attorney is aware of the attorney's duties and that someone other than the attorney is aware that the attorney is acting. Requiring an attorney who is already acting for a mentally incapable donor to give notice, albeit belatedly, would give all donors the benefit of the protections provided by the new law. WCLRA finds these observations persuasive and recommends that an attorney who is already acting for a mentally incapable donor should be required to give Notice of Attorney Acting within a reasonable period after the new law takes effect. A widespread public education process will have to be undertaken in order to alert attorneys appointed under the existing law of their duty to give Notice of Attorney Acting under the new law.

D. Applying the Standard of Care

[216] The proposed standard of care is similar to existing standards of care. It should apply prospectively to attorneys under existing EPAs as well as those made after the new law takes effect.

E. Remuneration of Attorney

[217] EPAs made after the new law takes effect must expressly authorize remuneration and state the basis for it or the attorney can receive nothing. This provision should not apply to existing EPAs since any existing EPA which does expressly authorize remuneration may not state the basis for it. Existing EPAs would need to have such provisions protected and validated by an appropriate transitional provision, so that the attorney's remuneration will continue as before.

[218] However, the new ability of attorneys to claim reasonable expenses properly incurred should apply to attorneys acting under both existing and new EPAs, since this statutory right will not be tied to the terms of any EPA.

F. Liability of Attorney

[219] There is no reason why our recommended liability provision should not apply to all attorneys, whether acting under an existing EPA or an EPA created after the new law takes effect.

G. Attorney's Knowledge of Duties

[220] The recommendations call for the development of widely-available public EPA education materials and best practices for lawyers and lay persons. An extensive educational initiative should be launched before the new law takes effect. Being informed of their duties is important for attorneys appointed under existing as well as new EPAs. The task of reaching attorneys appointed under existing EPAs may be challenging in that new attorneys have reason to search out information about their duties whereas existing attorneys likely became informed when they consented or commenced acting. Reaching all attorneys will be a challenge for those persons who take on responsibility for the educational component.

H. Reporting Suspected Misuse of an EPA

[221] There is no reason to limit the availability of the new measures when it comes to reporting and investigating suspected misuse. The new measures are recommended for the protection of the interests of donors. They should be available with respect to EPAs whenever made.

III. SUMMARY OF CONCLUSIONS

[222] The conclusions reached in the preceding paragraphs are summarized in chart form in Appendix B.

IV. IMPLEMENTATION DATE

[223] Governments in each of the four western provinces will require time to prepare public education materials that explain the EPA reforms. The need to inform attorneys under existing EPAs of their duties under the new law (in particular, the duty to give Notice of Attorney Acting within a reasonable period after the new law takes effect) has already been emphasized. Some provinces may also need time to make appropriate arrangements for a public official to receive reports of concerns about the conduct of an attorney under an EPA, to conduct an investigation where called for, and to perform an educative function in preventing the occurrence of EPA misuse. These steps should be taken before the new law is brought into force.

Recommendation No. 14: Transitional provisions

(1) EPAs that were validly made under the existing law should continue in effect under the new law.

(2) The new "foreign EPA" recognition criteria should apply to existing EPAs.

(3) The attorney duties under the new law should apply to an attorney under an existing EPA where the attorney is acting for a mentally incapable donor when new law takes effect. This includes the duty to give Notice of Attorney Acting within a reasonable period after the new law is introduced. Concerning the duty to provide details of financial transactions upon request, each of the four western provinces should determine whether any differences in the details of fulfilling this duty under the new law are of such significance with respect to the donor's likely expectations that the existing law, or some part of it, should continue to apply to existing EPAs in that jurisdiction.

(4) The duty to give Notice of Attorney Acting should apply to an attorney appointed under an existing EPA where the donor becomes mentally incapable after the new law takes effect.

(5) An attorney appointed under an existing EPA should meet the standard of care set out in the new law when carrying out duties to a donor who is mentally incapable when, or becomes mentally incapable after, the new law takes effect.

(6) The new attorney remuneration provision should not apply to existing EPAs. A transitional provision will validate any existing EPA which expressly authorizes remuneration even if it does not meet the new criteria. However, the new provision allowing attorneys to claim reasonable expenses properly incurred will apply to all attorneys, whether acting under a new or existing EPA.

(7) The liability provision will apply to all attorneys, whether acting under a new or existing EPA.

(8) Prior to the new law taking effect, each of the western provinces should undertake an extensive public education process in order to inform all attorneys (both those appointed under the existing law and those appointed under the new law), lawyers and the public at large of the new law's details.

(9) The new measures for reporting and investigating suspected EPA misuse should apply to existing as well as new EPAs. These measures should be established before the new law takes effect.

CHAPTER 6.
CONCLUSION

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

[225] While important, no legislative reform and education alone will fully prevent the risk of EPA misuse. The best hope that individuals have for ensuring the just and fair administration of their affairs is to focus on building healthy, trusting relationships with the people around them, to choose attorneys wisely, and to make known to the prospective attorney, and others, their intentions with respect to their property. This is not always easy because family dynamics can be very complicated, particularly where the relationships involve issues of power and control. Moreover, prospective attorneys with intentions of self-interest are often skilled at manipulation and deception and the ability of donors to choose attorneys wisely may be significantly impaired as a result.

[226] For these reasons, legislative safeguards play a vital role in ensuring that an effective safety net is in place for donors who are vulnerable to exploitation by reason of their inability to supervise the administration of their property. As such, increased execution and accounting safeguards, standard EPA forms, efforts aimed at increasing the knowledge of attorneys, family members and the public in general about the nature and scope of the attorney's duties, and provision for increased external scrutiny of the conduct of attorneys are important measures toward curtailing misuse. While these recommended legislative reforms may not be sufficient on their own, WCLRA believes that, if adopted, such measures will be significant in shaping the behaviours of individuals.

APPENDIX A
PREVENTING MISUSE OF AN EPA

Selected provisions from
The Public Guardian and Trustee Act
S.S. 1983, c. P-36.3

Freezing of funds by financial institution

40.5(1) In this section and in sections 40.6 to 40.9:

(a) "financial abuse" means the misappropriation of funds, resources or property by fraud, deception or coercion;

(b) "record" means a book, paper, document or thing, whether in electronic form or otherwise, that may contain information respecting the finances of a vulnerable adult;

(c) "vulnerable adult" means an individual, 16 years of age or more, who has an illness, impairment, disability or aging process limitation that places the individual at risk of financial abuse.

(2) A financial institution may suspend the withdrawal or payment of funds from a person's account for up to five business days where the financial institution has reasonable grounds to believe that the person is a vulnerable adult and:

(a) is being subjected to financial abuse by another person, including a person appointed as property decision-maker pursuant to The Adult Guardianship and Co-decision-making Act; or

(b) is unable to make reasonable judgments respecting matters relating to the person’s estate and that the estate is likely to suffer serious damage or loss.

(3) The financial institution shall immediately advise the public guardian and trustee of the suspension, the reasons for the suspension and any financial information held by the financial institution respecting that person.

(4) Where the withdrawal or payment of funds has been suspended pursuant to subsection (2), the financial institution may allow certain payments to be made where it is of the opinion that it is appropriate to do so.

(5) A financial institution acting pursuant to this section is not in breach of any other Act.

2001, c.33, s.19.

Freezing of funds by public guardian and trustee

40.6(1) The public guardian and trustee may require a financial institution to suspend the withdrawal or payment of funds from a person's account for up to 30 days and may require that the financial institution provide the public guardian and trustee with any financial information held by the financial institution respecting that person where:

(a) the public guardian and trustee has reasonable grounds to believe that the person is a vulnerable adult; and

(b) the public guardian and trustee receives an allegation that the person:

(i) is being subjected to financial abuse by another person, including a person appointed as his or her property decision-maker pursuant to The Adult Guardianship and Co-decision-making Act; or

(ii) is unable to make reasonable judgments respecting matters relating to his or her estate and that the estate is likely to suffer serious damage or loss.

(2) Where the withdrawal or payment of funds has been suspended pursuant to subsection (1), the public guardian and trustee may authorize the financial institution to allow certain payments to be made where the public guardian and trustee is of the opinion that it is appropriate to do so.

(3) A financial institution acting pursuant to this section is not in breach of any other Act.

2001, c.33, s.19.

Authority to investigate

40.7(1) The public guardian and trustee may investigate an allegation that a person the public guardian and trustee has reasonable grounds to believe is a vulnerable adult:

(a) is being subjected to financial abuse by another person, including a person appointed as his or her property decision-maker pursuant to The Adult Guardianship and Co-decision-making Act; or

(b) is unable to make reasonable judgments respecting matters relating to his or her estate and that the estate is likely to suffer serious damage or loss.

(2) In an investigation pursuant to subsection (1), the public guardian and trustee may:

(a) at any reasonable time, examine any record, whether in the possession of the person believed to be a vulnerable adult or any other person; and

(b) request any person to provide any information and explanations the public guardian and trustee considers necessary to the investigation.

(3) If requested to do so by the public guardian and trustee, a person shall make available any record or shall provide the information and explanations mentioned in clause (2)(b).

(4) The public guardian and trustee may specify a reasonable time within which a person shall comply with subsection (3).

2001, c.33, s.19.

Copies of records

40.8(1) Where a record has been examined pursuant to section 40.7, the public guardian and trustee may make copies of that record.

(2) A record certified by the public guardian and trustee to be a copy made pursuant to this section:

(a) is admissible in evidence without proof of the office or signature of the public guardian and trustee; and

(b) has the same probative force as the original record.

(3) The public guardian and trustee shall ensure that after a copy of any record examined pursuant to section 40.7 is made, the original is promptly returned to:

(a) the place from which it was removed; or

(b) any other place that may be agreed to by the public guardian and trustee and the person who was in possession of the record.

2001, c.33, s.19.

Warrants

40.9(1) Where the public guardian and trustee requires the production of any record and the person from whom the record is required refuses or neglects to produce it, the public guardian and trustee may apply ex parte to a justice of the peace or a judge of the Provincial Court for a warrant authorizing the public guardian and trustee or a person named in the warrant to:

(a) enter and search any premises named in the warrant for the record that the person refused or neglected to produce; and

(b) seize and take possession of the record.

(2) A justice of the peace or judge of the Provincial Court, if satisfied on oath of the public guardian and trustee that he or she has required production of a record and the person from whom production was required has refused or neglected to produce that record, may issue the warrant.

2001, c.33, s.19.

APPENDIX B
TRANSITIONAL PROVISIONS CHART

Area of Reform	Situation at Time Amending Legislation takes Effect			
	Continuing EPA		Springing EPA	
	Attorney Acting Donor Mentally Capable	Attorney Acting Donor Not Mentally capable	Attorney Not Acting Donor Mentally Capable	Attorney Acting Donor Not Mentally capable
1. Procedural Formalities for Making an EPA	Continue EPAs validly made under the existing law	Continue EPAs validly made under the existing law	Continue EPAs validly made under the existing law	Continue EPAs validly made under the existing law
2. "Foreign EPA" Recognition Criteria	Apply new law	Apply new law	Apply new law	Apply new law
3. Attorney Duties				
a. Act honestly, in good faith and in the donor's best interests	Apply new law when donor loses capacity	Apply new law	Apply new law when donor loses capacity	Apply new law
b. Consider wishes and past decisions of donor	Apply new law when donor loses capacity	Apply new law	Apply new law when donor loses capacity	Apply new law
c. Use assets for the donor's benefit	Apply new law when donor loses capacity	Apply new law	Apply new law when donor loses capacity	Apply new law

Area of Reform	Situation at Time Amending Legislation takes Effect			
	Continuing EPA		Springing EPA	
	Attorney Acting Donor Mentally Capable	Attorney Acting Donor Not Mentally capable	Attorney Not Acting Donor Mentally Capable	Attorney Acting Donor Not Mentally capable
d. Keep the donor's property and funds separate, except as permitted by statute	Apply new law when donor loses capacity	Apply new law	Apply new law when donor loses capacity	Apply new law
e. Keep records of financial transactions	Apply new law when donor loses capacity	Apply new law	Apply new law when donor loses capacity	Apply new law
f. Provide details of financial transactions upon request	Apply new law when donor loses capacity	Apply new law. Each province to determine whether any part of existing law should be preserved (*e.g.*, allow persons entitled to an accounting under the existing law to request details of financial transactions).	Apply new law when donor loses capacity	Apply new law. Each province to determine whether any part of existing law should be preserved (*e.g.*, allow persons entitled to an accounting under the existing law to request details of financial transactions).
g. Give Notice of Attorney Acting	Apply new law when donor loses capacity	Give notice under new law within a reasonable period after new law takes effect	Apply new law when donor loses capacity	Give notice under new law within a reasonable period after new law takes effect.
4. Standard of Care	Apply new law when donor loses capacity	Apply new law	Apply new law when donor loses capacity	Apply new law

Area of Reform	Situation at Time Amending Legislation takes Effect			
	Continuing EPA		Springing EPA	
	Attorney Acting Donor Mentally Capable	Attorney Acting Donor Not Mentally capable	Attorney Not Acting Donor Mentally Capable	Attorney Acting Donor Not Mentally capable
5. Attorney Remuneration	Continue EPAs validly made under the existing law	Continue EPAs validly made under the existing law	Continue EPAs validly made under the existing law	Continue EPAs validly made under the existing law
6. Attorney Expenses	Apply new law	Apply new law	Apply new law when donor loses capacity	Apply new law
7. Liability of Attorney	Apply new law	Apply new law	Apply new law when donor loses capacity	Apply new law
8. Attorney Knowledge of Duties	Educate about new law	Educate about new law	Educate about new law	Educate about new law
9. Reporting and Investigating Suspected EPA Misuse	Apply new law	Apply new law	Apply new law	Apply new law