DISCUSSION PAPER

ENDURING POWERS OF ATTORNEY IN NOVA SCOTIA

Law Reform Commission of Nova Scotia
June 1998

WHAT DO YOU THINK?

The Law Reform Commission is very interested in knowing what you think about the issues raised in the Discussion Paper, *Enduring Powers of Attorney in Nova Scotia.*

We have attempted, as much as possible, to describe the law and the problems with the law in a way that can be understood by people who are not lawyers and who are not familiar with the legal system. This Discussion Paper does not represent the final views of the Commission. It is designed to encourage discussion and public participation in the work of the Commission. Your comments will assist us in preparing a Final Report for the Minister of Justice. The Final Report will contain recommendations on how the law in Nova Scotia should be reformed.

If you would like to comment on our suggestions you may:

- Fax a letter to the Commission at (902) 423-0222
- Send an e-mail to the Commission at lawrefns@fox.nstn.ca
- Telephone the Commission at (902) 423-2633
- Write to the Commission at the following address

  Enduring Powers of Attorney Project
  Law Reform Commission of Nova Scotia
  2nd Floor, 1484 Carlton Street
  Halifax, Nova Scotia
  B3H 3B7

In order for us to fully consider your comments before we prepare our Final Report, please contact us by **November 15, 1998**.

Please note that the Final Report will list the names of individuals and groups who make comments or submissions on this Discussion Paper. Unless comments are marked confidential, the Commission will assume respondents agree to the Commission's quoting from or referring to comments made. Respondents should be aware that the Nova Scotia *Freedom of Information and Protection of Privacy Act* may require the Commission to release information contained in submissions.

The Law Reform Commission of Nova Scotia was established in 1991 by the Government of Nova Scotia under an *Act to Establish an Independent Law Reform Commission.*

The Commissioners are:

Gregory North, Q.C., Co-President
Dawn Russell, Co-President
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The Commission's work is available on the Internet through the Chebucto Community Net at http://www.chebucto.ns.ca/Law/LRC and also from links on the Government of Nova Scotia Web Site (http://www.gov.ns.ca/) under Government Agencies.

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TABLE OF CONTENTS

Page

ENDURING POWERS OF ATTORNEY IN NOVA SCOTIA

SUMMARY

In June 1997, the Law Reform Commission of Nova Scotia commenced a project to reform the law of enduring powers of attorney. Nova Scotia has a *Powers of Attorney Act* which allows for enduring powers of attorney. There are concerns, however, that the current model lacks adequate procedural safeguards to prevent financial abuse. As well, people who rely on enduring powers of attorney question whether they are legally valid if they come into effect only when a person is mentally incompetent. The Commission is of the view that the legislation, as currently drafted, fails to address these and other concerns. In this Paper, the Commission focuses on safeguards to protect people who are giving enduring powers of attorney. The Commission also suggests ways in which the law can be changed to ensure that a person's wishes are implemented more effectively.

Powers of attorney generally

A power of attorney is a legal document which authorizes a person or company to act on behalf of another person to deal with or dispose of his or her property. The person receiving the power to act is called the "attorney". The person giving the power is called the "donor". There are two types of powers of attorney: a general power and a limited power. A general power of attorney can be all encompassing and can allow the attorney to make virtually any type of decision relating to the donor's property. A limited power is more restricted and is usually used to complete a specific financial transaction when the donor is on vacation, is ill or is otherwise unable to attend in person.

At common law, a power of attorney automatically terminates upon the death or bankruptcy of the donor. The mental incapacity of the donor also ends the power of attorney. A power of attorney is therefore not a useful device for managing a person's affairs in the event of their mental incapacity. As a result, "enduring" powers of attorney have been recognized by all Canadian provinces to allow for powers of attorney which "endure" beyond the donor's mental capacity. If the donor later becomes mentally incapacitated, the power of attorney continues to operate.

Contingent power of attorney

Most Canadian provinces which allow enduring powers of attorney also contemplate the possibility that the power of attorney will come into effect *only* upon the occurrence of a future event. This postpones the attorney's authority until the future event occurs. The power of attorney is therefore said to be "contingent" upon the future event. The most common event, or contingency, specified in such powers of attorney is the mental incompetence of the donor. If the enduring power of attorney is to be contingent, this must be explicitly stated. If it is *not* explicitly stated, the enduring power of attorney takes effect from the moment it is signed. Many people are confused about contingent powers of attorney. In Nova Scotia, contingent

powers of attorney seem to be primarily used by trust companies. The legal validity of contingent powers of attorney in Nova Scotia has also been questioned because the *Powers of Attorney Act* contains no specific provisions allowing them. On the other hand, contingent powers of attorney are not specifically prohibited by the *Powers of Attorney Act*. It is therefore unclear whether a Nova Scotia court would recognize them as legally valid. The issue of the validity of contingent powers of attorney is one of the central issues addressed in this Paper.

Preliminary suggestions for reform

The Commission seeks public commentary to assist it in developing recommendations for reforming the *Powers of Attorney Act*. In particular, the Commission invites comment on its preliminary suggestions, including the following:

- An attorney must be: mentally competent and of the age of majority (presently 19 years of age), the Public Trustee, or a financial institution. An attorney must not be an undischarged bankrupt.

- A donor should be able to name any number of attorneys to act on their behalf. If more than one attorney is named, they must act jointly unless the enduring power of attorney states otherwise. If a donor appoints joint attorneys to act together, they must make decisions by unanimous agreement unless the enduring power of attorney states that they can make decisions by majority agreement. A donor should also be able to appoint alternate attorneys to act successively.

- When the donor is incapable of reading or signing an enduring power of attorney, an individual, other than the attorney or the attorney's spouse, should be able to sign it on the donor's behalf.

- When the donor is incapable of reading or signing an enduring power of attorney, it must be signed in the donor's presence, at the donor's direction and in the presence of two or more witnesses who are present at the same time. All enduring powers of attorney must be witnessed by two people, who are present at the same time, neither of whom is:
    1. The attorney or the attorney's spouse.
    2. The donor's spouse.
    3. A child of the donor or a person whom the donor has demonstrated a settled intention to treat as his or her child.
    4. A person who is mentally incompetent.
    5. A person who is less than the age of majority (presently nineteen years of age).

- Spouse should be defined to include common law spouse, whether of the same or opposite sex.

- Registration of an enduring power of attorney should not be mandatory.

- Enduring powers of attorney legislation should deal specifically with contingent powers of attorneys. If an enduring power of attorney is contingent upon mental competency, the certificates of two medical practitioners should be required to prove that the contingency has occurred.

- When a donor of an enduring power of attorney becomes mentally incompetent, the attorney should have a duty to act:

    1. if they know or ought reasonably to know that the donor is mentally incompetent; and
    2. if they have assumed management of the estate or contracted with the donor to do so.

- Legislation should authorize the release of confidential information concerning the donor's mental and physical health for the limited purpose of determining whether the contingency of mental incompetency has occurred.

- Legislation should specify that the relationship between a donor and attorney is "fiduciary" in nature and that an attorney therefore has a duty to, among other things: account, exercise reasonable care, not make secret profits, and not act contrary to the interests of the donor.

- An attorney should be required to exercise the judgment and care that a reasonably prudent person in comparable circumstances would exercise.

- If the enduring power of attorney has been terminated or is void, an attorney should be protected from liability for having acted in good faith if the attorney did not know and had no reasonable grounds for believing that the attorney's authority had been terminated or lost.

- The legislation should specifically state that an enduring power of attorney may authorize third party payments, including charitable and seasonal gifts. If the enduring power of attorney does not authorize such payments, an attorney may not authorize charitable or seasonal gifts. An attorney should be able to provide for the reasonable maintenance and support of the donor's dependents.

- The donor should be able to request an accounting at any time. When the donor is mentally incompetent, the attorney should be required to provide an accounting upon the demand of any person named for that purpose in the enduring power of attorney. If the donor does not name anyone in the enduring power of attorney, or if the named person is the attorney, the spouse of the attorney or is deceased or mentally incompetent, the attorney shall provide an annual accounting to the donor's nearest relative. The court should have the discretion to grant an order for accounting as it considers appropriate.

An attorney should also be required to provide an acconting upon termination of an enduring power of attorney.

- If the attorney's authority under the enduring power of attorney has been terminated, an attorney's act should be valid and binding in favour of any person who did not know of the termination.

- Courts should continue to be authorized to substitute an attorney upon the application of an interested party. Courts should also be authorized to vary the terms of an enduring power of attorney upon the application of an interested party.

- An attorney should be able to renounce an appointment by giving notice to the donor. If the donor is no longer mentally competent and the attorney has assumed management of the estate or contracted to do so, the attorney must apply to court in order to renounce the appointment.

- An enduring power of attorney should terminate if it is revoked by the donor or if the donor dies. Subject to the court's right to vary the terms of an enduring power of attorney, including the right to substitute an attorney, an enduring power of attorney should also terminate upon:
  - the death or mental incapacity of the attorney;
  - the renunciation of the attorney;
  - the coming to pass of a time or event specified in the enduring power of attorney; or
  - the appointment of a guardian under the *Incompetent Persons Act*.

- The bankruptcy of the donor should not automatically terminate the enduring power of attorney since the attorney can represent the donor's interests at the bankruptcy proceedings.

The Commission invites comment on whether a Certificate of Independent Legal Advice should be required in order for an enduring power of attorney to be valid. The Certificate of Independent Legal Advice would contain a statement that the donor signed (or acknowledged having signed) the enduring power of attorney in the presence of the lawyer, that the donor acknowledged that the enduring power of attorney was voluntarily signed, and that the donor appeared to understand the nature and effect of the document.

LES PROCURATIONS PERPETUELLES EN NOUVELLE-ECOSSE

SOMMAIRE*

Au mois de juin 1997, la Commission de réforme du droit de la Nouvelle-Ecosse a initié un projet de réforme du droit relatif aux procurations perpétuelles. La législation néo-écossaise comporte une *Loi sur les procurations* qui permet les procurations perpétuelles. Néanmoins, la question de l'existence de mesures de protection dans le système actuel pouvant prévenir les abus financiers constitue une préoccupation. En outre, les personnes qui se fient aux procurations perpétuelles se demandent si elles sont juridiquement valides si elles ne prennent effet qu'au moment où l'auteur de la procuration perpétuelle devient mentalement inapte. La Commission est d'avis que la législation telle que rédigée actuellement ne répond pas à bon nombre de préoccupations, dont celle-ci. Dans le présent document, la Commission concentre ses efforts sur les mesures visant à protéger les personnes qui donnent des procurations perpétuelles. La Commission suggère aussi des amendements à la loi afin d'assurer que les souhaits d'une personne soient exécutés de façon plus efficace.

Les procurations en général

Une procuration est un document juridique en vertu duquel une personne ou une compagnie est autorisée à agir au nom et lieu d'une autre personne dans le but de gérer ou de disposer de ses biens. La personne qui reçoit ce pouvoir d'agir se nomme le "mandataire". La personne qui octroie ce pouvoir se nomme le "mandant". Deux types de procurations existent : la procuration à portée générale et la procuration à portée limitée. Une procuration à portée générale peut être très étendue et peut donner au mandataire un pouvoir décisionnel relativement à tout type de décision concernant les biens du mandant. Une procuration à portée limitée est plus restreinte et est utilisée habituellement en conjonction avec une transaction financière spécifique alors que le mandataire est en vacances, est malade ou ne peut agir en personne pour d'autres raisons.

En droit coutumier et jurisprudentiel (common law), une procuration s'éteint automatiquement avec le décès ou la faillite du mandant. L'inaptitude mentale du mandant met aussi fin à la procuration. Une procuration n'est donc pas un outil efficace pour gérer les affaires d'une personne dès lors que l'inaptitude mentale survient. Il en résulte que les procurations perpétuelles ont été reconnues par toutes les provinces canadiennes comme des procurations qui subsistent au-delà de l'inaptitude mentale du mandant. Si dans l'avenir le mandant devient mentalement inapte, la procuration demeure en force.

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* Traduit de l'anglais par Me Nathalie Bernard, LL.M (Dalhousie University), LL.B (Dalhousie University, LL.B (Université Laval).

Procuration contingente

La plupart des provinces canadiennes qui reconnaissent les procurations perpétuelles acceptent aussi la possibilité que la procuration n'entre en vigueur *seulement* si un événement futur survient. Cela reporte donc l'exercice des pouvoirs du mandataire jusqu'à ce que l'événement futur se produise. La procuration est donc considérée comme dépendante d'un événement futur. L'événement futur ou la contingence spécifiée le plus souvent dans les procurations est l'inaptitude mentale du mandant. Si la procuration perpétuelle est contingente, cela doit être explicitement prévu. Si cette mention *n'apparaît pas* explicitement, la procuration perpétuelle entre en vigueur dès sa signature.

Pour plusieurs, le caractère contingent d'une procuration crée de la confusion. En Nouvelle-Ecosse, les procurations contingentes sont principalement utilisées par les compagnies de fiducie. La validité juridique des procurations contingentes en Nouvelle-Ecosse fait l'objet de débats parce que la *Loi sur les procurations* ne contient aucune disposition les prévoyant. Néanmoins, la *Loi sur les procurations* n'interdit pas spécifiquement l'utilisation des procurations contingentes. Il est donc difficile de savoir si les tribunaux de la Nouvelle-Ecosse les déclareraient valides. La question de la validité des procurations contingentes constitue l'un des points principaux traités dans le présent document.

Propositions de réforme préliminaires

La Commission invite le public à lui faire parvenir ses commentaires afin de l'aider dans l'élaboration de recommandations visant la réforme de la *Loi sur les procurations*. Plus particulièrement, la Commission invite le public à lui faire parvenir ses commentaires sur les propositions de réforme préliminaires décrites ci-dessous :

- Un mandataire doit être : mentalement apte et majeur (majorité présentement fixée à 19 ans), le Curateur public (Public Trustee) ou une institution financière. Le mandataire ne peut être un failli non libéré.

- Le mandant devrait pouvoir nommer plusieurs mandataires pour agir en son nom. Si plusieurs mandataires sont nommés, ils devront agir conjointement à moins que la procuration perpétuelle ne prévoie des dispositions à l'effet contraire. Si un mandant nomme plusieurs mandataires pour agir de concert, ces mandataires doivent prendre les décisions d'un commun accord à moins que la procuration perpétuelle ne prévoie des décisions prises par majorité des voix. Un mandant peut aussi nommer des mandataires successifs.

- Dans le cas où un mandant serait incapable de lire ou d'apposer sa signature à une procuration perpétuelle, une personne autre que le mandataire ou que le conjoint du mandataire, devrait pouvoir signer au nom du mandant.

- Dans le cas où un mandant serait incapable de lire ou d'apposer sa signature à une

procuration perpétuelle, cette dernière doit être signée en présence du mandant, suivant ses instructions et en présence aussi d'au moins deux témoins présents en même temps. Toutes les procurations perpétuelles doivent être faites devant deux témoins, présents en même temps, lesquels ne peuvent être:

1. le mandataire ou le conjoint du mandataire;
2. le conjoint du mandant;
3. un enfant du mandant ou toute personne pour laquelle le mandant démontré sa claire intention de la traiter comme son enfant;
4. une personne qui est inapte mentalement;
5. une personne mineure (actuellement l'âge de la majorité est fixé à19 ans).

- L'expression "conjoint" devrait inclure le conjoint de fait du même sexe ou du sexe opposé.

- L'enregistrement des procurations ne devrait pas être obligatoire.

- La législation relative aux procurations perpétuelles devrait traiter des procurations perpétuelles contingentes dans un chapitre distinct. Dans le cas où l'entrée en vigueur d'une procuration perpétuelle dépend de la capacité mentale, deux certificats médicaux devraient être requis afin de prouver que la contingence s'est produite.

- Dans le cas où le mandant d'une procuration perpétuelle deviendrait inapte mentalement, le mandataire devrait avoir l'obligation d'agir:
  1. S'il sait ou devrait raisonnablement savoir que le mandant est mentalement inapte; et
  2. S'il a accepté la gestion des biens du mandant ou a conclu une entente avec le mandant à cet effet.

- La législation devrait permettre la divulgation d'informations confidentielles concernant la santé mentale et générale du mandant aux fins limitées de déterminer si la contingence sous la forme de l'inaptitude mentale s'est produite.

- La législation devrait spécifier que la relation entre le mandant et le mandataire est de nature « fiduciaire » et que le mandataire a donc l'obligation, entre autres, de rendre compte, d'agir avec diligence, de ne pas faire de profits cachés, et de ne pas agir contrairement aux intérêts du mandant.

- Un mandataire devrait avoir l'obligation d'user du jugement et d'agir avec la diligence d'une personne raisonnablement prudente dans les mêmes circonstances.

- Dans le cas où une procuration perpétuelle prendrait fin ou serait nulle, un mandataire ne devrait pas être tenu responsable pour avoir agit de bonne foi s'il ignorait que ses pouvoirs avaient pris fin ou étaient nuls et s'il n'avait pas de motifs raisonnables de croire que ses pouvoirs avaient pris fin ou étaient nuls.

- La législation devrait prévoir spécifiquement qu'une procuration perpétuelle autorise les paiements à des tiers, particulièrement les dons de bienfaisance et les dons protocolaires. Si la procuration perpétuelle n'autorise pas de tels paiements, un mandataire ne peut les effectuer. Sous réserve des dispositions de la procuration perpétuelle, un mandataire devrait pouvoir subvenir aux besoins raisonnables des dépendants du mandant.

- Le mandant devrait avoir le droit d'exiger que le mandataire rende compte à tout moment. Si le mandant est inapte mentalement, le mandataire devrait avoir l'obligation de rendre compte à la demande de la personne nommée à cet effet dans la procuration perpétuelle. Dans les cas où le mandant n'a nommé personne à cet effet, si la personne nommée est le mandataire ou son conjoint, ou si la personne nommée est décédée ou mentalement inapte, le mandataire devra rendre compte annuellement au parent le plus proche du mandant. Les tribunaux devraient avoir discrétion pour émettre une ordonnance de rendre compte. Un mandataire devrait aussi avoir l'obligation de rendre compte lorsque la procuration perpétuelle prend fin.

- Dans l'éventualité où les pouvoirs d'un mandataire en vertu d'une procuration perpétuelle ont pris fin, les actes du mandataire devraient être valides et avoir force exécutoire en ce qui concerne les tiers qui ignoraient que les pouvoirs du mandataire avaient pris fin.

- Les tribunaux devraient avoir le pouvoir de remplacer un mandataire sur demande d'un tiers intéressé. Les tribunaux devraient aussi avoir le pouvoir de modifier les conditions d'une procuration perpétuelle à la demande d'un tiers intéressé.

- Un mandataire devrait pouvoir se démettre de ses fonctions en donnant un avis au mandant. Dans le cas où le mandant deviendrait mentalement inapte et que le mandataire avait assumé la gestion des biens du mandant ou avait conclu une entente à cet effet avec le mandant, le mandataire doit faire une demande devant les tribunaux afin d'être démis de sa fonction.

- Une procuration perpétuelle devrait prendre fin si elle est révoquée par le mandant. Sous réserve du pouvoir des tribunaux de modifier les conditions d'une procuration perpétuelle, comprenant le droit de remplacer le mandataire, une procuration perpétuelle devrait prendre fin aussi dans les cas suivants :
  1. le décès du mandant;
  2. le décès du mandataire ou son inaptitude mentale;
  3. la démission du mandataire;
  4. l'écoulement du période de temps spécifiée dans la procuration perpétuelle ou la non matérialisation d'un événement spécifié dans la procuration perpétuelle; ou
  5. la nomination d'un gardien en vertu de la *Loi sur les personnes inaptes.*

- La faillite du mandant ne devrait pas automatiquement mettre fin à la procuration perpétuelle puisque le mandataire peut représenter les intérêts du mandant durant les procédures en matière de faillite.

La Commission invite le public à lui faire parvenir ses commentaires sur la question de savoir si

une procuration perpétuelle devrait être accompagnée d'un Certificat de consultation juridique afin d'être valide. Ce Certificat contiendrait une déclaration à l'effet que le mandant a signé (ou a reconnu avoir signé) la procuration perpétuelle en présence d'un avocat, que le mandant reconnaît que la procuration perpétuelle fut librement signée et que le mandant semblait comprendre la nature et la portée du document.

Iapjiw Lawyere'wiktmaj Wen Nopa Sko'sia

Summary*

Nipniku's 1997ek, Law Reform Kmisn Ujit Nopa Sko'sia poqtlukwatkis uji koqaja'tn tplutaqn tan maliaptitew enduring powers of attorney, Nopa Sko'sia kekkunk Powers of Attorney Act tan asite't, enduring powers of attorney. Katu jipalute'tasik mita mu tepianuk etek tan koqajeuksin wen. Pantetek ka'qn tan wen tli opla'laten. Aq elt mimajuinu'k tani elitasuala'tiji enduring powers of attornia, mektmi'tij tlian pasik legalewilin attornial tan tujiw wen elwe'wiej. Kmisn telaptik mu tepjiknmuk Legislation msit koqowey nikey tan tel wikasik. Kmisn elapij'kisi ikalan tani mimajuinu e'wmitij enduring power of attorney. Kmisn wetkik tplutaqn sasewa'tasin klaman mimajuinu'k tel sutaqatitij tla'sitew.

Apjiw Tel Lukwek (Powers of Attorney Generally)

Power of attorney na li'kele'wik wikatikn tan asite'lmatl mimajuinu'l kisna kompani nsitmalsewan ktikl mimajuinul tan tujiw ketui ntui'skelij wtmotaqn kisna pas natali maliaptimilij. Wula tan nekem akase'walut telui'tut "attorni". Tan akasewa'teket telui'tut "donor". Tapuamu'kl powers of attorney: General powers asite'lmatl attornial alsumsilin tela'tekelij. Limited powers na attorni mu teli alsumsik, pasik apjiw suliewey maliaptik kesnukwalij donoral aq mu kisi i'milik.

Ula komminewik tplutaqn, kaqiaq power of attorni simtuk donor tan tujiw nepkk kisna kaqnmaj wijey pa ap eluwewièj. Mu tal wulasitnuk power of attorney tan tujiw wen eluwewiej. Na wej tliaq kanataewe'l provinsl asite't "enduring" powers of attorni siawi lukwen tlia donor mu nuku koqajatpaq.

Eskipesik Powers of Attorney (Contingent)

Suel msit kanataewe'l Provinsl tan asite'tmititj enduring powers of attorni ankite'tmitij ula power of attorni lukwetew pasik nataliaq. Eleketl attornial s;kmalin misoqo nataliaq. Power of attorney na nuku teluem "Eskipesik" misoqo nataliaq. Mènuaqasik enduring power of attorni "Eskipe'sin" koqajatasis. Katu mu koqajuikasinuk na lukwes teli nqase'kk si'gnewa'tasik.

Pukwelkik mimajuinu'k mu nestmi'tik kontingent powers of attorni, Nopa Sko'sia kes tle'k trust kompani'l pasik e'wmitij. Mektasik Nopa Sko'sia li'kle'win kontingent powers of attorni, muta a mu nas wikasinu powers of attorni actiktuk. Pas katu mu ewikasitnuk mu kisi eywasin powers of attorni actiktuk. Na weji mu ketlewenuk Nopa Sko'sia kourtl li'kle'wite'tminow. Na weji kesi mamuni ankaptasik ula wi'katikniktuk.

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* Mi'kmaw translation by: Katherine Sorbey, Listuguj Qc.

E'wsi ilsutaqnn ujit koqajataqn

(Preliminary Suggestion for Reform)

Kmisn elitasualaji apoqnmakuno mimajuinu'tan tli koqaja'ten powers of attorni act. Apj me tan kmisn ki's kisi ilutkl, ula elmi wikasikl:

- Attorni nuta't: koqajatpan aq tepi puna'n (19 yrs. & older) Public Trustee'e'win; suliewey nujo'tk Institution aq attorni tan mu wajuek tetuoqn.

- Donor tepawtis kisi luko'kkn attornia ketuitl te'silij mnuekej ateli'tij aq newtejit, miamuj maw lukutitaq mi'soqo pilu'sitekek enduring power of attorni. Maw lukutitij attorniaq miamuj pa mawi wulte'taq koqowey kisna wekaw enduring powers of Attorni kiaskiw tluek mu nutanuk msit newte tl te'tminow koqowey. Donor kis tepkis sumata attornia.

- Donor mu nta'kitjek kisna signewa'tuk wtuisnim enduring power of attorniktuk, piluey natuen, katu mu attorni kisna wte'piteml attorni, kisi apoqnmuatal donoral aq signe'watekeywatal.

- Donor mu nta' kitjek kisna signewa'tuk enduring power of attorney, miamuj donor eyk, donor ilsutk, aq miamuj donor eyk, donor ilsutk, aq miamuj tapusijik witnessaq eykkik same time. Msit enduring powers of attornie'l wi'katiknn miamuj tapusijik witnessewa'tutitl aq tetpiw eykik aq ki'tk mu:

    1. Attorni kisna wte'piteml
    2. Donor wkisikuml kisna wte'piteml
    3. Donor unijan kisna unijanewite'lmatl
    4. Tan wen mu pujatpaq
    5. Tan wen mu tepipuna'q (19)

- Tepawtis wiaqi wi'tuksin tan wen toqa'mayoq kisna toqonasioq tlia ji'nemuioq kisna e'pitewioq ki'tkk

- Mu tl tenus miajuj registre'watun enduring power of attornis.

- Enduring powers of attorni lejisle'tion pasik maliaptis kontinjint powers of attorni piluey lejisle'tion. L'pa na enduring power of attorni li kontinjinte'win tan tetutatpalij wenl, tapusijik malpale'witewe'k wi'katiknk nuta'tiss klaman kjijiten kiaskiw kontinjinci kis tliaq.

- Tan tujiw donor mu nuku nestuatpaq, attorni tl tess koqajateken:

    1. el pa na kjijiaj donoral awnasielitl; aq
    2. kejitoqip nikanpukuit siawi maliaptiss koqowey.

- Legislation tepawtiss asite'tmin sea'tasin klusuaqn tan tetutaskmalij donoral klman kjijiten kekkunatl attornial tan nujeyatl.

- Legislationiktuk tl tess wi'tasin na attorni nuji "ankweywatl" donoral nikey, aq la attorni mu kisi wsmuktimuk tan tel pukuij: tleywan donoral tan nekem pewat tleyuksin.

- Attorni miamuj tl maliaman donoral, tan nekem tl maliamsis.

- Kaqlukwej attorni a, tepawtiss mu kisi ajkna'luksin, teli kpkije'k tetapua'tekes aq mu kejituksip kaqlukwetow.

- Legisletion tepawtis tluek asite'taqn iknmuuksit attorni, klaman tetuo'qnn apankitasital, aq kisi salitewa'teken tami se'kk. Mu ku'knmuk asite'taqn ma kis tla'tekek Katu a majukwat tan enduring power of attorni tel wikasik, kisi ntui'sketus donoral wtmo'taqn aq uji mimaju'nas dornoral wikma tan elita'sualji.

- Tepawtiss donor kisi kwilutmin aq kinua'tuksin tan tel pukuik wtmo'taqn tan pa tujiw. donor etli pnej wn'jek, attorni tepawtiss miamuj kinua'tuan tan app pilue'l donor ewi'tapnn nespi ankweyatl. Mu i'muk wen tan maliaptik donoral wtmo'taqn, na amuj attorni kinua'tuataq tan donor maw kikjakumaji. Kourtiktuk tl sutasis, kourt tepite't nuta'q iloqaptasin donor wtmo'taqn attorni ktu kaqlukwej miamuj nekem muska'tus tan tel pukuik koqowey.

- L'pa na tliaq attorni mena'lus toqo mu kejituk, ikalkuss attorni act muta kejitukop mena'lujek.

- Wjikesi'j wen piluey kis sase'walan attornial, kourtiktuk wji iknemuanes assite'taqn. Aq kourtl asite'lmaness kisi piltu sutminow enduring power of attorni.

- Attorni ktu punlukwej, nikan kinuatuas donoral. Mu nsituatpalik donoral na miamuj attorni kourtiktuk wjikessis kisi punlukwen.

- Tl kaqiass enduring powers of attorni donor mina'laj wulte'tk koqowey tan kourtiktuk tel pukvik kisna pilu'sutasik enduring powers of attorni, maw kourt pilue'l attornial ika'lan, Tl kaqiass enduring powers of attorni tan tujiw:

    - donoro'q nepkaq;
    - attorni npikk kisna eluwewiet,
    - attorni alui-te't lukowaqn
    - oqa'qq na'kwek kisna telitpiaq tan tel sutasikip enduring powers of attorniktuk.
    - incompetent persons actiktuk piluey nikanpukualut. Prokewij, donor, mu tl tenuss attorni kaqlukwen, muta me' kisi apoqnmuas donoral pankruptewilij.

Kmisn wejiket nuta'tn certificate of independent legal advice-ey wi'katikn ujit enduring power of attorni valide'win. Ula certificate of independent legal advice-ey wi'katikn wiaqtetal klusuaqnn telwikasikl donor sin'newa'tekes (kisna nenwite'tk kis sin'newa'tekep) la enduring power of attorni aq eykip lawyer, ula donor nenwite'tk mu wen asimaqapnn si'nnewa'to'q enduring power of attorni, aq na tujiw teli ankamkusis nsitmin tan tlit pia'tew koqowey.

I INTRODUCTION

1. The project

In September 1993, the Law Reform Commission of Nova Scotia released a Discussion Paper which considered the law relating to adult guardianship in Nova Scotia.[1] The Commission recommended numerous changes to the way guardians are appointed for people found by the courts to be "mentally incompetent".[2] A "guardian of the estate" is a person appointed by the court to handle an adult's financial affairs. A "guardian of the person" is a person appointed by the court to look after an adult's personal affairs. During consultations on the adult guardianship project, the Commission concluded that guardianship of adults should only be used as a "last resort", after all other alternatives have been tried. It was clear that better alternatives were needed to avoid court applications for guardianship.

The Commission went on to study alternatives to "guardianship of the person". In November 1994, the Commission released a Discussion Paper on living wills. The Commission suggested reform to the law which allows someone else to make personal and health care decisions when a person is no longer able to do so.[3] The Commission did not, however, consider alternatives to "guardianship of the estate" as a separate project area. This was partly because Nova Scotia already had a *Powers of Attorney Act*[4] which allows for enduring powers of attorney.

The Commission has since learned of concerns regarding enduring powers of attorney. There are concerns that the current scheme lacks adequate procedural safeguards to prevent financial abuse of people who appoint someone to make financial decisions on their behalf. People who rely on enduring powers of attorney have questions about when enduring powers come into effect. They often wonder whether enduring powers of attorney are legally valid documents. As a result of these concerns, in June 1997 the Commission began to study the law relating to enduring powers of attorney. The Commission concluded that the legislation, as currently drafted, fails to address concerns raised. This Paper will focus on safeguards to protect people giving enduring powers of attorney and suggest ways in which the law can be changed to ensure that a person's wishes can be implemented more effectively.

2. Legal language

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[1] Law Reform Commission of Nova Scotia, *Adult Guardianship in Nova Scotia: Suggestions for Reform of the Incompetent Persons Act*, Discussion Paper (Halifax: Law Reform Commission of Nova Scotia, September 1993).

[2] This document will, for the most part, use the terms mentally competent or incompetent in order to reflect current legislative language although mentally capable or incapable is a less pejorative way to describe an adult not capable of decision-making; see Law Reform Commission of Nova Scotia, *Adult Guardianship in Nova Scotia: Suggestions for Reform of the Incompetent Persons Act*, *ibid*.

[3] Law Reform Commission of Nova Scotia, *Living Wills in Nova Scotia*, Discussion Paper (Halifax: Law Reform Commission of Nova Scotia, November 1994); and Law Reform Commission of Nova Scotia, *Adult Guardianship and Personal Health Care Decisions*, Final Report (Halifax: Law Reform Commission of Nova Scotia, November 1995).

[4] R.S.N.S. 1989, c. 17.

This Discussion Paper attempts to present legal information as clearly as possible so that people who do not have legal training can understand and comment on the Commission's suggestions for reform. There are still some situations where the language relates to specific legal and technical concepts and the words used will not be familiar to everyone. This section provides definitions of the words used in this Discussion Paper.

Act - Law made by elected members of government. Also referred to as "statutes" or "legislation" and includes regulations.

Adult guardianship - The law relating to the appointment of guardians to make another person's decisions, either financial, personal or both.

Advance health care directive - A legal document in which a person sets out how their health care is to be handled in the event of their incapacity. They may appoint someone to make health care decisions for them (i.e., a proxy) and/or set out specific instructions or general principles about how their health care is to be handled.

Affidavit - A written statement made by a person who signs and either swears to or affirms the truthfulness of the statements made.

Attorney - A person or company who is given authority to act on behalf of a person under a power of attorney.

Common law - Law developed over the years by judges when making decisions in court. These decisions are relied upon by other judges in making decisions in other cases.

Common law relationship - A spousal type relationship between two people who did not go through a legally recognized form of marriage.

Deed - A document which transfers title to land.

Donor - A person who grants authority to another person or company to act on their behalf under a power of attorney.

Enduring power of Attorney - A power of attorney which "endures" or continues to be effective beyond the donor's mental incapacity. See also "power of attorney".

Estate	-	Everything a person owns at the time of their death or incapacity.
Execute	-	The process of signing a will or other legal document such as a power of attorney.
Legislation	-	Law made by elected members of government. Also referred to as "statutes" or "acts" and includes regulations.
Living will	-	A type of advance health care directive in which a person sets out specific instructions or general principles about how their health care is to be handled in the event of their incapacity. See also "advance health care directive".
Power of Attorney	-	A legal document in which a person (the "donor") gives authority to a person or company (the "attorney") to act on the donor's behalf. The attorney is usually given authority to deal with or dispose of the donor's property. A power of attorney does not deal with health care issues. See also "advance health care directive".
Public Trustee	-	A government office that may be appointed to, among other things, act as a guardian of an adult who is found to be mentally incompetent.
Statute	-	Law made by elected members of government. Also referred to as "legislation" or "acts" and includes regulations.

II GENERAL INFORMATION

1. Powers of attorney

A power of attorney is a legal document that authorizes a person or company to act on behalf of another person to deal with or dispose of their property. The person receiving the power is called the "attorney"[5] and the person granting the power is called the "donor". There are two types of powers of attorney: a general power and a limited power. A general power of attorney can be all-encompassing and can allow the attorney to make virtually any type of decision relating to the donor's property.[6] A limited power of attorney is more restricted. A limited power of attorney is usually used to complete a specific financial transaction when a person is on vacation, is ill or is otherwise unable to attend in person. It may be limited in duration (i.e., for a specific period of time) or as to the type of power it gives the attorney.

Powers of attorney are governed by the common law of agency and the relationship is that of a principal and agent. The principal (donor) appoints the agent (attorney) to act on the principal's behalf, specifying what may or may not be done by the agent. An attorney, as an agent of the donor, is viewed as having a fiduciary duty to the donor. This means that the attorney must act only in the best interests of the donor. It also means that an attorney is prevented from using the donor's property for their own benefit and that they must resolve conflicts of interest in favour of the donor.[7] An attorney must also exercise diligence and prudence in the management of the donor's property.

2. Ending a power of attorney

A donor can terminate a power of attorney by notifying the attorney that his or her powers are revoked. The attorney can also terminate a power of attorney by renouncing his or her position as attorney.[8] At common law, a power of attorney automatically terminates on the death or bankruptcy of the donor.[9] Thus, unlike a will, which takes effect on death, a power of attorney can only be used during the donor's lifetime because it terminates on the donor's death. At common law, the mental incapacity of the donor also ends the power of attorney.[10] As a result,

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[5] An "attorney" need not be a lawyer.

[6] It does not, however, permit the attorney to make a will on behalf of the donor.

[7] F.M.B. Reynolds, *Bowstead on Agency*, 15th ed. (London: Sweet and Maxwell, 1985) at 45.

[8] An attorney renounces his or her appointment by notifying the donor.

[9] The only exception is an irrevocable power of attorney, that is, one which is expressed to be irrevocable and is given to secure proprietary or other interest of the attorney; see *Wilkinson* v. *Young* (1992), 25 D.L.R. (3d) 275 (Ont. H.C.).

[10] *Drew* v. *Nunn* (1879), 4 Q.B.D. 661 and *Yonge* v. *Toynbee*, [1910] 1 K.B. 215.

at common law there is no concept of an "enduring" power of attorney which continues to operate after the donor's incapacity. This is a significant deficiency since many people wish to plan for their incapacity by providing for a power of attorney to operate when they are unable to make their own decisions. All provincial legislatures responded to this gap in the common law by amending their laws to allow for "enduring powers of attorney", that is, ones which "endure" beyond the person's mental capacity. An enduring power of attorney does not end if the donor loses mental capacity. An enduring power of attorney takes effect as soon as it is signed and witnessed unless it states otherwise. If the donor states that the attorney may not act unless the donor becomes mentally incompetent, this is considered to be a "contingent" enduring power of attorney.[11] In this Paper, an enduring power of attorney will be referred to as an "EPA".

3. Planning for incapacity

Most people are aware of the importance of estate planning, including the drafting of a will.[12] The need to consider who will manage a person's affairs in the event of their mental incapacity is also an integral part of estate planning. An EPA allows for continued management of a person's assets during incapacity. An advance health care directive allows for the continued management of their personal affairs during incapacity. If a person does not have either of these documents, they may be risking an expensive, time-consuming and stigmatizing application for the appointment of a guardian under Nova Scotia's *Incompetent Persons Act*. [13]

The issue of advance health care directives has been dealt with extensively by the Commission in earlier reports.[14] The rest of this Paper will deal with EPAs as an approach to planning for incapacity.[15]

An EPA is a power of attorney which continues to have effect, or "endure", despite the on-set of mental incompetency and the donor's consequent inability to direct, monitor, and supervise the actions of the attorney. It will remain in effect if, at the time it is signed, it contains a statement

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[11] Discussed in II.4 below.

[12] A national survey by Decima Research, however, found that 48.7% of Canadian adults have no will, and 52.9% have not done any estate planning; see "The Need for Estate Planning" (1998) 39 Will Power at 8 (Newsletter of CCH Canadian Limited).

[13] R.S.N.S. 1989, c. 227.

[14] *Living Wills in Nova Scotia* and *Adult Guardianship and Personal Health Care Decisions*, *supra* note 3.

[15] Other alternatives for incapacity planning such as the appointment of a guardian, the use of trusts, agency arrangements, gifting, joint property, bank powers of attorney as well as appointing a representative payee under federal legislation will not be considered in any detail in this Report. For a review of these useful but limited approaches to incapacity planning see D.C. Simmonds, "Planning for Incapacity" 27 Estates and Trusts Reports 116 at 118-126.

that the attorney should continue to act despite the incompetency of the donor.[16]

Every province in Canada now recognizes EPAs.[17] Much of the legislation, such as that in Nova Scotia, is similar to the *Uniform Powers of Attorney Act* adopted by the Uniform Law Conference of Canada (U.L.C.C.) in 1978.[18] This EPA legislation contains few formalities and safeguards and is very brief. Nova Scotia's *Powers of Attorney Act* is only three pages long and does little more than validate the use of EPAs.

Nova Scotia's *Act* states:

> *A power of attorney, signed by the donor and witnessed by a person who is not the attorney or the spouse of the attorney, that contains a provision expressly stating that it may be exercised during any legal incapacity of the donor, is*
>
> *(a) an enduring power attorney;*
>
> *(b) not terminated or invalidated by reason only of legal incapacity that would, but for this Act, terminate or invalidate the power of attorney; and*
>
> *(c) valid and effectual,*
>
> *subject to any conditions and restrictions contained therein that are not inconsistent with this Act.*[19]

Until May 25, 1988, when the *Powers of Attorney Act* came into effect, any power of attorney made in Nova Scotia became void upon the donor's incapacity. As a result, any power of attorney executed in Nova Scotia prior to May 25, 1988 is not enduring and should not be relied upon in the event of the donor's incapacity.

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[16] R.M. Gordon and S.N. Verdun-Jones, *Adult Guardianship in Canada* (Carswell: Toronto, 1992) at 3-114.

[17] Alberta, *Powers of Attorney Act*, 1991, c. P-13.5 and *Personal Directives Act*, S.A. 1996, c. P-4.03 as amended by 1997, c. 18; British Columbia, *Power of Attorney Act*, R.S.B.C. 1979, c. 334; Manitoba, *Powers of Attorney and Mental Health Amendment Act*, S.M. 1996, c. 62, (in effect April 7, 1997*);* New Brunswick, *Property Act*, R.S.N.B. 1973, c. P-19; Newfoundland, *Enduring Powers of Attorney Act*, R.S.N. 1990, c. E-11; Nova Scotia, *Powers of Attorney Act*, R.S.N.S. 1989, c. 17; Ontario, *Substitute Decisions Act*, 1992, S.O. 1992, c. 30; Prince Edward Island, *Powers of Attorney Act*, R.S.P.E.I. 1988; Quebec, *Civil Code of Quebec*, S.Q. 1991, c. 64; and Saskatchewan, *Powers of Attorney Act*, S.S. 1996, c. P-20.2.

[18] Uniform Law Conference of Canada, *Proceedings of the Sixtieth Annual Meeting*, *Appendix O* (St. John's, Newfoundland, August 1978) at 233.

[19] Section 3.

The mental capacity required to be a donor of an EPA includes the ability to understand:

- the nature and extent of his or her property and financial affairs,
- that the attorney may exercise all the powers in the life time of the donor that the donor can himself or herself exercise with respect to the matters set forth in the document, unless and until the document is revoked,
- that the all-embracing terms of the document give the attorney the power to deal with everything the donor owns, and
- that the donor will lose the right to revoke the document in the event that he or she becomes mentally incapable and that it will likely remain in effect until their death.[20]

Most provinces do not require registration of an EPA with a Public Trustee or other government office or agency. There is thus no formal system for the monitoring or supervision of an attorney who is acting for a mentally incompetent person. Most provinces do, however, provide for an interested party to apply to court to require an attorney to submit their accounts to the court for review and approval.

4. Contingent powers of attorney

Most Canadian legislation which allows an EPA to endure beyond a person's mental capacity also contemplate the possibility that it will come into effect *only* upon a future contingency, most often the donor's incapacity. This means that the attorney cannot act until the future event occurs.[21] This must be explicitly stated in the EPA. If it is *not* explicitly stated, the EPA takes effect from the moment it is signed.

There remains a certain amount of confusion among lawyers with respect to contingent powers of attorney and it appears they are used primarily by trust companies. In Nova Scotia, the legal validity of contingent powers of attorney has been questioned because the *Powers of Attorney Act* contains no specific provisions allowing them.[22] Neither, however, are they prohibited. It is therefore unclear whether a Nova Scotia court would recognize them. The issue of the validity of contingent powers is one of the central issues in this Paper. The Commission believes contingent powers of attorney should be expressly recognized and provided for in the legislation.

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[20] *Godelie* v. *Public Trustee* (1990), [1991] 39 E.T.R. 40 (Ont. Dist. Ct.); see also *Re K*, *Re F*, [1988] 1 All E.R. 358 (Ch. D.).

[21] Some jurisdictions refer to these as "springing" powers of attorney; see e.g. Manitoba Law Reform Commission, *Enduring and Springing Powers of Attorney, Report No. 83* (Winnipeg: Manitoba Law Reform Commission, March 1994) [hereinafter Manitoba Report].

[22] See W. Ripley, "Practical Estate Planning Options for Non-Traditional Couples" (Paper presented to the CBA-N.S. Professional Development Conference, 30 January 1998) at 11. For an opposing view see R.J. Clarke, "Advising the Elderly and Their Families" (Paper presented to the CBA-N.S. Professional Development Conference, 1995).

This is discussed at length in Part III below.[23]

[23] Issue 7.

III SUGGESTIONS FOR REFORM

Making an EPA

1. Choosing an attorney

The choice of who to appoint as attorney, particularly for an EPA, is a very important one. The person must be trustworthy, ethical and competent. Nova Scotia legislation does not contain any restrictions on who can be an attorney.[24] In practice, however, attorneys are adults, trust companies or the Public Trustee. The wording of the legislation could be problematic because the common law suggests that any mentally capable person can act as an attorney, even a child.[25] The Commission believes that a person should be an adult in order to act as an attorney. This is consistent with the approach taken by many provinces that have recently revised their enduring powers of attorney legislation. Ontario's *Substitute Decisions Act 1992*[26] requires that a person be at least 18 years old to act as an attorney. It also permits the Public Guardian Trustee (PGT) to act if it agrees to do so.[27] In Newfoundland, an attorney must be 19 years of age. Similarly, the Alberta legislation requires that an attorney be an adult at the time the EPA is executed although the Alberta Law Reform Institute did not believe an age restriction was necessary.[28] In Manitoba, the attorney must be an adult and mentally competent and not an undischarged bankrupt.[29] Under the legislation pending in British Columbia,[30] the attorney must be an adult, the Public Trustee, or a credit union or trust company.

In terms of mental competency, at common law a grant of attorneyship to an incompetent person

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[24] Neither does the U.L.C.C. draft *Act* or legislation in Saskatchewan, New Brunswick, and Prince Edward Island.

[25] J. Frankovic *et.al.*, *Canadian Estate Administration Guide* (North York: CCH Canada Limited, 1996) vol. 1 at 20,005.

[26] S.O. 1992, c. 30.

[27] Section 7(3).

[28] Alberta Law Reform Institute, *Enduring Powers of Attorney*, *Report for Discussion No. 7* (Edmonton: Alberta Law Reform Institute, February 1990) at 601-661 [hereinafter Alberta Report for Discussion]. Nor did it believe that mental competency or bankruptcy would disqualify someone from acting as an attorney although both would cause the EPA to terminate.

[29] This is also the case in England and New Zealand.

[30] British Columbia's *Representation Agreement Act*, R.S.B.C. 1993, c. 67 has not been proclaimed and therefore the *Powers of Attorney Act*, R.S.B.C. 1979, c. 334, is the law at present. Under the new legislation EPAs are replaced with "representation agreements" which combines elements of EPAs and advance health care directives. The new *Act* no longer refers to "attorneys" but rather refers to those appointed under a representation agreement as "representatives".

is invalid.[31] It may be helpful, however, for the legislation to specifically state that an attorney must be mentally competent in order to clarify that the EPA terminates when an attorney becomes incompetent. The Public Trustee in Nova Scotia is given authority in the *Public Trustee Act*[32] to act as an attorney. It would be useful to also include this in the EPA legislation. This would, among other things, make people more aware of the Public Trustee's office.

There are also concerns with allowing undischarged bankrupts to deal with trust funds. As stated by the English Law Commission: "The bankrupt attorney might find irresistible the opportunity presented by his attorneyship to use the donor's assets to improve his position".[33] The Commission is of the view that an attorney should not be an undischarged bankrupt.

The Commission suggests:

An attorney must be:
- mentally competent and of the age of majority (presently 19 years of age),
- the Public Trustee, or
- a financial institution.

An attorney must not be an undischarged bankrupt.

2. Joint and alternate attorneys

Nova Scotia's *Powers of Attorney Act* refers to "an" attorney. This would seem to preclude joint attorneys. The *Interpretation Act*,[34] however, states that the singular includes the plural and vice versa. The *Powers of Attorney Act* can therefore be construed as allowing more than one attorney. This is consistent with the common law which permits a donor to appoint more than one attorney who must act jointly. At common law, unless the donor has indicated otherwise in the EPA, joint attorneys must reach unanimous agreement before they can take any action.[35]

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[31] *Bowstead on Agency*, *supra* note 7 at 33.

[32] R.S.N.S. 1989, c. 379.

[33] Manitoba Report, *supra* note 21 at 11 [citing The Law Commission (Eng.), *The Incapacitated Principal* (Report #122, 1983) 23].

[34] R.S.N.S. 1989, c. 235, s.19(i).

[35] *Bowstead on Agency*, *supra* note 7 at 49.

Also, if one of the attorneys is unable or unwilling to continue to act, the attorneyship ends.[36]

Ontario's new legislation allows for two or more attorneys and indicates that if two or more people are named as attorneys, they shall act jointly, unless the power of attorney states otherwise.[37] The Alberta legislation allows for the appointment of joint or alternate attorneys. If alternate attorneys are appointed, the appointment of one attorney is conditional on the ending of the appointment of the other.

Manitoba legislation also permits a donor to appoint any number of persons to act jointly or successively. Unlike Alberta and Ontario, however, where the EPA fails to indicate whether the attorneys are acting jointly or successively, they must act successively. The Manitoba Commission was quite critical of joint attorneys and highlighted two major disadvantages:

> *The prospect of stalemate among the attorneys (with the result that no activity takes place) and the fact that the termination of one attorneyship (for example, by the death of one of the attorneys) will terminate the entire power of attorney.*[38]

The Manitoba Commission also recommended that the common law presumption of joint attorneys be reversed. Rather than requiring unanimity, the Manitoba legislation requires a simple majority unless the EPA states otherwise.

The Commission agrees that people should be allowed to name more than one attorney. Many people, especially if they are naming a child as attorney, find it hard to choose only one attorney. Since courts are prepared to grant co-guardianship under the *Incompetent Persons Act*,[39] EPAs should not be more restrictive. If a person names more than one attorney, they should be deemed to act jointly, unless the EPA states otherwise. Joint attorneys must make decisions unanimously unless the donor specifies that they can reach agreement by a simple majority. Even reaching agreement by majority can be a cumbersome process, especially if the attorneys do not live in the same area. In any event, the requirement of unanimity should be included in legislation to ensure donors are fully aware of it.

The Commission believes that a donor should also be permitted to name any number of attorneys who would act successively in the order named. The alternate attorneys would act in the event the first person or subsequent attorneys are unwilling or unable to act. This would avoid some of the problems of joint attorneys while ensuring that there will still be someone to act as attorney.

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[36] Manitoba Report, *supra* note 21 at 2.

[37] Section 7(4).

[38] Manitoba Report, *supra* note 21 at 13.

[39] R.S.N.S. 1989, c. 218.

The Commission suggests:

- A donor should be able to name any number of attorneys to act on their behalf.
- If more than one attorney is named, they must act jointly unless the EPA states otherwise. In other words, they must make decisions by unanimous agreement unless the EPA states that they can make decisions by majority agreement.
- A donor should be able to appoint alternate attorneys to act successively.

3. Signing on behalf of the donor

In some cases, a donor may not be physically able to sign documents. Some provinces expressly allow an EPA to be signed by someone other than the donor, provided they sign in the presence of and under the direction of the donor. New Brunswick's *Property Act,*[40] for example, allows an EPA to be signed by the donor, or be "signed in the name of the donor by another person in the presence and at the direction of the donor".[41] The Alberta Law Reform Institute recommended that a person be permitted to sign for the donor only in situations of "physical incapacity" in order to limit the risk of abuse.[42] This is reflected in the Alberta legislation which requires that the donor be *physically* incapable of signing the EPA.[43] Similarly, British Columbia's *Representation Agreement Act*[44] allows for a person who is physically incapable of signing the agreement to have it signed by someone else.[45]

Manitoba, on the other hand, has a special provision allowing an individual other than the attorney or the attorney's spouse to sign on the donor's behalf where a donor is "incapable of *reading or signing* an EPA".[46] The Commission prefers this approach. If a person is blind, illiterate, or physically incapable of signing their own EPA, someone else should be able to sign it on their behalf. It is fundamental, however, that legislation contain protections

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[40] R.S.N.B. 1973, c. P-19.

[41] Section 58.2(b).

[42] Alberta Report for Discussion, *supra* note 28 at 37.

[43] Section 2(3).

[44] R.S.B.C. 1993, c. 67.

[45] Section 13(4).

[46] Section 10(2) (emphasis added).

against abuse such as those contained in the *Wills Act*.[47] This would include the requirement that an EPA be signed in the donor's presence, at the donor's direction and in the presence of two or more witnesses who are present at the same time.[48]

The person signing on behalf of the donor should also not be the attorney or the attorney's spouse. Consistent with recommendations in other Commission reports, spouse should include common law spouses, whether of the same or opposite sex.[49]

The Commission suggests:

- When the donor is incapable of reading or signing an EPA, an individual (other than the attorney or the attorney's spouse) should be able to sign it on the donor's behalf. The EPA must be signed in the donor's presence, at the donor's direction and in the presence of two or more witnesses who are present at the same time.
- Spouse should be defined to include common law spouse, whether of the same or opposite sex.

4. Witnesses

The *Powers of Attorney Act* requires that a power of attorney be witnessed by a person who is not the attorney or the spouse of the attorney.[50] Although at common law powers of attorney do not have to be witnessed,[51] every province requires that the signing of an EPA be witnessed. The reasons for this requirement were outlined by the Alberta Law Reform Institute:

> *The reasons usually given for this requirement are that it (1) confirms the identity of the donor and the absence of physical duress, (2) minimizes the risk of forgery, (3) impresses upon the donor the seriousness of the proposed action, and (4) provides evidence of authenticity to third parties*

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[47] R.S.N.S. 1989, c. 505.

[48] Section 6, *Wills Act, ibid.*

[49] For example, Law Reform Commission of Nova Scotia, *Adult Guardianship and Personal Health Care Decisions*, Final Report (Halifax: Law Reform Commission of Nova Scotia, November 1995) at 82 and Law Reform Commission of Nova Scotia, *Probate Reform in Nova Scotia*, Discussion Paper (Halifax: Law Reform Commission of Nova Scotia, March 1998) which defines spouse as: "a person of the same or opposite sex with whom the person has a close personal relationship that is of importance to both of them" at 52.

[50] Section 3.

[51] See Newfoundland Law Reform Commission, *Working Paper on Powers of Attorney* (St. John's: Newfoundland Law Reform Commission, November 1987) [hereinafter Newfoundland Report].

relying on the power of attorney.[52]

The various jurisdictions differ, however, with respect to who *cannot* witness an EPA and the number of witnesses that are required. Most EPA statutes contain fairly narrow restrictions on who cannot witness an EPA and the attorney or the attorney's spouse are usually excluded from being witnesses. In New Brunswick, however, an EPA can be witnessed by any adult person "other than the donee" (i.e., other than the attorney).

British Columbia's *Representation Agreement Act* is unusual in that the agreement must be executed in the presence of two witnesses as well as each attorney[53] named in the agreement.[54] Ontario legislation also requires that an EPA be executed in the presence of two witnesses and it precludes the following people from acting as witnesses:

1. *The attorney or the attorney's spouse or partner.*
2. *The donor's spouse or partner.*
3. *A child of the donor or person whom the donor has demonstrated a settled intention to treat as his or her child.*
4. *A person whose property is under guardianship or who has a guardian of the person.*
5. *A person who is less than 18 years old*.[55]

By requiring that witnesses be 18 years of age and not subject to a guardianship order, the Ontario legislation addresses the concern that witnesses be mentally capable of understanding what they are doing. As well, the Ontario legislation excludes those with a very close relationship to the donor, such as the donor's spouse or partner or the donor's child, from acting as witnesses. This is presumably to prevent those who may have a financial interest in the donor's estate from exerting undue influence on the donor.

The Alberta Law Reform Institute also recommended that those ineligible to act as witnesses include the attorney and the attorney's spouse (including "common law" spouse).[56] While it did not favour further expanding the class of ineligible witnesses, it recommended that the EPA be witnessed by a lawyer who would sign a Certificate of Legal Advice.[57] The spouse of the lawyer who signs the Certificate of Legal Advice is also excluded from being a witness to the EPA.

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[52] Alberta Report for Discussion, *supra* note 28 at 40.

[53] It uses the word "representative" instead of attorney.

[54] Section 13.

[55] Section 10(2).

[56] Alberta Report for Discussion, *supra* note 28 at 42.

[57] This was repealed on December 1, 1997 by the *Personal Directives Act*, S.A. 1996, c. P-4.03; the issue of mandatory legal advice will be discussed further below in Part II.5.

Manitoba legislation precludes the attorney and his or her spouse from acting as witnesses. This legislation is unique in requiring that a witness be:

> *(a) an individual registered, or qualified to be registered, under Section 3 of the* Marriage Act *to solemnize marriages;*
> *(b) a judge of the superior court of the province;*
> *(c) a justice of the peace, magistrate or provincial judge;*
> *(d) a duly qualified medical practitioner;*
> *(e) a notary public appointed for the province;*
> *(f) a lawyer entitled to practice in the province;*
> *(g) a member of the Royal Canadian Mounted Police; or*
> *(h) a member of a municipal police force in the province who exercises the powers of a peace officer.*[58]

The Commission does not agree that this approach would prevent the type of abuse with which the Commission is concerned. Such a provision presumes that members of the specified classes are more trustworthy. In the Commission's view, requiring that an "authority figure" act as a witness does not necessarily make the document more reliable.

The Commission agrees that an attorney or an attorney's spouse should not be permitted to witness an EPA. The Commission also believes that a witness should be a mentally competent adult and that the donor's spouse or child should be precluded from witnessing an EPA.

The Newfoundland Law Reform Commission favoured requiring one witness since it felt that two witnesses were not more likely to deter fraud than one witness. It also stated:

> *Moreover, a two witness requirement increases the likelihood of initial inadvertent non-compliance and hence invalidity. Finally, simplicity and accessibility favour one witness rather than two*.[59]

The Commission, however, prefers the Ontario approach which requires two witnesses to an EPA. The Australian Law Reform Commission[60] also recommended that an EPA be executed in the presence of two independent witnesses. This recommendation was adopted in the legislation.[61] The Commission believes there is no sound reason to distinguish the requirements for executing an EPA from the requirements for executing of a will. A will must be signed in the presence of two or more witnesses who are present at the same time. The Commission feels that

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[58] Section 11(1).

[59] Newfoundland Report, *supra* note 51 at 35.

[60] Australian Law Reform Commission, *Enduring Powers of Attorney*, *Report No. 47* (Canberra: Australia Government Publishing Service, 1988).

[61] *Powers of Attorney Amendment Act* 1989 (Australian Capital Territory).

requiring two witnesses helps impress the significance of an EPA upon the donor and the witnesses.

The Commission suggests:

An EPA should be witnessed by two people who are present at the same time, neither of whom is:

1. The attorney or the attorney's spouse.
2. The donor's spouse.
3. A child of the donor or a person whom the donor has demonstrated a settled intention to treat as his or her child.
4. A person who is mentally incompetent.
5. A person who is less than the age of majority, presently 19 years of age.

5. Mandatory legal advice

The issue of whether or not a person making an EPA should be *required* to consult a lawyer was the most difficult one for the Commission. Although the Commission is concerned that requiring a lawyer may reduce access to EPAs, this concern must be balanced with the importance of ensuring that people are fully informed as to the impact of signing an EPA and that the EPA they are signing is valid and reflects their wishes. This is especially important because an EPA continues to operate long after the person is mentally capable of changing it. The only way of guaranteeing that a person has obtained legal advice is to require, by legislation, that a Certificate of Independent Legal Advice be attached to the EPA. The Commission is considering the implementation of mandatory legal advice based on the recommendations of the Alberta Law Reform Institute. Such a Certificate is required by matrimonial property legislation in some provinces. Such legislation requires proof, before any settlement is confirmed or any agreement signed, that both spouses have received independent legal advice and are therefore informed as to their legal rights.

The Alberta Law Reform Institute recommended the use of a Certificate and cited New South Wales as the only other jurisdiction to have adopted this approach.[62] Alberta's *Powers of Attorney Act* states:

> *The certificate of legal advice referred to in subsection (1)(b)(iv) must state at least the following:*
> *(a) that the donor attended before the lawyer providing the certificate;*

[62] The New South Wales *Act* (s. 163 F(2)) provides that EPAs must be witnessed by a "prescribed person" (defined as a clerk of petty sessions, a barrister or solicitor), who must certify in writing that he or she explained the effect of the instrument to the donor prior to its being executed; in Alberta Report for Discussion, *supra* note 28 at 45.

(b) that the donor appears to the lawyer to understand the nature and effect of the document;
(c) that the lawyer is satisfied that the donor is an adult;
(d) that
(i) the donor signed the EPA, or acknowledged the donor's signature, in the presence of the lawyer, or
(ii) the EPA was signed on behalf of the donor as provided for in subsection (3) in the presence of the lawyer and the donor and under the direction of the donor;
(e) in the case of the signing of an EPA referred to in clause (d)(ii), that the donor acknowledged to the lawyer that the donor was physically incapable of signing the EPA;
(f) that the donor acknowledged to the lawyer that the donor gave the EPA voluntarily;
(g) that the lawyer is satisfied by examination of the donor that the donor understood the explanatory notes referred to in subsection (1)(b)(iii).[63]

Until December 1997, Alberta legislation required that an EPA include a Certificate of Legal Advice signed by a lawyer who is not the attorney or the attorney's spouse. In December 1997, Alberta's *Personal Directives Act* came into force. A personal directive is the same as an advance health care directive, that is, a legal document in which a person sets out how their health care is to be handled in the event of their incapacity. They may appoint someone to make health care decisions for them (i.e., a proxy) and/or set out specific instructions or general principles about how their health care is to be handled. The *Personal Directives Act* amended the *Powers of Attorney Act* so that the requirements for making enduring powers of attorney are the same as those for making a personal directive. As a result, the Certificate of Legal Advice is no longer required for valid EPAs. Obviously, the legislature was seeking to provide consistency in terms of the formal requirements for execution of an EPA and an advance health care directive. Anecdotal evidence suggests, however, that lawyers in Alberta continue to use the Certificate of Legal Advice as a matter of prudent practice.

While the Alberta Certificate of Legal Advice may ensure that the donor is informed as to the nature and quality of the act of making an EPA, such a Certificate does not necessarily address all problem areas. Social workers and others report that many problems arise when a person has lost mental capacity and an attorney is acting inappropriately. The Certificate of Legal Advice does not address concerns arising after execution and after a person has become mentally incompetent.

The Commission recognizes that requiring legal advice may seem unduly intrusive and may be perceived as an effort by lawyers to require people to use their services. The Commission also acknowledges that having legal advice does not guarantee that the EPA reflects the donor's wishes or that it will be drafted properly. On the other hand, legal fees for preparation of an EPA should not be excessive and it may make an EPA more effective in ensuring that the

[63] Section 2(4), the explanatory notes are set out below.

donor's actual wishes are followed. Anecdotal evidence from Alberta suggests that preparing EPAs is less expensive than going to court to contest a poorly drafted one. An EPA is also a fairly technical document and a Certificate of Independent Legal Advice may ensure that the donor is fully advised before signing it. The Commission seeks comment on whether such a Certificate should be required for a valid EPA.

The Commission invites comment on whether:

- A Certificate of Independent Legal Advice should be required in order for an EPA to be valid. The Certificate of Independent Legal Advice would contain a statement that the donor signed (or acknowledged having signed) the EPA in the presence of the lawyer, that the donor acknowledged that the EPA was voluntarily signed, and that the donor appeared to understand the nature and effect of the document.

The Alberta legislation (prior to its amendment which repealed the use of explanatory notes and a Certificate of Legal Advice) also contained detailed explanatory notes which are to be read by a donor before signing the EPA. The explanatory notes state as follows:

> **Read These Notes Before Signing This Document**
>
> 1 The effect of this document is to authorize the person you have named as your attorney to act on your behalf with respect to your personal property and financial affairs.
>
> 2 Unless you state otherwise in the document, your attorney will have very wide powers to deal with your property on your behalf. The attorney will also be able to use your property to benefit your spouse and dependent children. You should consider very carefully whether or not you wish to impose any restrictions on the powers of your attorney.
>
> 3 This document is an "enduring" power of attorney, which means that it will not come to an end if you become mentally incapable of managing your own affairs. At that point your attorney will have a duty to manage your affairs and will not be able to resign without first obtaining permission from the court. The power of attorney comes to an end if you or your attorney dies.
>
> 4 This document takes effect as soon as it is signed and witnessed. If you do not want your attorney to be able to act on your behalf until after you become mentally incapable of managing your own affairs,

you should say so in this document.

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

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

The Commission does not believe that explanatory notes should be part of legislation. Explanatory notes should, however, be part of a checklist supplied by the Nova Scotia Barristers' Society or by the Continuing Legal Education Society of Nova Scotia to assist lawyers in drafting EPAs.

The Commission suggests:

- That explanatory notes be part of a checklist supplied by the Nova Scotia Barristers' Society or by the Continuing Legal Education Society of Nova Scotia to assist lawyers in drafting EPAs.

6. Registration

None of the EPA legislation in Canada contains a mandatory registration procedure. Although Manitoba legislation states that a donor or attorney *may* file a copy of the EPA with the Public Trustee, filing has no effect on an attorney's duties or accounting requirements.[64] The Ontario Public Guardian Trustee's office is also considering developing a registry for people to voluntarily register their powers of attorney.[65] British Columbia's *Representation Agreement Act*, which is not yet in force, has a mandatory registration provision. It states that the government may make regulations providing for the establishment and operation of a representation agreement registry.[66]

The issue of registration was canvassed extensively by the Alberta Law Reform Institute. It noted that although a number of law reform agencies recommended mandatory registration, very few jurisdictions have adopted it. Mandatory registration may be favoured because it gives more protection to donors by making the EPA a matter of public record. Interested parties can then read the EPA to determine whether the attorney is acting consistent with the donor's wishes. This rationale was followed by the Ontario and Manitoba Law Reform Commissions. The

[64] Section 12; interview with Irene Hamilton, Public Trustee for Manitoba (15 May 1998).

[65] Letter of Judith Wahl, Executive Director, Advocacy Centre for the Elderly (25 September 1997).

[66] Section 42(b).

Ontario Law Reform Commission stated:

> *The [registration] requirement...puts the power of attorney on public record, and more importantly, publicly identifies the attorney. This not only protects the attorney, but also enables interested parties to inform themselves of the existence of the power.*[67]

Registration is required in Australia, in the Northern Territory[68] and also in Tasmania.[69] The most prominent example of a mandatory registration system for EPAs, however, is found in England's *Enduring Powers of Attorney Act*[70] and in the North Ireland Order.[71] Under this scheme, a duty to register an EPA arises once the attorney has reason to believe the donor is, or is becoming, mentally incompetent. The attorney is then required to apply to the court "as soon as practicable" to register the EPA. The attorney cannot exercise authority under the EPA until it is registered with the court, except in very limited circumstances. The court has supervisory power over the attorney, including the power to give directions as to the management of the estate and the power to order the attorney to pass accounts.

A 1992 Nova Scotia report on elder abuse and neglect[72] made numerous recommendations with respect to filing of EPAs, including the following:

> *Amend the* Power of Attorney Act *to achieve the following:*
>
> *(i) When the donor of an enduring power of attorney becomes legally incapacitated, the donee should be legislatively required to:*
>
> *(a) file a medical opinion from the donor's physician noting the medical condition of the donor in the Prothonotary's office;*
> *(b) file a notarized copy of the power of attorney in the Prothonotary's office;*
> *(c) file a surety bond for twice the value of the assets under management with the Prothonotary's office;*

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[67] Ontario Law Reform Commission, *Report on Powers of Attorney* (Toronto: Ontario Law Reform Commission, 1972) at 26 [hereinafter Ontario Report].

[68] *Powers of Attorney Act* 1980, No. 25 [in force Jan. 28, 1983, Gaz. Jan. 28, 1983] [am. 1988, No. 42] (Northern Territory of Australia).

[69] *Powers of Attorney Act* (1934, as amended by the *Powers of Attorney Amendment Act* 1987, No. 87 (Tasmania).

[70] 1985, c. 29 (England).

[71] Enduring Power of Attorney (Northern Ireland) Order 1987, SI 1987/1627 (NI 16) [in force April 10, 1989, SI 1989/63].

[72] Nova Scotia, *Elder Abuse/Neglect Committee Report* (Halifax: Queen's Printer, April 1992).

(d) file annual account statements. A special individual should be retained by the government to review the file's accounts and scrutinize the same.

(ii) The legislation should also contain a penalty or fine chargeable against the attorney who fails to file the accounting within a certain time frame. The Prothonotary's office in Halifax is being computerized. The computer could be programmed to provide a listing of all attorneys operating pursuant to an enduring power of attorney and noting whether the account statements have been filed.[73]

The Commission has been advised that neither these, nor any of the other recommendations of the Committee have been implemented.

The Commission is of the view that compulsory registration is highly bureaucratic and raises numerous privacy issues. A public registry might allow people to access personal financial information. The Commission also believes that individuals making EPAs have a responsibility to advise others of its existence and that registration should not therefore be mandatory.

The Commission suggests:

- Registration of EPAs should not be mandatory.

7. Contingent powers of attorney

Most Canadian provinces appear to allow for "contingent" powers of attorney. Contingent powers of attorney are EPAs which are effective only upon the occurrence of a specified event, usually the mental incompetency of the donor.[74] The authority which the EPA confers on the attorney therefore remains in abeyance until the specified contingency occurs. This differs from powers of attorney which come into effect the moment they are signed and end when the donor becomes mentally incompetent. This also differs from EPAs which come into effect immediately but continue to operate or "endure" after the donor becomes mentally incompetent. Most EPA legislation in Canada has been interpreted to allow contingent powers of attorney but most do not specifically define how they work or how they are triggered.

Nova Scotia's power of attorney legislation has been interpreted to enable the use of contingent powers:

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[73] *Ibid.* at 11.

[74] Some jurisdictions refer to these as "springing" powers of attorney because they "spring" into effect upon the occurrence of the specified event. See e.g. Manitoba.

> *...many clients wish to make the power of attorney effective only in the event of subsequent incapacity, and although not explicit from the Act, the qualifying statement contained in section 3: "subject to any conditions and restrictions contained therein that are not inconsistent with this Act" seems to allow such a provision.*[75]

Others, however, have questioned whether they would be recognized under Nova Scotia law.[76]

In many cases, the contingent power of attorney will specify not only the contingency upon which the power will take effect, but exactly how to determine whether the contingency has occurred. It may, for example, indicate that the contingency is considered to have occurred if one or more physicians provide a written opinion stating that it has occurred.

The Alberta Law Reform Institute was of the view there should be a provision in the legislation permitting the use of contingent powers. This approach was also taken by the British Columbia and Manitoba Law Reform Commissions. As the Alberta Law Reform Institute stated:

> *...the effectiveness of a power of attorney depends upon the willingness of third parties to rely on the attorney's authority. Regardless of what the true legal position may be, if third parties have any doubts about the validity of springing powers of attorney, there will be little point in donors granting them*.[77]

It is important to have an express provision in the legislation dealing with contingent powers of attorney to ensure that lawyers are fully aware of the concept when advising clients. As well, third parties, such as banks and trust companies, may be more willing to deal with an attorney under a contingent power of attorney if the legislation contains a test for determining whether the contingency has occurred.

To determine when the contingency occurs, some provinces[78] authorize donors to name a person who will conclusively determine when the contingency has occurred. There is concern, however, that an EPA not be declared invalid because someone has not been named. As a result, the Alberta legislation allows the donor to name a specific person and contains a default provision allowing the contingency of mental incompetency to be determined upon the written declaration of two medical practitioners. The Alberta Law Reform Institute was of the view that it should not just be physicians who are permitted to determine when the contingency occurs. In

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[75] R.J. Clarke, *supra* note 22.

[76] W. Ripley, *ibid*.

[77] Alberta Report for Discussion, *supra* note 28 at 81.

[78] E.g., Alberta, British Columbia and Manitoba.

many cases, it suggested, a family member or close friend will be in a better position to judge when the person is no longer capable of managing his or her affairs.

The Commission believes that permitting donors to specify a person who will conclusively determine when mental incompetency has occurred is problematic, especially if the named person is a relative or friend who may be reluctant to say the person is mentally incompetent. The Commission believes that if the contingency is the donor's mental incompetency, the written declaration of two medical practitioners is more appropriate.

Another issue is what type of language to use in the legislation so that it is clear what type of power of attorney is authorized. Manitoba legislation uses the language "springing power of attorney" in a separate section of its legislation. In Alberta, on the other hand, there is a section referring to "contingent powers". The Alberta legislation states that an EPA may provide that it comes into effect at a specified future time or on the occurrence of a specified contingency. The contingency includes, but is not limited to, the mental incapacity or infirmity of the donor.

The Commission prefers the Alberta language which refers to an EPA as contingent upon future incapacity. The Commission believes this is easier to understand than the introduction of a new concept of "springing" powers. As stated above, the Commission believes that it is important to specifically include contingent powers in the legislation to confirm that this type of EPA is legally valid. Some people may be reluctant to give someone else control of their affairs even though it is not to take effect until they become incapacitated. They may be more willing to do so if the legislation specifically authorizes contingent powers. At present, most EPAs are not contingent and simply rely upon the goodwill of the attorney not to use the power until it is needed.

The Commission suggests:

- EPA legislation should deal specifically with contingent EPAs.
- If an EPA is contingent upon the donor's mental incompetency, the certificates of two medical practitioners should be required to prove that the contingency has occurred.

Using an EPA

8. Duty to act

An EPA places no obligation on an attorney to act as attorney once the donor becomes mentally incompetent. The attorney may, however, be required to act if they have a contract with the donor in which they promised to act. In other words, although the attorney has the power to act,

at common law at least, there is no *duty* on the attorney to act.[79] The common law position has, however, been altered by legislation in many provinces.

The Manitoba Law Reform Commission recommended that if the donor of an EPA becomes mentally incompetent, an attorney should be under a positive duty to act.[80] Notwithstanding this, however, where the attorney proves to the satisfaction of the court that they have acted "honestly, reasonably and in good faith," the court may relieve the attorney from personal liability either wholly or partially.[81] The Manitoba Law Reform Commission was of the view that when the donor is unable to terminate the attorneyship due to mental incompetence, the law should encourage the attorney to act consistently with what the donor would have chosen had he or she been able to do so. The Manitoba legislature accepted these recommendations and the Manitoba legislation imposes a duty on an attorney to act for an incompetent donor.

Other law reform commissions have been divided on whether there should be a duty to act as attorney. Law reform agencies in Newfoundland, British Columbia, South Australia, and Tasmania concluded that such a duty should be required. Law reform agencies in England, New South Wales, the Australian Capital Territory and the Republic of Ireland, however, recommended against imposing a statutory duty to act.

The Alberta Law Reform Institute took the approach that a statutory duty to act should arise when the attorney knows or ought to know that the donor is mentally incapable of managing his or her affairs. It further stated that the duty to act should not be imposed unless the attorney has accepted the appointment, either expressly or by implication. It rejected the approach taken in Tasmania and Newfoundland where the attorney is deemed to be a trustee. It did not approve of deeming the attorney to be a trustee largely because of Alberta's *Trustee Act* which contains strict limitations on how a trustee can invest money. It also allows the court to vary the terms of the trust or appoint a substitute trustee which the Alberta Institute recommended against.

This Commission agrees with imposing a positive duty to act when the donor of an EPA becomes incompetent. It does not, however, favour the Newfoundland approach which deems an attorney to be a trustee of the donor's property. A trusteeship is a more onerous obligation then an attorneyship. There can be a significant passage of time and many changed circumstances between the time a person drafts an EPA and when it is needed. An attorney should therefore not be saddled with all the responsibilities of a trustee. The Commission is of the view that an attorney should only have a duty to act if they know or ought reasonably to know that the donor is mentally incompetent and the attorney has assumed management of the estate or contracted to do so.

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[79] *Bowstead on Agency, supra* note 7 at 44; G.H.L. Fridman, *The Law of Agency,* 5th ed. (London: Butterworths, 1983) at 137f.

[80] Manitoba Report, *supra* note 21 at 17-18.

[81] Section 6(3).

The Commission suggests:

When a donor of an EPA becomes mentally incompetent, the attorney has a duty to act:

1. if they know or ought reasonably to know that the donor is mentally incompetent; and

2. if they have assumed management of the estate or contracted with the donor to do so.

9. Confidentiality

Issues regarding confidentiality of information may arise in determining whether a donor has become mentally incompetent. A physician or other health care professional may be unable or reluctant to disclose information about a patient without the patient's consent. The donor may, however, be incapable of giving a valid consent. If the EPA expressly provides for a named person to determine whether the donor has become mentally incompetent, the health care practitioner may be reluctant to disclose information without a specific consent authorizing them to release the information to that named person. The health care practitioner may therefore refuse to disclose the information needed to assess the donor's capacity and determine whether the EPA becomes effective.

EPA legislation in Nova Scotia, Newfoundland, Prince Edward Island, Saskatchewan, and New Brunswick, does not deal with this problem. More recent legislation, such as that in Alberta, Manitoba, Ontario and British Columbia has, however, addressed this problem. In Alberta, the Alberta Law Reform Institute recommended that the legislation authorize the release of information concerning the donor's mental and physical health for the purpose of confirming whether the specified contingency has occurred.[82] This requires that the health care practitioner release the information and protects the practitioner should the donor later complain that it was released without his or her consent. This recommendation was incorporated into the Alberta legislation[83] and the same approach was taken in Manitoba.[84]

The Commission supports the Alberta and Manitoba approach because physicians may refuse to assess an individual due to an inability to obtain consent. A clause authorizing the release of confidential information, for the limited purpose of determining whether a donor is mentally competent, should be part of the legislation.

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[82] Albert Report for Discussion, *supra* note 28 at 89.

[83] Section 6.

[84] Section 6(5).

The Commission suggests:

- Legislation should authorize the release of confidential information concerning the donor's mental and physical health for the limited purpose of determining whether the contingency of mental incompetency has occurred.

10. Duty of care

At common law, the relationship between donor and attorney is fiduciary in nature. This means that an attorney has a duty to, among other things, account, exercise reasonable care, not make secret profits, and not act contrary to the interests of the donor.[85] If an attorney is acting gratuitously (i.e., without pay), the attorney is held to the standard of a typically prudent person managing his or her own affairs.[86] If being paid for their services, however, an attorney is held to a higher standard, that applicable to a professional property or financial manager.[87]

The Alberta Law Reform Institute considered whether the attorney's duties should be set out in legislation. It concluded that "the nature and extent of the attorney's duties are well established and there is no reason to incorporate them into the proposed legislation".[88] This is reflected in the legislation which resulted from the report.

The Commission was divided on how this issue should be addressed. On the one hand, it may not be necessary to set out the duties of the attorney in the legislation since, as the Alberta Law Reform Institute points out, the common law is quite clear on these duties. On the other hand, including the duties in the legislation may make people more aware of the obligations. The Commission feels, on balance, that it is better to explain the nature of the relationship between the donor and attorney in the legislation.

The Commission suggests:

- Legislation should specify that the relationship between a donor and attorney is "fiduciary" in nature and that an attorney therefore has a duty to, among other things: account, exercise reasonable care, not make secret profits, and not act contrary to the interests of the donor.

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[85] *Canadian Estate Administration Guide, supra* note 25 at 20,006.

[86] *Bowstead on Agency*, *supra* note 7 at 152-155.

[87] *Ibid*. at 144ff.

[88] Alberta Report for Discussion *supra* note 28 at 66.

Manitoba's new legislation states:

> ***Standard of care of attorney not compensated***
> *19(2) An attorney who does not receive compensation for acting as an attorney 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.*
>
> ***Standard of care of attorney compensated***
> *19(3) An attorney who receives compensation for acting as an attorney 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.*

Other jurisdictions, such as South Australia, simply provide that the attorney must exercise their powers with reasonable diligence to protect the interests of the donor.[89] This is similar to the recommendation of the British Columbia Law Reform Commission[90] which relied upon the duty of "prudent management" contained in the English Working Paper:

> *Our provisional view is that the attorney should be under a duty of "prudent management," by which we mean that he should be placed under a positive requirement to do for the benefit of the donor all those acts which the attorney should reasonably be expected to do, having regard to the incapacity of the donor. The precise nature and extent of the duty should depend on all the circumstances, including the extent and nature of the donor's property, the needs of the donor and of those for whom he might reasonably be expected to provide, the donor's other commitments and liabilities, and also any particular qualifications of the attorney himself, and whether he is receiving payment for his services.*[91]

The Commission believes that the duty of care owed by an attorney to a donor should be that an attorney must exercise the judgement and care that a reasonably prudent person in comparable circumstances would exercise.

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[89] South Australia *Act*, Section 7.

[90] At 31.

[91] English Law Reform Commission, *Working Paper on Powers of Attorney* (1967) at 58.

The Commission suggests:

- An attorney should be required to exercise the judgment and care that a reasonably prudent person in comparable circumstances would exercise.

11. Liability of the attorney

As discussed above, at common law a power of attorney ends if the donor becomes mentally incompetent. If this occurs, an attorney, acting under a power of attorney, is liable to third parties with whom he or she deals under the authority of the power of attorney, even if the attorney did not know of the termination. The attorney can be liable for breach of the "implied warranty of authority" as was decided by the English Court of Appeal in *Yonge* v. *Toynbee*.[92] In this case, a man instructed his lawyers to defend him against an action which was about to be brought against him. Before the action commenced, he was certified as being of "unsound mind". Unaware of this, the lawyers conducted legal proceedings on his behalf. The court held the man's lawyers personally liable for having impliedly warranted an authority they did not possess. In other words, they were liable for acting on his behalf when they were acting under a power of attorney that had been terminated by his incompetence. They therefore had no authority to act on his behalf.

Both the Alberta Law Reform Institute and the Ontario Law Reform Commission have questioned the validity of the *Yonge* case.[93] Most provinces have chosen not to follow it by providing protection for an attorney in their EPA legislation. Nova Scotia's *Powers of Attorney Act* does not deal with liability of the attorney.

Several of the "new" EPA statutes have expanded upon the issue of liability of the attorney. For example, the attorney's liability for having acted in good faith arises not only in the event that the EPA is terminated, but in the event that the EPA may have been invalid to begin with. This may occur, for example, if the donor was incompetent at the time of executing the EPA. The Alberta Law Reform Institute amended one of its earlier recommendations to deal with EPAs which were invalid at the time of execution. This was incorporated into the Alberta legislation:

> *14 (1) an attorney shall not incur any liability to the donor or to any other person for having acted in pursuance of a power of attorney that has been terminated or that is void by reason of the donor's mental incapacity or infirmity if the attorney did not know, and had no reasonable grounds for believing, that the attorney's authority had terminated*

[92] [1910] 1 K.B. 215 (C.A.).

[93] Alberta Report for Discussion, *supra* note 28 at 106; and Ontario Report, *supra* note 67 at 380.

or been lost.[94]

Ontario also deals with the exercise of a power of attorney after termination or invalidity:

> 13 *(1) if a continuing power of attorney is terminated or <u>becomes</u> invalid, any subsequent exercise of the power by the attorney is nevertheless valid as between the grantor or the grantor's estate and any person, including the attorney, who acted in good faith and without knowledge of the termination or invalidity.*[95]

The Commission wishes to address the concerns raised by other law reform commissions with respect to the *Yonge* decision. An attorney should be protected from liability for having acted in good faith not only in the event that the EPA is terminated but also if the EPA was invalid to begin with.

The Commission suggests:

- If the EPA has been terminated or is not valid, an attorney should be protected from liability for having acted in good faith if the attorney did not know and had no reasonable grounds for believing that the attorney's authority had been terminated or lost.

12. Authority to benefit others

It is a common law rule that under a power of attorney, an attorney may not make a gift of or otherwise use the donor's property for the benefit of anyone other than the donor.[96] This rule results from the fiduciary nature of the relationship between a donor and attorney. The rule can be changed, however, by the donor's specific instructions contained in the EPA. Most donors will, for example, specify in the EPA, the fees and costs to be paid to the attorney as well as any payments the attorney may make to third parties. If this has not been set out and the donor becomes mentally incompetent, the donor can no longer consent to such payments being made.

This approach has been changed by statute in some jurisdictions. For example, the English *Act* provides that an attorney may act under an EPA to benefit persons, other than the donor, if the

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[94] Section 14.

[95] Section 13; emphasis added. This does not address the liability issue if the EPA was invalid at the time of execution only if it "becomes invalid".

[96] As an agent they may not, without the informed consent of their principal, use their principal's property to acquire a benefit for himself; *Bowstead on Agency, supra* note 7 at 48.

donor might normally be expected to provide for the needs of those persons.[97] It also allows for seasonal gifts to relatives and others connected with the donor and for gifts to charities that the donor previously supported or might reasonably be expected to support.[98] Similar provisions are contained in the legislation in New Zealand and Northern Ireland.[99]

The Alberta Law Reform Institute also recommended that attorneys not be left without authority to attend to the needs of the donor's spouse and dependent children (either of which might include the attorney). It did not, however, believe that the legislation should make express provision for seasonal gifts or charitable donations.[100] The Alberta legislation states that an attorney may use their authority for the maintenance, education, benefit and advancement of the donor's spouse and dependent children (including the attorney, if the attorney is the donor's spouse or dependent child).[101] Any other gifts must be specifically provided for in the EPA.

A similar approach was taken in Manitoba. Manitoba legislation allows the attorney to dispose of the donor's estate in order to satisfy a legal obligation of the donor to maintain and support another person, which may include the attorney.[102]

Ontario's *Act* contains fairly detailed provisions explaining the expenditures allowed by an attorney including gifts *or loans* as well as charitable gifts in certain circumstances. It states as follows:

> *37 Required expenditures. - (1) A guardian of property shall make the following expenditures from the incapable person's property:*
>
> *1. The expenditures that are reasonably necessary for the person's support, education and care.*
> *2. The expenditures that are reasonably necessary for the support, education and care of the person's dependants.*
> *3. The expenditures that are necessary to satisfy the person's other legal*

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[97] *Enduring Powers of Attorney Act* 1985, c. 29 (England) at section 3(4); this includes a benefit to the attorney and is subject to any conditions or restrictions contained in the EPA.

[98] Section 3(5); provided that the value of each gift is not unreasonable having regard to all the circumstances and in particular the size of the donor's estate.

[99] *Protection of Personal and Property Rights Act* 1988, No. 4, s. 107 (N.Z.) and Enduring Powers of Attorney (N. Ireland) Order 1987, SI 1987/1627 (NI 16) [in force April 10, 1989, S/I 1989/63] ss. 5(4) and 5(5), as cited in Alberta Report for Discussion, *supra* note 28 at n. 20 at 76.

[100] Albert report *supra* note 20 at 77.

[101] Section 7(b); this is similar to the approach seen in Alberta's *Dependent Adults Act* (cite?) its adult guardianship legislation similar in purpose to Nova Scotia's *Incompetent Persons Act.*

[102] Section 23.

obligations.

(3) Optional expenditures - the guardian may make the following expenditures from the incapable person's property:

1. Gifts or loans to the person's friends and relatives.
2. Charitable gifts.

(4) Guiding principles. - The following rules apply to expenditures under subsection (3):

1. They may be made only if the property is and will remain sufficient to satisfy the requirements of subsection (1).
2. Gifts or loans to the incapable person's friends or relatives may be made only if there is reason to believe, based on intentions the person expressed before becoming incapable that he or she would make them if capable.
3. Charitable gifts may be made only if:
i. the incapable person authorized the making of charitable gifts in a power of attorney executed before becoming incapable, or
ii. there is evidence that the person made similar expenditures when capable.
4. If a power of attorney executed by the incapable person before becoming incapable contained instructions with respect to the making of gifts or loans to friends or relatives or the making of charitable gifts, the instructions shall be followed, subject to paragraphs 1, 5 and 6.
5. A gift or loan to a friend or relative or a charitable gift shall not be made if the incapable person expresses a wish to the contrary.
6. The total amount or value of charitable gifts shall not exceed the lesser of,
i. 20 per cent of the income of the property in the year in which the gifts are made, and
ii. the maximum amount or value of charitable gifts provided for in a power of attorney executed by the incapable person before becoming incapable.

The Commission believes that allowing an attorney to make seasonal gifts or loans to friends and relatives is problematic and provides opportunity for financial abuse. The legislation should, however, confirm that the donor may authorize specific third party payments in the EPA. The Commission also suggests that the legislation allow an attorney to provide for the reasonable maintenance and support of the dependents.

The Commission suggests:

- The legislation should specifically state that an EPA may authorize third party payments, including charitable and seasonal gifts. If the EPA does not authorize such payments, an attorney may not authorize charitable or seasonal gifts.
- An attorney should be able to provide for the reasonable maintenance and support of the donor's dependents.

13. Accounting

At common law, one of the duties of an attorney is a duty to account.[103] This means that an attorney must maintain accurate accounts of all transactions entered into for the donor and must produce them upon request.[104] If the donor is mentally capable, he or she can choose whether to request an accounting. If the donor is no longer mentally capable, however, the question arises as to whom the attorney is to account and when. Statutes based on the U.L.C.C. draft *Act* allow interested parties to apply to court to require that the attorney pass their accounts.[105] The Nova Scotia *Act*, for example, states:

> 5 (2) *Where an attorney is ordered to have accounts passed, the attorney shall submit the accounts for approval to the Court or, where a judge of the Court so orders, to the Public Trustee at such intervals as the judge may order and, when approved, the attorney shall file the accounts with the prothonotary of the Supreme Court for the county where the application is heard.*
>
> 5 (4) *Nothing in this Section prevents an attorney from submitting accounts to the Public Trustee for approval and the Public Trustee shall consider accounts when submitted by an attorney.*[106]

Nova Scotia's Public Trustee indicates that an attorney has never filed accounts with her office, either voluntarily or after being ordered to do so by the court.

If the court orders the attorney to file accounts, it orders that accounts be filed for transactions

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[103] This is in light of the fiduciary relationship between the donor and attorney.

[104] *Halsbury's Laws of England*, vol. 1, 4th ed. (London: Butterworths, 1980) at para. 780.

[105] An exception to this is Saskatchewan.

[106] Section 5(4).

entered into *during the incapacity of the donor*. In other words, the court has to determine when the donor became mentally incompetent. The court will need evidence to assist it in making this determination. This becomes problematic if the evidence is not readily available. The Alberta Law Reform Institute concluded that courts may incorrectly determine the date on which mental incapacity "occurred", thus leaving many financial transactions not covered by the accounting. As a result the Alberta Institute recommended that "the court have the discretion to grant whatever order for accounting it considers appropriate".[107] This is reflected in the Alberta legislation which requires the attorney to bring and pass accounts in respect of "any or all transactions".[108] Some Australian states direct the attorney to pass accounts in respect of *all* transactions entered into on behalf of the donor.

The Manitoba Law Reform Commission considered, at length, the problem of holding the attorney accountable during the donor's mental incapacity. It concluded that a court ordered accounting is too time-consuming and expensive. Instead, it suggested a system in which a regular accounting would be provided and a court order would only be required in unusual circumstances. It relied, in part, on a common law principle that allows the donor to name a person who will receive the attorney's accounts in the donor's place (in this case, while the donor is incapacitated and unable to receive them).[109] The Manitoba Commission also proposed that the legislation allow the donor to name people to whom the attorney would be obliged to account on an annual basis. It proposed that the named people be people who have an interest in protecting the donor's property as they would likely take action if fraud or mismanagement was detected.[110] The Manitoba Commission concluded that the named recipients be those most likely to be the donor's heirs. These people would usually be the donor's closest relatives and those who are most likely to inherit the donor's property. The Manitoba Commission recommended that:

> *"The attorney should be obliged to provide accounts upon demand to a recipient or a recipient named by the donor in the enduring power of attorney. If no recipient is named or if the named recipient is deceased, mentally incompetent or is the attorney or the attorney's spouse, the attorney should be obliged to provide annual accounts to the donor's nearest relative or relatives*."[111]

The legislation which resulted from the Manitoba Commission report defines "nearest relative"

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[107] Alberta Report for Discussion, *supra* note 28 at 73.

[108] Section 10.

[109] *Halsbury's Laws of England*, *supra* note 104 at 68; *Bowstead on Agency*, *supra* note 7 at 191; *Dadswell* v. *Jacobs* (1887), 34 Ch. D. 278 (C.A.) [cited in Manitoba Report *supra* note 21 at 18 (n.9)].

[110] Manitoba Report, *supra* note 21 at 18.

[111] *Ibid*. at 20-21.

to mean:

> *(a) the adult who is related to the donor, mentally competent and first listed in the following series:*
>
> *(i) spouse,*
> *(ii) child,*
> *(iii) grandchild,*
> *(iv) great-grandchild,*
> *(v) parent,*
> *(vi) sibling,*
> *(vii) niece or nephew, or*
>
> *(b) where no person qualifies under clause (a), the Public Trustee.*[112]

The Commission prefers the Manitoba approach which allows an informal yet mandatory accounting process. It allows the donor to address not only who will make the financial decisions but who will, in effect, review those decisions based on the accounting provided. The Commission believes that the person named as recipient of the accounting should also receive a copy of the EPA. This would better enable them to assess whether the money is being spent appropriately and consistent with the donor's instructions.

The Commission suggests that the court maintain its supervisory authority to order accounting for a period other than during incapacity. This may be necessary to prove financial abuse which may occur under an EPA while the donor is mentally competent but unaware that the EPA was being misused. Upon termination of an EPA, the attorney should also be required to provide a final accounting.

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[112] *The Powers of Attorney and Mental Health Amendment Act*, s. 1. It should be noted that the Manitoba Law Reform Commission in its definition of nearest relative was of the view that the first priority should be given to the donor's spouse or "spousal equivalent"; Manitoba Report, *supra* note 21 at 20-21.

The Commission suggests:

- The donor should be able to request an accounting at any time.
- When the donor is mentally incompetent, the attorney should be required to provide an accounting upon the demand of any person named for that purpose in the EPA. If the donor does not name anyone in the EPA, or if the named person is the attorney or the spouse of the attorney or is deceased or mentally incompetent, the attorney shall provide an annual accounting to the donor's nearest relative.
- "Nearest relative" means the adult person who is related to the donor, mentally competent and first listed in the following series: spouse, child, grandchild, great-grandchild, parent, sibling, niece or nephew, or where none of these people qualifies, the Public Trustee.
- The court should have the discretion to grant an order for accounting, as it considers appropriate.
- An attorney should also be required to account upon termination of an EPA.

14. Protection to third parties

An attorney, in the course of acting under an EPA, deals with many third parties. When the attorney's authority is terminated,[113] third parties who are unaware of the termination may continue to deal with the attorney. At common law, the donor remains liable to these third parties. This rule has been codified in most provinces. The U.L.C.C. draft *Act* and the Saskatchewan *Act* provide that an act by an attorney in favour of a person who is unaware of the termination, is valid and binding in favour of that person "and in favour of a person claiming under him" (i.e., fourth parties). The law reform agencies in other provinces criticized this approach. As the Alberta Institute concluded: "it refers only to the knowledge of the party who deals with the attorney, and thus it may afford protection to fourth parties even if they know of the termination of authority."[114] As a result, Alberta recommended that the attorney's act be valid and binding in favour of *any* person who did not know of the termination.[115] This is reflected in the Alberta legislation.[116]

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[113] At common law, EPAs are not valid and termination would most commonly occur due to the donor's mental incapacity.

[114] Alberta Report for Discussion, *supra* note 28 at 109.

[115] *Ibid*.

[116] Section 14(2) of the Alberta legislation.

British Columbia's *Act* states that if the agreement is not in effect or is invalid, any exercise of the authority is valid and binding in favour of a person who did not know and had no reason to believe that the agreement (or provision) was not in effect or was invalid.[117] As in Alberta, this provides broad protection to parties dealing with attorneys.[118]

The Commission believes that if the attorney's authority under the enduring power of attorney has been terminated, an attorney's act should be valid and binding in favour of any person who did not know of the termination.

The Commission suggests:

- If the attorney's authority under the enduring power of attorney has been terminated, an attorney's act should be valid and binding in favour of any person who did not know of the termination.

Changing/Ending an EPA

15. Renunciation by attorney

In some cases, a person named as attorney may not wish to act. At common law, he or she may renounce the appointment by giving notice to the donor.[119] The question arises as to whether the right to renounce should be allowed if the donor is mentally incompetent. As the Alberta Law Reform Institute explained, an attorney should not be able to leave a donor's estate in "limbo" by renouncing the appointment. It therefore recommended that if an attorney has a duty to act,[120] the attorney should not be able to renounce without the court's permission. The duty to act arises under the Alberta legislation if the EPA has not been terminated or if the attorney has at any time acted under the EPA or otherwise indicated acceptance of the appointment. An application to renounce would be considered to be an application to have the EPA terminated. If the court allows the attorney to renounce the appointment in Alberta, it can also direct the applicant or the Public Trustee to bring an adult guardianship application.[121]

Manitoba legislation also states that an attorney may not renounce while he or she is subject to

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[117] Section 24(2).

[118] A similar provision is seen in Section 13 of Ontario's *Substitute Decisions Act*.

[119] *Halsbury's Laws of England, supra* note 104 at para. 879.

[120] See Issue 8 above.

[121] Alberta Report for Discussion, *supra* note 28 at 96-97; this approach is reflected in section 12 of the legislation.

"the duty to act" unless the court's permission is obtained.[122] Ontario legislation allows an attorney to resign but if the attorney has already acted under the EPA, the resignation is not effective until a copy of the resignation is sent to a number of people (including the donor, other attorneys under the EPA, and the spouse or partner of the donor).[123]

The Commission believes that a person should not be forced to continue to act as an attorney against their wishes. If many years have passed from the naming of the attorney, the person may have become unable or unwilling to act. Also, forcing an unwanted duty on an attorney will likely mean that the job will not be done properly. The Commission believes it would not be in the donor's best interests to have such a person continue. If the donor is mentally competent, an attorney should be able to renounce with notice to the donor. When the donor is no longer mentally competent, the Commission believes the attorney should be required to apply to court to renounce the appointment if he or she has assumed management of the estate or contracted to do so. In the interim period before the court hears the application, the person should be required to continue to act as attorney.

The Commission believes it would also be useful to provide notice of an application to renounce to the Public Trustee. The Public Trustee may be asked to become a guardian if an application for guardianship is later made. Notice would advise the Public Trustee of a possible guardianship application.

The Commission suggests:

- An attorney should be able to renounce an appointment by giving notice to the donor.
- If the donor is no longer mentally competent and the attorney has assumed management of the estate or contracted to do so, the attorney must apply to court in order to renounce the appointment. In the interim period before the court hears the application, the person should be required to continue to act as attorney.
- Notice of an application to renounce should be given to the Public Trustee.

16. Substitution and variation

While a donor is mentally capable, he or she may vary any terms of the EPA. He or she may also replace or substitute an attorney. Some jurisdictions have included this common law principle in their legislation. In Newfoundland, for example, the *Act* states that the donor may

[122] Section 21.

[123] Section 11.

revoke or terminate an EPA or change the attorney, as long as the donor has legal capacity.[124] Once the donor becomes incapacitated and the EPA becomes effective, problems arise if the attorney is no longer able to act, dies, becomes mentally incompetent or is otherwise unwilling to act. Neither the U.L.C.C. draft *Act* nor the Saskatchewan legislation allows the court to substitute attorneys. The legislation in Prince Edward Island, Nova Scotia, New Brunswick, and Newfoundland, however, allows for a person having an interest to apply to the court to substitute another person for the attorney named in the EPA. Nova Scotia legislation also allows a judge of the Supreme Court to "grant such relief as the judge considers appropriate"[125] but it is uncertain whether this would be interpreted to allow the judge to vary the EPA.

New Brunswick also gives the court fairly wide discretion. If an EPA is in place and the donor is mentally incompetent, a New Brunswick court may vary the attorney's powers to manage the estate, if it is in the best interests of the estate.[126]

The Alberta Law Reform Institute was quite critical of allowing a court to substitute an attorney or vary the terms of an EPA. It felt that court substitution is both artificial and inappropriate and that substitution by the court undermines the fact that an attorney is usually chosen in order to *avoid* court intervention.[127] The Alberta Institute concluded that if the EPA is no longer sufficient to protect the donor's interests, the appropriate course of action is to apply under adult guardianship legislation to appoint a guardian who can then make decisions for the donor, independent of the EPA and under the court's supervision. The Manitoba legislation, on the other hand, allows the court to substitute another person in place of the original attorney or to vary the EPA "subject to the provisions of the enduring power of attorney"[128].

The Commission prefers the provision currently contained in the Nova Scotia statute allowing a court to substitute an attorney where appropriate. A court may order substitution, for example, if the attorney is no longer able to act, dies, become mentally incompetent or is otherwise unwilling to act. If another attorney is available and willing to act, expensive and time-consuming guardianship applications may therefore be avoided.

The Commission also feels that courts should be authorized to vary an EPA upon the application of an interested party. It may, for example, be appropriate to vary an EPA if the donor specified a charitable donation to be made from the estate and the attorney felt it was depleting the estate. In those circumstances, the court should have the authority to vary the terms of the EPA by discontinuing or removing the charitable donation.

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[124] Section 11.

[125] Section 5(1)(e).

[126] Section 58.4.

[127] Alberta Report for Discussion, *supra* note 28 at 94-95.

[128] Section 24(1).

The Commission suggests:

- Courts should continue to be authorized to substitute an attorney upon application by an interested party.
- Courts should also be authorized to vary the terms of an EPA upon application by an interested party.

17. Termination

At common law, a power of attorney is terminated by a number of events:

(a) the death or mental incapacity of the donor,
(b) the death or mental incapacity of the attorney,
(c) the bankruptcy of the donor,
(d) the renunciation by the attorney,
(e) the revocation by the donor, or
(f) the coming to pass of a time or event specified in the power of attorney after which it is terminated.[129]

Obviously, an EPA would not be terminated by virtue of the mental incapacity of the donor. As discussed further below, the Commission is of the view that all but one of the other terminating events are applicable to EPAs.[130]

Although all EPA legislation deals with termination by the mental incapacity of the donor, most of the "older" statutes rely on the common law terminating events outlined above. In New Brunswick, an EPA is terminated when a court appoints a committee of the estate of the donor[131] or when another person is substituted by the court.

Ontario's *Substitute Decisions Act* is more explicit and states that an EPA is terminated:

- when the attorney dies, becomes incapable of managing property or resigns, unless,
  (i) another attorney is *authorized* to act under subsection 7(5), or
  (ii) the power of attorney provides for the substitution of another person and that person is able and willing to act;

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[129] *Canadian Estate Administration Guide*, *supra* note 25 at 29,700.

[130] The exception being the bankruptcy of the donor, discussed below.

[131] This is similar to the appointment of a guardian in Nova Scotia under the *Incompetent Persons Act*.

- when the court appoints a guardian of property for the grantor under section 22;
- when the grantor executes a new continuing power of attorney, unless the grantor provides that there shall be multiple continuing powers of attorney;
- when the power of attorney is revoked;
- when the grantor dies.[132]

The Alberta Law Reform Institute dealt extensively with the issue of termination of EPAs. First of all, it recommended that an EPA should terminate upon a trusteeship order being granted under the *Dependent Adults Act*. This process is similar to the appointment of a guardian under Nova Scotia's *Incompetent Persons Act*. It also recommended that the EPA terminate on the death of the donor, except in cases of irrevocable powers of attorney.[133] These recommendations are consistent with the common law approach. The Alberta Institute also recommended that the EPA terminate on the death of the attorney. It felt that the bankruptcy of the donor, however, should *not* result in automatic termination of the EPA as "it is probably in the best interests of the donor to have the attorney's authority continue, so as to enable the attorney to make decisions on the donor's behalf in relation to matters connected with the bankruptcy".[134] These recommendations were implemented in legislation that followed the Alberta Institute report.[135]

The Manitoba Law Reform Commission recommended that an EPA terminate upon the death of the donor. In its view, the death of the attorney, although it would obviously terminate the attorneyship, would not necessarily have to terminate the EPA. This relates back to its suggestion that a court be permitted to substitute an attorney for the individual named by the donor. It also recommended that the attorneyship be terminated by the mental incompetence of the attorney, the bankruptcy of the attorney or the bankruptcy of the donor (unless otherwise provided for in the EPA).[136] However, it suggested that a certificate of incompetence or an "order of supervision concerning the donor" (under Manitoba's mental health legislation) should not terminate the EPA.

This Commission agrees that an EPA should terminate if it is revoked by the donor or if the donor dies. It also suggests that, subject to the court's right to vary the terms of the EPA and to substitute another attorney for the person named by the donor, an EPA should terminate on the death or the mental incapacity of the attorney. The bankruptcy of the donor, however, should not result in automatic termination since it is to the donor's benefit to have the attorney represent the donor's interest in the bankruptcy proceedings. The bankruptcy of

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[132] Section 12 (not directly quoted).

[133] An irrevocable power of attorney is one which is expressed to be irrevocable and is given to secure a proprietary or other interest of the attorney; see *Williamson* v. *Young* (1972) 25 D.L.R. (3d) 275 (Ont. H.C.).

[134] Alberta Report for Discussion, *supra* note 28 at 103.

[135] Section 13.

[136] Manitoba Report, *supra* note 21 at 29-30.

the attorney should also terminate an EPA, as should the renunciation of the attorney, or the coming to pass of a time or event specified in the EPA. If a court orders the appointment of a guardian under the *Incompetent Persons Act*, this should also terminate the EPA.

The Commission suggests:

- An EPA should terminate if it is revoked by the donor or if the donor dies.
- Subject to the court's right to vary the terms of an EPA, including the right to substitute an attorney, an EPA should also terminate upon:
  - the death or mental incapacity of the attorney;
  - the renunciation of the attorney;
  - the coming to pass of a time or event specified in the EPA; or
  - the appointment of a guardian under the *Incompetent Persons Act*.
- The bankruptcy of the donor should not automatically terminate the EPA since the attorney can represent the donor's interests at the bankruptcy proceedings.

18. EPAs made in other places

The issue of whether an EPA made in one jurisdiction will be recognized in another is a complex but significant one. It is especially important in light of increased mobility of people between provinces. The Manitoba Law Reform Commission summarized the law as it applies to EPAs as follows:

> *Stated briefly, the common law position is that the proper law of the agency agreement (usually the law of the place where the agency agreement was made) will govern the obligations between agent and principal (in this case, the attorney and the donor). However, any dealings the agent has with third parties will be governed by the proper law of the contract between them, which may well be the law of a different place. Significantly, it appears that the proper law of the contract between agent and third party will determine the existence and extent of the agent's authority to act for the principal.*[137]

This common law approach has been altered in some jurisdictions. In Alberta and Manitoba, for example, the common law has been altered by allowing the attorney's authority to be determined by the law of the jurisdiction where the EPA was executed. The Alberta legislation specifically provides that an EPA is valid if it is made "according to the law of the place where it has been

[137] *Ibid*. at 34 (footnotes omitted).

executed".[138] Manitoba legislation also refers to recognition of foreign EPAs. It states that they are valid in Manitoba if they are valid according to the law of the place where executed and if the EPA states that it is to continue despite the donor becoming mentally incompetent after execution.[139]

Finally, Ontario's *Act* states that the EPA is valid if, at time of its execution, it complied with the internal law of the place where:

> *(a) the power of attorney was executed;*
> *(b) the grantor was then domiciled; or*
> *(c) the grantor then had his or her habitual residence*.[140]

The Commission prefers the Alberta and Manitoba approach where an EPA is valid if it is made according to the law of the place where it has been executed. This is straightforward and clearly addresses the problem of EPAs made in other jurisdictions.

The Commission suggests

- That an EPA should be valid in Nova Scotia if it is made according to the law of the place where it was executed.

[138] Section 3(5).

[139] Section 25.

[140] Section 85.

IV SUMMARY OF SUGGESTIONS

MAKING AN EPA

1. Choosing an attorney [pages 9 - 10]

- An attorney must be:
    - mentally competent and of the age of majority (presently 19 years of age),
    - the Public Trustee, or
    - a financial institution.

- An attorney must not be an undischarged bankrupt.

2. Joint and alternate attorneys [pages 10 - 12]

- A donor should be able to name any number of attorneys to act on their behalf.

- If more than one attorney is named, they must act jointly unless the EPA states otherwise. In other words, they must make decisions by unanimous agreement unless the EPA states that they can make decisions by majority agreement.

- A donor should be able to appoint alternate attorneys to act successively.

3. Signing on behalf of the donor [pages 12 - 13]

- When the donor is incapable of reading or signing an EPA, an individual (other than the attorney or the attorney's spouse) should be able to sign it on the donor's behalf. The EPA must be signed in the donor's presence, at the donor's direction and in the presence of two or more witnesses who are present at the same time.

- If a donor is signing an EPA on their own behalf, it must be signed in the presence of two or more witnesses who are present at the same time.

- Spouse should be defined to include common law spouse, whether of the same or opposite sex.

4. Witnesses [pages 13 - 16]

- An EPA should be witnessed by two people who are present at the same time, neither of whom is:
    1. The attorney or the attorney's spouse.
    2. The donor's spouse.
    3. A child of the donor or a person whom the donor has demonstrated a settled intention to treat as his or her child.
    4. A person who is mentally incompetent.
    5. A person who is less than the age of majority, presently 19 years of age.

5. Mandatory legal advice [pages 16 - 20]

- The Commission invites comment on whether a Certificate of Independent Legal Advice should be required in order for an EPA to be valid. The Certificate of Independent Legal Advice contain a statement that the donor signed (or acknowledged having signed) the EPA in the presence of the lawyer, that the donor acknowledged that the EPA was voluntarily signed, and that the donor appeared to understand the nature and effect of the document.

- That explanatory notes be part of a checklist supplied by the Nova Scotia Barristers' Society or by the Continuing Legal Education Society of Nova Scotia to assist lawyers in drafting EPAs.

6. Registration [pages 20 - 22]

- Registration of EPAs should not be mandatory.

7. Contingent powers of attorney [pages 22 - 25]

- EPA legislation should deal specifically with contingent EPAs.

- If an EPA is contingent upon the donor's mental incompetency, the certificates of two medical practitioners should be required to prove that the contingency has occurred.

USING AN EPA

8. Duty to act [pages 25 - 26]

- When a donor of an EPA becomes mentally incompetent, the attorney has a duty to act:
    1. if they know or ought reasonably to know that the donor is mentally incompetent; and
    2. if they have assumed management of the estate or contracted with the donor to do so.

9. Confidentiality [pages 26 - 27]

- Legislation should authorize the release of confidential information concerning the donor's mental and physical health for the limited purpose of determining whether the contingency of mental incompetency has occurred.

10. Duty of care [pages 27 - 29]

- Legislation should specify that the relationship between a donor and attorney is "fiduciary" in nature and that an attorney therefore has a duty to, among other things: account, exercise reasonable care, not make secret profits, and not act contrary to the interests of the donor.

- An attorney should be required to exercise the judgment and care that a reasonably prudent person in comparable circumstances would exercise.

11. Liability of the attorney [pages 29 - 30]

- If the EPA has been terminated or is not valid, an attorney should be protected from liability for having acted in good faith if the attorney did not know and had no reasonable grounds for believing that the attorney's authority had been terminated or lost.

12. Authority to benefit others [pages 30 - 33]

- The legislation should specifically state that an EPA may authorize third party payments, including charitable and seasonal gifts. If the EPA does not authorize such payments, an attorney may not authorize charitable or seasonal gifts.

- An attorney should be able to provide for the reasonable maintenance and support of the donor's dependents.

13. Accounting [pages 33 - 36]

- The donor should be able to request an accounting at any time.

- When the donor is mentally incompetent, the attorney should be required to provide an accounting upon the demand of any person named for that purpose in the EPA. If the donor does not name anyone in the EPA, or if the named person is the attorney or the spouse of the attorney or is deceased or mentally incompetent, the attorney shall provide an annual accounting to the donor's nearest relative.

- "Nearest relative" means the adult person who is related to the donor, mentally competent and first listed in the following series: spouse, child, grandchild, great-grandchild, parent, sibling, niece or nephew, or where none of these people qualifies, the Public Trustee.

- The court should have the discretion to grant an order for accounting, as it considers appropriate.

- An attorney should also be required to account upon termination of an EPA.

14. Protection to third parties [pages 36 - 37]

- If the attorney's authority under the enduring power of attorney has been terminated, an attorney's act should be valid and binding in favour of any person who did not know of the termination.

CHANGING/ENDING AN EPA

15. Renunciation by attorney [pages 37 - 39]

- An attorney should be able to renounce an appointment by giving notice to the donor.

- If the donor is no longer mentally competent and the attorney has assumed management of the estate or contracted to do so, the attorney must apply to court in order to renounce the appointment. In the interim period before the court hears the application, the person should be required to continue to act as attorney.

- Notice of an application to renounce should be given to the Public Trustee.

16. Substitution and variation [pages 39 - 40]

- Courts should continue to be authorized to substitute an attorney upon application by an interested party.

- Courts should also be authorized to vary the terms of an EPA upon application by an interested party.

17. Termination [pages 40 - 43]

- An EPA should terminate if it is revoked by the donor of if the donor dies.

- Subject to the court's right to vary the terms of an EPA, including the right to substitute an attorney, an EPA should also terminate upon:
    - the death or mental incapacity of the attorney;
    - the renunciation of the attorney;
    - the coming to pass of a time or event specified in the EPA; or
    - the appointment of a guardian under the *Incompetent Persons Act*.

- The bankruptcy of the donor should not automatically terminate the EPA since the attorney can represent the donor's interests at the bankruptcy proceedings.

18. EPAs made in other places [pages 43 - 44]

- That an EPA should be valid in Nova Scotia if it is made according to the law of the place where it was executed.