



Enduring Powers of Attorney: Areas for Reform

Final Report
2008

Executive Summary and List of Recommendations

WESTERN CANADA LAW REFORM AGENCIES

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

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

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

EXECUTIVE SUMMARY

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

Recognition of EPAs

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

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

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

witnessed in the usual way. Ineligible witnesses are the attorney, the attorney's spouse, the donor's spouse and any proxy who signs on behalf of the donor. The witness is required to sign a witness statement setting out that the formal requirements of signing and witnessing have been met.

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

Duties of attorneys under EPAs

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

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

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

to obtain financial information. To qualify as an “interested person,” the person or institution must establish a need to know in the best interests of the donor.

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

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

Safeguards against misuse of EPAs

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

When an attorney commences acting for a mentally incapable donor, the attorney will have to issue a document called Notice of Attorney Acting, in which the attorney will acknowledge and accept the attorney duties under the EPA and confirm that the attorney is now handling the mentally incapable donor’s affairs. The Notice must be given within a reasonable time to any person designated by the donor in the EPA to receive that notice or, if none is designated, to the donor’s immediate family. “Immediate family” consists of the donor’s spouse (including an opposite or same sex partner in a marriage-like arrangement), adult children (including step-children and adopted children), parents and adult siblings. In the EPA, the donor can exclude any immediate family member by name from receiving the Notice but the donor cannot waive the general duty to give notice. If

there is no one to receive notice, the attorney must give the Notice to a designated public official.

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

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

LIST OF RECOMMENDATIONS

Recommendation No. 1: Statement of enduring effect

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

Recommendation No. 2: Criteria for recognition

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

An enduring power of attorney, whether it is made in [enacting jurisdiction] or not, has the same effect as though it were made in accordance with this Act if,

(a) it meets the formal requirements of this Act; or

(b) it was made under and meets the formal requirements established by the legislation of

(i) the jurisdiction where the enduring power of attorney was made, or

(ii) the jurisdiction where the person who made the enduring power of attorney was habitually resident at the time the enduring power of attorney was made.

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

Recommendation No. 3: Uniform formalities

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

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

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

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

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

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

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

Recommendation No. 5: Formal validity – witnesses

- (1) One witness is required to be present when an EPA is signed.
- (2) The attorney, the attorney’s spouse and the donor’s spouse are ineligible to act as a witness (“spouse” includes an opposite or same sex partner in a marriage-like relationship).
- (3) The witness is required to sign a witness statement setting out that
 - (a) the EPA was signed by the donor (or the donor’s proxy in the donor’s presence);
 - (b) the EPA was signed by the donor while physically apart from the attorney;
 - (c) the donor appeared to understand the nature of the document;
 - (d) the donor appeared to agree voluntarily to sign the document; and
 - (e) the witness is not the attorney, the attorney’s spouse or the donor’s spouse

Recommendation No. 6: Standard form EPA

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

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

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

- (1) Each of the western provinces should enact a statutory list of duties that are specific to attorneys acting under EPAs.
- (2) The duties should be stated in plain language. The legislation should not characterize attorneys as fiduciaries, trustees or agents.
- (3) The following list of duties, which moves from general to specific, should be adopted as the statutory list of duties that will arise upon the incapacity of the donor where the attorney has consented or commenced to act:
 - (a) act honestly, in good faith, and in the best interests of the donor;
 - (b) take into consideration the known wishes of the donor and the manner in which the donor managed the donor’s affairs while competent;
 - (c) use assets for the benefit of the donor;
 - (d) keep the donor’s property and funds separate, except as permitted by statute;
 - (e) keep records of financial transactions;
 - (f) provide details of financial transactions upon request; and
 - (g) give Notice of Attorney Acting.
- (4) In carrying out the duties, the attorney
 - (a) shall be held to the standard of care of a prudent person in comparable circumstances (including having comparable experience and expertise);

- (b) shall not receive remuneration from the donor for acting as the attorney unless the EPA expressly authorizes the remuneration and states the basis for it; and
- (c) can be reimbursed from the donor's property for reasonable expenses properly incurred in acting as the attorney.

(5) An attorney is not personally liable for loss or damage to the donor's property or financial affairs, if the attorney complies with

- (a) the provisions of the EPA under which the attorney acts;
- (b) the attorney's duties, as set out in the Act and any order of a court;
- (c) any directions of a court given under the Act; and
- (d) any other duty that may be imposed by law.

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

- (1) The accounting requirements of the western provinces should be harmonized.
- (2) The duty of an attorney to keep records of financial transactions is active, ongoing and mandatory. The duty includes making an inventory of the property brought under the attorney's control and keeping track of all subsequent transactions with respect to that property, with documented proof.
- (3) The duty of an attorney to provide details of the financial transactions is passive, arising only upon the request of specified persons. The duty would be met by providing a summary statement of the property brought under the attorney's control and subsequent financial transactions with respect to that property, and by giving the persons who are entitled to know the details an opportunity to examine the records themselves.
- (4) Immediate family members and any persons designated by the donor will be entitled to request details of the financial transactions at "reasonable intervals." The donor may exclude by name in the EPA any immediate family member who the donor does not want to receive details.
- (5) Where an immediate family member or designated person and the attorney disagree about what constitutes a reasonable interval, the immediate family member or designated person is entitled to make a court application for an order directing the attorney to provide details of the financial transactions.
- (6) All other interested persons should be entitled to ask a public official (the Public Trustee, Public Guardian and Trustee or other public official, as appropriate to the province) to direct the attorney to provide details of the financial transactions or to apply to court for an order so directing.
- (7) In order to qualify as an interested person for the purpose of obtaining details of the financial transactions, the person or institution must establish a need to know in the best interests of the donor.

Recommendation No. 9: Inclusion of duties in standard form EPA

The standard form EPA will include a list of the statutory attorney duties.

Recommendation No. 10: Knowledge of duties

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

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

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

Recommendation No. 12: Giving Notice of Attorney Acting

- (1) The attorney must give a Notice of Attorney Acting to designated persons within a reasonable period of time after the donor is declared to lack capacity and the attorney assumes exclusive responsibility for managing the donor's financial affairs.
- (2) The donor can designate by name in the EPA any person or persons to receive the Notice of Attorney Acting.
- (3) Where the donor does not name anyone, the Notice of Attorney Acting must be given to the donor's immediate family members, which means the donor's spouse (including an opposite or same sex partner in a marriage-like arrangement), adult child (including a step-child and adopted child), parent and adult sibling. The attorney must make reasonable efforts to give notice to all immediate family members in the listed categories.
- (4) The donor cannot waive the attorney's duty to give Notice of Attorney Acting, but can designate by name in the EPA any immediate family member who should not receive the Notice of Attorney Acting.
- (5) If there is no person to whom the attorney can give notice, the attorney must give Notice of Attorney Acting to the appropriate public official.
- (6) The attorney must also give Notice of Attorney Acting to the donor.
- (7) The Notice of Attorney Acting must list the attorney's statutory duties.
- (8) The attorney must acknowledge and accept the duties by signing the Notice of Attorney Acting prior to giving notice.
- (9) Regulations should provide a standard form Notice of Attorney Acting; however, use of the standard form should not be mandatory.

Recommendation No. 13: Reporting suspected misuse of an EPA

- (1) Each of the four western provinces should designate a public official to receive reports of concerns about the conduct of an attorney under an EPA.
- (2) The reporting of concerns should be voluntary.
- (3) A person who reports in good faith should be protected. No action or other proceeding may be brought against a person who reports misuse or participates in an investigation unless the person acted maliciously or without reasonable and probable grounds.
- (4) The public official charged with receiving reports should have the discretion to investigate any suspected EPA misuse.

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

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

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

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

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

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

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

Recommendation No. 14: Transitional provisions

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

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

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

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

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

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

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

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

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