

# Enduring Powers of Attorney: Areas for Reform Supplementary Report Executive Summary

## A. Introduction

The Manitoba Law Reform Commission is a member of the Western Canada Law Reform Agencies (WCLRA), along with the Alberta Law Reform Institute, the British Columbia Law Institute and the Saskatchewan Law Reform Commission. The WCLRA was formed to encourage harmonization of the laws of the four western provinces. In July 2008, the WCLRA published its report *Enduring Powers of Attorney: Areas for Reform*.

A power of attorney is an instrument under which a person (the donor) confers upon another person the power to manage the donor's property and financial affairs. An enduring power of attorney (EPA) continues in effect during, or comes into effect on, the subsequent mental incompetence of the donor. The WCLRA report makes several recommendations for legislative reform in the four western provinces to increase consistency in respect of EPAs and to facilitate the recognition of EPAs among the provinces.

The publication of the WCLRA report provides a timely opportunity to examine additional aspects of *The Powers of Attorney Act* in Manitoba that may require reform. This supplementary report provides an overview of the impact of the WCLRA report on *The Powers of Attorney Act* and identifies additional areas of reform for Manitoba.

## B. Western Canada Law Reform Agencies Report

The WCLRA report *Enduring Powers of Attorney: Areas for Reform* makes several recommendations to increase legislative consistency in relation to EPAs in Manitoba, Saskatchewan, Alberta and British Columbia. In some respects, the recommendations are consistent with the existing Manitoba Act, but some amendments will be necessary for implementation.

The WCLRA report calls for all four western provinces to provide in legislation for both springing and continuing EPAs, and to implement uniform criteria for the recognition of EPAs made in other jurisdictions. The report also makes several recommendations with respect to uniform formalities for making an EPA. The EPA should expressly state that the attorney's authority continues in effect during, or comes into effect on, the donor's mental incompetence. The legislation should also require that the donor sign or acknowledge his or her signature in the presence of a witness, separate and apart from the attorney. If the donor is physically incapable, a proxy may sign on behalf of the donor. A brief standard form EPA should be prescribed by regulation to facilitate EPA recognition, although its use would be voluntary.

The WCLRA report recommends that each province set out in legislation a list of specific attorney duties, and that an attorney should be held to the standard of care of a prudent person

having comparable experience and expertise. The attorney should not receive remuneration unless the EPA expressly authorizes the remuneration and states the basis for it. The report also contains detailed recommendations regarding the duty of an attorney to account to others with respect to his or her administration of the donor's property. Immediate family members and any person designated by the donor would be entitled to request details at reasonable intervals, although the donor could exclude any person by name.

Currently, none of the four provinces provides a formal mechanism for an attorney to acknowledge or consent to his or her appointment. The WCLRA report recommends that the attorney acknowledge and accept the duties under an EPA in a Notice of Attorney Acting. Legislation should require an attorney to give the Notice to the donor and to specified persons within a reasonable period of time after the donor is declared to lack the mental capacity to manage his or her affairs. Where no person is named in the EPA to receive the Notice, the attorney should be required to make reasonable efforts to give notice to all of the donor's immediate family members. The legislation should allow the donor to exclude any person in the EPA, and where there is no person to whom the Notice can be given, the attorney should give the Notice to the appropriate public official.

The WCLRA report recommends the implementation of a voluntary reporting scheme for persons who suspect misuse of an EPA by an attorney. The legislation should designate a public official to receive reports of concerns. Other persons should also have the right to apply to court to terminate an EPA. Financial institutions should have the power to freeze accounts where they have reasonable grounds to suspect misuse and the duty to report the suspected misuse to the public official. The WCLRA report also recommends a number of transitional provisions.

The Commission recommends that the recommendations of the WCLRA be implemented in Manitoba. However, the attorney's duty to provide financial details under the WCLRA report is broader than the duty in the existing Manitoba Act, and as a transitional measure, the provisions of the existing Act should continue to apply to EPAs made before the amendments recommended by the WCLRA come into force.

Several provisions of *The Powers of Attorney Act* are not affected by the recommendations of the WCLRA. These provisions will remain intact, except where the Commission makes recommendations for additional reforms.

## C. Additional Enduring Power of Attorney Reforms

The WCLRA report *Enduring Powers of Attorney: Areas for Reform* does not deal with all aspects of power of attorney legislation. In the Commission's view, there are additional improvements that are appropriate for Manitoba.

The Commission recommends amendments to *The Powers of Attorney Act* to clarify that the mental incompetence of a donor does not terminate the authority of his or her attorney if the EPA provides that it is to continue despite, or come into effect on, the mental incompetence of the donor. The amendments should also clarify that in order for a springing power of attorney to be an EPA, it must comply with the formal requirements for an EPA.

The Manitoba Act currently sets out a number of circumstances that will terminate an attorney's authority under an EPA. The Commission considers that there are additional events that should cause an attorney's authority to terminate. For example, an attorney's authority should terminate where the attorney is the spouse or common law partner of the donor and the

marriage or common law relationship ends, or on the dissolution, winding up or cessation of business of a corporate attorney.

The Manitoba Act does not currently address the termination of the EPA itself, and under the common law, the death of the sole attorney appointed under an EPA terminates the EPA. In the Commission's view, where the sole attorney dies and no successor attorney has been named in the EPA, the Act should provide that the court has jurisdiction to appoint a substitute attorney.

The Commission recommends that additional eligibility criteria be established for EPA attorneys, to reduce the risk of EPA misuse. Individuals who have been convicted within the previous 10 years of certain criminal offences, including assault, sexual assault, theft, fraud and breach of trust, should be disqualified, unless the individual has been pardoned or the donor gives his or her written acknowledgement and consent. Individuals and corporations involved in providing personal care or health care services to the donor for compensation should also be disqualified. The Commission also recommends that the Public Trustee and a corporation other than one that provides personal care or health care services to the donor for compensation should be authorized to act as an attorney under an EPA. The duty of an attorney in the existing Act to act on behalf of the donor once the attorney has accepted his or her appointment under the EPA should continue in place.

The WCLRA report noted that there is no mechanism in the four western provinces for noting on the title to a donor's land that the donor is precluded from dealing with the property. In the Commission's view, the Act should be amended to require an attorney to register a Notice of Attorney Acting in respect of the donor's land, to give notice to others that the attorney has become solely responsible for decision making regarding the land.

*The Wills Act of Manitoba* protects the interests of beneficiaries to a will in cases where a committee or substitute decision maker for property disposes of property that was devised or bequeathed in the owner's will. Beneficiaries have the same interest in the proceeds of the disposition as they would have had in the property if it had not been disposed of. The Commission recommends that similar protection be extended when the person disposing of the property is an attorney acting under an EPA.

Finally, the Commission recommends that *The Real Property Act* and *The Homesteads Act* be updated in relation to EPAs, and that a legislative review be undertaken to ensure that all Manitoba statutes include the appropriate references to enduring powers of attorney.