LAW REFORM COMMISSION OF BRITISH COLUMBIA

Working Paper No. 62

The Enduring Power of Attorney: Fine-Tuning the Concept

This Working Paper is circulated for criticism and comment. It does not represent the final views of the Commission.

It would be appreciated if comments could be submitted by November 30, 1989.

November, 1991

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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Introductory Note

The Commission makes a general practice of inviting comment and criticism on its research and analysis prior to making a Report to the Attorney General on any particular subject. One of the means by which the Commission carries out this objective is the circulation of Working Papers to those persons, groups or organizations to whom the particular subject under study would be of interest.

This process of soliciting the comments of interested persons and bodies provides the Commission with the benefit of the experience and views of the community, and thereby assists the Commission in making proposals for the reform of the law that are both relevant and sound.

This Working Paper represents the present state of the Commission's research on the subject under study, and marks the point at which the views and comments of others would be of greatest value to the Commission. The final recommendations of the Commission will be developed in the light of the comment and criticism received.

It would be appreciated if comments and criticism were submitted by November 30, 1989, to the following address:

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A. Agents and Other Surrogates

The law confers or recognizes rights, and controls how they may be exercised and by whom. An owner of property, for example, has a bundle of rights that he may exercise, provided he is an adult and of full capacity.

A person who is mentally infirm or not of full age, however, must rely on another, a surrogate or a substitute, to exercise his rights for him. A minor, for example, must act through a parent or a guardian. A person who is mentally incompetent (a "patient") will come under the protection of a person called a "committee" who is empowered to exercise the patient's rights on his behalf.[1] The rights of a deceased person vest in a personal representative (an administrator or executor) who may exercise them until the deceased's successor is determined. Like nature, the law abhors a vacuum. A large portion of the law, consequently, is concerned with ensuring that there is always someone who is capable of exercising particular legal rights.

Not every case in which a substitute becomes entitled to exercise another's rights on his behalf happens by operation of law. And not every case involves a substitute exercising powers on behalf of a person no longer capable of doing so for himself. A person, for example, may designate or appoint another to act on his behalf, and still retain the ability to exercise his legal rights as well. In these cases, the appointed surrogate is usually called an "agent" and the appointer is usually referred to as the "principal." A particular type of agent, one who is usually empowered to act for the principal in all matters or in a range of matters specified in the instrument is an "attorney,"[2] and his authority is usually created in a document called a "power of attorney."

Until fairly recently the functions of these two types of surrogates -- the one who assumes sole ability to exercise an other's legal rights as a substitute or protector and the one who shares that ability with the appointer -- tended to be viewed as serving quite different functions. The law provided only very limited machinery by which a person could, while competent, indicate who he wanted to manage his affairs should he become incompetent.[3] A general rule of agency law prevented a principal from creating a power of attorney which would clothe the attorney with the authority to continue to act for the principal after the latter had become incompetent. The rule caused the attorney's authority to automatically terminate on that event. The law, essentially, was unable to accommodate a transition from shared authority to sole authority in the attorney.

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[1] The *Patients Property Act,* R.S.B.C. 1979, c. 313, provides for the appointment of a committee to be responsible for the affairs and/or the person of the patient. The committee is frequently an official known as the Public Trustee.

[2] In some places the primary meaning of "attorney" is a person qualified to practice law and it is used interchangeably with "lawyer." The word is not used in that sense in this Working Paper.

[3] S.9 of the *Patients Property Act, supra,* n. 1 permits a potential patient to nominate a committee. *See* Appendix C.

That rule has now been changed and for approximately the last 10 years individuals have been able to create a power of attorney that will survive the principal's incapacity. "Enduring power of attorney" is the term which has been adopted for this. The purpose of this Working Paper is to examine certain aspects of its operation in the light of what we have learned and the experience of other jurisdictions. A starting point is the statute in which this reform, and others, has been implemented.

B. The *Power of Attorney Act*

After many years of existence on our statute book, as an almost obsolete enactment, the *Power of Attorney Act*[4] has recently been the subject of substantial amendments which have breathed new life into it. These amendments embody reform initiatives arising out of three past reports of the Law Reform Commission.

In *Report on Powers of Attorney and Mental Incapacity*[5] the Commission examined the difficulties posed by the common law rule that the authority granted under a power of attorney ceases to have legal effect when the principal becomes mentally incompetent. It is in this very circumstance that many persons who create powers of attorney wish them to be valid. The Commission recommended that the concept of the "enduring power of attorney" be adopted in legislation. This was done through the enactment of section 7 of the Act.[6] A power of attorney that conforms to the formalities set out will survive the subsequent mental incapacity of the principal.

In *Report on the Termination of Agencies*[7] recommendations were made for provisions to protect the innocent agent or third party whose legal position may be threatened by an unknown event which has the effect of terminating the agent's authority to act for the principal. These recommendations are implemented in sections 1 to 4 of the Act.[8] Those sections apply to agency relationships generally. They are not limited, as were the provisions they replaced, to powers of attorney.[9]

In *Report on a Short Form General Power of Attorney*[10] it was recommended that the Act should authorize the use of an extremely abbreviated form of power of attorney as an alternative

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4 R.S.B.C. 1979, c. 334. The full text of the Act is set out as Appendix A to this Working Paper.

5 LRC 22, 1975.

6 Enacted by *Attorney -General Statutes Amendment Act, 1979,* S.B.C. 1979, c. 2, s. 52. The language of s. 7 was drawn from s. 2 of the *Uniform Powers of Attorney Act* promulgated by the Uniform Law Conference of Canada in 1978.

7 LRC 21,1975.

8 Enacted by *Miscellaneous Statutes Amendment Act (No. 1), 1987,* S.B.C. 1987, c. 42, s. 90.

9 *See Report on the Termination of Agencies, supra,* n. 7 at 9 for a discussion of issues raised by that limitation.

10 LRC 79, 1985.

to the lengthy and verbose "long form" in common use. This recommendation was implemented through the enactment of section 8 and the forms in the Schedule to the act.[11]

C. Some Issues

1. Experience under the Act

The amendments in relation to the termination of agencies and to the short form power of attorney were enacted only in 1987 and, as yet, there is little actual experience concerning their operation. There is no reason to believe, however, that they are likely to create any difficulties in practice. Section 7, which provides for the "enduring power of attorney" is somewhat older. It was enacted in 1979 and we have almost 10 years of experience with it. It is section 7, and some of the issues that arise out of it that form the focus of this Working Paper.

The basic policy is set out in section 7(1) which provides:

> 7. (1) The authority of an attorney given by a written power of attorney that
> (a) provides that the authority is to continue notwithstanding any mental infirmity of the donor; and
> (b) is signed by the donor and a witness to the signature of the donor, other than the attorney or the spouse of the attorney,
>
> is not terminated by reason only of subsequent mental infirmity that would but for this Act terminate the authority.

The concept of the enduring power of attorney appears to have been well-received by both the public and the legal profession. It has become widely used and nothing in our experience with section 7 calls its basic principle into question. This experience does, however, suggest that there are ways in which the enduring power of attorney could be made even more useful, and that certain ambiguities surrounding its operation in particular circumstances could be resolved.

2. When Does a Power of Attorney Become Effective?

Most powers of attorney are intended to have legal effect as soon as they are created. This is the tenor of the short forms set out in the Schedule to the Act and nothing in the language of section 7 suggests that it contemplates that enduring powers of attorney will deviate from this norm.

Experience demonstrates, however, that an appreciable number of persons who use the enduring power of attorney are anxious to arrange matters so that it does not have the effect of conferring authority on the attorney from the time of its creation. Their preference is to allow the

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[11] Enacted by *Miscellaneous Statutes Amendment Act (No. 1), 1987, supra*, n. 8, ss. 91, 92.

authority to remain dormant so long as the principal is of full capacity but to allow the instrument to operate with full vigor when he ceases to be of full capacity.

A number of techniques may be employed to achieve this goal, but, it is not wholly clear whether they fully and safely meet the needs and wishes of their users. This issue is explored in greater detail in Chapter II.

3. When Does a Power of Attorney Cease to Have Effect?

The policy of section 7 is that an enduring power of attorney should terminate if and when the affairs of the principal come under the control of a committee pursuant to the provisions of the *Patients Property Act*.[12] This policy finds its expression in subsection (2) of section 7:

> (2) The authority of an attorney under a power of attorney referred to in subsection (1) terminates on the making of an order under section 2 of the *Patients' Property Act* or on the appointment of a committee under section 6(1) of that Act.

Questions have been raised whether the circumstances set out in subsection (2) are exhaustive. An examination of these questions suggests that the relationship between the *Power of Attorney Act* and the *Patients Property Act* might be more clearly defined. The committee rule itself may call for re-examination. The appointment of a committee need not necessarily terminate an enduring power of attorney to protect the principal. It is not clear that this consequence serves any practical purpose. These issues are addressed in Chapter III.

4. Housekeeping and Unfinished Business

There are some additional changes to the *Power of Attorney Act* that are relatively non-contentious and which may properly be described as "housekeeping." First, when the 1987 amendments were made respecting the termination of agencies, they should have been accompanied by a consequential amendment directed at section 7(3). This was overlooked.

Second, depending on the conclusions reached in Chapter II, it may be desirable to amend the forms in the Schedule. The forms already point out to the user that a power of attorney may be in "enduring" form. If the Act also authorized a mechanism by which the legal effect of the power of attorney could be held dormant until it is needed, it would be a logical extension that the forms also reflect that possibility.

Finally, while section 7 implements the central recommendation made in the *Report on Powers of Attorney and Mental Incapacity,* a number of subsidiary recommendations were also made which were aimed at refining the operation of the enduring power of attorney. These recommendations were overlooked at the time section 7 was enacted, and we revisit some of them

12 *Supra*, n. 1.

to see if their inclusion in the legislation would still be desirable. These matters are all addressed in Chapter IV.

A. The Problem

1. The Purpose of the Enduring Power of Attorney

The need for legislation such as section 7 of the *Power of Attorney Act*[1] which provides for an enduring power of attorney was canvassed in the Commission's 1975 *Report on Powers of Attorney and Mental Incapacity*.[2] After examining the common law rule that an attorney's authority is revoked by the mental incapacity of the principal, the Report went on to evaluate that rule.

First it was noted that in continuing to act after the principal has (arguably) become mentally incompetent the attorney runs a substantial risk of incurring liability.[3] In many cases this result may be unfair. Moreover, it may be in the public interest that the attorney continue to act. The Report echoed the comments of the English Law Commission:[4]

> It is clear that in a great many cases, attorneys continue to act notwithstanding that their donors have become incapable and that indeed in doing so, they perform a valuable service since, if the jurisdiction of the Court of Protection were invoked in all these cases, the Court's present resources would not enable it to cope with the resulting increase in work.... [I]t cannot be desirable that common practice is so much at variance with the requirements of the law.

The second, and more serious, flaw in the legal position as it then existed was that it defeated the reasonable expectations of those who wished to use powers of attorney. The Report observed:[5]

> There are probably very few solicitors in practice who have not, at one time or another, been approached by an elderly client requesting that a power of attorney be prepared appointing a close friend or relative to conduct his affairs because the client fears or feels his mental powers may be weakening. It is not easy to explain that.., *at the very moment he would wish such a power to become operative* it would, in law be terminated. . .[emphasis added]

Section 7 of the *Power of Attorney Act* is a response to this concern, but some might argue that it is an incomplete response.

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1 R.S.B.C. 1979, c. 334.

2 LRC 22, 1975.

3 *Ibid.*, at 10.

4 The Law Commission, *Powers of Attorney* (Law Com. No. 30, 1970) 12.

5 *Supra*, n. 2 at 10.

2. When Should a Power of Attorney Become Operative?

It is useful to focus for a moment on the words emphasized, and the wishes of the hypothetical client described, in the previous quotation. The client wants, through the medium of an enduring power of attorney, to provide for a substitute decision maker to deal with his affairs when he is no longer capable of doing so. But a general power of attorney, in its enduring form, such as one of those set out in the Schedule to the Act, may go further than he would wish. While it would clothe his attorney with the authority to act after the client became incompetent, it would also permit him to act before that event. This may be expressly contrary to the wishes of the client. In other words, an enduring power of attorney such as that apparently contemplated by the Act will not necessarily become operative "at the very moment he would wish."

This wish, however, is not entirely realistic. It is wholly inappropriate to view the loss of mental and legal capacity as something which occurs at a distinct and sharply defined point in time. It has been observed that:[6]

> ... in the days when the rule was formulated that supervening insanity of the principal revoked the authority of the agent whether he knew about it or not, there was a clearcut test of insanity. Either a man was certified or he was not certified. If he was certified he was insane. If he was not certified he wasn't insane.... A very large number of the cases which nowadays end up in the court of protection are those elderly persons who give general powers of attorney when they realize that their memories and powers of concentration are beginning to fail but when they are still unquestionably sane. As the years go by, they slowly and imperceptibly deteriorate, but there is no given moment in time when it can be said they crossed the border line from capacity to incapacity....

One significant advantage attached to an enduring power of attorney which is effective from the time of its creation is that it renders unnecessary any determination of whether or not the principal is legally competent at any given time. It accommodates the gradual nature of loss of capacity.

Notwithstanding this advantage, it seems clear that a significant number of would-be principals are uncomfortable with the notion of conferring authority on an attorney which has the potential to be exercised before it is needed.

For example, a person may still be both mentally and physically vigorous notwithstanding advancing years. Merely out of a sense of "putting one's affairs in order" such a person may make provision for future events or contingencies. One such event is death and the legal response to it is to make a will and appoint an executor to be responsible for dealing with that person's affairs after his death. But the will confers no immediate authority on the executor. His powers remain dormant until the occurrence of the contingency that awakens them -- the testator's death. The fact that the executor's powers cannot be exercised in the testator's lifetime do not reflect any distrust of the executor. It is simply that they are not needed any earlier, and the law and practice both accommodate this reality.

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[6] Extract from a submission of the Holborn Law Society to the English Law Commission, as set out in *Report on Powers of Attorney and Mental Incapacity, supra,* n. 2 at 10.

Making an enduring power of attorney is also making provision for a future contingency. Many persons approach that exercise with exactly the same attitude they bring to will-making. While they do not distrust the attorney selected, they do not see why it is necessary or desirable that the attorney's authority should take effect immediately. In the result, solicitors are frequently asked to prepare an enduring power of attorney, but to find some way in which its full operation can be deferred.

This emerged clearly in the discussion arising out of a course devoted to "Incapacity" sponsored by the Continuing Legal Education Society of British Columbia which was held early in 1988.[7] Several solicitors present spoke of this "demand" and the techniques that might be adopted to meet it. The discussion also suggested that the use of some of these techniques would be accompanied by a degree of uncertainty as to the extent and quality of protection they give the principal, and the potential exposure to risk of the attorney.

This demand, and the uncertainty which surrounds current ways of meeting it, is not peculiar to British Columbia. In New York it is an issue which has been addressed by both the Law Revision Commission and the Legislative Assembly of that State. In 1988 a Bill was brought forward based on recommendations of the Law Revision Commission.[8] In the Commission's formal statement in support of the Bill it was said:[9]

> New York, like all other states in the United States, permits a person to create a "durable" power of attorney, i.e., one which continues in effect even after the principal becomes incompetent. The statute is silent, however, with respect to whether a person may limit such a "durable" power to take effect at a future date or upon the occurrence of a contingency such as the principal's incapacity. It is, therefore, uncertain whether such a power, i.e., a "springing" power, could be created in New York. Some have indicated their belief that such a power could not be created under present law. At the same time, many persons who would wish to create a durable power are reluctant to create such a power to take effect immediately since they are thereby surrendering certain control over their affairs when they are in good health and capable of functioning independently. As a result such persons are ultimately deprived of the use of a durable power since it cannot be created after they become incompetent and resort must therefore be had to the appointment of a conservator or committee.

The provisions of the New York Bill are discussed below.

It might also be noted that New York has adopted a new and useful term to denote the power of attorney which takes effect at a time later than the time of its creation. This is referred to as a "springing power of attorney." We propose to use this terminology in the balance of this paper.

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7 *See* Continuing Legal Education Society, *Incapacity* (Materials Prepared for a Seminar Held in Vancouver, B.C., April 13, 1988).

8 **Laws of New York, 1988 Regular Session, Ch. 210. "Springing Powers of Attorney," Amending the general obligations law by adding a new section 5-1602.**

9 ***See* Law Revision Commission, State of New York, *Report of the Law Revision Commission for 1988* published in *Mckinney's Session Law News* No. 4., August, 1988 at A-495 (hereafter referred to as the New York Report).**

B. Techniques for Creating a Springing Power of Attorney

1. Custody of the Instrument

There are two basic approaches one might adopt in attempting to defer the operation of a power of attorney. The first focuses on physical possession of the document or instrument in which the power is embodied or created. A practical safeguard against any premature exercise of the power by the attorney is to arrange matters so that the instrument only comes into his possession at the time it is intended to become operational. The safeguard lies in the reality that most third parties would be reluctant to deal with a purported attorney who is unable to produce the written instrument which evidences his authority.

This approach is not free of difficulty. It is necessary to involve an additional person to retain custody of the instrument while the power is suspended. That person must, moreover, make a determination when it is appropriate to give the attorney possession of the instrument. If that determination requires the custodian to make some judgment as to the principal's mental state, the question arises whether a duty of care is owed and to whom. Depending on the answers, the custodian of the instrument may find himself exposed to liability for a bad judgment call.

The position of the custodian of the instrument may be eased somewhat if he is acting under written instructions which require him to surrender it to the attorney in precisely defined circumstances (for example, on receiving one or more doctors' affidavits attesting to the principal's incompetence) or which make it clear that the determination is purely a matter of discretion to be exercised by him.

It should be noted that this technique would not create a true "springing power of attorney." The attorney's authority would come into being immediately. In practice, however, he would be unable to satisfy third parties that he has that authority unless he also has possession of the instrument itself.

2. The Occurrence of a Specified Contingency

The second approach to the creation of a springing power of attorney is to make it a provision of the instrument itself that it shall not take legal effect until specified conditions have been satisfied.[10] It is the availability of this approach which was doubted in New York.

Whatever the position may be in New York, we see no legal impediments to the creation of a springing power of attorney in this province. The creation of a power of attorney, or any other agency relationship, is, at bottom, a matter of contract. There is nothing in the general law of contract which prevents two parties from including in an agreement between them a proviso that the agreement only take legal effect on the happening of some event. We are not aware of

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[10] To be effective as between principal and attorney, it is likely that the conditions need not appear on the face of the instrument. It is also likely, however, that where the conditions are not apparent on the face of the instrument, a court would not allow an innocent third party to be prejudiced.

anything peculiar to agency law which suggests a departure from that position. In our view, the current law allows a person to create a true springing power of attorney even though the *Power of Attorney Act* does not explicitly endorse its creation.

3. Limitations of The "Contingency" Technique

Our conclusion that, as a matter of contract and agency law, it is currently possible to create a springing power of attorney is not the end of the matter. The kind of springing power that might currently be created suffers from certain practical limitations which render sterile any debate over what may or may not be done under the general law.

In many cases, whether or not an instrument, in fact and law, confers authority on the attorney is not the critical issue. The issue is whether a person or institution with whom the attorney may wish to deal on behalf of the principal is prepared to accept that the attorney has the authority he claims. If such a person is not satisfied of the attorney's authority, there may be no way to compel him to deal with the attorney. In this way the principal's wishes will be frustrated even if, as a matter of law, the power of attorney is effective.

If a power of attorney only comes into effect on the happening of a contingency, its acceptability may be limited. How is a stranger to the arrangement to know whether or not the contingency which causes the power to spring into life has been satisfied? Much will depend on the nature of the contingency. Is the event on which it depends capable of objective determination? Can that determination be made easily and independently of the attorney? If these requirements are not met, the attorney may have grave difficulty in persuading anyone that he is clothed with the authority he claims.

An example of a contingency which does not meet these requirements might be one which would bring a power of attorney into force on the principal's incapacity. Any third party would be justified in exercising great caution in dealings with an attorney who derives his authority from an instrument framed in this fashion.[11] The dilemma is that the contingency set out is the one that many principals would like to see as the "trigger" which causes the power of attorney to spring into being.

C. New York's Statutory Solution

1. Background

The "durable" power of attorney, as it is known in the United States, has been widely accepted. This acceptance is due in large measure to the inclusion in the *Uniform Probate Code* of a section which provides for a durable power of attorney. This provision, in turn, inspired the

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[11] This view was shared by the New York Commission. *See* text, *infra,* at n. 16.

promulgation of a *Uniform Durable Power of Attorney Act.* Both statutes are similar on essential points and differ only on questions of drafting and organization.[12]

The central concept of the acts is the durable power of attorney, defined in the *Uniform Durable Power of Attorney Act* as: [3]1

> A durable power of attorney is a power of attorney by which a principal designates another his attorney in fact in writing and the writing contains the words "This power of attorney shall not be affected by subsequent disability of the principal," or "This power of attorney shall become effective upon the disability or incapacity of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal s subsequent disability or incapacity.

Two features of this definition are significant.

First, with the words "this power of attorney shall become effective upon the disability or incapacity of the principal" the springing power of attorney is recognized and authorized. Second, it sets out no test or means by which competence can readily be determined. A springing power of attorney created under the U.S. model legislation would, therefore, not be universally accepted in the "marketplace" as sufficient evidence of the attorney's authority, a concern noted by the Law Revision Commission of New York:[14]

> Although all states have adopted the durable power of attorney in some form, only a few have included language which indicates the power can be made effective upon the incompetency or disability of the principal. States which statutorily recognize the springing durable power of attorney have not statutorily defined the requirements for proof of disability, incompetence or incapacity.... As a result, attorneys have been left to draft appropriate language which will enable the power to become effective upon the incapacity of the principal but have been given little direction as to what would be sufficient to verify that incapacity short of adjudication. One reason for this may be that the legislatures wanted to give the individual who wishes to use this power as much deference as possible in detailing those events which would "trigger" the durable power of attorney as well as the p roof used to confirm that the events have occurred.... [T]he lack of any statutory guidance inhibits its use because the statutory silence creates uncertainty regarding the triggering of the springing durable power.

The New York Commission saw the proper focus of reform as establishing a method of proving that the set of circumstances that constitute a disability have come into being:[15]

> [T]he use of durable powers of attorney.. would become more widespread if.. .[potential principals].. were clearly permitted the option of restricting its use until a future time or until the occurrence of some event such as incapacity. At the same time, the Commission believes that if the law permits a power to

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[12] The *Uniform Durable Powers of Attorney Act* is set out as Appendix B to this Working Paper. We refer to the two acts collectively as the "model acts or the "model legislation."

[13] S.1.

[14] *See* New York Report, *supra,* n. 9 at A-501. The Commission noted that only 18 states had adopted the model legislation with language that authorized the springing power of attorney.

[15] *Supra,* n. 9 at A-504.

> be limited to take effect on the occurrence of an event such as the principal's incapacity or incompetence, without specifying the manner in which the occurrence of such event is to be determined and without rendering the method of making such determination conclusive, there will be doubt as to whether the power has taken affect and third parties will, justifiably, be reluctant to deal with the attorney-in-fact.

Their solution to this difficulty was described in the following terms: [16]

> The Commission, therefore, proposes a "self-contained" springing power of attorney. Specifically the Commission proposes that a person may grant a power to take effect at a future time or upon the occurrence of a contingency. If the grant is limited to take effect upon the occurrence of a contingency, the instrument must name a person or persons (who may be different from the named attorney-in-fact) who may make a written declaration that the contingency has occurred. A power so limited will take effect upon such written declaration and third parties may safely deal with the attorney-in-fact, with out regard to whether the contingency has in fact occurred. Put another way, the power will "spring" upon the written declaration of the named person, and will not depend on whether the named person has made a "correct" determination that the contingency has occurred. The principal in effect would be delegating to another person the power to make the power of attorney effective. Third parties would not have to be concerned with questions such as whether the principal was really incompetent", etc. Moreover, since the person named to make the declaration that the contingency has occurred need not be the same as the person name d as attorney-in-fact, the principal is given flexibility in choosing the persons to perform either function. For example, assume the contingency that the principal has identified is the inability to manage financial affairs. The principal may believe that the person who can be trusted to make an accurate assessment of the principal's abilities would not be an effective money manager and so the principal may wish to appoint a third party as attorney-in-fact. Under the.. .proposal, the principal can structure the power to allow for that arrangement.

The Report went on to illustrate the working of the proposal with a number of examples.

2. The New York Legislation

The legislation enacted to implement the proposal of the New York Law Revision Commission provided:[17]

1. An instrument granting a power of attorney may limit such power to take effect at a specified future time.

2. An instrument granting a power of attorney may limit such power to take effect upon the occurrence of a specified contingency, including but not limited to the incapacity of the principal, provided that the instrument requires that a person or persons named in the instrument declare, in

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16 *Supra,* at A-505.

17 *Supra*, n. 8.

writing, that such contingency has occurred. A power limited as provided in the preceding sentence shall take effect upon the written declaration of the person or persons named in the instrument that the specified contingency has occurred without regard to whether the specified contingency has occurred.

3. The disability or incompetence of a principal shall not revoke or terminate the authority of an attorney-in-fact who acts under a power of attorney executed in writing by the principal in accordance with subdivision one or two if the instrument contains the words "This power of attorney shall not be affected by the disability or incompetence of the principal", or words of similar import showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's disability or incompetence.

The Act was not given retrospective effect.

D. Analysis of the New York Legislation

The New York legislation provides three ways in which the effectiveness of a power of attorney might spring into existence.

1. Effluxion of Time

Section 1 permits the power to take effect at a specified future time. This appears to contemplate provisions such as the following:

> This power of attorney shall take effect on January 1, 1992.
>
> or
>
> This power of attorney shall take effect 6 months after the date of its execution.

Section 1 puts beyond doubt the validity of such provisions.

2. Contingency Other than Incapacity

Section 2 permits the power to take effect on the happening of a specified contingency. This contingency may include but is not limited to the principal's incapacity. What other events might a principal wish to provide for? The New York Report gives as an example[18] the case of person whose professional duties regularly take her to the middle east and who wishes to designate an attorney who can act if she should be taken hostage. It is not difficult to envisage other examples.

3. Incapacity of the Principal

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[18] *Supra,* n. 9 at A-507.

The incapacity of the principal is a contingency that is specifically mentioned as one which may be stipulated to be a "triggering event."

4. Proof of Occurrence

It is not the occurrence of the triggering event that causes the power of attorney to take effect -- it is the proof of that event in a particular fashion. If the person named in the instrument declares in writing that the contingency has occurred then the power of attorney takes effect whether or not the declaration is correct. It is the declaration that is critical.

E. Proposals for Reform

On a strictly technical level, we believe that the New York legislation, so far as it authorizes a springing power of attorney, arguably does nothing that cannot be done under current British Columbia law. It does not follow, however, that similar legislation ought not to be enacted in this province. Such legislation would achieve two things. First it would put the legal acceptability of the springing power of attorney beyond doubt and encourage its use in appropriate cases. Second it provides a mechanism by which, in a simple and straightforward fashion, a third party can determine whether a contingent power of attorney has come into force.

The second feature would, in practical terms, represent a significant advance over the present situation. Where the contingency is the incapacity of the principal, it would allow him to designate his doctor as the person on whose declaration the power of attorney becomes effective. Third parties would not be required to form their own conclusions as to the principal's incapacity in deciding whether or not they can safely deal with an attorney.

Formal proposals, cast in the form of amendments to the *Power of Attorney Act* are set out in Chapter V.

CHAPTER III TERMINATING THE ENDURING POWER OF ATTORNEY

A. The Policy

In its *Report on Powers of Attorney and Mental Incapacity*[1] the Commission endorsed the principle that an enduring power of attorney should terminate on the appointment of a committee.[2] That principle has been adopted in other Canadian legislation on this topic and in the (Canadian) *Uniform Powers of Attorney Act.*

The termination of an enduring power of attorney is addressed in section 7(2) of the *Power of Attorney Act:*

> (2) The authority of an attorney under a power of attorney referred to in subsection (1) terminates on the making of an order under section 2 of the *Patients' Property Act* or on the appointment of a committee under section 6(1) of that Act.

We understand that differing views have emerged respecting the status of an attorney when the appointment of a committee takes place in a way not contemplated by section 7(2).

B. An Ambiguity?

The source of the difficulty seems to be a lack of harmony between section 7(2) and the provisions of the *Patients Property Act*[3] Section 7(2) describes two circumstances in which things done under the *Patients Property Act* will terminate an enduring power of attorney. The circumstances enumerated are not, however, exhaustive of those in which a committee can be clothed with powers under the *Patients Property Act.*

A key definition in that act is "patient." One limb of the statutory definition provides:[4]

> "patient" means
>
> (a) ...
> (b) a person who is declared under this Act by a judge to be
> (i) incapable of managing his affairs;
> (ii) incapable of managing himself; or
> (iii) incapable of managing himself or his affairs;

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1 LRC 22, 1975.

2 The reasons for this endorsement are discussed *infra*.

3 R.S.B.C. 1979, c. 313. This Act is the successor to the *Patients' Estates Act* referred to in the quotation from LRC 22, *infra*, at n. 7. Selected provisions of the *Patients Property Act* are set out as Appendix C to the Working Paper.

4 *Ibid.*, s. 1.

Section 2 of the *Patients Property Act* provides for an application to, and declaration by, a judge which will result in a per-son becoming a patient. The Court may also appoint a committee[5]5 Section 6(1) provides:

> 6. (1) Subject to section 13, on application by the Attorney General or any other person, the court may appoint any person to be the committee of the patient.

Sections 2 and 6(1) are those referred to in section 7(2) of the *Power of Attorney Act* as triggering termination.

But the definition of "patient" in the *Patients Property Act* has another limb. It provides:

> "patient" means
>
> (a) a person who is described as one who is, because of mental infirmity arising from disease, age or otherwise, incapable of managing his affairs, in a certificate signed by the director of a Provincial mental health facility as defined in the Mental Health Act or by the officer in charge of a psychiatric unit as defined in that Act; or...

That definition should be read in conjunction with section 6(3) of the Act:

> (3) Subject to section 16, except during the time that a person appointed under subsection (1), other than the Public Trustee, is the committee of a patient, the Public Trustee is the committee of the patient.

In other words, whenever a person becomes a "patient" through the issue of a certificate by an official having status under the *Mental Health Act,* the Public Trustee automatically, through the operation of section 6(3), becomes the committee of that person. This is a circumstance not referred to in section 7(2) of the *Power of Attorney Act.*

It has been suggested that the certification procedure does not terminate an enduring power of attorney.[6] While the issue is not wholly free of doubt, we think the better view is that certification does terminate the power. This view rests on section 19 of the *Patients Property Act:*

> 19. On a person becoming a patient, every power of attorney given by him is void and of no effect.

This provision is clear and unequivocal, and it draws no distinction between the enduring power of attorney and those which do not survive the principal's incapacity.

Nothing in section 7(2) of the *Power of Attorney Act* suggests that it was meant to prevail or be exhaustive of the events that will terminate an enduring power of attorney. Rather, it seems to

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5 The two applications may be brought in the same proceeding. Sees. 6(4).

6 Continuing Legal Education Society, Incapacity (Materials Prepared for a Seminar Held in Vancouver B.C. April 13, 1988) at 6.1.06. *See also* Robertson, *Mental Disability and the Law in Canada* (1987) 170; the author describes the legislation as "equivocal."

have been included to give the reader a cross-reference to the *Patients Property Act* -- a cross-reference which, unhappily, turned out to be incomplete.

If the principle of section 7(2) is to be retained there may be some virtue in eliminating the imperfect interface between the two acts. This might be done simply by repealing section 7(2), or by replacing it with a provision that tracks the language of section 19 of the *Patients Property Act.*

C. The Policy Reconsidered

It is not quite so self-evident as it was 14 years ago, when this Commission made its *Report on Powers of Attorney and Mental Incapacity,* that the appointment of a committee should terminate an enduring power of attorney. While this policy has been widely accepted in Canada and adopted in our *Uniform Powers of Attorney Act,* the United States seem to have adopted a different approach.

The American approach is that set out in section 3(a) of the *Uniform Durable Power of Attorney Act:*

> 3. [Relation of Attorney in Fact to Court-appointed Fiduciary]
>
> (a) If, following execution of a durable power of attorney, a court of the principal's domicile appoints a conservator, guardian of the estate, or other fiduciary charged with the management of all the principal's property or all of his property except specified exclusions, the attorney in fact is accountable to the fiduciary as well as to the principal. The fiduciary has the same power to revoke or amend the power of attorney that the principal would have had if he were not disabled or incapacitated.

The "fiduciaries" described in this provision perform a function similar to that of a committee. Clearly, the authority of the attorney does not terminate when such a fiduciary is appointed.

In the Commission's 1975 Report the reason stated for favouring termination of the attorney's authority on the appointment of a committee was that it provided a safeguard against an abuse of powers on the part of the attorney. The Report stated:[7]

> It seems to us that the greatest single safeguard against the abuse of an enduring attorney's power would be the existence of the *Patients, Estates Act.*

The Report then pointed out the relevant provisions of that Act and continued:

> This gives status to a broad range of people to apply for a declaration under the Act. Normally the interests of the incapacitated principal will coincide with those of other parties such as potential beneficiaries of his estate and creditors. It is not unreasonable to expect those parties to police the

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[7] *Supra*, n. 1 at 21.

> activities of enduring attorneys and apply for a declaration and the appointment of a committee if abuse seems evident. Financially disinterested parties who see abuse may draw it to the attention of the Public Trustee who... [may] intervene....

It may be argued that the American approach answers the concerns respecting abuse, and allows committeeship proceedings to perform the "watchdog" role originally envisaged. A clear power in the committee to require that the attorney account for his management of the principal's affairs, and to revoke the power of attorney would seem to be sufficient protection.

It probably makes little difference which approach is adopted in situations where the committee is a person other than the Public Trustee and who is appointed by the court pursuant to a declaration made in an application under section 2 of the *Patients Property Act.* Such a proceeding almost inevitably reflects a conclusion that there has been a change in circumstances which requires that the affairs of the principal be brought under the control of the committee. The only advantage offered by the American approach is to give the committee a degree of control over the timing of the termination of the power of attorney.

The certification procedure, which can also result in a principal falling within the definition of "patient," does not, however, involve a conclusion that there be a change in the management of the principal's affairs. The statutory designation of the Public Trustee as committee in those circumstances is by default. Obviously some kind of default mechanism is necessary to provide for continuity in the management of a patient's affairs. But where the patient himself has provided a default mechanism, in the form of an enduring power of attorney, it is not obvious that the statutory mechanism should prevail as a matter of course. Cases will inevitably arise where it will be appropriate that the Public Trustee should be responsible for the patient's affairs. These can be dealt with through a revocation of the enduring power of attorney by the Public Trustee.

It is our provisional view that section 7 of the *Power of Attorney Act,* so far as it concerns the termination of an enduring power of attorney, should move toward the American model. A specific proposal for reform is set out in Chapter V.

A. Housekeeping

1. The Scheduled Forms

The forms in the Schedule to the *Power of Attorney Act* provide the user with the option of creating the short form general power of attorney in "enduring" form. The implementation of the proposals in Chapter II would give this user a new option -- allowing the authority of the attorney to "spring" into existence on the happening of a specified event or contingency. We believe this option should also be reflected on the face of the statutory forms so potential principals and their advisors are aware that it is available. Suggested additions to achieve this are set out in the next Chapter.

2. Section 7(3)

When section 7 was first enacted, the drafter sought to protect innocent attorneys and third parties from the adverse legal consequences that might flow when, unknown to them, a committee had been appointed and the attorney's authority was terminated under section 7(2). This was done by bringing the termination within the application of former sections 1 to 3 which provided protection where the attorney's authority was terminated by a "disability" not known to them. Section 7(3) provides:

> (3) A termination under subsection (2) is a disability for the purposes of sections 1, 2 and 3, but the termination does not disentitle a person to the protection of those sections.

That provision has now been overtaken by events.

In 1987 sections 1 to 3 were repealed and replaced with more general provisions protecting agents and third parties from the consequences of virtually any termination of the agent's authority that is unknown to them.[1] It is no longer necessary to deem a termination under section 7(2) to be a disability since the new provisions will apply in any event. Section 7(3) might have been repealed at that time but that was not done. It should be repealed now.[2]

B. Unfinished Business

While section 7 of the *Power of Attorney Act* reflects the central recommendation made in this Commission's 1975 *Report on Powers of Attorney and Mental Incapacity,* the focus of the

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1 *See Miscellaneous Statutes Amendment Act (No. 1), 1987,* S.B.C. 1987, c. 42, s. 90.

2 The need to repeals. 7(3)does not depend upon whether the appointment of a committee terminates an enduring power of attorney.

drafter was on the *Uniform Powers of Attorney Act* which had recently been promulgated by the Uniform Law Conference of Canada. That focus is not surprising. The Uniform Act was the latest word in Canada on such legislation and, while it took into account a number of developments, it also was greatly influenced by the work of our Commission. The Uniform Act and the 1975 recommendations diverged on some points of detail but, so far as the two bodies of work are co-extensive, we have no quarrel with the decision to follow the drafting and contents of the Uniform Act in enacting legislation to authorize the creation of enduring powers of attorney.

This decision and the exclusive focus on the Uniform Act, however, had one undesirable consequence. The Commission's Report contained a group of subsidiary recommendations aimed at more clearly defining the operation of the enduring power of attorney and the rights and obligations of principals and attorneys. These recommendations were overlooked and left unimplemented. They in no way conflict with section 7 as it was enacted and there is no reason to believe that their omission reflects a conscious rejection by government of their contents.

These recommendations may continue to have merit and may properly be regarded as "unfinished business." On the other hand, the experience with the current legislation may suggest that these recommendations represented unnecessary refinements. In Appendix D to this Working Paper we set out extracts from the *Report on Powers of Attorney and Mental Incapacity* which describe briefly the problems that were perceived in 1975 which the recommendations were intended to meet. The recommendations themselves are set out below.

The Commission, in 1975, recommended that:

8. The legislation should provide that an enduring attorney must exercise his powers as a man of ordinary rudence would manage his own private affairs for the benefit of the principal and his family, having regard to the nature and value of the property of the principal and the circumstances and needs of the principal and his family.

9. The duty created by recommendation 8 should be subject to any explicit instruction given by the principal to the attorney, and intended to be acted upon at a time when the principal was mentally competent.

10. The attorney should be under no obligation or liability to the principal or his successors

    (a) with respect to any act done by the attorney pursuant to an explicit instruction given by the principal if, at the time the act was done, the attorney honestly believed that the principal was mentally competent;

    (b) with respect to the attorney's failure to do any act pursuant to an explicit instruction given by the principal if, at the time the instruction was given or at the time the act was ordered to be done, the attorney honestly believed that the principal was mentally incompetent and the act was inconsistent with the duty imposed by recommendation 8.

13. The appointment of an enduring attorney should be deemed to create a trust for the purposes of section 9 [now section 10] of the *Public Trustee Act.*

Section 10 of the *Public Trustee Act*[3] which, under the last of those recommendations, would be made applicable to enduring powers of attorney provides:

> 10. (1) The Public Trustee may investigate and audit the affairs, dealings and accounts of a trust in which a person who is or may be a beneficiary is a minor or is or may be mentally disordered.
>
> (2) In making an investigation or audit, the Public Trustee, and a person acting for him,
>
> (a) ma y inspect the accounts and records of the trustee an d securities and documents held by him; and
> (b) may require from the trustee the information and explanations he considers necessary to the investigation or audit.
>
> (3) The trustee shall make available the accounts and records and give the information.

Comment is invited on whether these recommendations address any problems that have emerged in practice or, even if no problems have emerged, whether their implementation would serve a useful preventative function.

Consideration might also be given to these recommendations in the light of our proposals respecting the springing power of attorney. Is any modification called for? Are additional provisions, in the same spirit, desirable? For example, should statutory protection be provided to the person who, in good faith, declares that a contingency has occurred so as to trigger a power of attorney? Are persons in that position, if unprotected, likely to be deterred from making a declaration through fear of liability to the principal or his estate if that declaration should be made in error?

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[3] R.S.B.C. 1979, c. 348.

A. A Draft Amendment

Our tentative proposals, as set out in the previous Chapters, were framed in general terms. In this Chapter we provide an alternative expression of those proposals in the more precise form of a draft amendment to the *Power of Attorney Act.*

1. The *Power of Attorney Act* is amended by repealing section 7 and substituting the following:

Enduring power of attorney

7. (1) The authority of an attorney given by a written power of attorney that

    (a) provides that the authority is to continue notwithstanding any mental infirmity of the donor; and

    (b) is signed by the donor and a witness to the signature of the donor, other than the attorney or the spouse of the attorney,

is not terminated

    (c) by reason only of subsequent mental infirmity that would but for this Act terminate the authority; or

    (d) by any provision of the *Patients Property Act* or the *Estates of Missing Persons Act*.[1]

(2) Where, pursuant to an enactment referred to in subsection (1)(d), a person has become the committee or curator of the donor of a power of attorney to which subsection (1) applies,

    (a) the attorney is accountable to the committee or curator for his management of the affairs of the donor; and

    (b) the committee or curator may revoke the power of attorney.

2. The following is added as section 7.1:

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[1] *Estates of Missing Persons Act,* R.S.B.C. 1979, c. 115, s. 11 provides that a power of attorney becomes void on the appointment under the Act of a curator for the principal.

Springing power of attorney

7.1 (1) A power of attorney may stipulate that it takes effect at a specified future time.

(2) A power of attorney may stipulate that it takes effect on the occurrence of a specified event or contingency including, but not limited to, the subsequent mental infirmity of the donor.

(3) A power of attorney described in subsection (2) may name one or more persons on whose written declaration the specified contingency or event is conclusively deemed to have occurred for the purpose of bringing the power of attorney into effect.

(4) A person referred to in subsection (3) may be the attorney appointed in the instrument.

3. Forms 1 and 2 in the Schedule are each amended by, immediately before the words 'This power of attorney is subject to...", adding:

(The following paragraph may be included if the donor wishes the authority granted by this power of attorney to come into force on the occurrence of a specified contingency or event:)

> In accordance with the *Power of Attorney Act* I declare that this power of attorney is to take effect ________________________________ (Set out contingency or event) and I further declare that the written declaration of __________________________________ (Name of Person) of ________________________________ (Address) shall, for the purpose of bringing this power of attorney into effect, be conclusive proof that the contingency or event set out above has occurred.

B. Call for Comment

Comment is sought on all aspects of the proposals made in this Working Paper. We would also appreciate receiving views on the unimplemented 1975 recommendations set out as "unfinished business" in the previous Chapter.

APPENDIX A
POWER OF ATTORNEY ACT
R.S.B.C. 1979, c. 334

Interpretation

1. In this Act

"agent" includes an attorney acting under a power of attorney; "knowledge" includes knowledge of circumstances which would put a reasonable person to his inquiry;

"terminated", when used with reference to the status of an agent's authority, means that the authority has been terminated either by revocation, by operation of law or both.

Application

2. (1) Sections 3 and 4 do not apply to agency relationships that
   (a) are created by section 7 of the *Partnership Act,* or
   (b) arise under common law out of the relationship of partners to a firm and to each other.

   (2) For the purposes of this Act, if a person has knowledge of the occurrence of an event that has the effect of terminating the authority of an agent, that person is deemed to have knowledge of the termination of the authority.

Liability of agent

3. Where an agent purports to act on behalf of a principal at a time when his authority to do so has been terminated and
   (a) the act is within the scope of his former authority, and
   (b) the agent has no knowledge of the termination,

   then, for the purpose of determining the liability of the agent for the act, he is deemed to have had the authority to so act.

Effect of termination

4. (1) Where
   (a) the authority of an agent has been terminated, and
   (b) a person who has no knowledge of the termination purports to deal with the principal through the agent,

then, for the purpose of determining the legal rights and obligations of the principal in relation to that person, the transaction shall, in favour of that person, be deemed to be as valid as if the authority had existed.

(2) Notwithstanding subsection (1), if the principal has

(a) terminated the authority of his agent by express revocation, and (b) given notice of the termination to his agent,

his liability to any person for the subsequent acts of his agent shall be determined without regard to this Act.

(3) Where the authority of an agent to act on behalf of his principal has been terminated, but

(a) the agent purporting to act for the principal enters into a transaction with a person (called in this section "the intermediate party"),

(b) the rights of another person (called in this section "the stranger") are dependent on the validity of the transaction entered into by the agent with the intermediate party, and

(c) the stranger had, at the material time, no knowledge of the termination of the authority of the agent,

then, for the purpose of determining the legal rights and obligations of the principal in relation to the stranger, the intermediate party shall be conclusively deemed to have had no knowledge of the termination.

Probate or administration granted to an attorney

5. Where probate or letters of administration have been granted to a person as attorney for some other person, sections 1 to 4 apply as if the payments made or acts done under the grant had been made or done under a power of attorney of which that other person was the donor.

Corporation may appoint attorney

6. (1) A corporation within the legislative jurisdiction of the Legislature may, by instrument in writing under its corporate seal, empower a person, in respect of a specified matter or purpose, as its attorney, to execute deeds or documents on its behalf.

(2) Every deed or document signed by the attorney on behalf of the corporation, and under his seal, is, if it comes within the scope of his authority, binding on the corporation, and of the same effect as if it were under the corporate seal of the corporation.

Enduring power of attorney

7. (1) The authority of an attorney given by a written power of attorney that

(a) provides that the authority is to continue notwithstanding any mental infirmity of the donor; and

(b) is signed by the donor and a witness to the signature of the donor, other than the attorney or the spouse of the attorney,

is not terminated by reason only of subsequent mental infirmity that would but for this Act terminate the authority.

(2) The authority of an attorney under a power of attorney referred to in subsection (1) terminates on the making of an order under section 2 of the *Patients, Property Act* or on the appointment of a committee under section 6 (1) of that Act.

(3) A termination under subsection (2) is a disability for the purposes of sections 1, 2 and 3, but the termination does not disentitle a person to the protection of those sections.

Short form

8. (1) A general power of attorney may be in Form 1 or Form 2 of the Schedule.

(2) A general power of attorney, in Form 1, confers authority on the attorney and in Form 2 confers authority on more than one attorney acting separately or acting together, as the case may be, to do on behalf of the donor anything that the donor can lawfully do by an attorney, subject to the conditions and restrictions, if any, that are contained in the power of attorney.

(3) This section applies to a power of attorney made before, on or after the date this section comes into force.

SCHEDULE

FORM 1

(Section 8)

Power of Attorney

(For the appointment of one attorney)

This General Power of Attorney is given on __________________________ 19__ (Date) by __________________________ (Donor) of __________________________ (Donor's Address)

I appoint the following person:

_________________________ (Name of Attorney) of _________________________ (Address of Attorney) to be my attorney in accordance with the *Power of Attorney Act* and to do on my behalf anything that I can lawfully do by an attorney.

(The following paragraph may be included if the donor wishes the authority granted by this power of attorney to continue notwithstanding any subsequent mental infirmity on his part:)

> In accordance with the *Power of Attorney Act,* I declare that this power of attorney may be exercised during any subsequent mental infirmity on my part.

This power of attorney is subject to the following conditions and restrictions:

(Cross this line out if there are no conditions or restrictions.)

WITNESSED BY:

(Signature of Witness)

(Print Name of Witness)

(Address of Witness) (Donor)

FORM 2
(Section 8)

Power of Attorney

(For the appointment of more than one attorney)

This General Power of Attorney is given on __________________________ 19__ (Date) by (Donor) of __________________________ (Donor's Address) __________________________

I appoint the following persons:

__________________________ (Name of Attorney) of __________________________
(Address of Attorney)

__________________________ (Name of Attorney) of __________________________
(Address of Attorney)

(Cross out one of the following alternatives)

(who may act separately (or) who shall act together) to be my attorneys in accordance with the *Power of Attorney Act* and to do on my behalf anything that I can lawfully do by an attorney.

(The following paragraph may be included if the donor wishes the authority granted by this power of attorney to continue notwithstanding any subsequent mental infirmity on his part:)

> In accordance with the *Power of Attorney Act,* I declare that this power of attorney may be exercised during any subsequent mental infirmity on my part.

This power of attorney is subject to the following conditions and restrictions:

(Cross this line out if there are no conditions or restrictions.)

WITNESSED BY:

(Signature of Witness)

(Print Name of Witness)

(Address of Witness) (Donor)

APPENDIX B
UNIFORM DURABLE POWER OF ATTORNEY ACT (U.S.)

(Selected Provisions)

1. [Definition]

A durable power of attorney is a power of attorney by which a principal designates another his attorney in fact in writing and the writing contains the words "This power of attorney shall not be affected by subsequent disability of the principal," or "This power of attorney shall become effective upon the disability or incapacity of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent disability or incapacity.

2. [Durable Power of Attorney Not Affected by Disability or Incapacity]

All acts done by an attorney in fact pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the save effect and inure to the benefit of and bind the principal and his successors in interest as if the principal were competent and not disabled.

3. [Relation of Attorney in Fact to Court-appointed Fiduciary]

(a) If, following execution of a durable power of attorney, a court of the principal's domicile appoints a conservator, guardian of the estate, or other fiduciary charged with the management of all the principal's property or all of his property except specified exclusions, the attorney in fact is accountable to the fiduciary as well as to the principal. The fiduciary has the same power to revoke or amend the power of attorney that the principal would have had if he were not disabled or incapacitated.

(b) A principal may nominate, by a durable power of attorney, the conservator, guardian of his estate, or guardian of his person for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced. The court shall make its appointment in accordance with the principal's most recent nomination in a durable power of attorney except for good cause or disqualification.

APPENDIX C
PATIENTS PROPERTY ACT
R.S.B.C. 1979, c. 313

(Selected Provisions)

Interpretation

1. In this Act

"court" means Supreme Court;

"patient" means

(a) a person who is described as one who is, because of mental infirmity arising from disease, age or otherwise, incapable of managing his affairs, in a certificate signed by the director of a Provincial mental health facility as defined in the *Mental Health Act* or by the officer in charge of a psychiatric unit as defined in that Act; or
(b) a person who is declared under this Act by a judge to be

(i) incapable of managing his affairs;
(ii) incapable of managing himself; or
(iii) incapable of managing himself or his affairs;

"Public Trustee" means the Public Trustee holding office under the *Public Trustee Act.*

Application and making of order

2. (1) The Attorney General, a near relative of a person or other person may apply to the court for an order declaring that a person is, by reason of

(a) mental infirmity arising from disease, age or otherwise, or
(b) disorder or disability of mind arising from the use of drugs,

incapable of managing his affairs or incapable of managing himself, or incapable of managing himself or his affairs.

(2) Subject to subsection (3), a notice setting forth the time and place of the application shall be served personally on the person who is the subject of the application not less than 10 days before the date of the application.

(3) On an application under this section, the court may

(a) direct that any person be served with notice of the application; or
(b) dispense with service on any person of notice of the application; but unless the court is satisfied that service on the person who is the subject of the application would be injurious to that person's health or would for any other reason be inadvisable in the interests of that person, it shall not dispense with service on that person.

(4) Where, on

(a) hearing an application under this section; and
(b) reading the affidavits of 2 medical practitioners setting forth their opinion that the person who is the subject of the application is, by reason of

(i) mental infirmity arising from disease, age or otherwise; or
(ii) disorder or disability of mind arising from the use of drugs, incapable of managing his affairs or incapable of managing himself, or incapable of managing himself or his affairs,

the court is satisfied that the person is, by reason of

(c) mental infirmity arising from disease, age or otherwise; or
(d) disorder or disability of mind arising from the use of drugs,

incapable of managing his affairs or incapable of managing himself, or incapable of managing himself or his affairs, it shall, by order, declare the person

(e) incapable of managing his affairs;
(f) incapable of managing himself; or
(g) incapable of managing himself or his affairs

as the case may be.

(5) The court may, on hearing an application under this section and reading the affidavits described in subsection (4), direct an issue to be tried, and in that event

(a) the question in the issue shall be whether the person who is the subject of the application is, by reason of

(i) mental infirmity arising from disease, age or otherwise; or
(ii) disorder or disability of mind arising from the use of drugs,

incapable of managing his affairs or incapable of managing himself, or incapable of managing himself or his affairs;

(b) this Act applies to the issue and the trial of it;
(c) the *Rules of Court* apply; and
(d) the court shall

(i) dismiss the application; or
(ii) by order, declare that the person who is the subject of the application

(A) is incapable of managing his affairs;
(B) is incapable of managing himself; or
(C) is incapable of managing himself or his affairs, as the case may be.

Appointment of committee

6. (1) Subject to section 13, on application by the Attorney General or any other person, the court may appoint any person to be the committee of the patient.

(2) On application by the Attorney General, the Public Trustee or any other person, the court may, subject to section 13, rescind the appointment of a person appointed as committee.

(3) Subject to section 16, except during the time that a person appointed under subsection (1), other than the Public Trustee, is the committee of a patient, the Public Trustee is the committee of the patient.

(4) An application under subsection (1) and an application under section 2 may be made as one application.

Nomination of committee by patient

9. On an application for the appointment of a committee, where there is presented to the court a nomination in writing of a committee by the patient,

(a) made and signed by him at a time when he was of full age and of sound and disposing mind; and
(b) executed in accordance with the requirements for the making of a will under the *Wills Act,*

the nominee shall be appointed committee unless there is good and sufficient reason for refusing the appointment.

Powers

15. (1) Subject to section 16,

(a) the committee of a patient as defined by paragraph (a) of the definition of patient in section 1 has all the rights, privileges and powers with regard to the estate of the patient as the patient would have if of full age and of sound and disposing mind;
(b) the committee of a patient

(i) declared to be incapable of managing his affairs has all the rights, privileges and powers with regard to the estate of the patient as the patient would have if of full age and of sound and disposing mind;
(ii) declared to be incapable of managing himself has the custody of the person of the patient; and
(iii) declared to be incapable of managing himself or his affairs has all the rights, privileges and powers with regard to the estate of the patient as the patient would have if of full age and of sound and disposing mind, and as well the custody of the person of the patient.

(2) For investing money, a committee is a trustee within the meaning of the *Trustee Act.*

Special direction

16. (1) On the appointment of a committee, the court may, by the same order, direct that the committee shall not have the rights, privileges or powers specified in the order.

(2) Where the court has specified that the committee does not have certain rights, privileges or powers,

(a) the registrar of the court shall send a copy of the order to the Public Trustee; and
(b) the Public Trustee has the rights, powers and privileges specified, and to that extent is the co-committee of the patient.

Powers of attorney

19. On a person becoming a patient, every power of attorney given by him is void and of no effect.

APPENDIX D
REPORT ON POWERS OF ATTORNEY AND MENTAL INCAPACITY
LRC 22, 1975

(Selected Portions: pages 30-32)

[There are]... rights, well established under present law, which the principal, his estate, or his committee have against the attorney in cases of dishonesty or mismanagement. It seems clear at common law that an attorney owes the principal such duties as

(a) the duty not to enter upon a transaction where there is a potential conflict of interest;
(b) the duty to account; and
(c) the duty to keep the principal's property separate from his own.

The care and skill required of the attorney will vary according to whether he acts gratuitously or for reward. Every agent acting for reward is bound to exercise such skill, care, and diligence in the performance of his undertaking as is usual or necessary in or for the ordinary or proper conduct of the profession or business in which he is employed. The degree of care and skill owned by a gratuitous agent to his principal is such skill and care as persons ordinarily exercise in their own affairs. These tests of care and skill seem to be appropriate for the enduring power of attorney, bearing in mind that the attorney may be a relative acting gratuitously, or may be a solicitor or an accountant acting for reward....

One respondent [to the working paper that preceded the Report] raised the following point:

> Has the Commission considered whether given a general enduring power of attorney, an Attorney has any more than an "authority" or "power"; in particular has he a positive duty of management of the estate which he becomes attorney.
>
> To take an example, will an attorney under an enduring power of attorney have a duty to review property insurance to ensure it is kept in line with replacement values?

There are a number of issues to be considered in this context. First, should there be a positive duty imposed by law on an enduring attorney to manage the estate of the principal if the authority he has been given so permits? Secondly, what should the nature of that duty be? Thirdly, when should that duty arise? Finally, what consequences should flow if that duty conflicts with the principal's instructions?

As to the first question we have no reservations. In our view it is desirable that, at some point, certain positive duties be cast upon enduring attorneys to act for the benefit of their principals. Without some underlying requirement of this nature the appointment of an enduring attorney may be an act of futility on the part of the principal.

Much thought has been given to what the nature of that duty should be. One possibility considered was to assimilate fully the position of the attorney to that of trustee. This has possible drawbacks as it would have the effect of applying numerous sections of the *Trustee Act,* including section 15 which limits trustee investments. We expect that a large number of enduring attorneys will be nonprofessional persons acting without reward. It seems unrealistic to expect them to adhere to the highly technical limitations on investment in this context. Moreover, those limitations will normally be at odds with the language of the document which creates the authority; a general power of attorney which grants the widest possible authority. We fear that both principals and attorneys may be misled as to the ambit of the attorney's investment competence.

What standard is appropriate? It is our view that a notion of "prudent management" should prevail and we would adopt such a standard grafted on to something akin to the language of section 19 of the *Patients' Estates Act:*

> 19. A committee shall exercise his powers for the benefit of the patient and his family, having regard to the nature and value of the property of the patient and the circumstances and needs of the patient and his family.

That duty would, of course, be subject to any limitation on the attorney's authority contained in the enduring power of attorney.

A most difficult issue is determining when that duty should arise. This difficulty is rooted in the fact that the relationship between the parties is one which, in this context, shifts from agency to quasi-trust. At the time an enduring power of attorney is created the principal is competent and the law of agency prevails until that competence ceases. Only then does the "prudent management" duty become important. Ideally, this duty would arise only when the principal loses his mental capacity, but this would place the attorney in the position of having to make a determination of when that occurs. This raises problems which we have recognized and tried to avoid elsewhere in this Report.

To impose the duty of prudent management at an earlier stage may create conflicts when the principal, while competent, gives the attorney explicit instructions to do, on his behalf, an act which may be imprudent. In such circumstances the general law of agency seems to dictate that the attorney should obey the instructions he is given.

The position which we have arrived at is a compromise. The duty of prudent management should arise at the time an enduring power of attorney is created but, so long as the principal remains competent, that duty is subject to any explicit instructions given by him to the attorney.

This will, however, still leave a situation in which the attorney will have to make a judgment as to whether or not the principal is competent:

> At a time when his capacity is in doubt, P instructs A to invest P's money in a highly speculative mining stock. Does A conform to the duty which an agent owes to his principal and obey the instruction or does he conform to the trustee-like duty of prudent management which he owes and disobey the instruction?

Such a choice seems unavoidable. That being the case, it seems fair to insulate the attorney from liability so long as he acts in good faith. It is our view that an enduring attorney should not be liable to a principal for carrying out an explicit instruction given at a time when a bona *fide* believed the principal to be competent or for failing to carry out an instruction given ordered to be carried out at a time when *bona fide* believed the principal to be incompetent.

[The recommendations which followed this discussion are set out in Chapter IV of this Working Paper.]