LAW REFORM COMMISSION OF BRITISH COLUMBIA

c/o British Columbia Law Institute
1822 East Mall, University of British Columbia
Vancouver, British Columbia V6T 1Z1
Voice: (604) 822 0142 Fax: (604) 822 0144 E-mail: bcli@bcli.org
Website: www.bcli.org

Backgrounder

LRC 110—Report on the Enduring Power of Attorney: Fine-Tuning the Concept

Date: February 1990

A power of attorney is a document giving someone else the power to make decisions on your behalf. The appointer is usually referred to as the "principal" and the person who has been appointed, as the "attorney." As a general rule of agency law, such a power does not continue when the principal loses mental capacity. Yet, for many people who create powers of attorney, it is at this very point that they wish the power of attorney to be valid. As a consequence, the concept of the "enduring power of attorney" was introduced and adopted in British Columbia to enable a power of attorney to survive the subsequent mental incapacity of the principal.

It is fair to say that most powers of attorney are intended to have legal effect as soon as they are created. However, there are an appreciable number of persons who use the enduring power of attorney who are anxious to arrange matters so that it does not have the effect of conferring authority from the time of its creation. They would prefer the authority to remain dormant while the principal is of full capacity and only to operate when the principal ceases to have full mental capacity.

The report notes that there appear to be two basic approaches that one might employ to defer the operation of the power of attorney. The first involves physical possession of the power of attorney by a third party who retains custody until it is intended to become operational. One of the fundamental problems with this option is that it might require the custodian to make a judgment on the principal's mental state. This raises a question as to whether a duty of care is owed by the custodian and to whom. Custodians could find themselves exposed to liability for a bad judgment call.

The second approach is to formulate the power of attorney in such a way that it has no legal effect until specified conditions have been satisfied. Such an approach has been adopted in New York and is referred to as a "springing power of attorney." The practical problem with this approach is that if the power of attorney only comes into effect on the happening of a contingency, how is an individual or institution to know whether or not the contin-

gency has been satisfied? The report examines the New York legislation to see how this problem is addressed. Essentially, New York's legislation overcomes the issue by providing that the power of attorney will become "legally effective" on the occurrence of an event (which may include incapacity) stipulated by the principal, if the occurrence is evidenced by a written declaration from a third party. In other words, the principal delegates to another person the power to make the power of attorney effective. For example, a principal who makes the power contingent on their mental incapacity could appoint their doctor as the third party.

The report concludes that the *Power of Attorney Act* should be amended to incorporate similar provisions in British Columbia and sets out draft amendments. The report also recommends a few other minor changes to the current Act.

Further Developments

See *Power of Attorney Act*, R.S.B.C. 1996, c. 370, s. 26, as am. by *Adult Guardianship and Personal Planning Statutes Act, 2007*, S.B.C. 2007, c. 34, s. 38 (not in force).