

LAW REFORM COMMISSION OF BRITISH COLUMBIA

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Backgrounder

LRC 22—Report on Powers of Attorney and Mental Incapacity

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A power of attorney is a species of the general legal category of agency. Under a power of attorney, one person (called a *donor*) authorizes another person (called an *attorney*) to do some thing on the donor's behalf. This "thing" that the attorney is authorized to do may be as specific as to sign a certain document or as wide-ranging as to perform any act that, at law, the donor may perform. Powers of attorney are commonly used as planning documents—that is, they are created as a safeguard against a calamity that may affect the donor.

This report is focussed on a rule of law that dramatically limited the utility of powers of attorney for planning purposes. At the time this report was written, when a person no longer had the capacity to manage his or her affairs, any power of attorney that the person had granted would automatically be terminated. This rule has frustrated the legitimate wishes of many people, as one of the common reasons for entering into a power of attorney is a desire to plan for just this situation.

The heart of the report is its four substantive chapters. The first of these chapters sets out the present law in British Columbia. The report traces the origins of the legal rule that is its subject back to two seminal English cases in the law of agency. The reported notes that there are some doubts about the cases' reasoning and application of precedent, but that the rule they announced nevertheless appears to be firmly entrenched in the law.

The report then provides an evaluation of the present law. It observes that many people grant powers of attorney for the purpose of planning for incapacity, so the rule runs counter to popular conceptions of how the law should apply and frustrates otherwise legitimate wishes. Denying people access to a power of attorney that endures after incapacity invariably results in more applications for court-appointed committees under the cumbersome *Patients Property Act*. The commission concludes this discussion by recommending that legislation overturn the common-law rule and enable the creation of enduring powers of attorney.

The next chapter contains a discussion of the safeguards that should operate to protect the donor of an enduring power of attorney. The chapter reviews legislation and law reform

studies from New South Wales, England, Ontario, and Manitoba. These models for reform provide a wide range of options, from simple and permissive to more complex and protective.

Finally, the report sets out the commission's recommendations in detail. The main recommendation is for the enactment of legislation to enable the creation of a power of attorney that endures beyond the incapacity of the donor. The chapter then considers in detail the types of safeguards that are appropriate for enduring powers of attorney. The commission's overriding preference is for simplicity, but recognizing that some protections are necessary. Among other topics covered, the commission recommends that enduring powers of attorney be in writing and that they require an affirmative indication on the face of the document that it is intended to be an enduring power of attorney. The commission does not recommend that enduring powers of attorney be filed with a public agency.

Further Developments

See *Attorney-General Statutes Amendment Act, 1979*, S.B.C. 1979, c. 2, s. 52 (now *Power of Attorney Act*, R.S.B.C. 1996, c. 370, s. 8).