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UNIFORM LAW CONFERENCE OF CANADA

**AMENDMENTS TO
THE UNIFORM ENDURING POWERS OF ATTORNEY ACT (2015)
REGARDING ELECTRONIC ENDURING POWERS OF
ATTORNEY (2021 AMENDMENTS)**

**As adopted February 16, 2021
as amended in accordance with
the Resolution of August 12, 2020**

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**Amendments to the Uniform Enduring Powers of Attorney Act (2015)
regarding Electronic Enduring Powers of Attorney
(2021 amendments)**

ELECTRONIC FORMAT

[1] In 2018, the Conference approved a project to examine whether electronic documents should be permitted in wills, powers of attorney and health care directives. In essence, the project would re-examine the 2010 decision to permit electronic documents, but only through the dispensing power – a rule which required a court application to recognize such documents.

[2] In 2019, the Conference approved the policy that electronic documents should be permitted in the three areas, and directed the preparation of a draft act and commentary for wills.

[3] In 2020, at its virtual annual meeting, the Conference reviewed amendments to the Uniform Wills Act, and directed that similar amendments be made to the *Uniform Enduring Power of Attorney Act*.

[4] The amendments build on the concepts approved in the Uniform Electronic Commerce Act of 1996. The elements of electronic medium - stored permanently and capable of retrieval for subsequent reference and use; and the definition of electronic signature are adopted directly from that Act. The concept of remote witnessing, where the parties are in each other's virtual presence, was developed for the Uniform Wills Act and is adopted here.

[5] The amendments allow conventional and electronic media to co-exist, and to interact with each other. For example, an electronic power of attorney could be terminated by a conventional declaration, and vice versa. The Witness Certificate and Notice of Commencing to Act could be in either medium, even if the original document was in the other medium.

[6] Electronic documentation is now in very broad use, and is accepted as part of normal commercial and personal planning activities. Accepting an electronic format is consistent with the current practice of many individuals and should expand the use of the three planning documents of wills, powers of attorney and health care directives. The Conference does not have a Uniform Healthcare Directives Act, although the *Uniform Substitute Decision Making Documents Act* (2016) provides for the recognition of such documents outside the jurisdiction in which they were prepared. To the extent that Healthcare Directives legislation requires a written document, signed and witnessed, the provisions in the *Uniform Wills Act* and the *Uniform Enduring Powers of Attorney Act* should be taken as an appropriate model which provinces and territories can adopt.

[7] The policy objective of these amendments is to enable the use of the electronic medium for two important substitute decision making documents. The working group recognized that there may be concerns about the legitimacy and security of the

documents in electronic format, especially where they are created without professional legal advice. It is common for a power of attorney or health care directive form to be downloaded and completed without further professional involvement.

[8] The legitimacy of the document is addressed by the formal requirements of a permanent document, signed and witnessed. Traditional tests for capacity and undue influence are buttressed by specific restrictions on who may act as a witness. All of these requirements apply equally to electronic documents. Non-legislated practices have developed to ensure the integrity and safe storage of the document. We expect that similar practices will be developed for electronic documents. We encourage entrepreneurial third parties to develop practices that can be incorporated into best practices. They are not legislated so they can develop organically, without freezing the technology at a particular point in time.

[9] Some jurisdictions may consider additional requirements to ensure that the activities of the attorney are more transparent. For example, Quebec requires a compulsory Court application to confirm the authority of the attorney and to articulate the steps the attorney will take. In addition, Quebec has adopted a disciplined terminology to reinforce the process – the grantor is known as “mandant”, the power of attorney document is the “mandat” and the attorney is the “mandataire”. The extra step, while involving time, expense and the involvement of a Notaire may have a significant impact on the reduction of financial abuse by attorneys.

[10] Comments on the individual elements of the electronic medium can be found in the Uniform Wills Act.

[11] The working group, ably assisted by our British Columbia drafter, Stephanie Weinhold and ably assisted by our New Brunswick drafter, Diane McInnis, consisted of:

Peter J.M. Lown QC, Chair
Donna Molzan, QC, Gov't AB,
Sevgi Kelci, Notaires de Que,
Tyler Nyvall, Gov't B.C.
Elizabeth Strange, Gov't N.B.,
Valérie Simard, Justice Can.,
Margaret Hall, Simon Fraser Univ.,
James Marton, Gov't Ont.,
Russell Getz, Gov't B.C.,
Charlaine Bouchard, Univ. Laval,
Darren Lund, Miller Thomson, Ont.
Maria Markatos, Gov't Sask.,
Andrea Hill, Turkstra Mazza, Ont.

Clark Dalton QC, ULCC.

All of which is respectfully submitted.

Uniform Law Conference of Canada

Amendments to the Enduring Powers of Attorney Act

1 Section 1 (1) of the Enduring Powers of Attorney Act is amended

(a) by adding the following definitions:

“**audiovisual communication technology**” includes assistive technology for individuals with disabilities « **technologie de communication audio-visuelle** »;

“**communicate**” includes to communicate using audiovisual communication technology that enables individuals to communicate with each other by hearing and seeing each other and by speaking with each other « **communiquer** »;

COMMENT: The definition of “communicate” embraces the elements of hearing, seeing and speaking - two-way communication, even if supported by technology which enables a person with disabilities to do so.

“**electronic**” includes created, recorded, transmitted or stored in digital form or in other intangible form by electronic, magnetic or optical means or by any other means that has capabilities for creation, recording, transmission or storage similar to those means and “**electronically**” has a corresponding meaning « **électronique** »;

“**electronic enduring power of attorney**” means an enduring power of attorney that is in electronic form; « **procuration perpétuelle électronique** »

“**electronic form**”, in relation to an electronic enduring power of attorney, other document or writing, means a form that is

- (a) electronic,
- (b) readable as text at the time the electronic enduring power of attorney, document or writing is made,
- (c) accessible in a manner usable for subsequent reference, and
- (d) capable of being retained in a manner usable for subsequent reference « **forme électronique** »;

COMMENT: The definition of “electronic form” is defined so as to be used throughout the Act when referring to electronic powers of attorney. It builds on the elements of use of the electronic medium capable of being stored, and accessible for future reference, all of which are present in the Uniform Electronic Commerce Act. For the purpose of the execution of powers of attorney it adds that the power of attorney must be readable as text at the time of execution. This has the deliberate effect of precluding, at the present time, video documents.

“**electronic signature**” means information in electronic form that a person has created or adopted in order to sign a document and that is in, attached to or associated with the document « **signature électronique** »;

“**virtual presence**” means the circumstances in which 2 or more individuals in different locations communicate at the same time to an extent that is similar to communication that would occur if all the individuals were physically present in the same location and “**virtually present**” has a corresponding meaning; « **présence virtuelle** ». , *and*

COMMENT: The definition of “virtual presence” allows remote witnessing where the grantor and witnesses can communicate as effectively as if they were all in the same location. This

concept was adopted, with slight modifications, by most jurisdictions in emergency orders dealing with the COVID-19 pandemic.

(b) by repealing the definition of “power of attorney” and substituting the following:

“**enduring power of attorney**” means a power of attorney described in section 2 and, in the case of an enduring power of attorney made on or after the coming into force of this Act, that complies with the requirements of section 3 and of section 4 or 4.1, as applicable, and

(a) includes an extra-provincial [**extra-jurisdictional**] power of attorney that complies with the requirements of section 14, whether or not the extra-provincial [**extra-jurisdictional**] power of attorney complies with sections 2 and 3 and with section 4 or 4.1, as applicable, but

(b) does not include an irrevocable power of attorney that is or has been

- (i) granted for valuable consideration, or
- (ii) granted to secure a liability of the grantor to the attorney
« **procuration perpétuelle** »;

2 The following section is added to Part 1:

Electronic signature

- 1.1** (1) For the purposes of sections 4, 4.2, 4.3, 7, 8, 22 and 23,
- (a) a reference to a signature includes an electronic signature and a reference to a document being signed includes the document being signed electronically, and
 - (b) a requirement for the signature of a person is satisfied by an electronic signature.
- (2) An electronic enduring power of attorney, a notice of attorney, a written revocation of an enduring power of attorney, a written resignation of an attorney and a written document referred to in section 20 are conclusively deemed to be signed if the electronic signature is in, attached to or associated with the enduring power of attorney so that it is apparent the grantor intended to give effect to the entire enduring power of attorney.

COMMENT: These provisions are taken directly from the Uniform Electronic Commerce Act where they have not disclosed any particular difficulties. It is important to note the variations that this provision allows. An individual may create an electronic version of their stylized signature, may adopt a mark or symbol representing their signature, or may use a process by which a document is validated as to signature by a third-party provider. In the latter case, the signature is attached to, rather than placed on the document.

3 Section 4 is repealed and the following substituted:

Grantor must sign enduring power of attorney

- 4** (1) This section applies to an enduring power of attorney that is not an electronic enduring power of attorney.
- (2) Subject to subsection (3) of this section and section 4.2, an enduring power of attorney must be in writing and signed and dated by
- (a) the grantor in the presence of 2 witnesses, and
 - (b) both witnesses in the presence of the grantor.

- (3) Subject to section 4.2, an enduring power of attorney may be signed on behalf of a grantor if
 - (a) the grantor is physically incapable of signing the enduring power of attorney,
 - (b) the grantor is present and directs that the enduring power of attorney be signed, and
 - (c) the signature of the person signing the enduring power of attorney on behalf of the grantor is witnessed in accordance with this section, as if that signature were the grantor's signature.
- (4) An enduring power of attorney must be accompanied by a certificate in the prescribed form from one of the witnesses.
- (5) For certainty, the certificate referred to in subsection (4) may be in electronic form.

4 *The following sections are added:*

Grantor must sign electronic enduring power of attorney

- 4.1**
- (1) This section applies to an electronic enduring power of attorney.
 - (2) Subject to subsections (3) to (5), an electronic enduring power of attorney must be in electronic form and signed with electronic signatures and dated by
 - (a) the grantor in the presence of 2 witnesses, and
 - (b) both witnesses in the presence of the grantor.
 - (3) Subject to section 4.2, an electronic enduring power of attorney may be signed with an electronic signature on behalf of a grantor if
 - (a) the grantor is physically incapable of signing the enduring power of attorney,
 - (b) the grantor is present and directs that the enduring power of attorney be signed, and
 - (c) the electronic signature of the person signing the enduring power of attorney on behalf of the grantor is witnessed in accordance with this section, as if that electronic signature were the grantor's electronic signature.
 - (4) In this section, a requirement that signing take place in the presence of another individual, or while individuals are present at the same time, is satisfied if the signing takes place while the individuals are in each other's virtual presence.
 - (5) For certainty, nothing in this section prevents some of the individuals described in this section from being physically present and others from being virtually present when signing the electronic enduring power of attorney.
 - (6) If an electronic enduring power of attorney is signed by the grantor and witnesses while any one of them is virtually present, the place of making the enduring power of attorney is the location of the grantor.
 - (7) An electronic enduring power of attorney is an enduring power of attorney for all purposes of the enactments of **[the province or territory]**.
 - (8) An enduring power of attorney must be accompanied by a certificate in the prescribed form from one of the witnesses.
 - (9) For certainty, the certificate referred to in subsection (8) may be in electronic form.

COMMENT: The Working Group considered whether to amend the Uniform Electronic Commerce Act to remove the exceptions for wills and powers of attorney in s. 2 of that Act. The Working Group declined to do so since that Act is an Act of general application. Retaining the exception, while providing detailed rules in Wills and Power of Attorney legislation, makes it clear that rules relating to the electronic format of wills or powers of attorney are found in the Uniform Wills Act and the Uniform Enduring Powers of Attorney Act respectively. The commentary to the Uniform Electronic Commerce Act has been amended to reflect that fact, as was expressly contemplated in the existing commentary.

It is important to bear in mind how this amended legislation treats electronic powers of attorney, that is, to create a parallel pattern between the conventional and electronic medium. We do not create provisions for electronic powers unless it is mandated by the medium. Over time, practices have developed for the safeguarding of the “original” conventional paper document – the original is retained by a lawyer, kept by the grantor in the safety deposit box or security safe. Once stored, the document might be digitized for ultimate access. We anticipate that similar practices will be developed for electronic powers, and we encourage their development and incorporation into best practices.

Limitation on signing on behalf of grantor and acting as witness

- 4.2** (1) The following persons must not sign an enduring power of attorney on behalf of a grantor:
- (a) a witness to the signing of the enduring power of attorney;
 - (b) a person prohibited from acting as a witness under subsection (2).
- (2) The following persons must not act as a witness to the signing of an enduring power of attorney:
- (a) a person named in the enduring power of attorney as an attorney;
 - (b) a family member of a person named in the enduring power of attorney as an attorney;
 - (c) an employee or agent of a person named in the enduring power of attorney as an attorney, unless the person named as an attorney is
 - (i) **[a member of the legal profession in the province or territory],**
 - (ii) **[the appropriate public official in the [the province or territory],**
or
 - (iii) a financial institution authorized to carry on trust business in **[the province or territory];**
 - (d) a person who is not an adult;
 - (e) a person who does not understand the type of communication used by the grantor, unless the person receives interpretive assistance to understand that type of communication.

[Signing in counterpart

- 4.3** (1) Subject to subsection (2), if a grantor and witnesses are in each other’s virtual presence when the grantor signs the enduring power of attorney, the enduring power of attorney may be made by signing complete and identical copies of the enduring power of attorney in counterpart.
- (2) When an enduring power of attorney is signed in counterpart, none of the copies of the enduring power of attorney being signed must be in electronic form.

- (3) Copies of an enduring power of attorney in counterpart are deemed to be identical even if there are non-substantive differences in the format of the copies.]

The practice of signing in counterpart was developed under emergency orders for the COVID-19 pandemic in 2020. Since lawyers and clients could not be in the same location, this practice combines “virtual presence” in which each person, grantor and witnesses, would sign an identical document, with regular execution of a document. The composite of the three documents represents the fully executed power. Use of this practice is more likely in hardcopy documents, but could occur for an electronic power of attorney where the parties are in “virtual presence” but do not have document sharing capacity.

Jurisdictions will decide whether to continue this temporary practice. The provision is shown in square brackets so jurisdictions can make the choice. Some may wish to continue the ability to ensure that any documents executed using the counterpart protocol are clearly valid when they become effective in the future.

5 Section 7 (1) (a) is repealed and the following substituted:

- (a) the date by which the enduring power of attorney has been signed by the grantor, **[and in the case of an enduring power of attorney signed in counterpart, the date by which the last copy of the enduring power of attorney is signed,]**

Comment: A power may come into effect on signing and witnessing, a date set in the document, or the happening of incapacity. Confirmation by a qualified healthcare provider is the default position.

The amendment in section 7 (1)(a) in brackets is only to be made if section 4.3 is added.

6 Section 8 is amended by adding the following subsection:

- (9) For certainty, a notice of attorney may be in electronic form.

7 Section 13 is amended

(a) in subsection (1) by adding “, including an electronic enduring power of attorney,” after “The authority of an attorney under an enduring power of attorney”, and

(b) by adding the following subsection:

- (1.1) For certainty, the written revocation referred to in subsection (1) (b) and the written resignation referred to in subsection (1) (e) may be in electronic form.

8 Section 20 is amended

(a) by renumbering the section as section 20 (1),

(b) in subsection (1) by striking out “section 4 (1), (2) or (5)” and substituting “section 4 (2), (3) or (4) or 4.1 (2), (3) or (8)”, and

(c) by adding the following subsection:

- (2) For certainty, the written document referred to in subsection (1) may be in electronic form.

9 Section 22 (1) is amended

(a) in clause (b) by striking out “in accordance with section 4” and substituting “in accordance with section 4 or 4.1, as applicable,” and

(b) in clause (b) (iii) by striking out “section 4” and substituting “section 4 or 4.1, as applicable”.

10 Section 23 is amended

- (a) in clause (a) (ii) by striking out “in accordance with section 4” and substituting “in accordance with section 4 or 4.1, as applicable,” and**
- (b) in clause (a) (ii) (B) by striking out “section 4” and substituting “section 4 or 4.1, as applicable”.**