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UNIFORM LAW CONFERENCE OF CANADA

***CONSOLIDATED UNIFORM ENDURING POWERS
OF ATTORNEY ACT (2015)***

**(as amended 2021)
(consolidated - June 2022)**

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in accordance with the
Resolution of August 2020**

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UNIFORM ENDURING POWERS OF ATTORNEY ACT (2015)
(as amended 2021)
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PART 1 - INTERPRETATION

Definitions

1 (1) In this Act:

“**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** »;

“**enduring power of attorney**” means a power of attorney described in section 3 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 4 and of section 5 or 6, as applicable, and

- (a) includes an extra-provincial [**extra-jurisdictional**] power of attorney that complies with the requirements of section 18, whether or not the extra-provincial [**extra-jurisdictional**] power of attorney complies with sections 3 and 4 and with section 5 or 6, 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** »;

“**family member**” means any of the following, with respect to the grantor or attorney, as the case may be

(a) [a spouse or former spouse]

(b) a son or daughter;

(c) a parent or legal guardian before the grantor or attorney, as the case may be, became an adult, except where the legal guardian was a minister of the Crown;

(d) a brother or sister;

(e) a grandparent;

(f) a grandchild;

(g) an uncle or aunt;

(h) a nephew or niece « **membre de la famille** »;

“**immediate family member**” means an adult referred to in paragraphs (a) to (d) of the definition of “family member” « **membre de la famille immédiate** »;

“**notice of attorney acting**” means a notice of attorney acting under section 12 « **avis d’entrée en fonction du fondé de pouvoir** »;

“**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** »

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.

(2) For the purposes of the definition of “family member” and “immediate family member” in subsection (1), the relationships listed in clauses (b) to (h) of that definition include adoptive and step-family relationships.

(2015 s. 1; Am. 2021 s. 1)

COMMENT: The definition of “enduring power of attorney” sets out the requirements for both a power of attorney created in the enacting jurisdiction as well as an extra-territorial power of attorney created outside of the enacting jurisdiction, an extra-territorial power of attorney. Under the Act an extra-territorial power of attorney is a valid power of attorney in the enacting jurisdiction if it is a valid power of attorney according to the law of the place where it is executed and it meets the other requirements of section 18. Therefore, the formalities of sections 3, 4 and 5 are not required for it to be valid in the enacting jurisdiction as would be required for a power of attorney created in the enacting jurisdiction.

In clause (a) of the definition of “family member” the enacting jurisdiction should insert their own definition to capture married spouses, common-law spouses and any other relationship that would be considered “spousal” within the jurisdiction. The definition should also extend to cover a former spouse and as well as cohabitantes who no longer live together, for example, because one is in an assisted care facility, but do not by that fact alone terminate their relationship.

The definition of “family member” is used to determine who may act as a witness. It is broadly framed in order to ensure that it encompasses as many family members as possible who might potentially have an undue influence on the donor in granting a power of attorney.

On the other hand, the definition of “immediate family member” is to specify who must receive notice of commencing to act. This is intended only to apply to a much smaller range of family members, immediate family members, that the attorney must give a Notice of Attorney Acting in the event the grantor does not specify the persons to whom a Notice must be given. This is done in order to respect the grantor’s personal privacy as much as possible, yet at the same time give notice to those that ordinarily should know about the power of attorney.

The definition of “notice of attorney acting” is to make it clear that, whenever this term is used, it means a reference to the Notice provided for in section 12.

Electronic signature

- 2 (1) For the purposes of sections 5, 7, 8, 11, 12, 26 and 27,
- (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 24 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.

(2021 s.2)

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.

PART 2 – ENDURING POWER OF ATTORNEY

Enduring power of attorney

- 3 A power of attorney may provide that
- (a) the attorney’s authority under the power of attorney is not terminated by a lack of capacity of the grantor that occurs after the power of attorney has been executed, or
 - (b) the power of attorney is to take effect on incapacity of the grantor.

(2015 s. 2)

Comment: This section clarifies the status and effect of an enduring power of attorney. If a power already exists, it is not terminated by the incapacity of the grantor. The power may also stipulate that it does not come into effect until the incapacity of the grantor. This is an explicit statement of what the law is in most jurisdictions. The regulations will supply a non-mandatory sample form, along with explanations to instruct the person completing the form. The autonomy of the grantor is confirmed by the ability of the grantor to customize the document to the particular needs of the individual.

Who may grant an enduring power of attorney

- 4 An adult who has the capacity to understand the nature and effect of an enduring power of attorney may grant an enduring power of attorney.

(2015 s. 3)

Comment: This section repeats the common law requirements of capacity – the grantor must have the capacity to understand the nature and effect of the document, namely, that a third party is being given the authority to handle and manage property on behalf of the grantor, and that the attorney has the duties set out in the Act. The common-law definition is provided in default. If a jurisdiction has a more specific statement of capacity, this section should be replaced.

Grantor must sign enduring power of attorney

- 5 (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 7, 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 7, 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.

(Rep. & Rep. 2021 s. 3)

Comment: There is a clear distinction between personal directives for health care and property attorneys. In the healthcare area, there is always a treatment provider whose responsibility it is to decide that the treatment is consented to and medically appropriate. In the case of a property attorney, there is no such independent third-party. On the property side, we have introduced requirements that are more rigorous than healthcare and follow the analogy of wills. It is common practice for wills and powers of attorney to be prepared together.

The formalities requirements set out a series of different stipulations. First, the document must be in writing. Second, the signature of the grantor is required. If the grantor is physically incapable of signing, the Act provides a method for the grantor to direct that the document be signed on his/her behalf. Third, the Act sets out requirements for who may witness. It is necessary to provide protection at the time of creation of the document, so that the document and the grantor are not subject to allegations of undue influence or improper motive. One method is to require independent witnesses who cannot influence the grantor, or who would not profit from their appointment.

However, there are provisions that preclude a person from signing on behalf of the grantor and acting in another capacity such as a witness (section 7). The exception in section 7(2)(c) is intended to apply to categories of persons whose responsibility it is to prepare the document, or to provide the fiduciary job

required by the statute. “Members of the profession” includes both lawyers and notaries if the responsibility of the latter includes the preparation of powers of attorney.

The working group considered a variation on the requirement for two witnesses, namely, one witness where that person is a lawyer (as is provided for in British Columbia and Saskatchewan). Ultimately, it was determined that a uniform requirement of two witnesses should prevail. It is not an overly rigorous requirement, and is consistent with general wills requirements, which do not express any preference for a document drafted by a lawyer or not. A further requirement is that the witnesses complete a certificate showing that the various formalities were met, and that the document was executed in the circumstances required by the Act, for example, physically apart from the attorney.

An enduring power of attorney must be accompanied by one witness certificate of one of the witnesses only.

Grantor must sign electronic enduring power of attorney

- 6
- (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 7, 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.

(2021 s. 4)

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

- 7 (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 province or territory]**, or
 - (iii) a financial institution authorized to carry on trust business in **[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.

(2021 s. 4)

Comment: As stated, there are provisions that preclude a person from signing on behalf of the grantor and acting in another capacity such as a witness.

The exception to section 7(2)(c) is intended to apply to categories of persons whose responsibility it is to prepare the document, or to provide the fiduciary role required by the statute. “Members of the profession” includes both lawyers and notaries if the responsibility of the latter includes the preparation of powers of attorney.

[Signing in counterpart]

- 8 (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.

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- (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.]

(2021 s. 4)

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.

Limitations on acting as attorney

- 9 (1) No person shall act as an attorney
- (a) in the case of an individual,
 - (i) unless the individual is an adult and has capacity at the time the attorney starts to act,
 - (ii) if the individual is an undischarged bankrupt, or
 - (iii) subject to subsection (2), if the individual has been convicted within the last 10 years of a criminal offence as prescribed in the regulations, or
 - (b) if the person
 - (i) provides personal care or health care services to the grantor for compensation, or
 - (ii) is an employee of a **[facility]** in which the grantor resides and through which the grantor receives personal care or health care services.
- (2) An individual referred to in subsection (1)(a)(iii) may act as an attorney
- (a) if the individual has been pardoned, or
 - (b) if, while the grantor has capacity, the individual discloses the fact of the conviction to the grantor and the grantor
 - (i) acknowledges the conviction in writing, and
 - (ii) consents in writing to the individual acting.

(2015 s. 5)

Comment: The trust placed in an attorney is an important element of the arrangement or delegation by the power of attorney and in the way in which the responsibilities and duties of the attorney are to be carried out. The trust and the authority require an adult, one whose actions are not restricted or tainted by bankruptcy or criminal conduct. However, the grantor may, with full knowledge and disclosure, override the disqualification on the basis of criminal conduct. The decision to provide for waiver of any kind was a difficult one. These are serious issues which might detract from the trust in, and position of, authority of the attorney. Providing for personal autonomy was achieved in very limited circumstances – past convictions, specifically acknowledged by the grantor, and specifically waived. There is no ability to provide a blanket waiver or a waiver of future transgressions. In addition, in order to avoid potential

conflicts of interest, the Act precludes a paid care provider or the employee of a care facility in which the grantor resides, from acting as an attorney.

The term “facility” is bracketed. Here the Act is meant to be referring to a “residential care facility”. If the generic term “facility” is not appropriate, it should be edited for jurisdictional requirements.

Form of enduring power of attorney

- 10 If a form of enduring power of attorney is prescribed, the use of that form is not mandatory. (2015 s. 6)

Comment: A non-mandatory prescribed form is the bridging concept used in this approach. A mandatory form would require attention to every element of the form, even though various interpretations provide a degree of leeway – not inaccurate or calculated to mislead. However, small variations could well trigger the validation provisions and therefore bring in the cost and complexity of a court application.

A non-mandatory prescribed form has two very important advantages. First, because it is prescribed, it is likely to be used in the vast majority of cases. Second, a non-mandatory prescribed form will bring structure without the risk of invalidity if some element is inadvertently omitted.

When enduring power of attorney is effective

- 11 (1) An enduring power of attorney is effective on the latest of
- (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,]**
 - (b) a date stated in the enduring power of attorney as being its effective date, and
 - (c) the date an event described in the enduring power of attorney as bringing the power of attorney into effect occurs.
- (2) If the grantor specifies that the enduring power of attorney is effective when the grantor is incapable of making decisions about the grantor’s financial affairs, a qualified health care provider may confirm whether the grantor is incapable.
- (3) In this section, “**qualified health care provider**” means a member of a health profession designated in the regulations as being qualified to conduct capacity assessments for the purpose of subsection (2).

(2015 s. 7; Am. 2021 s. 5)

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 11(1)(a) in brackets is only to be made if section 8 is added.

Notice of attorney acting

- 12 (1) The attorney must give a notice of attorney acting to the persons referred to in subsection (2) or (3) within a reasonable period of time after the incapacity of the grantor.
- (2) The grantor may designate by name or by class in the enduring power of attorney any person or persons to receive the notice of attorney acting.
 - (3) If the grantor does not name anyone, the notice of attorney acting must be given to an immediate family member of the grantor.

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- (4) The grantor may not waive the attorney's duty to give notice of attorney acting, but may designate by name in the enduring power of attorney any immediate family member who should not receive the notice of attorney acting.
- (5) The attorney must also give notice of attorney acting to the grantor.
- (6) The notice of attorney acting must list the attorney's duties referred to in section 13(1) and (2).
- (7) The attorney must acknowledge and accept the duties by signing the notice of attorney acting prior to giving notice.
- (8) If a form of notice of attorney acting is prescribed, the use of that form is not mandatory.
- (9) For certainty, a notice of attorney may be in electronic form.

(2015 s. 8; Am. 2021 s. 6)

Comment: This is one of the most important aspects of the Act. It is a crucial time in the operation of a power of attorney to create the necessary transparency as soon as the attorney commences to act. The attorney must by way of this notice, indicate to persons who are interested in the fact of the power of attorney, and must acknowledge the responsibilities being undertaken. This notice triggers potential supervision, requirements to account and an acknowledgment and understanding of the attorney's duties. It is a central part of protection against elder financial abuse by removing any cloak of secrecy around the activities of the attorney.

The notice will be set out in regulations, and one of its primary purposes is to start the vital process of communication by the attorney. This is a functional rather than a formal notice, and does not carry with it requirements of being witnessed or a requirement for formal service of the document. The Act specifies the group of persons who would ordinarily have an interest in the affairs of the grantor. The autonomy of the grantor is safeguarded by the ability to indicate who should and who should not get the notice.

Duties of attorney

- 13**
- (1) An attorney must
 - (a) act honestly, in good faith, and in the best interests of the grantor,
 - (b) engage the grantor in decision-making to the extent possible,
 - (c) take into consideration the known wishes of the grantor and the manner in which the grantor managed the grantor's affairs while competent,
 - (d) use assets for the benefit of the grantor,
 - (e) keep the grantor's property and funds separate from the attorney's property and funds, except as permitted by statute,
 - (f) keep records of financial transactions,
 - (g) communicate regularly about the affairs of the grantor with immediate family members and persons designated under section 12(2),
 - (h) provide details of financial transactions upon request by a person referred to in paragraph (f), and
 - (i) give notice of attorney acting under section 12.
 - (2) In carrying out the duties, the attorney
 - (a) is to be held to the standard of care of a prudent person in comparable circumstances, including having comparable experience and expertise,

- (b) must not receive remuneration from the grantor for acting as the attorney unless the enduring power of attorney expressly authorizes the remuneration and states the basis for it, and
 - (c) is entitled to be reimbursed from the grantor's property for reasonable expenses properly incurred in acting as the attorney.
- (3) An attorney is not personally liable for loss or damage to the grantor's property or financial affairs, if the attorney complies with
- (a) the provisions of the enduring power of attorney under which the attorney acts,
 - (b) the attorney's duties, as set out in this Act and any order of a court,
 - (c) any directions of a court given under this Act, and
 - (d) any other duty that may be imposed by law.

(2015 s. 9)

Comment: This section describes the duties of an attorney from different perspectives. Section 13 recognizes the fiduciary-like relationship which requires the attorney to act honestly, in good faith and in the best interests of the grantor. An integral element of the relationship is the obligation to take into consideration the known wishes of the grantor, and the manner of management by the grantor when competent. The fiduciary-like relationship is confirmed by an explicit requirement to use assets for the benefit of the grantor (and by necessary implication, not for the benefit of the attorney). Essentially paragraphs C and D tell the attorney that the property does not belong to the attorney, is not to be used for the attorney's benefit and should not be merged with the property of the attorney. The possibility that the attorney will inherit from the grantor does not allow for any compromise of these duties.

The section explicitly requires the attorney to keep records; reinforces the oversight of others by responsiveness to requests for financial accounting. It also lists the duty to give notice of acting in section 12.

Subsection (2) describes the standard of care required of an attorney – a prudent person in comparable circumstances. This is well accepted articulation of the standard of care required of trustees, directors of non-profit organizations, etc. The working group considered a number of variations on the standard of care. One, in particular, relates to whether or not an attorney is remunerated. Differential standards are currently provided for in Manitoba and the Northwest Territories. The ultimate recommendation is that the standard is flexible enough to accommodate varying experience and compensation.

Remuneration requires specific approval in the document, although reasonable expenses can always be reimbursed.

Subsection (3) indicates that an attorney is not liable for loss – if the attorney is following the instructions in the document or other duties imposed by the court or by law.

There may be other situations where the attorney acts on the basis of a document that turns out to be invalid or has been terminated without the attorney's knowledge (see later section).

Accounting

- 14
- (1) On the request of the grantor, the attorney must provide an accounting to the grantor.
 - (2) If the grantor lacks capacity, an accounting may be requested by
 - (a) a person named by the grantor in the enduring power of attorney,

- (b) if no person is named pursuant to paragraph (a), an immediate family member of the grantor, or
 - (c) if two or more attorneys are appointed in the enduring power of attorney, the other attorney or attorneys.
- (3) The grantor may not waive the attorney's duty to provide an accounting under subsection (2), but may designate by name in the enduring power of attorney any immediate family member who should not receive the accounting.

[\(2015 s. 10\)](#)

Request for accounting

- 15
- (1) If the grantor or a person referred to in section 14(2) has been unable to obtain an accounting from the attorney, he or she may request **[the Public Trustee and Guardian for the jurisdiction]** to direct the attorney to provide an accounting.
 - (2) Any interested person may request **[the Public Trustee and Guardian for the jurisdiction]** to direct the attorney to provide an accounting.
 - (3) **[The Public Trustee and Guardian for the jurisdiction]** may direct the attorney to provide an accounting if
 - (a) on receipt of a request pursuant to subsection (1) or (2), **[the Public Trustee and Guardian for the jurisdiction]** considers it appropriate to do so, or
 - (b) **[the Public Trustee and Guardian for the jurisdiction]** considers it to be necessary and in the public interest to do so.
 - (4) If **[the Public Trustee and Guardian for the jurisdiction]** does not direct the attorney to provide an accounting under subsection (3), or the attorney does not provide an accounting as directed by **[the Public Trustee and Guardian for the jurisdiction]**, the court may direct the attorney to provide an accounting to the court or to **[the Public Trustee and Guardian for the jurisdiction]** on application of
 - (a) the grantor,
 - (b) a person referred to in subsection (2) or section 14(2), or
- (c) **[the Public Trustee and Guardian for the jurisdiction]**.

[\(2015 s. 11\)](#)

Comment: Assuming an attorney has given notice of acting, both transparency and oversight require some accounting. Accounting to a public official at lengthy interludes is of little benefit to family members. On the other hand, an attorney should not be inundated with frequent, detailed requests from marginally connected individuals. The Act designates "immediate family members" as the appropriate group to receive and supervise the financial information. Subject to override by the grantor the Act sets out the time of reporting. The attorney is required to provide an accounting on request. The Act does not set out a default minimum period within which an accounting must be provided. If the attorney does not respond, the immediate family members may engage the assistance of the Public Trustee and Guardian in getting the attorney to comply. There is also a final resort to the court at which point possible termination of the attorney might come into play.

This clause provides for requests by either the designated person, or immediate family members. It was not thought necessary to adopt the Saskatchewan position which allows family members to request only if no person is named. It should also be noted that the Public Trustee and Guardian is not listed here, since

the Public Trustee and Guardian has other powers of investigation, and should not be seen as an automatic depository of financial information.

Immunity for good faith actions or omissions

16 No action or other proceeding may be brought against a person for anything done or omitted in good faith in relation to a request for an accounting under section 14 or 15.

[\(2015 s. 12\)](#)

Termination of authority under enduring power of attorney

17 (1) The authority of an attorney under an enduring power of attorney, including an electronic enduring power of attorney, is terminated

- (a) on the date specified in the enduring power of attorney,
 - (b) on the written revocation of the enduring power of attorney by the grantor while the grantor has the capacity to understand
 - (i) the nature and effect of an enduring power of attorney, and
 - (ii) the effect of terminating an enduring power of attorney,
 - (c) on the death of the grantor,
 - (d) on the death or lack of capacity of the attorney,
 - (e) on the written resignation of the attorney, given to
 - (i) if the grantor has capacity, the grantor,
 - (ii) if the grantor lacks capacity and two or more attorneys are appointed in the enduring power of attorney, the other attorney or attorneys, or
 - (iii) if the grantor lacks capacity and there are no other attorneys under the enduring power of attorney, an available adult family member of the grantor,
 - (f) except in the case of an enduring power of attorney made before the coming into force of this Act, on the attorney ceasing to meet the conditions set out in section 9(1)(a)(ii) and (iii) and (b),
 - (g) if a decision-maker is appointed for the grantor or attorney pursuant to **[the jurisdiction's guardianship legislation]**, on the appointment of the decision-maker,
 - (h) if the grantor and attorney are legally married or have cohabited as spouses, on their ceasing to cohabit as spouses as a result of an intention to end their spousal relationship, and
 - (i) in the circumstance described in subsection (3).
- (2) 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.
- (3) If **[the Public Trustee and Guardian for the jurisdiction]** is appointed as guardian for the grantor or attorney under **[the jurisdiction's Public Trustee and Guardian legislation]**, the authority of the attorney under an enduring power of attorney may be suspended or revoked by the appointment
- (4) If **[the appropriate court for the jurisdiction]** is satisfied on the application of any interested person that an attorney has abused his or her authority under an enduring power of attorney, the court may direct that the attorney's authority under the enduring power of attorney be terminated.

[\(2015 s. 13; Am. 2021 s. 7\)](#)

Comment: There are a number of obvious situations in which authority is terminated. The grantor (while competent) revokes, the attorney resigns, or the document has a built-in termination date. The death of either grantor or attorney terminates the authority.

A guardianship order, which is granted after a review of all the circumstances of the grantor, will therefore take priority and terminate the power of attorney. The existence of the power of attorney is one factor to be considered in the guardianship application.

Extra-provincial [extra-jurisdictional] powers of attorney

- 18** An extra-provincial [extra-jurisdictional] power of attorney is an enduring power of attorney if it is a valid power of attorney according to the law of the place where it is executed and
- (a) it provides that the attorney's authority under the power of attorney is not terminated by a lack of capacity of the grantor that occurs after the power of attorney has been executed, or
 - (b) it provides that
 - (i) the attorney's authority under the power of attorney is not terminated by the incapacity of the grantor that occurs after the power of attorney has been executed, and
 - (ii) it provides that an appointment comes into effect on incapacity of the grantor.

(2015 s. 14)

Comment: These are dealt with as well, along with health directives, in a comprehensive recognition statute – the *Uniform Recognition of Substitute Decision-making Documents Act*.

PART 3 – FINANCIAL ABUSE OF VULNERABLE ADULTS

Comment: It is crucial to note that this part applies more broadly than just to attorneys. The remedies and protections apply to any financial abuse of a vulnerable adult. For that reason, several definitions are specific to this part.

Depending on the way in which legislation in each jurisdiction is set up, this part could remain in the *Powers of Attorney Act*, be placed in the *Public Guardian and Trustee Act*, or be placed in specific legislation aimed at protection of vulnerable adults.

Definitions

19 In this Part:

“**financial abuse**” means the misappropriation of funds, resources or property by fraud, deception or coercion;

“**record**” means a book, paper, document or thing, whether in electronic form or otherwise, that may contain information respecting the finances of a vulnerable adult;

“**vulnerable adult**” means an adult individual who has an illness, impairment, disability or aging process limitation that places the individual at risk of financial abuse.

(2015 s. 15)

Comment: These definitions are specific to this part and are therefore at the beginning of the part rather than in the general definition section.

Rather than key on references to specific definitions in the other legislation, such as the Public Guardian and trustee or person in care legislation, the definitions provide a broad generic description of either the nature of abuse, or the person who may be at risk. Jurisdictions may wish to tie into other legislation, but should avoid unduly restricting the purpose of this part.

Freezing of funds by financial institution

- 20 (1) If a financial institution has reasonable grounds to believe that a person is a vulnerable adult and
- (a) is being subjected to financial abuse by another person, including a person appointed as his or her attorney or as his or her guardian pursuant to **[the jurisdiction's guardianship legislation]**, or
 - (b) is unable to make reasonable judgments respecting matters relating to his or her estate and that the estate is likely to suffer serious damage or loss,
- the financial institution may suspend, for up to 5 business days,
- (c) the withdrawal or payment of funds from the person's account,
 - (d) a change in investment decisions or fund strategies affecting the person, or
 - (e) other dealings with the person's financial funds, resources or property.
- (2) The financial institution must immediately advise **[the Public Trustee and Guardian for the jurisdiction]** of the suspension, the reasons for the suspension and any financial information held by the financial institution respecting that person.
- (3) If the withdrawal or payment of funds has been suspended pursuant to subsection (1), the financial institution may allow certain payments to be made if it is of the opinion that it is appropriate to do so.
- (4) A financial institution acting pursuant to this section is not in breach of any other Act.

(2015 s. 16)

Freezing of funds [by Public Trustee and Guardian for jurisdiction]

- 21 (1) If **[the Public Trustee and Guardian for the jurisdiction]** has reasonable grounds to believe that the person is a vulnerable adult, and **[the Public Trustee and Guardian for the jurisdiction]** receives an allegation that the person
- (a) is being subjected to financial abuse by another person, including a person appointed as his or her attorney or as his or her guardian pursuant to **[the jurisdiction's guardianship legislation]**, or
 - (b) is unable to make reasonable judgments respecting matters relating to his or her estate and that the estate is likely to suffer serious damage or loss,
- [The Public Trustee and Guardian for the jurisdiction]** may require a financial institution
- (c) to provide **[the Public Trustee and Guardian for the jurisdiction]** with any financial information held by the financial institution respecting the person, and
 - (d) to suspend, for up to 3 months,
 - (i) the withdrawal or payment of funds from the person's account,
 - (ii) a change in investment decisions or fund strategies affecting the person, or
 - (iii) other dealings with the person's financial funds, resources or property.

- (2) If the withdrawal or payment of funds has been suspended pursuant to subsection (1), **[the Public Trustee and Guardian for the jurisdiction]** may authorize the financial institution to allow certain payments to be made if **[the Public Trustee and Guardian for the jurisdiction]** is of the opinion that it is appropriate to do so.
- (3) A financial institution acting under this section is not in breach of any other Act.

(2015 s. 17)

Comment: There are two situations where funds, for example, held by financial institutions may be frozen. The first, as provided in section 20, temporary halt to transactions is by the financial institution itself, if the financial institution has reasonable grounds to suspect abuse or loss to the estate of a person unable to manage their own affairs. The financial institution must notify a public official if this step is taken. This type of freezing order is for a very limited period of time.

The second level, as provided in section 21, is a freezing order by the public official, who may suspend operations for a longer period and who may require the financial institution to provide information about the circumstances. Since this suspension is for a longer period, there is a statutory power to deal with regular recurring payments which are thought to be appropriate, for example rent and utilities or residential care payments.

The use of these two powers is a useful and powerful tool in preventing abuses before they are complete.

Authority to investigate

- 22
- (1) **[The Public Trustee and Guardian for the jurisdiction]** may investigate an allegation that a person **[the Public Trustee and Guardian for the jurisdiction]** has reasonable grounds to believe is a vulnerable adult
 - (a) is being subjected to financial abuse by another person, including a person appointed as his or her property decision-maker pursuant to **[the jurisdiction’s guardianship legislation]**, or
 - (b) is unable to make reasonable judgments respecting matters relating to his or her estate and that the estate is likely to suffer serious damage or loss.
 - (2) In an investigation under subsection (1), **[the Public Trustee and Guardian for the jurisdiction]** may
 - (a) at any reasonable time, examine any record, whether in the possession of the person believed to be a vulnerable adult or any other person, and
 - (b) request any person to provide any information and explanations **[the Public Trustee and Guardian for the jurisdiction]** considers necessary to the investigation.
 - (3) If requested to do so by **[the Public Trustee and Guardian for the jurisdiction]**, a person must make available any record or must provide the information and explanations referred to in subsection (2)(b).
 - (4) **[The Public Trustee and Guardian for the jurisdiction]** may specify a reasonable time within which a person must comply with subsection (3).

(2015 s. 18)

Comment: Anecdotal evidence suggests that, even if there is statutory authority to investigate, this is not well known in the public and the public will be reluctant to take advantage of it. Attempts to allege “fraud” are often deflected by police authorities as not being “criminal” and not being worthy of pursuit.

This section establishes a clear authority to investigate. It also broadens the categories to situations where financial abuse of a grantor may occur. The section also confers powers on the official to seek records or information from third parties. A further section resolves evidentiary problems of records involved or obtained in the investigation.

Copies of records

- 23 (1) If a record has been examined under section 22, **[the Public Trustee and Guardian for the jurisdiction]** may make copies of that record.
- (2) A record certified by **[the Public Trustee and Guardian for the jurisdiction]** to be a copy made under this section
- (a) is admissible in evidence without proof of the office or signature of **[the Public Trustee and Guardian for the jurisdiction]**, and
 - (b) has the same probative force as the original record.
- (3) **[The Public Trustee and Guardian for the jurisdiction]** must ensure that after a copy of any record examined under section 22 is made, the original is promptly returned to
- (a) the place from which it was removed, or
 - (b) any other place that may be agreed to by **[the Public Trustee and Guardian for the jurisdiction]** and the person who was in possession of the record.

(2015 s. 19)

PART 4 - GENERAL

Validation power for non-compliant enduring powers of attorney

- 24 (1) If, on application, **[the appropriate court for the jurisdiction]** is satisfied on clear and convincing evidence that a written document embodies the intention of a grantor, the court may order that the written document is fully effective as the enduring power of attorney of the grantor, despite that the document was not made in accordance with section 5(2), (3) or (4) or 6(2), (3) or (8).
- (2) For certainty, the written document referred to in subsection (1) may be in electronic form.

(2015; s. 20; Am. 2021 s. 8)

Comment: This provision has been found to be useful in the wills area. There may be invalid documents, notwithstanding best intentions and efforts to meet the formalities. The section sets out the standard of proof which would justify a validation order.

Application to court

- 25 **[The Public Trustee and Guardian for the jurisdiction]** or any other interested person may apply to **[the appropriate court for the jurisdiction]** for advice or directions with respect to an enduring power of attorney.

(2015 s. 21)

Comment: While we do not mandate court involvement in every case, the availability of resort to the courts for advice and direction has often been helpful. This section preserves and provides the power as a backup. There are several examples, particularly where the Public Trustee and Guardian may wish to seek advice and directions, or where the results of an investigation show that termination of a power of attorney is appropriate. Some jurisdictions may require the existence of a power of attorney to be disclosed wherever guardianship is sought.

The Act does not create an obligation to report financial abuse, nor does it set out any specific protection for the complainant. However, the expectation is that any investigation would be taken on sensitively and carefully so as to protect the complainant as far as possible.

Validity of transactions

- 26 (1) An action taken by an attorney under an enduring power of attorney is valid and binding in favour of a person dealing with the attorney or receiving any benefit from the attorney, and in favour of a person claiming under him or her, if that person does not know of the existence of one or more of the following circumstances:
- (a) the authority under the power of attorney is terminated;
 - (b) in the case of an enduring power of attorney that has apparently been signed and witnessed in accordance with section 5 or 6, as applicable,
 - (i) the grantor did not have the capacity to grant the enduring power of attorney pursuant to section 4,
 - (ii) the attorney has acted in violation of section 9, or
 - (iii) the enduring power of attorney does not meet the requirements of section 5 or 6, as applicable.
- (2) No person is required to inquire into or ascertain the existence of one or more of the circumstances referred to in subsection (1) if that person does not know of its existence. (2015 s. 22; Am. 2021 s. 9)

No liability in certain circumstances

- 27 (1) The attorney is not liable to the grantor, or to the estate of the grantor, for an action taken under a power of attorney if
- (a) any or all of the following circumstances occur:
 - (i) the authority under the power of attorney is terminated;
 - (ii) in the case of an enduring power of attorney that has apparently been signed and witnessed in accordance with section 5 or 6, as applicable,
 - (A) the grantor did not have the capacity to grant the enduring power of attorney pursuant to section 4, or
 - (B) the enduring power of attorney does not meet the requirements of section 5 or 6, as applicable,
 - (b) the attorney did not know of the existence of one or more of the circumstances referred to in paragraph (a), and
 - (c) the attorney, with the exercise of reasonable care, could not have known of the existence of one or more of the circumstances referred to in paragraph (a).
- (2) The attorney is not liable to the grantor, or to the estate of the grantor, for failing to act in pursuance of an enduring power of attorney if the attorney, with the exercise of reasonable care, could not have known that the contingent appointment under the enduring power of attorney had come into effect. (2015 s. 23; Am. 2021 s. 10)

Comment: Sections 26 and 27 provide for two situations: one, where a document acted on and thought to be valid turns out to be invalid; and two, where the authority under the document has been terminated, but parties are not aware of that fact. The sections do three things – validate the actions of the attorney;

relieve the third-party from having to inquire into the apparent authority; and excuse the attorney from liability for actions taken.

These sections apply to all powers of attorney, not just enduring powers. These sections replace section 1(2) and section 2(1) of the 1978 Uniform Act.

Regulations

28 The Lieutenant Governor in Council may make the following regulations:

- (a) prescribing criminal offences for the purpose of section 9(1)(a)(iii);
- (b) designating health professions for the purpose of section 11(3);
- (c) respecting forms for the purposes of this Act.

(2015 s. 24)

Comment: This is necessary to provide for suggested forms.

Regulations are also used to define those criminal offenses which would disqualify a potential attorney. For example, Saskatchewan provides for a disqualification if the individual has been convicted within the last 10 years of a criminal offence relating to assault, sexual assault or other acts of violence, intimidation, criminal harassment, uttering threats, theft, fraud or breach of trust. Some of these offences relate directly to the integrity of the individual in relation to property matters and coercion, all of which could possibly taint the efficacy of the power of attorney and lead to situations of abuse. But note a pardon and an acknowledgement and consent of the grantor while not under a disability, under section 9(2) can override the disqualification. This is to respect the individual autonomy of the grantor in making such decisions.

Forms for notice, witness certificate or accounting may be provided for in the regulations.

Jurisdictions may have differing nomenclatures for health professionals and may also want to regulate who is qualified to make decisions as to when an adult is incapable of making decisions under section 11(3) according to their own local laws.

Jurisdictions may also want to consider amendments to their public institution privacy legislation or their private sector privacy legislation to provide for the collection, use and disclosure of personal information such as in the following circumstances:

- (a) for the purposes of detecting or suppressing fraud or of preventing fraud that is likely to be committed and it is reasonable to expect that the disclosure with the knowledge or consent of the individual would compromise the ability to prevent, detect or suppress the fraud;
- (b) made on the initiative of an organization to a government institution, a part of a government institution or the individual's next of kin or authorized representative and the organization has reasonable grounds to believe that the individual has been, is or may be the victim of financial abuse, the disclosure is made solely for purposes related to preventing or investigating the abuse, and it is reasonable to expect that disclosure with the knowledge or consent of the individual would compromise the ability to prevent or investigate the abuse.

See for example, S-4: An Act to amend the Personal Information Protection and Electronic Documents Act and to make a consequential amendment to another Act, section 22, with amendments to section 7(3) of the Act.

<http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=6524311>

CONSOLIDATED UNIFORM ENDURING POWERS OF ATTORNEY ACT (2015)
as amended 2021
(consolidated to 2021)

Comment: The resolution adopted by the Conference in August 2015 provides that upon adoption of the *Uniform Powers of Attorney Act*, Section 1(2) and Section 2 of the existing *Uniform Powers of Attorney Act* (1978) shall be withdrawn.

Resolution 2020: THAT the commentary to the Uniform Electronic Commerce Act section 2 is modified by adding the following after the first paragraph:

As a result, the Uniform Wills Act and the Uniform Powers of Attorney Act provide for wills and powers of attorney in electronic form and provide detailed rules for the creation, alteration or revocation of such documents. The exception in s. 2 is maintained specifically to ensure that the rules relating to wills and powers of attorney are exclusively and comprehensively set out in Wills or Powers of Attorney legislation;