ENDURING POWERS OF ATTORNEY ACT

Introduction

Studies have shown that elder abuse is on the rise, and that financial abuse may constitute as much as half of all elder abuse. While the *Criminal Code* has been amended to provide further powers relating to offences against rights of property, it is accepted that there is still room for civil law measures that can prevent financial exploitation or address it without recourse to criminal proceedings. This statute attempts to provide several practical and effective remedies to address financial abuse.

Traditionally, when an individual lost or had reduced capacity, the response was the appointment of a guardian through a court process. The introduction of a substitute decision-maker (attorney), selected and identified by the individual (grantor), introduced an element of self-direction along with a degree of informality which avoided the time, expense and restrictiveness of a court process. The development of informal processes in financial and living arrangements, and for health care decisions, is consistent with the objective of moving away from a court process.

However, there are advantages to a court process that a more informal system may not achieve. The court process is open and transparent, entails supervised acknowledged duties, and the process is theoretically monitored throughout.

Québec, alone among Canadian jurisdictions, requires a validation process ("homologation") for the appointment of a substitute decision-maker (mandataire) for property matters. These ULCC proposals do not require "homologation", but they do seek to achieve all the benefits of the process, clear duties acknowledged by the substitute decision-maker, and an ongoing obligation to communicate with and report to immediate family members.

The purpose of this statute is to introduce measures to reinforce that powers of attorney are used in an informed and appropriately regulated way. The statute introduces several initiatives:

- Sets out the duties and responsibilities of attorneys, to help educate both grantors and attorneys. This initiative should have the benefit of eliminating any abuses due to ignorance and misinformation.
- Requires notice of when an attorney commences to act, thus ensuring some transparency around the determination of the grantor's inability, and imposing a requirement to provide accounting periodically or on request.
- Creates a central forum for complaint and investigation, using the Public Trustee and Guardian and filling a void for family members and third parties who may not now know where to turn.
- Provides some effective and immediate remedies to prevent or disrupt breaches while in progress.

At the same time as creating specific duties and remedies, it is hoped that a change in culture can occur. The attorney for an aging individual is not a beneficiary in waiting; is not a

borrower from unused capital; nor does the attorney have carte blanche to use the individual's assets. Assets are to be used for the benefit of the grantor, involving the grantor to the extent possible and in accordance with the wishes of the grantor. The attorney must make decisions in good faith for those purposes.

The statute also creates measures to harmonize a number of other areas:

- formalities for creation of a power of attorney;
- competency of witnesses;
- witness certificates;
- non-compliant documents.

Part 3 of this Act must be viewed closely. It recognizes that a vulnerable adult may be subject to influence by a broader group than the subset of "attorneys". This part recognizes that when that influence becomes "abuse", the remedies and protections should apply, even if the "abuser" is not an attorney.

The format of this Act is that of an Act, which should replace the Powers of Attorney Act in various jurisdictions. The content adds significantly to the basic legislation in existence in those jurisdictions. However, some jurisdictions have centered their legislative efforts in this subject area either in their Public Trustee and Guardian legislation or in other legislation on the topic of vulnerable adults. If so, several of the sections in this Act could be easily housed in the themed legislation. The essential point of the exercise is to ensure that there are protections and remedies to protect against elder financial abuse in a harmonized way across the jurisdictions.

ENDURING POWERS OF ATTORNEY ACT

Contents

PART 1 - INTERPRETATION

Definitions

1 (1) In this Act:

"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, complies with the requirements of sections 3 and 4, 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, 3 and 4, 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;

"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;

"immediate family member" means an adult referred to in paragraphs (a) to (d) of the definition of "family member";

"notice of attorney acting" means a notice of attorney acting under section 8.

(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.

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 14. Therefore the formalities of sections 2, 3 and 4 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 cohabitees 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 8.

PART 2 – ENDURING POWER OF ATTORNEY

Enduring power of attorney

2 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.

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

3 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.

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

4 (1) Subject to subsections (2) to (4), 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.

(2) Subject to subsection (3), 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.

(3) 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 (4).

(4) 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 jurisdiction]**,

(ii) **[the appropriate public official in the jurisdiction]**, or

(iii) a financial institution authorized to carry on trust business in **[the jurisdiction]**;

(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.

(5) An enduring power of attorney must be accompanied by a certificate in the prescribed form from one of the witnesses.

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. This precludes electronic documents which are exempted from the operation of the *Uniform Electronic Commerce Act*, section 2(2). 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. However there are provisions that preclude a person from signing on behalf of the grantor and acting in another capacity such as a witness. 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.

The exception to section 4(4)(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.

Limitations on acting as attorney

5 (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.

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

6 If a form of enduring power of attorney is prescribed, the use of that form is not mandatory.

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

7 (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,

(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).

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.

Notice of attorney acting

8 (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.

(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 9 (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.

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

9 (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 8 (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 8.

(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.

Comment: This section describes the duties of an attorney from different perspectives. Section 9 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 8.

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

10 (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.

Request for accounting

11 (1) If the grantor or a person referred to in section 10 (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 10 (2), or

(c) **[the Public Trustee and Guardian for the jurisdiction]**.

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

12 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 10 or 11.

Termination of authority under enduring power of attorney

13 (1) The authority of an attorney under an 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 5 (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) 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

(3) 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.

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

14 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.

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

15 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.

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

16 (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.

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

17 (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.

Comment: There are two situations where funds, for example, held by financial institutions may be frozen. The first, as provided in section 16, 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 17, 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

18 (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).

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

19 (1) If a record has been examined under section 18, **[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 18 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.

PART 4 - GENERAL

Validation power for non-compliant enduring powers of attorney

20 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 4 (1), (2) or (5).

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

21 **[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.

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

22 (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 4

(i) the grantor did not have the capacity to grant the enduring power of attorney pursuant to section 3,

(ii) the attorney has acted in violation of section 5, or

(iii) the enduring power of attorney does not meet the requirements of section 4.

(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.

No liability in certain circumstances

23 (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 sections 4

(A) the grantor did not have the capacity to grant the enduring power of attorney pursuant to section 3, or

(B) the enduring power of attorney does not meet the requirements of section 4,

(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.

Comment: Sections 22 and 23 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

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

(a) prescribing criminal offences for the purpose of section 5 (1) (a) (ii);

(b) designating health professions for the purpose of section 7 (3);

(c) respecting forms for the purposes of this Act.

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 5(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 nomenclature 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 7(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

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.