

APPENDIX O

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POWERS OF ATTORNEY

I

REPORT OF THE ONTARIO COMMISSIONERS

The subject of powers of attorney which can survive the mental incapacity of the donor was extensively discussed at the 1976 and 1977 meetings of the Uniform Law Conference. Little agreement was reached beyond the general principle that legislation to provide for a form of power of attorney that could survive mental incapacity was desirable. There was apparently a general feeling that the legislation should be as simple as possible and should be modelled on a comparable provision of the American Uniform Probate Code.

Accordingly we have drafted a very simple statute for this year's Conference (attached as the Schedule). We have not included any standard form of enduring power of attorney. We have not included provisions for filing an enduring power or for applying to a court for substitution of a new attorney. This has resulted in a drastic simplification of the draft Act.

This year's draft *Uniform Powers of Attorney Act* simply provides that, by the inclusion of appropriate wording, any written power of attorney can survive the donor's mental incapacity. Such a power of attorney must be signed and witnessed. It ceases to be valid if a committee of the estate of the donor is appointed pursuant to mental incompetency proceedings.

Section 3 of the draft Act is an attempt to clear up some of the difficulties relating to the termination of all powers of attorney. It protects innocent third parties who have dealt with the attorney after the power has terminated. It also shelters from liability the attorney who exercises the power after it has terminated if the attorney could not reasonably have known of the termination.

There is some urgency to this matter. There have been many requests that legislation to permit powers of attorney to survive mental incapacity be brought forward soon. Lawyers, particularly those with extensive family-oriented practices, perceive a pressing need for this kind of legislation. There are many cases where existing law is creating

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hardship. We present our draft Act to the Conference with the hope that a consensus can be quickly reached.

Stephen B. McCann
on behalf of the
Ontario Commissioners

6 June 1978

SCHEDULE

DRAFT UNIFORM POWERS OF ATTORNEY ACT

Enduring
power of
attorney

1. A written power of attorney that,
 - (a) states that the power is to continue notwithstanding any mental incapacity of the donor of the power; and
 - (b) is signed by,
 - (i) the donor; and
 - (ii) a witness, other than the attorney or the spouse of the attorney, to the signature of the donor,

does not cease to be valid by reason only of mental infirmity that renders the donor incapable of managing his affairs after the power is granted.

Effect of
appointment
of committee

2. A written power of attorney that continues to be valid notwithstanding mental infirmity of the donor of the power ceases to be valid with the appointment of a committee of the estate of the donor.

Where
suspension or
termination
of power
not known

3. Where a power of attorney is terminated,
 - (a) an act in pursuance of the power by the attorney in favour of a person who does not know of the termination of the power is valid and binding in favour of the person and in favour of a person claiming under him; and
 - (b) the attorney is not liable to the donor or the estate of the donor of the power for an act in pursuance of the power where the attorney did not know and with the exercise of reasonable care would not have known of the termination of the power.

UNIFORM POWERS OF ATTORNEY ACT

(as adopted by the Conference in 1978)

Termination
of authority
under power
of attorney

1.—(1) Where the authority under a power of attorney is terminated, an act in pursuance of the power by the attorney in favour of a person who does not know of the termination of the authority is valid and binding in favour of the person and in favour of a person claiming under him.

Idem

(2) Where the authority under a power of attorney is terminated, the attorney is not liable to the donor of the power or the estate of the donor for an act in pursuance of the power where the attorney did not know, and with the exercise of reasonable care would not have known, of the termination of the authority.

Enduring
power of
attorney

2.—(1) The authority of an attorney given by a written power of attorney that,

(a) provides that the authority is to continue notwithstanding any mental infirmity of the donor; and

(b) is signed by the donor and a witness, other than the attorney or the spouse of the attorney, to the signature of the donor,

is not terminated by reason only of subsequent mental infirmity that would but for this Act terminate the authority.

Effect of
appointment
of a
committee

(2) Subject to section 1, the authority of an attorney under a power of attorney referred to in subsection (1) terminates on the appointment of a committee (*or other method by which a committee is established for the estate of the donor in the enacting jurisdiction*).