APPENDIX T

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POWERS OF ATTORNEY

ONTARIO REPORT

INTRODUCTION

The following paper, intended as a decision document, is divided into two parts. The first part deals with proposals for the creation by legislation of a form of power of attorney, called an enduring power of attorney, which can survive the mental incapacity of the donor of the power. The second part deals with proposals for legislation setting out the rights and liabilities of agents, third parties and other parties pursuant to the termination, by revocation or by operation of law, of an ordinary (i.e., non-enduring) power of attorney.

Part One

ENDURING POWERS OF ATTORNEY

EXISTING LAW

According to the law of agency, a power of attorney granted to an attorney while the donor of the power is of sound mind becomes void when the donor becomes mentally ill to the degree that he loses legal capacity. This results from a basic theory of agency, namely, that the agent only has capacity to carry out those transactions which his principal has legal capacity to carry out. Therefore once the principal has lost capacity to contract, the agent's capacity is terminated also.

Often, however, a general power of attorney is executed by a person who is looking into the future and wishes to provide for someone, e.g., a member of his family, to look after his affairs when he is no longer capable of managing them by reason of old age or disease. If the attorney in such a situation immediately ceases to act on behalf of his principal as soon as he suspects the principal has become incompetent, he may very well be defeating the whole purpose of the power of attorney. If he continues to act at a time when his principal has, in fact, lost legal capacity, the attorney may be exposing himself to an action for breach of warranty of authority brought by a third party with whom the attorney has carried out transactions on behalf of his principal.

Several provincial law reform commissions have issued reports dealing with this problem. There is general agreement that the crea-

tion of a form of power of attorney capable of surviving the mental incapacity of the donor would be a valuable reform. It is generally felt that provincial legislation in respect to mental health and mental incompetency is not entirely satisfactory in dealing with situations where the affairs of someone who has become incapacitated through old age or mental disease need looking after. The commissions have voiced the opinion that legal proceedings to have someone declared "mentally incompetent" or "incapable of managing his affairs" may be distasteful and disruptive to family life.

It is also generally felt that an individual should have the right when mentally capable of making provision for the management of his affairs at a time when he is not so capable just as he may provide by a general power of attorney for the management of his property at a time when he will be absent from the jurisdiction.

The law reform commissions of Ontario, Manitoba and British Columbia have produced reports recommending legislation to create enduring powers of attorney. Their recommendations have differed markedly and are in some cases incompatible. What follows is a series of general propositions, each one followed by alternative recommendations representing the views of the three commissions. It is hoped that decisions taken on these alternatives will provide guidelines for draft uniform legislation.

FORMALITIES

(1) A power of attorney which is to be capable of enduring the mental incompetency of the donor must be in writing, signed by the donor, and dated.

(i) All the law reform commissions agree that these should be fundamental conditions.

(2) A power of attorney will not take effect as an enduring power unless there is an *express* statement in the instrument creating the power that it is to endure the mental incapacity of the donor.

(i) All the law reform commissions agree that an express statement should be a fundamental condition.

(3) An enduring power of attorney should be witnessed.

(i) The Ontario Law Reform Commission recommends that an enduring power be executed in the presence of at least one witness, who shall be someone other than the donee or the spouse of the donee.

(ii) The Manitoba Law Reform Commission recommends that an enduring power should be executed by the donor in the presence of at least two witnesses (i) neither of whom must be the donee or the spouse of the donee and (ii) one of whom must be a physician, surgeon, barrister or solicitor, and (iii) not more than one of whom is a member of the donor's family. The Manitoba Commissioners also recommended that provision be made for a supporting affidavit in which the witnesses testify that (a) they know the donor personally and (b) they have reason to believe the donor and the person executing the power of attorney are one and the same person, and (c) that the donor appears to be of sound mind and that he appeared to understand what was being executed.

(iii) The British Columbia Law Reform Commission recommends that the signature of the principal be witnessed, but also recommends that this be a non-mandatory requirement, i.e. failure to comply would not invalidate the power.

(4) The effect of non-compliance with the formalities of creating an enduring power should be to turn the power into an ordinary power of attorney which would be terminated if the donor becomes mentally imcompetent.

(i) The Ontario and Manitoba Law Reform Commissions make no recommendation.

(ii) The B.C. Law Reform Commission recommends that there be two kinds of formalities, namely, those which must be complied with if the document is to be effective as an enduring power of attorney and those which ought to be complied with, but which, if they are not, do not affect the validity of the document. In the first category the B.C. Commission placed the requirement that the instrument creating the power should be in writing, signed, and dated and that it should contain an express statement that the power is to endure. In the second category, the most important formalities are that the principal's signature should be witnessed (as mentioned above) and that the power should be under seal (because of the rule that an attorney cannot carry out any transaction which is required to be under seal unless the instrument creating his agency is also under seal—this rule is now almost obsolete since there are very few transactions

which must be executed under seal). The requirements in the second category would be voluntary, i.e. non-compliance would not prevent the creation of a valid enduring power of attorney provided the formalities in the first category are complied with.

The B.C. Commission further recommends that if an enduring power is invalid because it fails to comply with the mandatory formal requirements, the invalidity should only affect the endurance. If the agency agreement is otherwise valid at common law, it should take effect as an ordinary power of attorney which would not survive the mental incapacity of the principal.

FILING

(5) The attorney under an enduring power of attorney should be required, within some time limit, to file a copy of the power with the registrar of an appropriate court.

(i) The OLRC recommends that the attorney should be required to file a notarial copy of the enduring power of attorney in the office of the registrar of the surrogate court of the county or district where the donor or the donee resides, not later than fifteen days after the attorney first learns that the donor has become incapacitated. The OLRC feels that this filing requirement serves two functions: it puts the power of attorney on public record and publicly identifies the attorney.

(ii) The Manitoba Law Reform Commission recommends that the attorney be required to file two copies of the enduring power in the office of the registrar of the surrogate courts and in the office of the Public Trustee within 15 days after the date on which he has signed the form of acceptance on the power of attorney.

(iii) The British Columbia Law Reform Commission recommends that no requirement as to filing be included in the legislation. They see no particular utility in a filing system for enduring powers of attorney, and feel that the legislative scheme should be kept as simple as possible.

(6) Provision should be made for a judge to extend the time for filing.

(i) The Ontario Law Reform Commission recommends that provision be made for an application to the surrogate court for an order validating the exercise of the power of attorney

in the period subsequent to incapacity notwithstanding the attorney's failure to file.

(ii) The Manitoba Law Reform Commission makes a recommendation to the same effect as that of the OLRC.

(7) The effect of failure to file, subject to the provision for extension of time, should be that the power of attorney cannot be validly exercised after the donor of the power has become mentally incompetent.

(i) This proposition is precisely what is recommended by the Ontario Law Reform Commission.

(ii) The Manitoba Law Reform Commission recommends that where an enduring power is not properly filed, subject to the provision for extension of time for filing, the enduring power of attorney shall not come into force and shall be of no effect.

DUTIES OF THE ATTORNEY

(8) There are a number of common law duties which an attorney owes to his principal, such as:

(a) the duty not to enter upon a transaction where there is a potential conflict of interest;

(b) the duty to account;

(c) the duty to keep the principal's property separate from his own; and

(d) a duty of care and skill.

(i) The British Columbia Law Reform Commission recommends that the legislation should provide that a fiduciary relationship exists between principal and enduring attorney and that, in any action against an enduring attorney, the principal and his committee, executor, or other successors have the benefit of the proprietary equitable remedies which are available to a *cestui que trust.*

(ii) The B.C. Law Reform Commission also recommends that a duty of "prudent management" be placed on an attorney under an enduring power. The duty of prudent management means that an enduring attorney must exercise his powers as a man of ordinary prudence would manage his own private affairs for the benefit of

the principal and his family, having regard to the nature and value of the property of the principal and the circumstances and needs of the principal and his family. This duty should be subject to any explicit instructions given by the principal to the attorney at a time when the principal was mentally incompetent.

(iii) The B.C. Law Reform Commission recommends that the attorney should be insulated from liability so long as he acts in good faith. An enduring attorney should not be liable to a principal for carrying out an explicit instruction given at a time when he *bona fide* believed the principal to be competent or for failing to carry out an instruction given or ordered to be carried out at a time when he *bona fide* believed the principal to be incompetent.

ACCOUNTING

(9) The enduring attorney should be required to pass his accounts upon the application of an interested party or the Public Trustee on behalf of an interested party.

(i) The Ontario Law Reform Commission recommends that:

(a) provision be made for interested parties to apply to the surrogate court for an order that the attorney be directed to pass his accounts; and

(b) that the Public Trustee be empowered to apply to the surrogate court on behalf of interested parties for an order directing the attorney to pass his accounts if a complaint is made to him.

The OLRC believes that the fact that the attorney can be called upon to give an accounting acts as a salutary check on the exercise of the power.

(ii) The Manitoba Law Reform Commission recommends that the enduring power of attorney should specifically provide that every attorney, if so directed by the donor, should be required to file his accounts annually with the Public Trustee. Every attorney who has been given a special power of attorney pursuant to the Act, and whose power has been properly filed, should be required to file his accounts annually with the Public Trustee, as directed, and within one month of learning of the donor's death. The Public Trustee should

be empowered to require a special attorney, not so directed by the donor, to file accounts if an interested party complains. The Public Trustee should also be empowered to investigate the accounts filed by enduring attorneys, and to take what action he deems necessary to protect the estate of the donor. The Commissioners believe that a degree of supervision over special powers of attorney should be given to the Public Trustee and that he should be put in a position to assess whether or not the mentally incompetent donor's estate is being administered competently.

(iii) The British Columbia Law Reform Commission recommends that there be an express provision in the legislation reiterating the right of the successor to the donor, when the donor has died, to call for accounts from the attorney. The Commissioners emphasize that such a provision would add nothing to the present law, and they make no recommendation in regard to annual or other periodic accounting duties.

WHO CAN ACT AS AN ATTORNEY

(10) The Council of the Law Society of England, in its presentation to the English Law Commission, proposed very strict limitations on the persons who would be entitled to act as attorneys under an enduring power. For example, they felt that there should be at least two joint attorneys at least one of whom is not a member of the donor's family and at least one of whom must be, and remain, a member of a professional body or an organization which is, for practical purposes, in a position to guarantee his honesty.

(i) None of the Canadian law reform commissions recommend that there be any limitation at all on the persons who can act as enduring attorneys.

TERMINATION

(11) The death of the donor should terminate an enduring power of attorney.

(i) The Ontario Law Reform Commission recommends that the donor of a power of attorney should not be able to provide expressly for the survival of the power subsequent to his death. (There is existing legislation in Ontario which allows the donor to provide that a power of attorney shall survive his death.)

(ii) The Manitoba Law Reform Commission recommends that an enduring power should cease upon the death of the donor (subject to a few statutory exceptions).

(12) The enduring power of attorney should be terminated when the donor is found to be mentally incompetent or is not so found but is found to be incapable of managing his affairs and a committee is appointed.

(i) The Ontario Law Reform Commission recommends that the enduring power should cease to be valid when a declaration of mental incompetence is made and a committee appointed. Clearly the OLRC intends that the same result should follow where a determination is made that a person is incapable of managing his affairs and a committee is appointed.

(ii) The Manitoba Law Reform Commission makes a recommendation to the same effect as the OLRC recommendation. They further recommend that where an application has been made to the Court of Queen's Bench to have a committee appointed for the estate of a person who is declared mentally incompetent, notice of the application should be required to be served upon the attorney.

(iii) The British Columbia Law Reform Commission recommends that an enduring power of attorney should terminate upon the making of a declaration of mental incompetency under the *Patients' Estates Act*. They note that under the B.C. legislation, where there is no specific appointment of a committee, the Public Trustee becomes *ex officio* the committee of the patient, so that a declaration always has the effect of appointing a committee.

REMOVAL OF ATTORNEY

(13) Provision should be made in the legislation for the removal of an attorney and the substitution of another.

(i) The Ontario Law Reform Commission recommends that:

(a) provision should be made for interested parties to apply to the surrogate court to have a person other than the named attorney substituted for the named attorney; and

(b) the Public Trustee should be empowered to make an application to the surrogate court on behalf of interested

parties for the appointment of a substitute attorney if a request is made to him; and

(c) provision should be made for the attorney himself to apply to the surrogate court to have another attorney substituted, on giving notice of his intention to make such application to the Public Trustee and to all interested parties.

(ii) The Manitoba Law Reform Commission recommends that:

(a) provision be made to permit a donee of a filed enduring power to be relieved of his duties as attorney by written notice to the Public Trustee and the donor; and

(b) provision should be made to permit any interested party or the Public Trustee, in cases where a donor is incapacitated, to apply to the Court of Queen's Bench for an order either appointing a new attorney or appointing the Public Trustee to administer the estate of the donor where the original attorney dies or becomes incapacitated or where any member of the donor's family or other interested party or the Public Trustee is of the opinion that the original attorney is not performing his duties and accepting his responsibilities in a competent manner.

(iii) The British Columbia Law Reform Commission recommends that no provision be made for removal and substitution of the attorney. They feel that if there is dissatisfaction with the way in which the attorney is discharging his responsibilities or if the attorney dies or becomes incapacitated, the best course is to bring the whole matter within the *Patients' Estates Act* by seeking a declaration of mental incompetency and the appointment of a committee.

NO WAIVER

(14) The Act should contain a provision expressly stating that where a donor intends the power to survive any subsequent incapacity, he cannot contract out of or waive the provisions of the Act.

(i) All the law reform commissions have endorsed this recommendation.

Part Two

TERMINATION OF ORDINARY POWERS OF ATTORNEY

Protection of Agent

(15) The position of an agent who, under an ordinary (non-enduring) power of attorney, has carried out a transaction with a third party subsequent to his principal's becoming mentally incapable is not entirely clear at common law. In *Drew v. Nunn*, where the agent was the wife of the principal and therefore assumed to have known of the termination of the agency by reason of her husband's insanity, the principal was held to be liable on the grounds that he had originally held his wife out as his agent and that holding-out would continue until the third party received notice of the termination of the agency. In *Yonge v. Toynbee* on the other hand, it was held that even where the agent had no knowledge of the termination of his authority, he was liable to a third party on the basis of a breach of warranty of authority. These cases appear to be in conflict on the question of the liability of the agent.

A noteworthy recent example of legislation which attempted to clarify and restrict the common law liability of an agent acting under a power of attorney is *The Powers of Attorney Act 1971* which was enacted in England to give expression to the recommendations of the English Law Commission. The British Columbia Law Reform Commission in its Report entitled "The Termination of Agencies" also has made a number of recommendations relating to the liability of agents. The B.C. proposals are intended to apply to agents generally, not just to those acting pursuant to a power of attorney.

An agent acting pursuant to a power of attorney at a time when the power of attorney has terminated should not incur liability if he did not know at the time that the power of attorney had terminated.

(i) The B.C. Law Reform Commission recommends that an agent who acts in pursuance of his authority at a time when it has been terminated, whether by revocation or operation of law, shall not, by reason of the termination, incur any liability (either to his principal or to any other person) if at that time he did not know that the authority had been terminated.

(ii) Section 5 (1) of the U.K. *Powers of Attorney Act 1971* states:

> A donee of a power of attorney who acts in pursuance of the power at a time when it has been revoked shall not, by

reason of the revocation, incur any liability (either to the donor or to any other person) if at that time he did not know that the power had been revoked.

(16) Knowledge of the occurrence of an event which has the effect of terminating a power of attorney should be deemed to be knowledge of the termination of the power itself.

(i) Both the B.C. Law Reform Commission proposals and the English legislation contain such a provision.

(ii) The B.C. Commission also recommends that for purposes of the legislation, "knowledge" should include knowledge of such circumstances as would put a reasonable man on his inquiry. It appears that this is probably the common law position anyway, but the B.C. Commissioners wish to leave no doubt.

Protection of Third Parties

(17) The common law protects a third party in situations where the third party, without knowledge that the agent's authority has been terminated, deals with the agent.

(i) The B.C. Law Reform Commission recommends that where the authority of an agent has been terminated, whether by revocation or operation of law, and a person, without knowledge of the termination, deals with the agent, the transaction between them shall, in favour of that person, be as valid as if the authority had been in existence.

(ii) Section 5(2) of the U.K. *Powers of Attorney Act 1971* states:

> Where a power of attorney has been revoked and a person, without knowledge of the revocation, deals with the donee of the power, the transaction between them shall, in favour of that person, be as valid as if the power had then been in existence.

Protection of Other Parties

(18) Legislative protection should be given to persons who have not dealt directly with the agent but whose rights nevertheless hinge on the validity of the agent's authority.

(i) Section 5(4) of the U.K. *Powers of Attorney Act 1971* states:

Where the interest of a purchaser depends on whether a transaction between the donee of a power of attorney and another person was valid by virtue of subsection (2) of this section, it shall be conclusively presumed in favour of the purchaser that that person did not at the material time know of the revocation of the power if —

(a) the transaction between that person and the donee was completed within twelve months of the date on which the power came into operation; or

(b) that person makes a statutory declaration, before or within three months after the completion of the purchase, that he did not at the material time know of the revocation of the power.

(ii) The B.C. Law Reform Commission recommends that where the interest of a person depends on whether a transaction between an agent and a second person was valid by virtue of the provision protecting parties dealing with the agent, and the first person did not know that the authority of the agent had been terminated, it shall be conclusively presumed in favour of the first person that the second person did not at the material time know of the termination of the authority.

Stephen V. Fram
on behalf of the
Ontario Commissioners

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