

Part 2 — Enduring Powers of Attorney

Division 1 — Definitions and Presumption of Capability

Definitions

10 In this Part and Part 3:

"adult" means an individual who is 19 years of age or older;

"attorney" means a person who

(a) is authorized under an enduring power of attorney to act as an attorney, and

(b) has signed the enduring power of attorney under section 17;

"court" means the Supreme Court of British Columbia;

"enduring power of attorney" means a power of attorney

(a) in which an adult authorizes an attorney to

(i) make decisions on behalf of the adult, or

(ii) do certain things

in relation to the adult's financial affairs, and

(b) that continues to have effect while, or comes into effect when, the adult is incapable;

"financial affairs" includes an adult's business and property, and the conduct of the adult's legal affairs;

"health care" has the same meaning as in the *Health Care (Consent) and Care Facility (Admission) Act*;

"health care provider" means a person who is licensed, certified or registered under a prescribed Act to provide health care;

"near relative" means an adult child, a parent, a grandparent, an adult brother or sister or any other adult relation by birth or adoption;

"personal care" includes the following matters in respect of an adult:

(a) diet, dress and hygiene;

- (b) health related activities, including medication;
- (c) social, recreational, employment and educational activities;
- (d) shelter, including admission to a care facility under the *Health Care (Consent) and Care Facility (Admission) Act*;

"qualified health care provider" means a medical practitioner or a member of a prescribed class of health care providers;

"spouse" means a person who

- (a) is married to another person and is not living separate and apart, within the meaning of the *Divorce Act* (Canada) , from the other person, or
- (b) is living with another person in a marriage-like relationship.

Adults presumed to be capable

- 11** (1) Until the contrary is demonstrated, an adult is presumed to be capable of
- (a) making decisions about the adult's financial affairs, and
 - (b) understanding the nature and consequences of making, changing or revoking an enduring power of attorney.
- (2) An adult's way of communicating with others is not grounds for deciding that the adult is incapable of making the decisions or having the understanding referred to in subsection (1) .

Division 2 — Making an Enduring Power of Attorney

Adult may make enduring power of attorney unless incapable

- 12** (1) An adult may make an enduring power of attorney unless the adult is incapable of understanding the nature and consequences of the proposed enduring power of attorney.
- (2) An adult is incapable of understanding the nature and consequences of the proposed enduring power of attorney if the adult cannot understand all of the following:
- (a) the property the adult has and its approximate value;
 - (b) the obligations the adult owes to his or her dependants;
 - (c) that the adult's attorney will be able to do on the adult's behalf anything in respect of the adult's financial affairs that the adult could do if capable, except make a will, subject to the conditions and restrictions set out in the enduring power of attorney;
 - (d) that, unless the attorney manages the adult's business and property prudently, their value may decline;
 - (e) that the attorney might misuse the attorney's authority;

- (f) that the adult may, if capable, revoke the enduring power of attorney;
- (g) any other prescribed matter.

What enduring power of attorney may do

- 13** (1) An adult may, in an enduring power of attorney, authorize an attorney to
- (a) make decisions on behalf of the adult, or
 - (b) do anything that the adult may lawfully do by an agent

in relation to the adult's financial affairs.

- (2) An adult may grant general or specific powers to an attorney.

Enduring power of attorney must include provision for continued authority

- 14** An adult who makes an enduring power of attorney must state in the enduring power of attorney

- (a) whether the attorney may exercise authority
 - (i) while the adult is capable, or
 - (ii) only while the adult is incapable

of making decisions about the adult's financial affairs, and

- (b) that the authority of the attorney continues despite the adult's incapability.

What enduring power of attorney must not do

- 15** A direction to an attorney to do either or both of the following is not valid and must be severed from an enduring power of attorney:

- (a) to do anything that is prohibited by law;
- (b) to omit to do anything that is required by law.

Adult must sign enduring power of attorney

- 16** (1) Subject to subsections (2) to (6), an enduring power of attorney must be in writing and signed and dated by

- (a) the adult in the presence of 2 witnesses, and
- (b) both witnesses in the presence of the adult.

- (2) Subject to subsection (3), an enduring power of attorney may be signed on behalf of an adult if

- (a) the adult is physically incapable of signing the enduring power of attorney,
- (b) the adult 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 adult is witnessed in accordance with this section, as if that signature were the adult's signature.

(3) The following persons must not sign an enduring power of attorney on behalf of an adult:

- (a) a witness to the signing of the enduring power of attorney;
- (b) a person prohibited from acting as a witness under subsection (6) .

(4) Only one witness is required if the witness is a lawyer or a member in good standing of the Society of Notaries Public of British Columbia.

(5) If an enduring power of attorney is to be effective for the purposes of the *Land Title Act*, the enduring power of attorney must be executed and witnessed in accordance with the *Land Title Act*.

(6) 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 spouse, child or parent of a person named in the enduring power of attorney as an attorney;
- (b.1) 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 lawyer,
 - (ii) a member in good standing of the Society of Notaries Public of British Columbia,
 - (iii) the Public Guardian and Trustee, or
 - (iv) a financial institution authorized to carry on trust business under the *Financial Institutions Act*;
- (c) a person who is not an adult;
- (d) a person who does not understand the type of communication used by the adult, unless the person receives interpretive assistance to understand that type of communication.

Attorney must sign enduring power of attorney

17 (1) Before a person may exercise the authority of an attorney granted in an enduring power of attorney, the person must sign the enduring power of attorney in the presence of 2 witnesses.

(2) The signing of an enduring power of attorney by an attorney is not required to be in the presence of the adult or any other attorney.

(3) Section 16 (4) and (6) applies to witnesses of an attorney's signature and, for this purpose, the reference in section 16 (6) to the adult is to be read as a reference to the attorney.

(4) A person named as an attorney in an enduring power of attorney who has not signed the enduring power of attorney is not required to give notice of any kind that the person is unwilling or unable to act as an attorney.

(5) If a person named as an attorney does not sign the enduring power of attorney, the authority of any other attorney is not affected, unless the enduring power of attorney states otherwise.

Division 3 — Attorneys

Who may act as attorney

18 (1) An adult may name one or more of the following persons as an attorney:

- (a) an individual, other than an individual who
 - (i) provides personal care or health care services to the adult for compensation, or
 - (ii) is an employee of a facility in which the adult resides and through which the adult receives personal care or health care services;
- (b) the Public Guardian and Trustee;
- (c) a financial institution authorized to carry on trust business under the *Financial Institutions Act*.

(2) Despite subsection (1) (a) , an individual described in subsection (1) (a) (i) or (ii) who is a child, parent or spouse of the adult may be named as an attorney.

(3) If an individual who is not an adult is named as an attorney, the individual must not act as attorney until that individual is an adult.

(4) An adult who names more than one attorney may assign to each of them

- (a) a different area of authority, or
- (b) all or part of the same area of authority.

(5) If all or part of the same area of authority is assigned to more than one attorney, the attorneys must act unanimously in exercising the authority, unless the adult does one or more of the following in the enduring power of attorney:

- (a) describes the circumstances in which the attorneys need not act unanimously;
- (b) sets out how a conflict between attorneys is to be resolved;
- (c) authorizes an attorney to act only as an alternate attorney and sets out
 - (i) the circumstances in which the alternate is authorized to act in place of the attorney, including, for example, if the attorney is unwilling to act, dies or is for any other reason unable to act, and
 - (ii) the limits or conditions, if any, on the exercise of authority by the alternate.

Duties of attorney

19 (1) An attorney must

- (a) act honestly and in good faith,
- (b) exercise the care, diligence and skill of a reasonably prudent person,
- (c) act within the authority given in the enduring power of attorney and under any enactment, and
- (d) keep prescribed records and produce the prescribed records for inspection and copying at the request of the adult.

(2) When managing and making decisions about the adult's financial affairs, an attorney must act in the adult's best interests, taking into account the adult's current wishes, known beliefs and values, and any directions to the attorney set out in the enduring power of attorney.

(3) An attorney must do all of the following:

- (a) to the extent reasonable, give priority when managing the adult's financial affairs to meeting the personal care and health care needs of the adult;
- (b) unless the enduring power of attorney states otherwise, invest the adult's property only in accordance with the *Trustee Act*;
- (c) to the extent reasonable, foster the independence of the adult and encourage the adult's involvement in any decision-making that affects the adult;
- (d) not dispose of property that the attorney knows is subject to a specific testamentary gift in the adult's will, except if the disposition is necessary to comply with the attorney's duties;
- (e) to the extent reasonable, keep the adult's personal effects at the disposal of the adult.

(4) An attorney must keep the adult's property separate from his or her own property.

(5) Unless the enduring power of attorney states otherwise, subsection (4) does not apply to property that

- (a) is jointly owned by the adult and the attorney as joint tenants or otherwise, or
- (b) has been substituted for, or derived from, property described in paragraph (a) .

Attorney's powers

20 (1) An attorney may make a gift or loan, or charitable gift, from the adult's property if the enduring power of attorney permits the attorney to do so or if

- (a) the adult will have sufficient property remaining to meet the personal care and health care needs of the adult and the adult's dependants, and to satisfy the adult's other legal obligations, if any,

(b) the adult, when capable, made gifts or loans, or charitable gifts, of that nature, and

(c) the total value of all gifts, loans and charitable gifts in a year is equal to or less than a prescribed value.

(2) An attorney may receive a gift or loan under subsection (1) if the enduring power of attorney permits.

(3) Permissions under subsections (1) and (2)

(a) must be express, and

(b) may be in relation to a specific gift or loan, or charitable gift, or to gifts or loans, or charitable gifts, generally.

(4) An attorney may retain the services of a qualified person to assist the attorney in doing anything the adult has authorized the attorney to do.

(5) An attorney may, in an instrument other than a will,

(a) change a beneficiary designation made by the adult, if the court authorizes the change, or

(b) create a new beneficiary designation, if the designation is made in

(i) an instrument that is renewing, replacing or converting a similar instrument made by the adult, while capable, and the newly designated beneficiary is the same beneficiary that was designated in the similar instrument, or

(ii) a new instrument that is not renewing, replacing or converting a similar instrument made by the adult, while capable, and the newly designated beneficiary is the adult's estate.

(6) Subject to subsection (7) , a person having custody or control of property belonging to an adult must deliver the property promptly, on request of the adult's attorney, to the attorney.

(7) A person must not deliver, to an adult's attorney, a will made by the adult if the adult has given instructions to a lawyer or notary public who holds the adult's will, or the will contains instructions, prohibiting delivery of the will to the attorney.

Attorney must not make a will for adult

21 An attorney must not make or change a will for the adult for whom the attorney is acting, and any will or change that is made for an adult by his or her attorney has no force or effect.

Liability of attorney

22 An attorney who acts in the course of the attorney's duties is not liable for any loss or damage to the adult's financial affairs if the attorney complies with

- (a) the duties of the attorney as set out in section 19 and the enduring power of attorney,
- (b) any directions of the court given under section 36 (1) (a) , and
- (c) any other duty that may be imposed by law.

No delegation by attorney

23 (1) Unless the enduring power of attorney states otherwise, an attorney must not delegate any decision-making authority given to the attorney in an enduring power of attorney.

(2) Despite subsection (1) , unless the enduring power of attorney states otherwise, an attorney may delegate all or part of the attorney's authority in relation to investment matters to a qualified investment specialist, including a mutual fund manager, if done in accordance with,

- (a) if the attorney is the Public Guardian and Trustee, the *Public Guardian and Trustee Act*, or
- (b) in any other case, section 15.5 of the *Trustee Act*.

Payment and expenses of attorney

24 (1) An attorney must not be compensated for acting as an adult's attorney unless the enduring power of attorney expressly authorizes the compensation and sets the amount or rate.

(2) An attorney may be reimbursed from an adult's property for reasonable expenses properly incurred in acting as the adult's attorney.

Resignation of attorney

25 (1) In this section, "close friend", in respect of an adult who has made an enduring power of attorney, means another adult who has a long-term, close personal relationship involving frequent personal contact with the adult, but does not include a person who receives compensation for providing personal care or health care to the adult.

(2) An attorney may resign by giving written notice to the adult and any other attorneys named in the enduring power of attorney.

(3) In addition to the persons referred to in subsection (2) , if the adult is incapable of making decisions at the time the attorney resigns, the attorney must give written notice of the resignation to a spouse, near relative or, if known to the attorney, close friend of the adult.

(4) The resignation of an attorney is effective

- (a) when notice has been given under this section, or
- (b) on a later date specified in the notice.

Division 4 — Operation of Enduring Power of Attorney

When enduring power of attorney is effective

26 (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 both by the adult under section 16 and by an attorney under section 17,
- (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 is confirmed to have occurred.

(2) If the enduring power of attorney, or a provision of it, is effective after a specified event occurs, the adult must state in the enduring power of attorney how and by whom the event is to be confirmed.

(3) If the adult specifies that the enduring power of attorney is effective when the adult is incapable of making decisions about the adult's financial affairs, and the person named to confirm the adult's incapability is incapable, unwilling or unable to act, a qualified health care provider may confirm whether the adult is incapable.

Acting when enduring power of attorney applies

27 (1) A capable adult may do anything that the adult has authorized an attorney to do, regardless of whether the enduring power of attorney is in effect.

(2) Subject to section 19 (2) and (3) (c) , the attorney may act within the attorney's authority, despite the objections of the adult at the time of the act, if the adult is incapable when making those objections.

Changing or revoking enduring powers of attorney

28 (1) Subject to any limits or conditions in the enduring power of attorney, and unless the adult is incapable of understanding the nature and consequences of doing so, an adult who has made an enduring power of attorney may change or revoke the enduring power of attorney.

(2) After changing or revoking an enduring power of attorney, the adult must give written notice to each attorney.

(3) A change must be in writing and must be signed by the adult in the same manner as an enduring power of attorney under section 16.

(4) A change or revocation is effective when notice is given under subsection (2) or on a later date stated in the notice.

(5) A change to an enduring power of attorney is binding on an attorney who receives notice of the change, unless the attorney resigns under section 25.

When authority of attorney is suspended or ends

29 (1) The authority of an attorney is suspended in any circumstances set out in an enduring power of attorney, for as long as those circumstances continue.

(2) The authority of an attorney ends

(a) if the enduring power of attorney is terminated,

(b) if the provisions of the enduring power of attorney that give authority to the attorney are revoked,

(c) if the attorney resigns in accordance with section 25, or

(d) if the attorney

(i) is the adult's spouse and their marriage or marriage-like relationship ends,

(ii) becomes incapable or dies,

(iii) is bankrupt,

(iv) is a corporation and the corporation dissolves, winds up or ceases to carry on business, or

(v) is convicted of a prescribed offence or an offence in which the adult was the victim.

(3) Subsection (2) (d) (i) does not apply if the enduring power of attorney states that the authority of the attorney continues regardless of whether the marriage or marriage-like relationship ends.

(4) A marriage ends for the purposes of this section on the date that the parties to the marriage are separated within the meaning of section 3 (4) of the *Family Law Act*.

(5) A marriage-like relationship ends for the purposes of this section on the date that the parties to the marriage-like relationship are separated within the meaning of section 3 (4) of the *Family Law Act*.

(6) If the authority of an attorney ends under subsection (2) , any remaining attorneys may continue to act unless the enduring power of attorney states otherwise.

(7) Anything lawfully done by an attorney on behalf of the adult, including making an agreement, remains binding on the adult after the authority of the attorney ends.

When enduring power of attorney is suspended or terminates

30 (1) If an adult becomes incapable after making an enduring power of attorney, any authority given to an attorney under the enduring power of attorney continues.

(2) An adult may set out in an enduring power of attorney any circumstances in which the enduring power of attorney is suspended, and, if those circumstances exist, the enduring power of attorney is suspended for as long as those circumstances continue.

(3) An enduring power of attorney is suspended in accordance with the *Patients Property Act*.

(4) An enduring power of attorney terminates

- (a) according to the terms of the enduring power of attorney,
- (b) if the adult who made the enduring power of attorney dies,
- (c) if the court terminates the enduring power of attorney under section 36 (5) ,
- (d) if the enduring power of attorney is terminated under section 19 or 19.1 of the *Patients Property Act*, or
- (e) if the enduring power of attorney is revoked.

Improper exercise of authority

31 (1) In this section, an exercise of authority by an attorney is improper if, at the time the attorney acts,

- (a) the authority of the attorney is suspended or has ended, or
- (b) the enduring power of attorney or the provision of it under which the attorney acts is not in effect, or is suspended, terminated or invalid.

(2) An attorney is deemed to have had authority to act under an enduring power of attorney, and is not liable for acting without authority, if the attorney

- (a) exercises authority improperly,
- (b) does not know, and could not reasonably have known, that the exercise of authority was improper, and
- (c) would have had authority to act if the applicable circumstances described in subsection (1) did not exist.

(3) If an attorney exercises authority improperly, the action is deemed to be valid and binding on the adult in respect of persons affected by the exercise of the authority who do not know and have no reason to believe that the exercise of authority is improper.