

1991 BILL 10

Third Session, 22nd Legislature, 40 Elizabeth II

THE LEGISLATIVE ASSEMBLY OF ALBERTA

BILL 10

POWERS OF ATTORNEY ACT

MR. SCHUMACHER

First Reading

Second Reading

Committee of the Whole

Third Reading

Royal Assent

Bill 10
Mr. Schumacher

BILL 10

1991

POWERS OF ATTORNEY ACT

(Assented to _____, 1991)

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Schedule

HER MAJESTY, by and with the advice and consent of the
Legislative Assembly of Alberta, enacts as follows:

- Definitions
- 1** In this Act,
- (a) “attorney” means a person who is empowered to act on behalf of the donor under a power of attorney;
 - (b) “certificate of incapacity” means a certificate of incapacity as defined in the *Dependent Adults Act*;
 - (c) “Court” means the Surrogate Court of Alberta;
 - (d) “donor” means a person who gives a power of attorney;

- (e) “enduring power of attorney” means a power of attorney provided for under section 2;
- (f) “spouse” includes parties to a relationship between a man and a woman who are living together on a domestic basis;
- (g) “trustee” means a trustee as defined in the *Dependent Adults Act*;
- (h) “trusteeship order” means a trusteeship order as defined in the *Dependent Adults Act*.

Enduring
power of
attorney

- 2(1)** A power of attorney is an enduring power of attorney if
- (a) the donor is an individual who is an adult at the time that the power of attorney comes into effect, and
 - (b) the power of attorney meets at least the following requirements:
 - (i) it is in writing and is signed by the donor;
 - (ii) it contains a statement indicating either that it
 - (A) is to continue notwithstanding any mental incapacity or infirmity of the donor that occurs after the execution of the power of attorney, or
 - (B) is to take effect on the mental incapacity or infirmity of the donor;
 - (iii) it incorporates the explanatory notes set out in the Schedule to this Act;
 - (iv) it is accompanied by a certificate of legal advice signed by a lawyer who is not the attorney or the attorney’s spouse.

(2) An individual is not eligible to be an attorney under an enduring power of attorney unless that individual is an adult at the time that the enduring power of attorney comes into effect.

(3) Notwithstanding subsection (1)(b)(i), if the donor is physically incapable of signing an enduring power of attorney, the enduring power of attorney may be signed on the donor’s behalf, in the presence of the donor and a lawyer and under the direction of the donor, by a person other than

- (a) the attorney under the enduring power of attorney,
 - (b) the lawyer in whose presence the enduring power of attorney is to be signed, or
 - (c) the spouse of the attorney or of the lawyer.
- (4) The certificate of legal advice referred to in subsection (1)(b)(iv) must state at least the following:
- (a) that the donor attended before the lawyer providing the certificate;
 - (b) that the donor appeared to the lawyer to be competent to give the enduring power of attorney;
 - (c) that
 - (i) the donor signed the enduring power of attorney, or acknowledged the donor's signature, in the presence of the lawyer, or
 - (ii) the enduring power of attorney was signed on behalf of the donor as provided for in subsection (3) in the presence of the lawyer and the donor and under the direction of the donor;
 - (d) in the case of the signing of an enduring power of attorney referred to in clause (c)(ii), that the donor acknowledged to the lawyer that the donor was physically incapable of signing the enduring power of attorney;
 - (e) that the donor acknowledged to the lawyer that the donor gave the enduring power of attorney voluntarily;
 - (f) that the lawyer is satisfied that the donor understood the explanatory notes referred to in subsection (1)(b)(iii).
- (5) Notwithstanding subsection (1), a power of attorney is an enduring power of attorney if, according to the law of the place where it is executed,
- (a) it is a valid power of attorney, and
 - (b) the attorney's authority under it is not terminated by the mental incapacity or infirmity of the donor that may occur after the execution of the power of attorney.

(6) This section applies notwithstanding any agreement or waiver to the contrary.

Incapacity at execution

3 An enduring power of attorney is void if, at the date of its execution, the donor is mentally incapable of understanding the nature and effect of the enduring power of attorney.

Effect of subsequent incapacity

4 An enduring power of attorney is not terminated by any mental incapacity or infirmity of the donor that occurs after the execution of the enduring power of attorney.

Coming into effect

5(1) An enduring power of attorney may provide that it comes into effect at a specified future time or on the occurrence of a specified contingency, including, but not limited to, the mental incapacity or infirmity of the donor.

(2) An enduring power of attorney referred to in subsection (1) may name one or more persons on whose written declaration the specified contingency is conclusively deemed to have occurred for the purpose of bringing the enduring power of attorney into effect.

(3) A person referred to in subsection (2) may be the attorney appointed under the enduring power of attorney.

(4) Where the specified contingency referred to in subsection (1) relates to the mental incapacity or infirmity of the donor and

(a) the enduring power of attorney does not name a person for the purposes of bringing the enduring power of attorney into effect, or

(b) the person named for the purposes of bringing the power of attorney into effect

(i) dies before the enduring power of attorney comes into effect, or

(ii) is unable or is incapable of determining whether the specified contingency has occurred,

the specified contingency shall be conclusively deemed to have occurred, for the purpose of bringing the enduring power of attorney into effect, when 2 medical practitioners declare in writing that the specified contingency has occurred.

Release of confidential information

6 Notwithstanding any restriction, statutory or otherwise, relating to the disclosure of confidential health care information, where an enduring power of attorney is to come into effect on the occurrence of a specified contingency that is the mental incapacity or infirmity of the donor, information concerning the donor's mental and physical health may be disclosed to the extent necessary for the purposes of confirming whether the specified contingency has occurred.

Authority of attorney

7 Subject to this Act and any terms contained in an enduring power of attorney, an attorney

- (a) has authority to do anything on behalf of the donor that the donor may lawfully do by an attorney, and
- (b) may exercise the attorney's authority for the maintenance, education, benefit and advancement of the donor's spouse and dependent children, including the attorney if the attorney is the donor's spouse or dependent child.

Duty to act

8 Where

- (a) an attorney has acted in pursuance of an enduring power of attorney or has otherwise indicated acceptance of the appointment, and
- (b) the enduring power of attorney has not been terminated,

the attorney has, unless the enduring power of attorney provides otherwise, a duty to exercise the attorney's powers to protect the donor's interests during any period in which the attorney knows, or reasonably ought to know, that the donor is unable to make reasonable judgments in respect of matters relating to all or part of the donor's estate.

Application to Court for advice

9(1) An attorney under an enduring power of attorney may apply by originating notice for the opinion, advice or direction of the Court on any matter respecting the management or administration of the donor's property.

(2) An attorney who is acting on the opinion, advice or direction given by the Court is deemed, so far as regards the attorney's own responsibility, to have discharged the attorney's duty in respect of the matter that was the subject of the opinion, advice or direction.

(3) Subsection (2) does not extend to indemnify an attorney in respect of any act done in accordance with the opinion, advice or direction of the Court if the attorney has been guilty of any fraud, wilful concealment or misrepresentation in obtaining the opinion, advice or direction.

Accounting

10(1) An application may be made to the Court by way of originating notice for an order directing an attorney to bring in and pass accounts in respect of any or all transactions entered into in pursuance of the enduring power of attorney.

(2) The application under this section may be made

- (a) by the donor, the donor's personal representative or a trustee of the donor's estate, or
- (b) if the donor is unable to make reasonable judgments in respect of matters relating to all or part of the donor's estate, by any interested person.

(3) A copy of the application and any order granted in respect of the application shall, unless the Court provides otherwise, be served on the donor and the attorney.

(4) On hearing an application under subsection (1), the Court may grant whatever order for accounting it considers appropriate in the circumstances.

(5) This section applies notwithstanding any agreement or waiver to the contrary.

Termination order

11(1) Any interested person may apply to the Court by way of originating notice for an order terminating the enduring power of attorney.

(2) A copy of the application and any order granted in respect of the application shall, unless the Court provides otherwise, be served on the donor and the attorney.

(3) On hearing an application under subsection (1), the Court may grant an order terminating the enduring power of attorney if the Court considers that this would be in the best interests of the donor.

(4) On granting an order terminating an enduring power of attorney, the Court shall not appoint a substitute attorney but may do one or both of the following:

- (a) direct that the applicant bring an application forthwith for a trusteeship order in respect of the donor's estate;
- (b) pending the application referred to in clause (a), appoint an interim trustee of the donor's estate with such powers as the Court considers appropriate.

Renunciation **12(1)** Except with leave of the Court, an attorney shall not, during any period in which the attorney is required to exercise the attorney's duty imposed under section 8, renounce the appointment as the attorney.

(2) An application for leave to renounce shall

- (a) be considered to be an application by the attorney to terminate the enduring power of attorney, and
- (b) be treated in the same manner as an application made under section 11.

(3) Notwithstanding subsection (2), where there is more than one attorney under an enduring power of attorney, an attorney may apply to the Court by way of originating notice for leave to renounce that attorney's appointment.

(4) A copy of the application made under subsection (3) and any order granted in respect of the application shall, unless the Court provides otherwise, be served on the donor and any other attorney.

(5) On hearing an application under subsection (2), the Court may grant an order granting the attorney leave to renounce the attorney's appointment if the Court

- (i) considers that this would be in the best interests of the donor, and
- (ii) is satisfied that any remaining attorney is prepared to carry out the attorney's duties.

Termination of enduring power of attorney **13(1)** Except in the case of an irrevocable power of attorney, and notwithstanding any agreement or waiver to the contrary, an enduring power of attorney terminates

- (a) subject to section 11, if it is revoked in writing by the donor at a time when the donor is mentally capable of understanding the nature and effect of the revocation;

- (b) subject to section 12, if the attorney renounces the appointment and gives notice of the renunciation to the donor;
 - (c) on the granting of a termination order pursuant to section 11;
 - (d) on the granting of a trusteeship order in respect of the donor;
 - (e) on the death of the donor or the attorney;
 - (f) on the granting of a trusteeship order or the issuing of a certificate of incapacity in respect of the attorney.
- (2) Where an enduring power of attorney
- (a) appoints more than one attorney, each with joint and several authority, or
 - (b) provides for alternate attorneys, the appointment of one being conditional on the cessation of the appointment of another,

references in subsection (1) to the attorney are deemed to be references to the last remaining attorney.

Exercise of power after termination

14(1) An attorney shall not incur any liability to the donor or to any other person for having acted in pursuance of a power of attorney that has been terminated or that is void by reason of the donor's mental incapacity or infirmity if the attorney did not know, and with the exercise of reasonable care would not have known, of the termination or loss of the attorney's authority.

(2) Where a power of attorney is terminated or is void by reason of the donor's mental incapacity or infirmity, any exercise of the power by the attorney is valid and binding in favour of any person who did not know, and with the exercise of reasonable care would not have known, of the termination or loss of the attorney's authority.

Report for the Court

15 Where an application is made under this Act, the Court may appoint a person to prepare a report for the Court respecting the matter before the Court.

Exception re service

16 Nothing in this Act shall be construed so as to require an applicant to an application before the Court to serve himself with

the application or any order or other document relating to the application.

Consequen-
tial
amendments

17 *The Dependent Adults Act is amended*

- (a) *in section 1 by adding the following after clause (d):*
 - (d.1) “enduring power of attorney” means an enduring power of attorney as defined in the *Powers of Attorney Act*;
- (b) *in section 3(2) by adding the following after clause (e):*
 - (e.1) any attorney under an enduring power of attorney given by the person in respect of whom the application is made if he is not the applicant or a person served pursuant to this subsection,
- (c) *in section 15(2) by adding the following after clause (e):*
 - (e.1) any attorney under an enduring power of attorney given by the person in respect of whom the application for review is made if he is not the applicant or a person served pursuant to this subsection,
- (d) *in section 22(2) by adding the following after clause (e):*
 - (e.1) any attorney under an enduring power of attorney given by the person in respect of whom the application is made if he is not the applicant or a person served pursuant to this subsection,
- (e) *in section 25*
 - (i) *by adding the following after subsection (2):*
 - (2.1) In considering the matters referred to in subsections (1)(c) and (2), the Court shall have regard to the existence of any enduring power of attorney given by the person in respect of whom the application is made.
 - (ii) *by adding the following after subsection (3):*

(4) If

- (a) the Court makes an order under this section in respect of an attorney under an enduring power of attorney, and
- (b) the Court has reason to believe that the donor of that power may be unable to make reasonable judgments in respect of matters relating to all or part of his estate,

the Court may direct the applicant to make an application for a trusteeship order in respect of the donor's estate.

(f) *in section 43*

- (i) *in subsection (1) by striking out "or of the trustee of his estate" and substituting "the trustee of his estate, if any, or any attorney under an enduring power of attorney";*
- (ii) *in subsection (2)(b) by striking out "the trustee" and substituting "or an attorney under an enduring power of attorney, the trustee or the attorney, as the case may be,";*

(g) *in section 52*

- (i) *by adding the following after subsection (1):*
 - (1.1) A certificate of incapacity is of no effect, and the Public Trustee does not become trustee of the estate of the person named in the certificate, if at the time the certificate is issued there exists an enduring power of attorney given by the person named in the certificate.
- (ii) *in subsection (6) by adding "or enduring power of attorney" after "trusteeship order" wherever it occurs;*

(h) *in section 58(1) by adding "and" at the end of clause (a), by striking out "and" at the end of clause (b) and by adding the following after clause (e):*

(e.1) a statement explaining that the certificate of incapacity has no effect if there exists an enduring power of attorney given by the person named in the certificate prior to the issuing of the certificate, but that the Public Trustee may manage the estate until notified of the enduring power of attorney;

(i) *in section 68(2) by adding the following after clause (a):*

(a.1) any attorney under an enduring power of attorney given by the person in respect of whom the order is made,

SCHEDULE

NOTES ON THE ENDURING POWER OF ATTORNEY

Read These Notes Before Signing This Document

1 The effect of this document is to authorize the person you have named as your attorney to act on your behalf with respect to your property and financial affairs.

2 Unless you state otherwise in the document, your attorney will have very wide powers to deal with your property on your behalf. The attorney will also be able to use your property to benefit your spouse and dependent children. You should consider very carefully whether or not you wish to impose any restrictions on the powers of your attorney.

3 This document is an “enduring” power of attorney, which means that it will not come to an end if you become mentally incapable of managing your own affairs. At that point your attorney will have a duty to manage your affairs and will not be able to resign without first obtaining permission from the court. The power of attorney comes to an end if you or your attorney dies.

4 This document takes effect as soon as it is signed and witnessed. If you do not want your attorney to be able to act on your behalf until after you become mentally incapable of managing your own affairs, you should say so in this document.

5 You may give this power of attorney even though you are under 18 years of age but the power of attorney cannot become an enduring power of attorney unless you are 18 years of age or older when the enduring power of attorney is to come into effect.

6 You may appoint as your attorney a person who is under 18 years of age but that person is not eligible to act as your attorney unless that person is 18 years of age or older when the enduring power of attorney is to come into effect.

7 You may cancel this power of attorney at any time, as long as you are mentally capable of understanding what you are doing.

8 You should ensure that your attorney knows about this document and agrees to being appointed as attorney.