The Law Society of Manitoba

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WILLS AND ESTATES

Chapter 3

Delegation of Authority Over Estates

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A. OFFICE OF THE PUBLIC GUARDIAN AND TRUSTEE OF MANITOBA

1. Overview of the Office of the Public Guardian and Trustee

The Public Guardian and Trustee of Manitoba is a corporation sole, originally created on February 1, 1973 with the enactment of *The Public Trustee Act,* C.C.S.M. c. P275. On April 1, 2014, this Act was repealed and replaced with *The Public Guardian and Trustee Act,* C.C.S.M. c. P205 (the *PTA*). In addition to clarifying the functions and updating the responsibilities of the office as Trustee for minor trusts and administrator of deceased estates, the name of the office was changed from the "Public Trustee" to "Public Guardian and Trustee."

As a corporation, the Public Guardian and Trustee has a seal and perpetual succession. The Public Guardian and Trustee is a special operating agency within the Department of Justice. As a corporation, however, the Public Guardian and Trustee is an entity separate from the government. It functions independently and is capable of suing or being sued on behalf of the clients and/or the estates or trusts which it administers.

2. Functions and Powers of the Public Guardian and Trustee as Committee

The following are the statutory functions of the Public Guardian and Trustee of Manitoba:

- Committee of both property and personal care of individuals who have been found incapable of managing their affairs under the provisions of *The Mental Health Act,* C.C.S.M. c. M110 (the *MHA*), where there is no other committee;
- Substitute decision maker of last resort for vulnerable persons within the meaning of *The Vulnerable Persons Living with a Mental Disability Act,* C.C.S.M. c. V90;
- Administrator of Estates;
- Litigation Administrator; and
- Litigation Guardian of Persons under legal disability.

a) Committee of Property and Personal Care

A committee is appointed by the Court of King's Bench or by operation of the *MHA* to manage the personal and/or the financial affairs of a person who is mentally incapable of doing so. A committee may be an individual appointed by the court or, if there is no person willing or able to apply to court, the committee may be the Public Guardian and Trustee of Manitoba. Appointments of individuals as committee is dealt with in Section D of this chapter. A committee may not be appointed for a

person who meets the definition of a vulnerable person within the meaning of *The Vulnerable Persons Living with a Mental Disability Act*;

There are three ways in which the Public Guardian and Trustee of Manitoba may be appointed as committee of property and personal care:

- in the case of a patient in a psychiatric facility, by a certificate of incompetence to make treatment decisions issued pursuant to *section 27(3)* of the *MHA* or by certificate of incompetence to manage property, issued pursuant to *section 40(3)* of the *MHA*;
- pursuant to an order of committeeship for both property and personal care issued in accordance with *section 61(1)* of the *MHA*; or
- pursuant to a court order.

i. Certificate of Incompetence to Make Treatment Decisions and Certificate of Incompetence to Manage Property; *The Mental Health Act*, Sections 27(3) and 40(3)

Upon admission to a psychiatric facility as a voluntary or an involuntary patient, a patient must be examined by a physician as soon as is reasonably possible. The physician must determine whether:

- the patient is mentally competent to consent to treatment (*MHA*, s. 27(3)); and
- whether the patient is mentally competent to manage their property *(MHA*, s. 40(3)).

If a patient is found competent to consent (or refuse to consent) to psychiatric or medical treatment, the physician may proceed on the patient's consent or refusal. If the physician finds that the patient is mentally incompetent to give (or refuse) consent to psychiatric or medical treatment, a Certificate of Incompetence to Make Treatment Decisions (Form 9) is completed by the physician and forwarded to the medical director of the psychiatric facility.

The forms are found in *The Mental Health Act Forms Regulation*, Man Reg 145/99.

The *MHA* sets out a list of people who may give substituted consent to treatment on behalf of the patient. If there is no such person willing or able to act, the medical director will send the certificate to the Public Guardian and Trustee, and the Public Guardian and Trustee will make treatment decisions on the person's behalf while they are in hospital and remain incompetent to consent to treatment. A copy of the Certificate of Incompetence to Make Treatment Decisions (Form 9) is included in the Forms and Precedents section.

If the physician finds the patient does not have capacity, or financial arrangements in place for the management of property, the physician will complete a Certificate of Incompetence to Manage Property (Form 10). A copy is included in the Forms and Precedents section.

The Form 10 is forwarded immediately to the Public Guardian and Trustee. Upon receipt of the Form 10, the Public Guardian and Trustee becomes committee of the patient's property and personal care. Copies of the Form 10 are also sent to the patient and the patient's nearest relative as defined in *section 1* of the *MHA*.

If a patient does not agree with the physician's decision to issue a Form 9 or 10, an application may be made to the Mental Health Review Board pursuant to *section 50(1)* of the *MHA*. An application may be made by a third party on the patient's behalf.

ii. Order of Committeeship Without a Court Order; *The Mental Health Act*, Section 61(1)

If a physician has examined a person who is not in a psychiatric facility, or who is about to be discharged from a psychiatric facility, and the physician is of the opinion that the person is not capable of managing their property or personal care, the physician may complete a Certificate of Incapacity (Form 21). The Form 21 is forwarded to the Director of Psychiatric Services (Director) who, if satisfied with the validity of the physician's opinion, may make an Order of Committeeship (Form 22) appointing the Public Guardian and Trustee as committee. Copies of both the Certificate of Incapacity (Form 21) and Order of Committeeship (Form 22) are included in the Forms and Precedents section.

Before issuing the order of committeeship, the Director may require any person with relevant information about the subject of the Form 21 to provide that information. Usually, the Form 21 is sent to the Director accompanied by a social history outlining, in more detail, the person's circumstances and the reasons why a committee is necessary.

> Once the Director is satisfied that an order of committeeship should be issued, notice of the intent to do so must be given to the person, the person's proxy named in a health care directive, if any, and the person's nearest relative. They will then have seven days within which to file any written objections with the Director, who will consider such objections prior to deciding whether to issue the order.

Persons who object to the order will be provided the opportunity of an interview with the Director to discuss their written objections prior to the Director's decision about the appointment of the Public Guardian and Trustee as committee. They may bring a representative to help them express their views. In addition, the Director may ask other knowledgeable persons to review the information presented and provide advice. However, the final decision whether or not to issue the order will be the Director's.

If the order is made, the Director may offer to meet with the individual or family to explain the reasons for the order and the mechanism for appeal. If appropriate, the meeting may take place jointly with the Public Guardian and Trustee.

If the Director believes on reasonable grounds that the person requires a committee on an urgent basis, the Director may dispense with the need for notice. Urgency may exist where:

- there is immediate danger of death or serious harm or deterioration to the physical or mental health of the person, or of serious loss to their property; and
- the person needs decisions to be made on their behalf to prevent that danger (*MHA*, *s. 61(7)*).

Upon being issued, the order is sent to the Public Guardian and Trustee with copies to the person, the proxy, if any, and the nearest relative. Upon receipt of the order of committeeship, the Public Guardian and Trustee becomes the committee of both property and personal care.

A person given notice of the order, or anyone else with leave of the court, may apply within 30 days (or such other time as the court may allow) for an order cancelling the order of committeeship or appointing some other person as committee.

If the Public Guardian and Trustee receives a notice of application to cancel the order or replace it as the person's committee, the person's property is not administered, except to the extent necessary:

- to gather in the assets and preserve the property;
- to pay debts; and
- to provide for the maintenance of the person and family.

When appointed as committee, the Public Guardian and Trustee acts as committee of both property and personal care.

By virtue of *section 63(2)* of the *MHA*, the Public Guardian and Trustee has the following authority as committee of personal care:

- to determine where and with whom the person shall live, either temporarily or permanently;
- to commence, continue, settle or defend any legal proceedings that relate to the person;
- to consent to medical or psychiatric treatment or health care on the person's behalf if a physician informs the Public Guardian and Trustee that the person is not mentally competent to make treatment decisions given the criteria set out in *section 27(2)* of the *MHA*; and
- to make decisions about daily living on the incapable person's behalf.

Whenever reasonably possible, the Public Guardian and Trustee will consult with the person and/or family when exercising any of the above powers.

An exception to the authority to consent to treatment arises where the person has made a health care directive in accordance with *The Health Care Directives Act,* C.C.S.M. c. H27. In that case, the Public Guardian and Trustee may not consent to treatment if the directive appoints a proxy or expresses a decision of that person respecting the proposed treatment.

> *Sections 93 through to 96* of the *MHA* set out limitations on a committee's authority over personal care. These limitations apply to the Public Guardian and Trustee as well as to court appointed committees.

The sections also provide for certain prohibited actions on the part of the committee. For example, consent to certain types of medical procedures may not be given. The committee must act diligently and in good faith. Actions taken must be the least restrictive and intrusive alternatives available. Whenever possible, the incapable person's wishes, values and beliefs should be respected.

Section 64 provides for emergency intervention on the part of the Public Guardian and Trustee. The Public Guardian and Trustee may take emergency action to protect the incapable person, including moving the person to a place of safety. The Public Guardian and Trustee may enter any place, using peace officers and reasonable force, if necessary, and a court order to do so is not required. This power may only be exercised if the Public Guardian and Trustee is committee and believes on reasonable grounds that:

- the person is or is likely to be abused or to suffer neglect; and
- there is immediate danger of death, serious harm or deterioration to the physical or mental health of the person.

> This is a very significant and potentially intrusive power. It will only be utilized in the most extreme circumstances, as a last resort. It is not available to a committee other than the Public Guardian and Trustee.

As committee of property, the Public Guardian and Trustee has all the powers set out in *sections 80* and *81* of the *MHA,* without application to the court. Generally speaking, the Public Guardian and Trustee may do all those things and exercise all authority that the person could do or exercise if competent.

As committee, the Public Guardian and Trustee has certain powers after the person's death or upon the cancellation of the order of committeeship. These powers are set out in *sections 9, 10, 11* and *12* of the *PTA.*

iii. Court Order

The Court of King's Bench may, upon application, appoint the Public Guardian and Trustee as committee of both property and personal care of an individual. This may happen when a private committeeship application is before the court and the presiding judge is not satisfied that the applicant is a suitable committee, or when there is a dispute within the family as to who should act.

If the Public Guardian and Trustee is appointed as committee by the court, it has the same powers as if appointed by an Order of Committeeship issued by the Director of Psychiatric Services.

b) Substitute Decision Maker

The Public Guardian and Trustee's role as substitute decision maker for property or personal care pursuant to *The Vulnerable Persons Living with a Mental Disability Act* will be discussed in detail in Section B.

c) Personal Representative

Generally, the Public Guardian and Trustee is not legally required to administer an estate unless ordered by the Court. When a person dies in Manitoba and there is no one in Manitoba willing or able to administer the estate, and administration is required, the Public Guardian and Trustee may be requested to act. This may be done in one of several ways.

By court application: An application may be made pursuant to *section 55* of *The Court of King's Bench Surrogate Practice Act*, C.C.S.M. c. C290, with notice to the Public Guardian and Trustee, seeking the appointment of the Public Guardian and Trustee as personal representative. In such circumstances, the Public Guardian and Trustee may accept the appointment, oppose the appointment, or propose terms and conditions relating to the appointment to the court.

By referral/request: Usually, such referrals are made where there is no will, no heirs-at-law, no one willing or able to act, or where there is dissension within the family. The police or the Chief Medical Examiner for Manitoba may request that the Public Guardian and Trustee apply to administer the estate.

Non-contentious matters may be referred to the Public Guardian and Trustee with a request that the Public Guardian and Trustee administer the estate. If everyone involved in the estate consents, the Public Guardian and Trustee may agree to apply for letters of administration. The Public Guardian and Trustee will generally decline to administer insolvent estates.

d) Litigation Administrator

Where the validity of a will of a deceased person is in question, or there are contentious issues surrounding the probate or administration of an estate, the court may appoint a person, including the Public Guardian and Trustee, as litigation administrator pursuant to *section 17* of *The Court of King's Bench Surrogate Practice Act*. The Public Guardian and Trustee must be provided with notice of a proposed appointment and be given an opportunity to make representations to the court pursuant to *section 6(2)(b)* of *The Public Guardian and Trustee Act*.

As litigation administrator, the Public Guardian and Trustee has all the rights of a general administrator, including payment of creditors, but does not have authority to distribute the estate. The litigation administrator remains under the jurisdiction of the court as long as the administration is required.

e) Litigation Guardian of Persons under Legal Disability

King's Bench Rule 7 provides for the appointment of a litigation guardian for parties to proceedings who are under a legal disability. This includes minors and persons who are mentally incompetent or incapable of managing their own affairs, not so declared.

The rule provides that the Public Guardian and Trustee or another person may, without a court order, represent a plaintiff or applicant who is under disability. The Public Guardian and Trustee will only agree to do so if there is no other person willing or able to act as litigation guardian and the Public Guardian and Trustee is of the view that it would be in the person's best interests that action be taken.

In most cases, a litigation guardian may only represent a defendant or respondent under disability if so ordered by the court. The procedure for appointment of a litigation guardian is set out in Rule 7.03.

Some further examples of circumstances where the Public Guardian and Trustee is statutorily required to represent the interests of persons under disability are as follows:

- King's Bench Rule 7.08 provides that all settlements reached on behalf of persons under disability must be approved by the court and the Public Guardian and Trustee must be served (the Public Guardian and Trustee is entitled to be heard with regard to the application);
- Pursuant to *section 43(3)* of *The Court of King's Bench Surrogate Practice Act,* where a personal representative is passing the accounts of the estate, and an interested person is under disability, the personal representative must serve the committee, or guardian of the estate, or if none, the Public Guardian and Trustee;
- *Section 10(3)* of *The Infants' Estates Act,* C.C.S.M. c. I35 requires service on the Public Guardian and Trustee in all applications for sale, mortgage, lease or other disposition of real property where an infant has an interest; and
- *Section 5* of *The Dependants Relief Act*, C.C.S.M. c. D37 requires service on the Public Guardian and Trustee of all applications pursuant to the Act where an interested person is under disability.

3. Compensation of the Public Guardian and Trustee

Pursuant to *section 28* of the *PTA*, the Public Guardian and Trustee is entitled to charge fees for its services. The fees are based on a percentage of capital and income. In addition, the Public Guardian and Trustee may charge for services performed by staff. Further information respecting the Public Guardian and Trustee's fees is available on the Public Guardian and Trustee's *website*.

B. THE VULNERABLE PERSONS LIVING WITH A MENTAL DISABILITY ACT

1. Introduction

The Vulnerable Persons Living with a Mental Disability Act (the *VPA*) was proclaimed on October 4, 1996. *Section 1(1)* defines a vulnerable person as:

> *… an adult living with a mental disability who is in need of assistance to meet his or her basic needs with regard to personal care or management of his or her property.*

Mental disability is defined as:

> *… significantly impaired intellectual functioning existing concurrently with impaired adaptive behaviour and manifested prior to the age of 18 years, but excludes a mental disability due exclusively to a mental disorder as defined in section 1 of The Mental Health Act.*

A mental disorder under section 1 of *The Mental Health Act* is defined as:

> *a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognize reality or ability to meet the ordinary demands of life, but does not include a disorder due exclusively to a mental disability as defined in The Vulnerable Persons Living with a Mental Disability Act.*

The *VPA* is intended to be used only as a last resort. People who live with a mental disability within the meaning of the *VPA* are presumed to have capacity to make decisions on their own or with the assistance of a support network, unless demonstrated otherwise. The *VPA* contains important features which will be outlined below.

2. Protection

On August 15, 2011, amendments to *Part 3* of the *VPA* were proclaimed that strengthen the provisions providing protection from abuse to vulnerable persons. The new provisions include the following:

- *section 20.1* prohibits abuse or neglect of a vulnerable person;
- *section 20.2* creates a positive duty on service providers, substitute decision makers appointed pursuant to the *VPA* or committees to take all reasonable steps to protect the vulnerable person from abuse or neglect;
- *sections 21(1)* and *(2)* create a duty to report suspected abuse or neglect for "a person who believes on reasonable grounds that a vulnerable person is, or is likely to be abused or neglected." This duty overrides any restrictions respecting the disclosure of information in legislation or elsewhere;

- *sections 21.1* and *21.2* provide protection to persons who, in good faith, report abuse or neglect;
- *section 22* provides for an investigation into the alleged abuse or neglect, and gives broad powers to the investigator to obtain information and enter premises;
- *section 23* provides for an order from a justice authorizing entry to premises and involvement of a peace officer, if necessary;
- *section 25.1* provides for a report to the professional body, if any, and the employer, if any, of a person who has been found to have abused or neglected a vulnerable person.

Sections 26 to 28 continue to provide for emergency intervention to protect a vulnerable person from abuse or neglect. This intervention may include removing the vulnerable person from a dangerous situation and involvement of peace officers.

3. Substitute Decision Making

The term "substitute decision maker" replaces the term "committee" for the purposes of the *VPA*. A substitute decision maker is to be appointed only as a last resort when the vulnerable person is incapable of making decisions alone, or with the assistance of a support network.

> Any person may make an application for the appointment of a substitute decision maker. An application may be made to appoint a substitute decision maker only in those areas of the person's life where decisions are necessary.

For example, an application may be made for a substitute decision maker to make medical decisions if there are medical decisions to be made immediately or on an ongoing basis. The appointment of a substitute decision maker will not cover all areas of the person's life, unless it can be demonstrated that decisions are currently needed in all areas.

The application is made to the Vulnerable Persons Commissioner, an official appointed pursuant to the *VPA*. Upon receipt of the application, the commissioner conducts a preliminary investigation to ensure that the subject of the application meets the definition of a vulnerable person, and that a substitute decision maker may be necessary. If that is the case, the commissioner appoints a hearing panel consisting of three individuals appointed pursuant to the *VPA*. The hearing panel will convene and receive evidence, oral or written, from interested parties on the issue of whether a substitute decision maker is required, in which areas of the person's life, and what conditions or terms should apply to the substitute decision maker.

The hearing before the hearing panel is informal, and the rules of evidence do not apply. The vulnerable person, and those people involved in their life are entitled to notice and to be heard. Once all of the information is gathered by the hearing panel, a recommendation is made to the commissioner. If the commissioner is satisfied that a substitute decision maker is required, an appointment is made setting out the terms and conditions of the appointment.

The *VPA* requires a substitute decision maker for property to account periodically to the Vulnerable Persons Commission (see *ss. 98 to 113*).

The appointment of a substitute decision maker lasts for a maximum of five years. It may be renewed at the end of that time. Any person may be appointed as a substitute decision maker with the exception of those people who are considered to be in a conflict of interest position with the vulnerable person (see *s. 54* and *s. 89*). The Public Guardian and Trustee may be appointed as substitute decision maker if there is no other suitable person willing or able to act.

All decisions of the commissioner concerning the appointment of a substitute decision maker are appealable to the Court of King's Bench (see *ss. 147 to 158*).

If a person meets the definition of a vulnerable person living with a mental disability, an application may not be made for committeeship under the *MHA.*

4. Admission to Developmental Centres

Regulations designate the Manitoba Developmental Centre in Portage la Prairie and St. Amant Centre in Winnipeg as developmental centres. Pursuant to *section 63* of the *VPA,* a person may not be admitted to a developmental centre unless a substitute decision maker with authority to decide where and with whom the person will live makes an application to the Court of King's Bench for approval of the admission.

Approval will only be granted if the court is satisfied that:

- reasonable efforts have been made to find an alternative placement and such efforts have been unsuccessful;
- it is in the best interests of the person to be placed into a developmental centre; and
- there is a developmental centre willing to accept the vulnerable person.

The above requirements do not apply for temporary admissions to developmental centres for less than three weeks in the course of a year (see *s. 64*).

The above is a very brief overview of some of the important features of the *VPA*. Further information regarding the VPA may be obtained from The Office of the Vulnerable Persons Commissioner at:

315 – 258 Portage Avenue
Winnipeg, MB R3C 0B6
Telephone: 204-945-5039
Toll free outside of Winnipeg 1-800-757-9857
http://www.gov.mb.ca/fs/vpco/index.html

Reference can also be made to the following article:

M. Anne Bolton, K.C., "The Vulnerable Persons Act: A Change for Manitoba" (1994) 14 Estates and Trusts Journal 80.

C. THE INFANTS' ESTATES ACT

1. Introduction

The Infants' Estates Act (the *IEA*) deals with guardianship and proceedings concerning the estates of children (i.e., persons under the age of majority). It prescribes the legal requirements for dealing with children's real and personal property. King's Bench Rule 67 sets out the procedure to follow on applications commenced under the *IEA.* All applications under this *Act* should be served on the Public Guardian and Trustee.

2. Guardianship of the Estate

Applications for guardianship of the estate of a child are made pursuant to the *IEA* and King's Bench Rule 67.

> Guardianship of the estate of a child must be distinguished from guardianship of the person. A guardian of the person has the authority and responsibility for the day-to-day custody, care, maintenance, supervision, and education of a child under the age of majority. A guardian of the estate of a child is appointed by the Court of King's Bench to take possession and control of the real and personal property of the child and/or to manage or sell that property in accordance with the direction of the court.

Parents may apply to the court for an order of guardianship of the estate of their child. They may also consent to the appointment of some other suitable person as guardian of the estate. In addition, the child, the Public Guardian and Trustee or any other interested person may apply for the appointment of a guardian of the estate and the court may, in the appropriate circumstances, dispense with the consent of either or both parents. The court may appoint the Public Guardian and Trustee.

> Guardians of the estate must post security as set out in the court order. They must also pass their accounts at intervals set out by the court. Trust companies and the Public Guardian and Trustee are exempt from these requirements.

The procedure for applying for the appointment of a guardian of an estate is set out in King's Bench Rule 67.04. A guardian of the estate has the authority to manage the personal property and take possession and control of the child's real property. The guardian may prosecute or defend any action or proceeding which may affect the child's estate. The

guardian may, where it is in the child's best interests, expend monies out of the trust for the child's maintenance, education, advancement or benefit.

The authority of the guardian may be expanded or limited by the court. The guardian's authority should be clearly stated in the court order. Guardians of a child's estate may be removed by the court in the same manner and for the same causes as trustees, or for any other proper cause. A guardian may only resign with leave of the court upon such terms and conditions as the court deems just.

3. Sale or Conveyance of Children's Property

Where the sale, mortgage, lease or other disposition of real property in which a child has an interest is desired, an application must be made to the court pursuant to the *IEA.*

Upon the application of a guardian or any interested person, the court may authorize the proposed disposition, if it is satisfied that it is in the best interests of the child to do so. In all such applications, the child is named as a respondent. King's Bench Rule 67 sets out the evidence that is required in support of such an application.

The court may authorize any person to execute the documents of conveyance, mortgage or lease on the child's behalf. Any such conveyance or other disposition is deemed to be as effective as if the child had executed the documents personally and had been of the age of majority at the time.

The proceeds of the sale, mortgage, lease or other disposition of a child's interest in real property made pursuant to an order under the *IEA,* are to be placed either in trust for the child, or disposed of in such manner as the court directs.

Where a child's interest in land is subject to a contingent or uncertain right or encumbrance, the court may set the reasonable value of the right or encumbrance and order that it be discharged from the proceeds of the disposition.

4. Children's Interests in Estates or Property

The *IEA* deals with children's interests in deceased estates and interests in personal property valued at $10,000 or less. The court may authorize the personal representative, trustee or any other person, as the case may be to deal with the interest in such manner as it deems fit.

> Anything done by a person pursuant to the authority of the court is binding on the child and all other persons. There is no liability for anything done or omitted to be done in good faith, but the person authorized by the court remains liable for any negligence in the administration of the child's estate.

D. COURT APPOINTED COMMITTEES

1. Introduction

Section 71(1) of *The Mental Health Act* (the *MHA*) provides the authority for the appointment by the Court of King's Bench of a private individual as a committee. The applicant must be a resident of Manitoba, and may apply to be the committee for property only, or the committee of both property and personal care.

An appointment of a person as committee of both property and personal care may only be made where the applicant has satisfied the court that, in addition to the need for a committee to manage the incapable person's property, there is a need for a committee for personal care. For the purposes of the *MHA*, a person is incapable of personal care if, because of mental incapacity, they are repeatedly or continuously unable to:

- care for themselves; and
- make reasonable decisions about matters relating to their person, or appreciate the reasonably foreseeable consequences of a decision or lack of decision (*MHA, s. 3*).

2. Procedure

Section 72 of the *MHA,* and King's Bench Rule 72 detail the information that is to be provided to the court on a committeeship application. Proceedings are commenced by notice of application and are usually supported by the affidavits of the applicant, at least two doctors and the consents or affidavits of service on all relatives of equal or greater consanguinity than the applicant. If the allegedly incapable person is competent to consent, their written consent should also be included. Samples of the Notice of Application and supporting affidavits are included in the Forms and Precedents section.

In determining whether a person requires a committee for property, the court must take into account the existence of any enduring powers of attorney the person may have made. Similarly, when deciding whether a committee of both property and personal care is necessary, the court must take into account whether a health care directive appointing a proxy is in existence (see *MHA, ss. 75(3)* and *(4)*).

The order appointing a committee may be for an indefinite or a limited period of time, as the court considers appropriate (*MHA, s. 75(6)*). The order takes effect immediately, unless security has been ordered. In that case, that part of the order for which the security has been ordered will not take effect until the security is provided (*MHA, s. 75(7)*).

The court may appoint two or more persons to act jointly as committees. In the event of the death of one of the joint committees, the remaining committee may continue acting (*MHA, ss. 76(1)* and *(2)*). The court may also appoint an alternate committee to act in the event of the temporary absence or death of the appointed committee (*MHA, s. 76(3)*).

Section 80 of the *MHA* sets out the powers the committee is entitled to exercise without specific court approval. *Section 81* contains a list of the powers for which specific approval is required. If section 81 powers are requested, the reasons for the request must be specifically stated in the applicant's affidavit. It is generally not sufficient to request section 81 authority simply to avoid the necessity and expense of a future motion to court.

Pursuant to *section 72(2)* of the *MHA*, the Public Guardian and Trustee must be served with all committeeship applications and supporting material at least ten days prior to the hearing.

The Public Guardian and Trustee reviews each application with a view to determining the following:

- whether sufficient notice has been given to the Public Guardian and Trustee and all others who are entitled to notice of the application;
- whether anyone objects, and if so, why;
- whether consents of all relatives of equal or greater consanguinity than the applicant have been filed and, if not, why not;
- whether the respondent has been served with the material and, if so, what their position is. If the respondent has not been served and a request has been made to dispense with service, whether there is proper medical evidence demonstrating why a dispensation of service should be permitted;
- whether the affidavit material complies with King's Bench Rule 72 and section 72 of the *MHA*, and whether all of the required information is included;
- if section 81 powers are requested, whether sufficient evidence is included upon which the court may grant the powers. Generally, the Public Guardian and Trustee opposes blanket requests for section 81 powers;
- if approval for the sale of real property is requested, an offer to purchase and two opinions of value or appraisals should be included in the material. In most cases, the Public Guardian and Trustee will oppose an application to approve the sale of property prior to an actual offer being received. The preferable procedure is to list the property for sale and accept an offer subject to court approval;
- if the estate is large or particularly complex, whether there is a plan for management of the assets;
- whether there should be a bond in a case where the applicant is not a member of the respondent's immediate family. If the applicant is not a relative, security should, in most cases, be posted;
- whether the applicant is a Manitoba resident; and

- whether the requirement for filing an inventory or accounting has been met. The Public Guardian and Trustee will not agree to a request to dispense with these requirements which are for the protection of the respondent and should always be met.

If the Public Guardian and Trustee has no concerns after reviewing an application, a letter will be sent to counsel for the applicant indicating that the Public Guardian and Trustee does not oppose the application and will not be represented at the hearing. If there are concerns about the application, an attempt will be made to discuss the concerns with counsel for the applicant and resolve them prior to the hearing.

If the concerns cannot be resolved, counsel for the Public Guardian and Trustee will proceed in one of the following ways:

- If there is no opposition to the appointment of the applicant, but there are concerns of a procedural nature, a letter will be written to counsel for the applicant, with a copy to the court setting out the concerns. In most cases, the Public Guardian and Trustee will not be represented at the hearing of the application.
- If concerns have been expressed about a proposed committee's abilities or actions, but there is insufficient evidence upon which to oppose the application, the Public Guardian and Trustee may request that security be posted or that accounts be served on the Public Guardian and Trustee prior to passing. The Public Guardian and Trustee may be represented at the hearing in these cases or may communicate the requests by letter to counsel and the court.
- If there are substantive concerns about the appropriateness of the applicant as committee or about the application, the Public Guardian and Trustee may oppose the application and the matter will proceed on a contested basis.

3. Presentation of the Application

a) Initial Proceedings

Most committeeship applications are initially placed on the uncontested list. If, on the date scheduled for hearing, there appears to be a serious contest, the judge will usually refer the matter to the contested list for a hearing date to be set. If there is no opposition, and the material is satisfactory, the order will usually be granted without the requirement of counsel making a submission.

The role of the judge on a committeeship application is to ensure that the applicant has complied with the requirements of the *MHA* and the King's Bench Rules. The judge's paramount concern will be to protect the interests of the respondent. Counsel should be prepared to answer any questions the judge may put forward. If there is a problem that cannot be dealt with to the satisfaction of the judge at that

time, the matter can be adjourned to a later date in order to permit counsel to provide additional material.

The forms of the orders are set out in *Forms 72A* (Order Appointing a Committee of Property) and *72A.1* (Order Appointing a Committee of Both Property and Personal Care) of the King's Bench Rules. A sample order is included in the Forms and Precedents section.

b) Subsequent Proceedings

If the order provides that security must be posted, the order will not take effect until the security is filed. The committee may thereafter begin managing the respondent's financial affairs.

The committee is required to file an inventory of assets, debts and income of the estate within six months, or earlier, if ordered by the court. The order will also provide that the committee must pass the estate's accounts periodically. The procedure for passing accounts is contained in King's Bench Rule 72.

c) Duties of the Court Appointed Committee

i. Committee of Property

> A committee of property is a fiduciary who must act diligently, honestly, with integrity and in good faith for the benefit of the incapable person (*MHA, s. 83*). The *MHA* sets out, in *sections 84(1)* and *(2),* the considerations a committee must take into account when making expenditures on behalf of an incapable person.

These guidelines are always subject to any specific provisions made by the judge when granting the committeeship order. The committee must make expenditures in the following priority:

1. expenditures that are reasonably necessary for the incapable person's support, education and care;
2. if there are sufficient funds, expenditures that are reasonably necessary for the support, education, and care of the incapable person's dependants;
3. if there are sufficient funds, expenditures that are necessary to satisfy the incapable person's other legal obligations.

Any court ordered payments will take priority over the above. If court ordered payments cannot be met on the person's behalf by the committee, an application to court to vary the payments will be necessary.

ii. Committee of Both Property and Personal Care

A committee of both property and personal care has all the powers and duties of a committee of property. In addition, they have those powers previously referred to earlier in this chapter entitled "Committee of Property and Personal Care". The fiduciary responsibilities related to the management of property are the same as stated above for a committee of property.

A committee for both property and personal care must, in addition and with respect to personal care, always perform their duties diligently and in good faith (*MHA*, *s. 94*). They must choose the least restrictive and least intrusive course of action relating to personal care that is available and appropriate in the circumstances (*MHA*, *s. 95*).

When making health care decisions on behalf of an incapable person, the committee must do so in accordance with the following:

- the patient's competently expressed wishes, if known;
- the patient's best interests, if their wishes are not known;
- the patient's best interests when their wishes are known, but following them would endanger the patient's physical or mental health, or the safety of another person (*MHA, s. 96(1)* and *s. 28(4)*).

When making other types of personal decisions, the committee must take into account the following:

- the person's wishes;
- if the wishes are not known, the person's values and beliefs;
- the person's best interests, if neither wishes nor values and beliefs are known, or if following them would endanger the health or safety of the person or others (*MHA, s. 96(2)*).

The committee must use reasonable diligence to determine the incapable person's wishes or values and beliefs. These provisions apply to the Public Guardian and Trustee as well as to court appointed committees (*MHA,* s. 96(2)).

d) Advice for the Non-Professional Committee

Counsel's duty owed to their clients when obtaining an order of committeeship does not end when the order is granted.

The following list is not exhaustive, but it describes many of the responsibilities of a court appointed committee. Counsel acting on a committeeship application should review the following "to do" list with their client:

- open and maintain a separate bank account to hold money of the estate pending investment (*MHA, s. 86(1)*). The committee should never place the funds in a joint account;
- to the extent possible pay bills and liabilities;
- prepare an inventory of assets immediately and file it in court within six months after the appointment (unless otherwise ordered);
- arrange for the bond, if ordered, and ensure that the bond is in a form that will be satisfactory to a master (the bond should be under seal and have an affidavit of execution attached);
- arrange for the safekeeping of any assets, records and wills/codicils;
- arrange for insurance on real and personal property and for a vacancy permit if applicable;
- make application for any private or government pensions, allowances or benefits to which the individual may be entitled (i.e., Worker's Compensation, C.P.P., O.A.S., Guaranteed Income Supplement, SAFER, War Veteran's Allowance, Employment Insurance, private company pensions, private disability benefits, M.P.I. benefits);
- file income tax returns and make arrangements for payment of taxes;
- close charge accounts;
- notify the individual's bank, utilities, post office, Manitoba Health, etc.; and
- obtain particulars of pre-arranged funeral or prepaid cemetery plots.

If the individual involved drives or owns a motor vehicle, counsel acting for the committee should review the following with their client:

- if applicable, notify the Registrar of Motor vehicles (see *s. 157(1)*) of *The Highway Traffic Act,* C.C.S.M. c. H60 which deals with the obligation of medical practitioners and optometrists to report to the registrar persons who, in their opinion, have "a disease or disability that may be expected to interfere with the safe operation of a motor vehicle…". Presumably one of the medical practitioners giving the affidavit evidence required would follow through with this report but a follow up is useful;

- give early consideration to the sale of the motor vehicle if it appears that the individual will not be able to utilize it, and until then ensure it is in safe storage to both maintain its value and prevent its use;
- apply for an insurance refund; and
- do not drive, or allow any other person to drive, the individual's motor vehicle.

Counsel must review the following real property considerations for sale of the individual's home (if the individual is a homeowner):

- is the individual likely to require the home to live in again?
- does the individual need the proceeds of the sale to maintain themselves?
- do any family members with a legitimate claim for support require the house for living accommodation?
- can the individual's estate afford the taxes, repairs and maintenance on the home?
- would it be better to rent the house?
- if the decision is made to sell the home, court approval of the sale is required.
- always make sure the home, and any other real property, is sufficiently insured.

Counsel should be aware that estate funds not required for immediate maintenance of the individual and dependants should be invested. Proper records and accounts must be maintained by the committee. The committee should keep the following records:

- detailed chronological statements of all receipts, disbursements and investments;
- receipted invoices for all payments; and
- all documents relating to the original inventory of assets (i.e., bank statements).

Further, if the committee intends to request compensation, records of time and efforts spent administering the estate should be kept in order to justify compensation at a later date. A committee of property may only be compensated upon court approval. This provision does not apply to the Public Guardian and Trustee (*MHA, s. 82*).

If the committee is appointed for both property and personal care, some of the committee's additional duties are the following:

- find out who the person's physician and other health care professionals are and establish contact;
- find out if the person has ever made a health care directive, whether naming a proxy or not. If so, review it and provide a copy to the physician and other relevant persons. Make sure it is relied on when health care decisions are made;
- make inquiries with the physician, family or friends (and the incapable person, if possible) to determine the person's wishes concerning health care and other important matters;
- if wishes can't be established, make inquiries as to values and beliefs; and
- find out if there are any outstanding legal actions pertaining to personal care or property. If there are, contact the lawyer involved, and make arrangements for continued representation, if appropriate.

e) Termination, Replacement and Variation of the Committeeship

Any person may apply to the court to have a committee removed or replaced, or a committeeship order varied.

The court may terminate the committee's appointment if it is satisfied that:

- the criteria for the appointment of a committee under *sections 75(1)* or *(2)* are no longer met;
- the committee is unable or unwilling to act;
- the committee has failed to act in accordance with the *MHA* or the order;
- the committee has acted improperly or in a manner that has or may endanger the well-being or property of the person; or
- the committee is no longer a suitable person to act as a committee (*MHA, s. 102(1)*).

The court, on application, may also replace a committee or vary the committeeship order (*MHA, ss. 104* and *105*).

E. POWERS OF ATTORNEY

1. Introduction

A power of attorney is an instrument wherein one person (referred to as "the donor") authorizes another (referred to as "the attorney") to act as the donor's agent or attorney. A power of attorney applies only to the donor's financial and property affairs.

The power may be general (authorizing the attorney to deal with all financial matters which the donor could lawfully deal with) or specific (authorizing the attorney to perform certain specific and limited acts).

In Manitoba, powers of attorney are primarily governed by *The Powers of Attorney Act,* C.C.S.M. c. P97 (the *POA*) and the common law of agency to the extent it has not been abrogated by the *POA* or other legislation as discussed below. Other statutes containing provisions which affect powers of attorney include *The Trustee Act,* C.C.S.M. c. T160, *The Mental Health Act,* C.C.S.M. c. M110, *The Corporations Act,* C.C.S.M. c. C225 and *The Vulnerable Persons Living with a Mental Disability Act,* C.C.S.M. c. V90.

2. *The Powers of Attorney Act*

Pursuant to common law, an attorney's authority ends if the donor becomes mentally incompetent. However, Manitoba has had legislation for many years allowing enduring powers of attorney.

> The cornerstone of an enduring power of attorney is that it contains a provision providing that the authority will continue and not terminate if the donor becomes incompetent. Enduring powers of attorney are a very useful tool allowing people to plan for a time in the future when they may not be able to manage their own affairs.

They are like an insurance policy and may never be used. Their utility is potentially marred in some cases by the broad extent of the power they give the attorney and the potential for misuse, innocently, by careless or uninformed attorneys, or intentionally by unscrupulous individuals leading to financial disadvantage of vulnerable individuals.

It was partly for this reason that the *POA* was proclaimed in April, 1997. The *Act* substantially broadens the previous provisions of *The Powers of Attorney Act,* and introduces provisions regarding the following issues:

(a) formal requirements of execution;

(b) accountability of attorney;

(c) termination of power of attorney;

(d) suspension of enduring power of attorney pending investigation by the Public Guardian and Trustee; and

(e) delayed operation or "springing powers of attorney."

Each of these will be discussed in more detail below.

a) Formal Requirements of Execution

Section 10 of the *POA* details the specific requirements of an enduring power of attorney. At the time of granting the authority, the donor must be mentally capable of understanding the nature and effect of the document (*s. 10(3)*). Otherwise, the enduring power of attorney is void. The solicitor drafting an enduring power of attorney must be satisfied of the donor's capacity.

The enduring power of attorney must conform with certain formal requirements. It must:

- be in writing;
- be signed by the donor, or the donor must acknowledge their signature in the presence of a witness;
- be signed by the witness in the presence of the donor; and
- provide that it is to continue despite the mental incompetence of the donor.

The *POA* also contains provision for an individual to sign an enduring power of attorney on behalf of and at the direction of a donor who is incapable of reading or signing the document (see *s. 10(2)*).

The *POA* specifies who may witness a donor's signature on an enduring power of attorney. This is to ensure that an independent party is involved and to protect the donor from duress or undue influence. The witness must be:

- an individual registered or qualified to be registered under *section 3* of *The Marriage Act,* C.C.S.M. c. M50 to solemnize marriages;
- a judge of a superior court of Manitoba;
- a justice of the peace, magistrate or provincial judge;
- a duly qualified medical practitioner;
- a notary public for Manitoba;
- a lawyer entitled to practice in Manitoba;
- a member of the R.C.M.P.; or

- a member of a municipal police force in Manitoba who exercises the powers of a peace officer (see *s. 11(1)*).

One might also argue that the limited classes of authorised witnesses and the general nature of the classes, judges, doctors, lawyers, magistrates and police officers, were created with a mind to imposing an obligation on witnesses to ensure, at the time of signing, that the donor is fully apprised and aware of the extent of the enduring quality of the power of attorney, the extent of the powers granted and the concomitant significance of selecting trustworthy and faithful attorneys to act. No Manitoba decision has created such an obligation, but it is open to consideration.

Neither the attorney nor their spouse/common-law partner may act as a witness (see *s. 11(2)*). While the section refers to "the" attorney and their spouse or common-law partner, it clearly intends to apply to any alternate named attorney and their spouse/common-law partner as their ability to act would be affected by their having acted as a witness. Arguably, an original attorney can act where a later named attorney or their spouse/common-law partner has acted as witness. The best practice is to ensure no named attorney, original or alternate, or their respective spouse/partner acts as witness.

> There is no legislated requirement that the witness must execute an affidavit of execution. However, it is good practice to do so in all cases in order to provide evidence at a later date that the power of attorney was validly executed.

In order to act as an attorney a person must, at the time the donor signs the document, be:

- an adult;
- mentally competent; and
- not an undischarged bankrupt (see *s. 16).*

Section 17 of the *POA* provides for the appointment of any number of attorneys to act jointly or successively. Unless the donor indicates whether the attorneys are to act jointly or successively, they will be presumed to act successively in the order in which they are named.

Section 18 provides that unless the donor provides otherwise in the power of attorney, when attorneys are appointed to act jointly, a decision of the majority is deemed to be a decision of all. If one or more attorneys dies or is unable or unavailable to continue acting, the remainder may make the decision, and the decision of the majority of the remainder is deemed to be the decision of all.

However, unless otherwise provided in the power of attorney, if two or more attorneys are acting and there is no majority decision, the first named attorney may make the decision. An attorney who disagrees with the decision made by the others, will not be liable for the consequences of the decision if they do not vote or consent to it, and provides a written objection to each of the other attorneys as soon as reasonably possible after learning of the decision.

b) Accountability of Attorney

The *POA* contains detailed provisions regarding the duties and accountability of an attorney under an enduring power of attorney. A donor who becomes mentally incompetent may be unable to protect their own interests. Therefore, these provisions provide a measure of protection for vulnerable donors.

One of the protections provided in the *POA* is to ensure that an attorney who knows or ought reasonably to know that a donor is mentally incompetent and has at any time acted under the power of attorney or otherwise indicated acceptance of the appointment as attorney is under a duty to continue to act during a donor's mental incompetence (see *s. 19(1)*).

This protects the donor from being left without an attorney at a time when they are no longer mentally capable of appointing a replacement. Under such circumstances, an attorney who has so acted or indicated acceptance of the appointment to act must continue to act until they obtain court approval allowing them to stop acting.

The consequences of contravening section 19 are that the attorney will be liable for any loss that results to the donor (see *s. 20).*

The authorities appear to agree that where there is no express or implied agreement for compensation, the attorney is not entitled to be compensated. This issue should be expressly dealt with in the power of attorney notwithstanding the broad powers of the court to consider an application made in respect of an enduring power of attorney given by *section 24(1).*

An attorney who does not receive compensation is required to exercise the judgment and care that a person of prudence, discretion and intelligence would exercise in the conduct of their own affairs. An attorney who is compensated must exercise the judgment and care of a person of prudence, discretion and intelligence in the business of managing the property of others (see s. 19). It doesn't hurt to include a provision in a power of attorney that gives the attorney notice of the higher standard where they are being compensated.

Prior to the proclamation of the *POA*, one of the major problems with enduring powers of attorney was that there was no one to enforce the duty of the attorney to account. The mentally incompetent donor was not able to do so, and the result was many cases of financial mismanagement going unchecked for lengthy periods of time. Accordingly, in an effort to provide protection to donors, provisions were

included in the *POA* requiring the attorney to account to a specified person or persons on a regular basis.

> *Section 22* of the *POA* provides that a donor may name a person in the enduring power of attorney to whom the attorney must account on demand. If no such person is named, or if the person named is no longer able to act, the attorney is required to account annually to the donor's nearest relative as defined in *section 1(1)* of the *POA*. The duty arises in either case during any period in which an attorney has a duty to act under *section 19(1)*.

The attorney and their spouse do not qualify as nearest relatives. In addition, where the named recipient is the attorney or their spouse/common-law partner (or is deceased or themselves mentally incompetent) then the attorney is required to account to the donor's nearest relative. While the intention of that provision is clear with respect to accounting to oneself or one's spouse/partner, the provision refers to "the" attorney.

It is awkward if the power of attorney provides for earlier named attorneys to account to later named attorneys, or *vice versa*, while the earlier or later named attorney is acting. Likely that would be seen as being compliant with the POA and would not result in the default requirement of reporting to a nearest relative of the donor, the best practice, where possible, would be to name persons as recipients of an accounting who are not also named in the successive line of potential attorneys.

> The person receiving the accounting has no duty or liability in respect of the accounting. However, hopefully a person who suspects or finds mismanagement would take appropriate action to resolve the situation. This is an area that should be canvassed with donors. There is a big difference between the statutory obligation to account annually to the nearest relative and the obligation to account to a named recipient upon demand.

The *POA* provides authority for an application to Court of King's Bench to deal with issues arising out of the enduring power of attorney (see s. 24).

Some Manitoba decisions discussing enduring powers of attorney are:

- *J.L. v. S.L.L. et al.,* 2006 MBQB 170 (CanLII);
- *Dubois v. Wilcosh*, 2007 MBQB 20 (CanLII);
- *E.B. v. S.B. and B.K.,* 2010 MBQB 15 (CanLII);
- *Young v. Paille et al*., 2012 MBQB 3 (CanLII).

c) Termination of Enduring Power of Attorney

A power of attorney for value may be expressed to be irrevocable (see *s. 5(2)*). Used infrequently, where a power of attorney is given for valuable consideration that is expressed in the document creating the irrevocable power with respect to a purchaser, the donor can't terminate the power without the agreement of the attorney. The power is not terminated by the death, disability or bankruptcy of the donor. In addition, the attorney and the purchaser are not affected by any act done by the donor to terminate the power of attorney without the attorney's agreement, or by the death, disability or bankruptcy of the donor.

Otherwise, *section 13* of the *POA* provides that an enduring power of attorney is terminated by:

- the appointment of a substitute decision maker for property for the donor pursuant to *The Vulnerable Persons Living with a Mental Disability Act*;
- the appointment of a committee of property of the donor by the Court of King's Bench;
- the bankruptcy of the donor, unless otherwise provided in the enduring power of attorney;
- the bankruptcy, mental incompetence or death of the attorney;
- the death of the donor;
- the renunciation of the appointment by the attorney in accordance with the *POA,* and receipt of notice of the renunciation by the donor;
- termination by the court.

In addition, a mentally competent donor always retains the common law right to terminate the power of attorney in writing at any time.

d) Suspension of Enduring Power of Attorney

Prior to the *POA*, the appointment of the Public Guardian and Trustee as committee under the *MHA* automatically terminated an enduring power of attorney. The benefit was that if there were suspicions that an attorney was mismanaging the donor's financial affairs, the Public Guardian and Trustee could become involved quickly to take over management, investigate, and take appropriate action on the donor's behalf. Unfortunately, in some cases, the appointment of the Public Guardian and Trustee was unnecessary, but had the effect of canceling the power of attorney in any event.

In order to remedy the situation, provision was made for the temporary suspension of a valid pre-existing power of attorney upon the appointment of the Public Guardian and Trustee as committee pursuant to *sections 41* or *61* of the *MHA.* The specific provision for suspension of the power of attorney is found in *section 67(1)* of the *MHA.*

When appointed as committee, the Public Guardian and Trustee must make reasonable inquiries to determine if a valid power of attorney exists. If so, the Public Guardian and Trustee will give written notice to the donor, attorney and the donor's nearest relative that the power of attorney is suspended temporarily. The Public Guardian and Trustee must then conduct an investigation to determine whether it is in the best interests of the donor for the Public Guardian and Trustee to continue acting as committee, or whether the power of attorney should continue (*MHA, ss. 67(2), 67(3)* and *67(5)).*

The Public Guardian and Trustee's investigation will start immediately, and will begin by a request to the attorney to account for the period of time they have been acting. The Public Guardian and Trustee will attempt to complete the investigation quickly and with minimum disruption to the donor's affairs. If necessary, the Public Guardian and Trustee will manage the donor's affairs during the course of the investigation.

In deciding whether the donor's best interests will be served by the Public Guardian and Trustee continuing to act, the Public Guardian and Trustee will consider a number of factors, including:

- whether the attorney has been properly managing the donor's financial affairs in accordance with the provisions of the *Act* and other relevant legislation;
- the wishes of the donor, if they can be ascertained;
- the relative positions of other family members of the donor; and
- the willingness of the attorney to continue acting.

Once the investigation is complete, the Public Guardian and Trustee will notify the donor, attorney, nearest relative of the donor and the official who appointed the Public Guardian and Trustee as committee of its decision.

In situations where joint attorneys or alternate attorneys have been named in a POA the Public Guardian and Trustee may terminate the power with respect to one of the attorneys, where the other wishes to act, thereby terminating the authority of the former attorney, and allowing the remaining attorney to act.

If the power of attorney is being terminated, the notice will contain a brief statement of the reasons. In addition, it will advise the recipients that if they disagree with the Public Guardian and Trustee's decision, they may indicate that in writing within 30 days. Should such an objection take place, the Public Guardian and Trustee must then bring a motion to Court of King's Bench for a determination whether the power of attorney should continue, or whether the Public Guardian and Trustee continues as committee.

When the Public Guardian and Trustee refers the matter to court, it will argue that the power of attorney should be terminated. If the Public Guardian and Trustee's position is upheld, the Public Guardian and Trustee's legal fees will be paid by the donor. If it is not upheld, the Public Guardian and Trustee will absorb its legal fees.

Alternatively, interested parties who are dissatisfied with the Public Guardian and Trustee's decision to terminate a power of attorney may make their own application to Court of King's Bench. (See also *s. 14* of the *POA* regarding suspension on appointment of an emergency substitute decision maker for property pursuant to the *VPA*.)

e) Springing Powers of Attorney

The *POA* contains provisions allowing a donor to specify a date or an event which will trigger the authority of the attorney to act. This is often the date the donor is adjudged to be mentally incapable of managing their affairs, which can be a difficult condition to determine. This is referred to as a springing power of attorney. *Section 6* of the *POA* provides that the donor may name one or more persons, called the *declarants*, to declare in writing that the event in question has occurred. The attorney may be named declarant.

If the power of attorney provides that it will come into force upon the mental incompetence of the donor, but no declarant is named or a named declarant is not able and willing to provide a declaration, two qualified medical practitioners may act as declarants. Alternatively, the court may, where appropriate, determine whether the event in question has occurred.

Where the contingency to the invocation of a springing power of attorney is the loss of competence of the donor, privacy laws related to the donor's health are suspended to the extent that the information is needed to allow a declarant, medical practitioner or the court to determine whether the donor has become mentally incompetent.

> While a springing power of attorney may initially seem to be an appealing way to minimize concerns that a power of attorney may be used prematurely by the attorney or for personal gain, it is important to remember that the basic premise behind a power of attorney is one of trust.

In other words, the donor must trust that the attorney will truly act in the donor's best interests at all times. If the donor is using a springing power of attorney to prevent possible abuses of power or premature use by the attorney, then the donor should seriously reconsider the appointment, as the element of trust is clearly lacking.

There may also be an issue of evidence relating to the triggering event. For example, it may become necessary to establish mental incompetence each time the power of

attorney is used. To address this concern, it may be appropriate to include a clause that clarifies when the triggering event will be deemed to have occurred.

Another drawback of a springing power of attorney is that a power of attorney may be required for some reason other than the specified event. For example, the donor may be completely competent but immobilized, or unable to write or communicate, or may be away and unreachable for an extended period of time. In these situations, the springing power of attorney would be an ineffective document.

Also, declaring the triggering event may take time. In the interim a donor's property may be at risk without anyone having the legal authority to step in and stop or minimise loss.

Subject to the above comments, however, the springing power of attorney may be a useful tool for some people. An example can be found in the Forms and Precedents section.

3. General Considerations

a) When is a Power of Attorney Appropriate?

There are many circumstances when powers of attorney will be the instruments of choice.

Powers of attorney are commonly used when an individual becomes concerned about their mobility and/or the possibility of lost capacity. The donor should consider appointing one or more attorneys who will look after the day-to-day payments of bills from, and depositing of receipts to, a bank account. If this is the extent of the power desired, a bank form of power may suffice.

The use of bank forms should be carefully considered as there are limitations. The donor may initially only require the attorney to attend to the day-to-day banking matters, but these needs may increase considerably in the future. They may ultimately include looking after income tax matters, arranging for the donor to move to a nursing home, selling a home or other assets, etc. In these cases, the bank form of power of attorney would be completely inadequate. Also, the bank form of power of attorney typically only applies to assets within a particular bank. Consequently, the donor would have to execute a form at each financial institution with which they hold assets or accounts.

Finally, it should be remembered that the witness to an enduring power of attorney must be from the select list set out in the *POA.* This fact may not be known by each bank. As a result, the document might not be properly witnessed if executed at the bank and therefore would not be enduring.

Where the donor's assets are more complex and the estate is larger, a general power of attorney is advisable. The stationer's form of general power of attorney provides an attorney with all authority required to deal with an estate of average complexity.

This form uses a drafting style which in some instances is almost incomprehensible, and has certain deficiencies discussed below. However, it is the form most often used and is therefore recognized by the institutions and persons used to having them presented as authority. Whatever form is used, care must be taken to ensure the provisions comply with the *POA*.

> An enduring power of attorney is a valuable component of the estate planning process. While it may never be used it is a very useful and important document to have in waiting and typically does not add significant additional cost to the planning process. Without a power of attorney loss of capacity will possibly require one or more family members to apply for an order of committeeship.

This is a time-consuming and costly application which results in an order that typically gives the committee less authority to deal with the property of the incompetent person than an attorney has under a general power of attorney. In addition, committees may need subsequent court approval to sell or deal with certain assets and they also have to periodically account to the court for their committeeship in accordance with the order. With a properly drafted power of attorney the attorney is not similarly hamstrung in managing the property of the donor.

Whether a power of attorney is appropriate in the circumstances always depends on the particular facts of the case, however it should be considered an instrumental document in a well devised estate plan. It may be used as a long- or short-term solution. The most important part of advising a client with respect to powers of attorney is to fully understand the client's objectives and to make thorough enquiries of the client's affairs prior to offering advice.

b) Assets in Other Jurisdictions

When dealing with assets in foreign countries, it is advisable to have two individuals unrelated to the donor witness the donor's signature and then have both witnesses take an affidavit of execution before a notary public, with an affixed seal.

When dealing with assets in other provinces, it is likely that execution by the donor before a notary public is all that is required.

However, in both circumstances, it is a good idea to contact the jurisdiction in advance to obtain information and, if required, their particular form of power of attorney.

c) Alternatives to Powers of Attorney

i. Committeeship

Where a person no longer has capacity, and did not execute an enduring power of attorney, committeeship may be the solution. This topic is dealt with more fully in section D: Court Appointed Committees.

ii. Trusts

Trusts are generally fairly costly to set up but may be a solution where a long-term arrangement is desirable. Tax advice should always be sought when considering this option.

iii. Agency by Trust Company

For complex estates, you may wish to advise your client to see a trust company officer about entering into an agency arrangement. This type of arrangement arises out of a contract between the client (while competent) and a trust company. It will set out the range of services to be performed by the trust company. Some of these services may be managing investments, record keeping, and bill payment.

This can be an expensive alternative, and if the donor wishes it to survive their incapacity, this must be expressly provided, since the trust company's standard agency form will not, in all likelihood, address this issue. If this type of agency is appropriate, care should be taken to review what services are really required. A general power of attorney may often still be necessary to deal with assets such as real estate.

iv. Representative Payee

Under the Canada Pension Plan, the *Old Age Security Act,* R.S.C., 1985, c. O-9 and the *Public Service Superannuation Act,* R.S.C., 1985, c. P-36 it is possible to direct the federal government to make payments to the pensioner's representative rather than to the pensioner. Refer to the particular legislation for details on this procedure. This alternative is of very limited usefulness and may only be useful where these are the only sources of income for the pensioner. Even then, if not all of the pensions are used up from time to time, a bank account would be required for depositing the excess, and a power of attorney may be necessary.

v. Gifting or Joint Ownership

A gift of property should not be used as a means of delegating authority to a donee to deal with the property for the donor's intended future benefit. A gift is a gift. The donee has no obligation to use the property for the benefit of the donor. Income derived from the property will become that of the donee. Gains accrued while the property is owned by the donee will be that of the donee.

The property will become subject to claims of creditors of the donee. Depending on the nature of the property gifted there may be a deemed disposition of the property by the donor in the year of gift with tax consequences to the donor.

> While *inter vivos* gifts may form part of a person's overall estate planning objectives, all legal effects of gifting should be discussed with a donor and proper evidence of the intention of the donor at the time of the gift should be documented by written declaration or agreement.

Gratuitous transfers of property, outright or into joint tenancy, may be a means of delegating authority to the new owner, whether sole or joint, to deal with the property for the donor's intended future benefit. While a presumption of advancement applies if the child is a dependent, absent evidence to the contrary at the time of a gratuitous transfer by a parent to an adult child that is not a dependent, a presumption of a resulting trust arises. In such a case the child holds the property in trust for the benefit of the transferor parent and their estate on death.

However, confusion often reigns among transferors and transferees with gratuitous transfers of property and conflicts may arise where the transferee child purports to claim ownership to the property upon the death of the parent.

Due to inherent risks with gratuitous transfers they ought to be used sparingly and only with legal advice with a mind to properly documenting the transferor's intentions and considering all potential tax consequences of the transfer.

The following Supreme Court of Canada decisions are on point:

- *Pecore v. Pecore*, 2007 SCC 17 (CanLII), [2007] 1 SCR 795;
- *Madsen Estate v. Saylor*, 2007 SCC 18 (CanLII), [2007] 1 SCR 838.

Numerous cases have considered *Pecore v. Pecore* and *Madsen Estate v. Saylor* since 2007.

d) Irrevocable Power of Attorney for Value

As noted above *section 5(2)* of the *POA* provides that where a power of attorney is given for valuable consideration and is expressed to be irrevocable in the instrument creating the power, then, in favour of a purchaser:

- the power shall not be revoked by the donor's death, disability or bankruptcy, or by the act of the donor done without the concurrence of the attorney;
- any act done by the attorney pursuant to the power is valid notwithstanding any act of the donor without the attorney's concurrence, or the death, disability or bankruptcy of the donor.

Section 5(1) defines "purchaser" as a purchaser in good faith of property for valuable consideration. This section does not appear to add anything to or change the common law principles governing the irrevocability of powers of attorney given for value, the attorney's immunity from a claim for damages while acting within their authority under such irrevocable power, and a third party's right to rely on such attorney's authority.

4. Drafting Powers of Attorney

a) General Powers of Attorney

An example of a comprehensive general power of attorney form is found in the Forms and Precedents section. This type of document is probably more appropriate where a lawyer is involved in the preparation of the power of attorney. It is more thorough, covering more powers and contingencies. A shorter, plain language form is found in the Forms and Precedents section. It is less useful in an estate planning process.

The standard stationer's forms may be deficient in many respects including Manitoba's requirements under *The Homesteads Act*, C.C.S.M. c. H80. If used, it should be modified accordingly. The stationer's forms may also be deficient in areas including, without limitation, compensation of attorneys, appointments of alternates, naming of declarants, naming recipients of an accounting, gifting, special powers that may apply and springing contingencies and therefore they have a limited value for use in limited circumstances.

b) Specific Powers of Attorney

In certain instances, a specific power of attorney is appropriate. It is often used, for example, when people move, leaving their principal residence unsold. In this example, a power of attorney is often given to their solicitor, authorizing them to consider and accept an offer to purchase, usually for specified terms including a minimum sale price.

Caution should be exercised when using powers of attorney in connection with sales of real property which are homestead property. See the discussion of the problems associated with this issue below.

Specific powers of attorney may also be used where a corporate officer, being the only signing officer for the company, will be unavailable at a critical stage of a commercial transaction.

Whatever the circumstances, the authority being given should be set out clearly and without ambiguity and should always contain a termination date.

One form of specific power of attorney which has been legislated is that required under *section 186* of *The Corporations Act.* This power of attorney is required for corporations which do not have an officer or director residing in the province, or whose registered office is outside the province. The attorney must be a resident of Manitoba. This power of attorney authorizes the attorney to accept service of any suit or proceeding against the company in Manitoba.

Examples of limited and short form powers of attorney are included in the Forms and Precedents section.

c) Limitations and Restrictions

As noted above, a power of attorney may be ineffective for dealing with homestead property if it does not meet *The Homesteads Act* provisions (*ss. 23* and *24*).

Section 23 of *The Homesteads Act* sets out certain requirements for execution by an attorney of consents or releases contemplated under the *Act.*

First, the power of attorney must expressly authorize the attorney to execute a consent to a disposition, a consent to a change of homestead or release under *The Homesteads Act* (see s. 23(1).

Second, a consent, release, consent to terminate a release or a discharge of homestead notice will not be effective if signed by the owner of the homestead property as attorney for the spouse or common-law partner.

Third, the power of attorney must contain an acknowledgment executed at the time of executing the power of attorney that the donor is executing the power of attorney freely and voluntarily without any compulsion on the part of the owner of the homestead property, and that the donor is aware of the nature and effect of the power of attorney. The acknowledgment must be signed apart from the owner and is to be in prescribed form which is to be endorsed on or attached to the power of attorney. A sample is included in the Forms and Precedents section.

> Section 24 provides that where spouses/common-law partners are both the owners of the homestead property, neither can execute a disposition of such homestead property as attorney for the other spouse or common-law partner.

While sections 23 and 24 set out the formal requirements relating to powers of attorney under *The Homesteads Act*, *section 26* provides that a court may, in certain circumstances, validate a document which lacks the formality required. In addition,

section 27 provides that defects in form, technical irregularities and lack of formality do not invalidate proceedings done under *The Homesteads Act*.

Section 30(5) deems documents executed in accordance with *The Dower Act* prior to August 15, 1993 to be effective for purposes of *The Homesteads Act*.

Teranet Manitoba, which operates Manitoba Land Titles, publishes a useful guide giving advice and direction on certain areas of land titles registrations. It is not exhaustive. It does address the homestead evidence that it deems necessary in a power of attorney to allow authorised attorneys to execute releases and consents and dispositions of jointly held property.

The following extract is taken from page 52 of the most recent revision of the guide, Revision 65 dated June, 2019, under the heading "Homestead Act special authority clause". It also appears on page 53 under the heading "Alternate attorney executing a disposition of the homestead".

"Many modern powers of attorney contain a clause allowing alternate attorneys to act where the primary attorney, the spouse or common-law partner of the donor, cannot act due to the operation of *The Homesteads Act*. A typical clause will allow the alternate attorneys to execute releases and consents under *The Homesteads Act*. This addition is helpful, however many such clauses are lacking in one of essential element: they do not provide for the execution of a disposition of jointly held homestead property. In order to protect from the difficulties that this situation can give rise to, powers of attorney need include a clause specifically authorizing an alternate attorney to act in place of the primary attorney for dispositions of jointly held property that is the parties homestead where the primary attorney cannot act because they are also the spouse or common law partner of the donor."

It is important to include this additional wording which is often missing in powers of attorney, which might look like the following:

> Homestead Property - With respect to any and all dispositions affecting my homestead, as that term is defined in *The Homesteads Act* (Manitoba), I appoint and authorise , acting alone, **or** and , acting jointly, to execute any and all consents, releases or documents required or permitted under *The Homesteads Act* (Manitoba) and amendments thereto, to give on my behalf evidence, by way of affidavit, statutory declaration or otherwise concerning any matters and in any form required or permitted under *The Homesteads Act* (Manitoba) and amendments thereto and to execute any and all dispositions of my homestead, where I have an estate or interest in that property which estate or interest is in addition to the rights that I have in the property by operation of *The Homesteads Act* (Manitoba) and amendments thereto. If is unable or unwilling to act as my attorney for the purposes as described in this paragraph then shall act in their place with the same powers and authority as described in this paragraph. Where joint appointments add: If either

or are unable or unwilling to act as my attorney for the purposes as described in this paragraph then the other shall act alone.

Some practitioners believe there is value to adding reference to *The Real Property Act* in addition to referent to *The Homesteads Act* in the provision. An example of alternative wording is as follows:

Homestead Property - With respect to any and all dispositions affecting my homestead, as that term is defined in *The Homesteads Act* (Manitoba), I appoint and authorise , acting alone, to execute any and all consents, releases, elections, acknowledgments, documents, forms or instruments required or permitted under *The Homesteads Act* (Manitoba) and amendments thereto or *The Real Property Act* (Manitoba) and amendments thereto, to give on my behalf evidence, by way of affidavit, statutory declaration or otherwise concerning any matters and in any form required or permitted under *The Homesteads Act* (Manitoba) and amendments thereto or *The Real Property Act* (Manitoba) and amendments thereto and to execute any and all dispositions of my homestead, where I have an estate or interest in that property which estate or interest is in addition to the rights that I have in the property by operation of *The Homesteads Act* (Manitoba) and amendments thereto.

One further example of restrictions and limitations to powers of attorney is that a donor cannot delegate discretions. Typically, an executor or trustee is given wide discretion under the terms of a will or trust deed. *The Trustee Act* (*ss. 35* and *36*) permits the appointing of attorneys by executors and trustees in certain circumstances (for example, where the trustee or executor will be out of the province for an extended period of time), and these sections should be reviewed when preparing such a power of attorney. Note that the provisions of *The Trustee Act* are always subject to the express terms of the will or the trust agreement.

5. Signing Remotely

Remote witnessing is now authorised by *sections 10.1(1)* and *10.1(2)* of *The Powers of Attorney Act* and regulation 80/2021 which came into force on October 1, 2021. The regulation sets out the procedure for an authorised person to witness a donor signing or acknowledging a signature on an enduring power of attorney without being in the presence of the donor and signing an enduring power of attorney as a witness without being in the presence of the donor. The procedure is set out in the regulations. Schedules to the regulations provide forms of certificates of remote witnesses where signed by a donor and where signed by a proxy on behalf of a donor. For more information, see the *Remote Witnessing module* on the Law Society website under Practice Resources.

6. Signing Under Seal

Practitioners should consider using a seal when the donor is signing a power of attorney. There is case law suggesting that without a seal the attorney does not have authority to sign any contracts or documents that require a seal. See *Powell v. London and Provincial Bank,* [1893] 2 Ch. 55 (Eng. C.A.), *Royal Bank v. Bauman* (1986), 72 A.R. 89 (Q.B.).

At paragraph 24 of *Royal Bank v. Bauman* Virtue J. notes "no special form of contract is required in order for an agent to enter into or execute a contract, even in writing, unless that contract itself is required to be under seal." In that decision certain documents which were not required to be signed under seal were determined to be valid notwithstanding that there was no seal on the original power of attorney. Presumably the documents would not have been found to be valid if they were ones that were required to be signed under seal.

Using a seal is a simple and benign practice. It isn't going to be harmful to use one and it could be legally useful depending on the documents being signed by the donor.

7. References

This article deals in general terms with powers of attorney. For further assistance refer to any text covering the law of agency, and to the following articles:

- Robert C. Dick, Q.C., "Administration of Estates of the Mentally and Physically Infirm" (1975) 2 Est. & Tr. Q. 256;
- David C. Simmonds, "Planning for Incapacity" (1988) 27 E.T.R. 117;
- Linda D. Fowler, "Powers of Attorney" Chapter 2, 33rd Bar Admission Course, Law Society of Upper Canada;
- Jeffrey Schnoor, Q.C. and Harold Dick, "Enduring and Springing Powers of Attorney", The Law Society of Manitoba, Continuing Legal Education program "Taking Care of Others: Substitute Decision Laws", March 13, 1997.

F. HEALTH CARE DIRECTIVES (LIVING WILLS)

1. Introduction

Advances in medical technology have provided great benefits to humanity, saving lives where death was once a certainty. Individuals who once faced quick and certain death can now be kept alive for considerable periods of time. However, many individuals fear that, because of these advances, they may languish at the end of their lives for months or years, unable to control their medical treatment and subjected to procedures which may save their lives, but reduce or destroy the quality of that life.

These concerns led to the enactment of *The Health Care Directives Act* in 1993 (the *HCDA*). This legislation permits a mentally competent maker to create a Health Care Directive that will give legally binding effect to the maker's wishes at a time when the maker no longer has capacity, or cannot communicate those wishes.

2. What is a Health Care Directive?

The *HCDA* permits individuals to make health care directives. A health care directive may contain one or both of the following:

- a statement of the maker's wishes concerning the medical treatment which they do or do not want administered at some future time when the maker is no longer competent; and
- the appointment of another person, called a proxy, to make health care decisions on the maker's behalf after the maker becomes mentally incompetent to make those decisions (*s. 5*).

Medical treatment is defined in the *HCDA* as "anything that is done for a therapeutic, preventative, palliative, diagnostic, cosmetic or other health-related purpose, and includes a course of treatment" (*s. 1*). For example, individuals can consent to or refuse life-prolonging treatment, palliative care, nutrition or hydration.

3. Who Can Make a Health Care Directive?

In order to make a health care directive, a person must have the capacity to give or refuse consent to current medical treatment (*s. 4(1)*). A person has the capacity to make medical decisions if they are able to understand the information that is relevant to making a decision and is able to appreciate the reasonably foreseeable consequences of a decision or lack of decision (*s. 2*).

Because it is difficult for someone to determine afterward whether this requirement is met, the *HCDA* provides that persons who are asked to give effect to health care directives can assume that individuals 16 and over have the capacity to execute a health care directive (*s. 4(2)(a)*) and that individuals under 16 do not (*s. 4(2)(b)*). Age 16 was chosen as this agrees with other Manitoba legislation which deals with the ability of minors to consent to health care.

The presumption is rebuttable: a person who is not yet 16 could be found to have the capacity to make a health care directive. Evidence must be brought forward to disprove the presumption of incapacity. Similarly, someone 16 or older may be found to have lacked the necessary capacity to make a health care directive.

4. Requirements of Form and Execution for a Health Care Directive

The method of execution set out in the *HCDA* is simple, involves minimal formalities, and approximates the method which has been accepted at common law. Health care directives must be written, dated (*s. 8(1)*) and signed by their makers (*s. 8(2)(a)*) or by another person at the direction and in the presence of the maker (s. 8(2)(b)). See further comments below related to a third party signing a health care directive for a maker.

While section 8(1) of the *HCDA* provides that a health care directive must be in writing, see *section 13* of the *HCDA*. That section sets out 4 principles that a proxy is required to follow. The 2nd and 3rd principles provide that where the maker's decisions are not expressed in a directive, the proxy shall act in accordance with any wishes that they know the maker expressed when the maker had capacity, and believes the maker would still act on if capable (s. 13 principle 2). If the proxy knows of wishes applicable to the circumstances that the maker expressed when the maker had capacity, and believes the maker would still act on them if capable, and if the wishes are more recent than the decisions expressed in a directive, the wishes must be followed (s. 13 principle 3).

> The word "express" is arguably not limited to written decisions. If that is correct, then the principles authorise the proxy to override written decisions in the health care directive by acting on later verbal decisions, notwithstanding the requirement under section 8(1) that a health care directive must be in writing.

This makes sense, since express decisions being made in a lawyer's office when a maker is young and healthy ought to be overridden by later verbal decisions where the maker is being rushed to a hospital in an ambulance due to a health emergency. Whether later verbal instructions override earlier written instructions has not been considered by a Manitoba court. If correct, it opens the door for interesting potential litigation where a proxy claims to have acted based on later verbal decisions that are contrary to the decisions set out in the

health care directive. See the reference below to part of the decision of Robins. J.S. for the Ontario Court of Appeal in *Fleming v. Reid.*

If a maker is not physically able to sign a health care directive, another person may sign at the direction and in the presence of the maker. In that case a witness to signing by the substitute is required. The substitute and witness, or their spouses cannot be named as proxy; this protects the maker from undue influence. The maker must acknowledge the signature of the substitute in the presence of the witness and the witness must sign the directive (as witness) in the maker's presence (s. 8(2)(b)). As set out above, except in the case of another person signing for a maker, a health care directive does not need a witness.

Documents made outside of Manitoba will be recognized as health care directives as long as they conform with the *HCDA's* execution requirements (*s. 10*).

The legislation does not require that a particular form be used. However, some forms which have been designed by the medical profession are readily available. Manitoba Health provides a form which can be accessed through their *website*.

While health care directives are provincially regulated, decisions from outside Manitoba may have some relevance to our court's consideration of issues related to health care directives and the *HCDA*. Courts may still recognize as legally binding instructions that do not meet the requirements of the *HCDA* (*s. 25*).

For example, if a health care directive was not dated, the document may nonetheless be valid at common law, as was the case in *Malette v. Shulman (Ont. C.A.),* 1990 CanLII 6868 (ON CA), (1990), 67 D.L.R. (4th) 321 (Ont. C.A.). In addition, the Ontario Court of Appeal decision in *Fleming v. Reid,* 1991 CanLII 2728 (ON CA), (1991), 4 O.R. (3d) 74 may be interpreted to permit a competent person to express their wishes for future treatment in any manner. Robins J.A. for the Ontario Court of Appeal stated (at 85-86):

> *A patient, in anticipation of circumstances wherein he or she may be unconscious or otherwise incapacitated and thus unable to contemporaneously express his or her wishes about a particular form of medical treatment, may specify in advance his or her refusal to consent to the proposed treatment. A doctor is not free to disregard such advance instructions, even in an emergency. The patient's right to forgo treatment, in the absence of some overriding societal interest, is paramount to the doctor's obligation to provide medical care. This right must be honoured, even though the treatment may be beneficial or necessary to preserve the patient's life or health, and regardless of how ill-advised the patient's decision may appear to others.*

Since Robins J.A. did not qualify his remarks by requiring that wishes be expressed in a certain way in order to be recognized as valid health care directives, it is possible that the courts will recognize expressions regarding future health care that are oral, videotaped or made by some other electronic means. Prior versions of these materials concluded that such expressions would not be considered to be health care directives within the meaning of the *HCDA.* Arguably they are for the reasons noted above, and based on one concluding that an

expressed decision is not necessarily one that is in writing. Concluding that they have to be in writing detracts from the value of the principles set out in section 13.

5. When is a Directive Effective?

Health care directives become effective once the maker has lost the capacity to make or communicate health care decisions and remain effective for the duration of that incapacity or inability to communicate (*s. 6(1)*). If the maker regains the ability to make or communicate decisions, then they will resume making those decisions directly. The *HCDA* contemplates that an individual may be competent to make some decisions but not others (*s. 6(2)*). In this case, the maker would make certain decisions and the directive or proxy would provide instructions on other decisions for which the maker has lost capacity.

If it is not clear whether or not the maker lacks the capacity to make health care decisions, and a court is asked to resolve this issue, the maker is deemed to have the capacity to instruct counsel (*s. 20*).

6. Effect of the Instructions in a Health Care Directive or the Instructions of a Proxy

> Once operative, the instructions contained in a health care directive or given by a health care proxy are as effective as the instructions which could have been given by the maker while competent (*s. 7*). The limits which apply to instructions given by competent persons about their current health care apply equally to instructions contained in health care directives and instructions given by health care proxies.

In other words, if an instruction would have been legally binding if the maker had given it directly, it is legally binding if contained in a health care directive or given by a proxy. Likewise, any instruction that would not have been legally binding if the person had given it directly is not legally binding if contained in a health care directive or given by a proxy. For example, a request for non-beneficial treatment or for assistance to commit suicide by the injection of poison is not legally binding and will not be given effect.

> Lawyers should keep track of evolution of medical assistance in dying ("MAID") legislation to determine a proxy's authority to initiate or continue an application for MAID, which at the time of the most recent revisions to these materials was not allowed.

In addition, the consequences of non-compliance by health care providers with instructions in a health care directive or instructions given by a proxy are the same as the consequences of non-compliance with current health care instructions: the civil law remedy of damages for battery and professional discipline. Once a person with a health care directive becomes incapable of giving or refusing consent to treatment, and provided that the existence of a health care directive is made known to health care providers, they are required to carry out the treatment wishes set out in it or communicated through a validly appointed proxy, to the same extent as they are required to carry out the treatment wishes of a competent individual.

There is no obligation on the part of anyone providing care to make inquiries to determine whether or not a person has made a health care directive (*s. 21*). Health care providers are not liable for acting contrary to treatment wishes expressed in a health care directive if they did not know of its existence or contents (*s. 22(b)*). The onus is on the maker to make people aware of the health care directive.

7. Issues Relating to the Proxy

a) Requirements for Proxy

A proxy should be someone that the maker knows and trusts, such as a spouse, partner, close friend, brother, sister or child. The *HCDA* does not restrict the choice. However, the *Act* does require that a proxy be apparently mentally competent and at least 18 years of age at the time that a health care decision is being made (*s. 12*).

b) Authority and Responsibility of Proxy

A proxy must act in accordance with certain principles that are designed to ensure that the treatment wishes of the maker are carried out as fully as possible. If a maker sets out treatment wishes in the health care directive, the proxy must comply with those treatment wishes unless they know that those treatment wishes changed since the health care directive was made. In that case, the proxy must follow the maker's most recent treatment wishes.

If the maker's wishes are not set out in the health care directive, the proxy must make decisions based on the proxy's knowledge of wishes expressed by the maker prior to incapacity. If the maker's wishes are not known at all, the proxy will have to make decisions in accordance with the maker's best interests (*s. 13*). The proxy will decide what factors are relevant to the decision and the weight to be given to each factor.

A maker may limit the scope of a proxy's power in the health care directive. The *HCDA* also provides limits on the types of decisions a proxy may make. For example, unless the maker specifically grants the power to do so in the health care directive, the proxy cannot consent on the maker's behalf to certain non-therapeutic procedures such as *inter vivos* tissue donation, treatment whose main purpose is research, and non-therapeutic sterilization (*s. 14*). These procedures would not usually be contemplated

by persons when delegating decision-making power and usually benefit others than the maker.

Having said that there is practical and societal value to discussing provision in the directive for authority for the proxy to consent to medical treatments for the primary purpose of research. Such research is typically safe and managed by professional researchers and health care professionals. In addition, the research requires ethics and compliance oversight, which in Manitoba are provided by the Health Research Ethics Board and the Biomedical Research Ethics Board at the Bannatyne campus of the University of Manitoba.

The research offers no known benefit to the participant and usually minimal risk. The research is typically benign and includes such unobtrusive asks such as completing questionnaires, participating in focus groups, and being interviewed, and in some cases taking small samples of blood, urine or biopsies. Submissions that researchers are required to make to apply for ethical approval are lengthy and detailed. Written materials made available to potential participants in considering whether or not to participate in the research is detailed and extensive and includes written consent forms. Board members consider all ethical aspects of the research proposals before they are approved.

Some research that could prove valuable to society in the long term relates to conditions such as dementia and Alzheimer's, where the participants lack capacity to consent. Without directives that authorise the proxy to consent to such treatments there is no pool of available participants for the study.

Although a proxy's primary responsibility is to make treatment decisions during the life of the maker, a proxy can also make decisions about the donation of some or all of the maker's organs or tissues. If a maker has not previously indicated their wishes respecting tissue donation, when the maker's death is inevitable and imminent, or after the maker's death, a doctor may ask the maker's proxy to consent to the removal of some or all of the maker's organs (*The Human Tissue Gift Act,* C.C.S.M. c. H180, *ss. 3(1), 3(1.1), 3(3), 3(3.1), 4(2)*).

In order to make informed decisions on behalf of the maker, the proxy requires access to the maker's medical information. The *HCDA* provides that the proxy has the right to be provided with all the information necessary to make informed health care decisions on behalf of the maker, unless the maker limits the release of medical information in the directive (*s. 18*).

c) More than One Proxy?

The *HCDA* provides that a maker may appoint more than one proxy. If the directive does not provide whether multiple named proxies are to act jointly or severally they are deemed to act successively in the order named in the directive. The maker may specify that the proxies are to make decisions together (*s. 15(1)*). Unless the directive states otherwise, a decision of the majority of the proxies is deemed to be the

decision of all of the proxies (*s. 15(2)(a)*). In the event of a deadlock, the first named proxy is authorized to make the health care decision (*s. 15(3)*).

The *HCDA* also provides that, where joint proxies are appointed and one or more of them dies or is unwilling or, after reasonable inquiries, unavailable to make a health care decision, the remainder of the proxies may make the decision and that decision is deemed to be the decision of all of them (*s. 15(2)(b)*).

d) Removal of Proxy; Immunity of Proxy

> A validly appointed proxy's decisions may only be overridden if it can be shown that decisions were made contrary to the maker's wishes, or not in good faith.

A court can review the proxy's actions, and rescind an improper direction of the proxy and suspend or revoke the proxy's appointment (*s. 17(1)(a)*). If no other substitute proxy has been appointed to act, the court can also substitute its own decision for that made by the proxy (*s. 17(1)(b)*). In substituting a decision, the court must do so in accordance with the same principles which guide the proxy's decision-making (*s. 17(2)*). No action will lie against a proxy for failing to make treatment decisions or for making treatment decisions if those decisions were made in good faith (*s. 19*).

8. Revocation of a Health Care Directive

A competent maker can change a health care directive at any time. The legislation provides for revocation in the same manner as revocation of a will. The maker can revoke the directive by destroying every signed copy or by instructing a third party to destroy them in the presence of the maker (*s. 9(1)(c)*). Another method of revocation is by making a new health care directive (*s. 9(1)(a)*). The later directive will override the earlier one. Alternatively, the maker may declare in writing their intention to revoke the directive, and execute this writing in accordance with the formalities required to execute a directive (*s. 9(1)(b)*).

In addition, the *HCDA* provides that unless a maker specifies otherwise in the health care directive, the appointment of a spouse as proxy is automatically revoked by subsequent divorce or annulment of the marriage (*s. 9(2)*).

9. Protection and Immunity for Health Care Providers

The *HCDA* ensures that the instructions contained in a health care directive or given by a health care proxy are given effect over the wishes of others - including over the wishes of family or friends. It provides that no legal action will lie against any person who administers or refrains from administering treatment to another person by reason only of their having acted in good faith, according to the terms of a health care directive or the decision of a

health care proxy (*s. 22(a)*). However, no one is exempted from negligence in carrying out these instructions.

In addition, the *HCDA* provides that a directive that has been acted upon and later found to have been revoked or not executed properly or made by a person who did not have the capacity to make health care decisions, will be deemed to be valid if the person who acted upon it had no reason to believe that the directive should not be followed (*s. 23*). This provision will protect health care professionals who follow the instructions in a directive or instructions given by a proxy where the directive is later found to be invalid.

10. How *The Mental Health Act* and *The Vulnerable Persons Living With a Mental Disability Act* Work with *The Health Care Directives Act*

The *MHA* incorporates some of the principles of the *HCDA*. If a patient in a psychiatric facility has a health care directive that appoints a proxy, their proxy may make treatment decisions on their behalf (*MHA, s. 28(1)*). However, where there is a conflict between the *MHA* and the *HCDA*, the *MHA* prevails (*s. 3*).

There are other situations where the provisions of the *MHA* override the provisions of the *HCDA*. For example, the attending physician of an incompetent patient may apply to the Mental Health Act Review Board for authority to provide psychiatric treatment to a patient if the patient's proxy has refused to consent (*MHA*, *s. 30(1)*). In such an application, the physician must satisfy the Review Board that:

- the patient's mental condition will, or is likely to, be substantially improved by the treatment in question;
- the patient's mental condition will not, or is not likely to, improve without the treatment;
- the anticipated benefit outweighs the risk of harm;
- the treatment is the least restrictive and least intrusive treatment available in the circumstances (*MHA, s. 30(2)*).

The Review Board is required to consider any wishes expressed by the patient about the treatment while mentally competent, and whether or not the patient would now, given the circumstances, alter those wishes if competent to do so (*MHA, s. 30(4)*). This provision is designed to provide for situations where new medication or treatment has become available which the patient would likely accept, if they had known of it when the directive was made.

Another exception to the *HCDA* is found in *section 28(4)* of the *MHA*. This section allows a person, including a proxy, who is making substituted treatment decisions on behalf of a patient in a psychiatric facility to override the patient's wishes expressed in a health care directive if they believe that to follow the wishes would endanger the physical health, mental health or safety of the patient or another person. In this case, the patient may apply to the

Mental Health Review Board for an order that the health care directive be followed. The Review Board must do so, unless:

- it is satisfied that the treatment decision in the health care directive is contrary to the patient's best interests; and
- it has considered all the relevant circumstances, including whether or not the patient would now, given the circumstances, alter their expressed wishes if competent to do so (*MHA, ss. 31(1)* and *(2)*).

Note that *section 28(4)* of the *MHA* does not apply to the Public Guardian and Trustee (see *MHA, s. 63(3)*).

The health care directives of vulnerable persons living outside of psychiatric facilities are fully recognized since the *HCDA* governs in any conflicts between that act and the *VPA*.

11. Advice for Practitioners

If you are consulted about how a health care directive should be executed, keep the requirements of the *HCDA* in mind. It must be a written document, signed and dated by the maker. Also remember that the *HCDA* allows for substitute execution, with witnessing.

Given the content of a health care directive, it is in the maker's best interests to first consult with their physician. The maker should make the instructions as clear and explicit as possible and provide copies of the directive to caregivers and health care professionals. A record of who is given a copy should be kept in case the maker wishes to revoke the health care directive.

You should also be aware that legislation in other jurisdictions may differ from the Manitoba legislation. If you are consulted about the legality of a Manitoban's health care directive outside Manitoba, you should research the relevant statutes or consult with legal counsel in the foreign jurisdiction.

If you are consulted by a health care practitioner about the validity of a given health care directive, you should advise that if the practitioner has no reason to believe that the directive is invalid then, in most cases, the instructions given in the directive or given by the health care proxy are as effective as the instructions given by a competent patient about current health care. The one exception to this concerns patients in psychiatric facilities: the instructions given by the proxy of such a patient can be overridden by the Mental Health Review Board.

In addition, given the above-mentioned Ontario Court of Appeal decisions and the principles set out in the *HCDA*, it is probable that even if a health care directive does not comply in form with the *HCDA,* that Manitoba courts will recognize similar expressions of future health care as binding directions which must be followed by health care professionals.

12. Signing Remotely

Remote witnessing is now authorised by *sections 8.1(1)* and *8.1(2)* of *The Health Care Directives Act* and regulation 82/2021 which came into force on October 1, 2021. The regulation sets out the procedure for an authorised person to witness the acknowledgement, by the maker, of a signature on a directive signed by a person other than the maker, without being in the presence of the maker and signing a directive as a witness without being in the presence of the maker. The procedure is set out in the regulations. For more information, see the *Remote Witnessing module* on the Law Society website under Practice Resources.

13. Conclusion

The *HCDA* provides Manitobans with a very progressive piece of legislation in the field of advance medical consent. Individuals can, with a minimum of formality, set out their wishes respecting future health care and appoint proxies to make future decisions for them, with the knowledge that their wishes will be given effect.

G. FORMS AND PRECEDENTS

1. Certificate of Incompetence to Make Treatment Decisions

(Form 9)

To the Medical Director of _____
(facility)

Re:_____
(name of patient)

I, _____, the attending physician of the patient named above, certify that
(name of physician)

1. I examined the patient on _____
(date(s) - day, month, year)
to determine if he or she is mentally competent to make treatment decisions.

2. I have considered:
   a) whether the patient understands:
      i) the condition for which the treatment is proposed,
      ii) the nature and purpose of the treatment,
      iii) the risks and benefits involved in undergoing the treatment, and
      iv) the risks and benefits involved in not undergoing the treatment; and
   b) whether the patient's mental condition affects his or her ability to appreciate the consequences of making a treatment decision.

3. I am of the opinion that the patient is not mentally competent to make treatment decisions for the following reasons:

_____

_____

_____

Signed on _____, at _____ Manitoba
(day, month, year)

_____
(Attending Physician)

2. Certificate of Incompetence to Manage Property

(Form 10)

To the Medical Director of _____
(facility)

Re: _____
(name of patient)

I, _____, the attending physician of the patient named above, certify that
(name of physician)

1. I examined the patient on _____
(date(s) - day, month, year)
to determine if he or she is mentally competent to manage his or her property.

2. I have considered all the relevant circumstances, including the following:
   a) the nature and severity of the patient's mental condition;
   b) the effect of the patient's mental condition on his or her ability to manage property;
   c) the nature of the patient's property and any arrangements known to me that the patient made, while competent, for its management; and
   d) whether or not decisions need to be made on the patient's behalf about that property.

3. I am of the opinion that the patient is not competent to manage his or her property for the following reasons

_____

_____

_____

Signed on _____, at _____ Manitoba
(day, month, year)

_____
(Attending Physician)

3. Certificate of Incapacity

To the Director of Psychiatric Services: (Form 21)

Re: _____
(name of person)

of _____
(address)

a person who is not a patient in a facility or who is a patient about to be discharged from a facility

I, _____, being a physician in Manitoba, certify that:
(name of physician)

1. I examined the person named above on _____
(date(s) - day, month, year)
2. I am of the opinion that:
   a) because of a mental condition, the person is incapable of managing his or her property or of personal care; and
   b) the incapacity is not due exclusively to a mental disability as defined in *The Vulnerable Persons Living With a Mental Disability Act.*
3. In forming my opinion, I have considered all the relevant circumstances, including the following:
   a) the nature and severity of the person's mental condition;
   b) the effect of the person's mental condition on his or her ability to manage property and capacity for personal care;
   c) the nature of the person's property and personal care requirements and any arrangements known to me that the person made while competent, for the management of property and the appointment of a proxy; and:
   d) whether or not decisions need to be made on the person's behalf about that property or with respect to personal care.
4. I am of the opinion that the person named above is incapable of managing his or her property or of personal care for the following reasons:

   _____

   _____

Signed on _____, at _____ Manitoba
(day, month, year)

_____
(Physician)

4. Order of Committeeship

Order of Committeeship

Formule 22 – Loi sur la santé mentale (paragraphe 61(1), c. M110)
Ordre de nomination du curateur public

Manitoba Health Santé

Re / *Objet* : _____
(name of person / *nom de la personne*)

1. The person named above, who is not a patient in a facility or who is a patient about to be discharged from a facility, has been examined by / *La personne susmentionnée, qui n'est pas un malade dans un établissement ou qui est un malade sur le point d'obtenir son congé d'un établissement, a été examinée par* _____, a physician in Manitoba. / *médecin au Manitoba.*
(name of physician / *nom du médecin*)

2. The physician has completed a *Certificate of Incapacity*, with reasons, stating that the physician is of the opinion that the person is incapable of managing his or her property or of personal care and has sent this *Certificate* to me / *Le médecin susmentionné a rempli un* certificat d'incapacité *qu'il m'a fait parvenir et dans lequel il déclare, avec motifs à l'appui, qu'il est d'avis que la personne est incapable de gérer ses biens ou de s'occuper de ses soins personnels.*

3. I (check appropriate box) / *Je déclare (cochez la case appropriée)* :

☑ have complied with section 60 of the Act by reviewing the physician's certificate, by giving notice of intent to issue an order, and by considering any objections and reviewing other information in accordance with that section / *m'être conformé(e) à l'article 60 de la* Loi *en examinant le certificat du médecin, en donnant un avis de mon intention de nommer, par ordre, le curateur public à titre de curateur à l'égard des biens et des soins personnels de la personne et en tenant compte, conformément à cet article, des renseignements supplémentaires et des oppositions reçus.*

☐ believe on reasonable grounds that the person named above needs a committee on an urgent basis because / *avoir des motifs raisonnables de croire qu'un curateur doit être nommé d'urgence à l'égard de la personne susmentionnée parce que :*

a) there is immediate danger of death or serious harm or deterioration to the physical or mental health of the person, or of serious loss to his or her property; and / *d'une part, cette personne est en danger de mort immédiat, qu'elle court le risque immédiat de subir une atteinte grave à sa santé physique ou mentale, de voir sa santé physique ou mentale se détériorer grandement ou de subir des pertes matérielles importantes;*

b) the person needs decisions to be made on his or her behalf to prevent that danger / *d'autre part, cette personne a besoin que des décisions soient prises en son nom pour prévenir ce danger ou ce risque.*

4. I am satisfied that it would be in the person's best interests to appoint a committee for him or her / *Je suis convaincu(e) qu'il serait dans l'intérêt véritable de la personne de nommer un curateur à son égard.*

5. I am satisfied that the person's incapacity is not due exclusively to a mental disability as defined in *The Vulnerable Persons Living with a Mental Disability Act* / *Je suis convaincu(e) que l'incapacité de la personne n'est pas uniquement attribuable à une déficience mentale au sens de la* Loi sur les personnes vulnérables ayant une déficience mentale.

I HEREBY MAKE an *Order of Committeeship* for the person named above / *Par conséquent, JE NOMME PAR LES PRÉSENTES le curateur public à titre de curateur à l'égard des biens et des soins personnels de la personne susmentionnée.*

Signed on / *Signé le* _____ _____, at / *à* _____, Manitoba / *au Manitoba.*
(day, month, year / *jour, mois, année*)

_____
(Director of Psychiatric Services / *Directeur des Services psychiatriques*)

MG – 7039 (REV. 11/08)

5. Notice of Application (for Committeeship of Property and Personal Care)

THE KING'S BENCH
BRANDON CENTRE

IN THE MATTER OF: Section 71 of *The Mental Health Act*, S.M. 1998, c.36

AND IN THE MATTER OF: A.B.

BETWEEN:

C.D. and E.F.

applicants,

-and-

A.B.

respondent.

(Application Under Section 71 of *The Mental Health Act*, S.M. 1998, c.36)

NOTICE OF APPLICATION

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicants. The claim made by the applicants appears on the following page.

THIS APPLICATION will come on for a hearing before a judge on the _____ day of _____, 20__ at ____ in the ___noon at the Court House, in the City of Brandon, in Manitoba.

IF YOU WISH TO OPPOSE THIS APPLICATION, you or a Manitoba lawyer acting for you must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer, must serve a copy of the evidence on the applicants' lawyer, or where the applicants do not have a lawyer, serve it on the applicants, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but no later than 4 days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

(date)

_____
Registrar

TO: A.B.
Room 201, Personal Care Home Inc.
4th Avenue, S.W.
Brandon, Manitoba
R8C 2B4

AND TO: The Public Guardian and Trustee of Manitoba
Suite 500 - 155 Carlton Street
Winnipeg, Manitoba
R3C 5R9

APPLICATION

1. The applicants make application:

(a) for an order pursuant to *The Mental Health Act* declaring that the respondent, A.B., is a person who, because of mental incapacity, is incapable of managing both her property and personal care, and therefore needs decisions to be made on her behalf about that property and concerning her personal care;

(b) for an order pursuant to *The Mental Health Act* appointing the applicants to be the committees of both the property and personal care of the respondent;

(c) for an order directing the sale of the respondent's interest in the property legally described as follows:

E 1/2 Lots 63 and 64, Plan 184, B.L.T.O.;

(d) for an order dispensing with service of this application and supporting affidavits upon the respondent;

(e) for an order dispensing with the giving of security by the committees as required by *The Mental Health Act*;

(f) for an order that costs, charges and expenses of and incidental to this application, whether in or out of court, shall be paid out of the estate of the respondent, and

(g) for an order granting to the committees full power to administer and manage both the property and personal care of the respondent, including, in particular, the powers conferred on committees by *The Mental Health Act*.

2. The grounds for the application are:

(a) the applicants are the only children of the respondent, who is a widow;

(b) the respondent is suffering from Alzheimer's disease and as a result thereof, she cannot fully comprehend what is happening and she is unable to look after herself or her business affairs; and

(c) the applicants have received an offer to purchase the above-referenced real property from XYZ Corporation and seek the court's approval on the sale of the property.

3. The following documentary evidence will be used at the hearing of the application:

(a) the affidavit of the applicants;

(b) the affidavit of William George Hamm, consultant in geriatric medicine; and

(c) the affidavit of Bernard David Shaw, physician of the respondent.

(date)

Green & Black
Barristers and Solicitors
123 Any Street
Brandon, Manitoba
R9Q 5B6

Lawyer: Lex Lex
Telephone No: 555-4924
Fax No: 992-l000

6. Affidavit of Applicants

THE KING'S BENCH
BRANDON CENTRE

IN THE MATTER OF: Section 71 of *The Mental Health Act* S.M. 1998, c.36

AND IN THE MATTER OF: A.B.

BETWEEN:

C.D. and E.F.

applicants,

-and-

A.B.

respondent.

AFFIDAVIT OF APPLICANTS

I, C.D., grocery store employee, and I, E.F., office clerk, both of the City of Brandon, in Manitoba, severally make oath and say:

1. That we have personal knowledge of the matters hereinafter deposed to by us.

2. That we are over the age of eighteen years, and are capable of acting as committees.

3. That I, C.D., am 50 years of age and reside at 123 - 4th Street in Brandon, Manitoba.

4. That I, E.F., am 55 years of age and reside at 245 - 6th Street in Brandon, Manitoba.

5. That we are both in good health, graduates of high school and capable of acting as committees.

6. That the respondent, A.B., is our mother. She was born March 16, 1920.

7. That we are the only children of A.B. Her husband, Z.B., who was our father, died on December 9, 1994. There are no other children of hers who have been adopted or who have died.

8. The respondent, A.B., was admitted as a patient to the Personal Care Home Inc. in Brandon, on or about April 9, 20__. She is suffering from Alzheimer's disease. It is expected

that she will remain in the Personal Care Home Inc. or some other facility for the rest of her life.

9. That we find when visiting with her that she cannot fully comprehend what is happening. She also requires assistance from the personal care home staff with all her activities of daily living.

10. That to the best of our knowledge, the respondent never executed an enduring power of attorney or a Health Care Directive.

11. That the main asset of the respondent, A.B., to be dealt with, is some real property, more particularly described as:

E 1/2 Lots 63 and 64, Plan 184, BLTO

12. That attached hereto and marked as Exhibit "A" to this our affidavit is a copy of the certificate of title for the real property.

13. That XYZ Corporation has offered to purchase the real property and attached hereto and marked as Exhibit "B" to this our affidavit is a copy of the offer to purchase.

14. That attached hereto and marked as Exhibits "C" and "D" to this our affidavit are appraisals from AB Real Estate Company and CD Real Estate Company, respectively, dealing with the opinions of those realtors as to the value of the real property.

15. That based on the aforementioned appraisals, we are of the opinion that the price of $___,000.00 offered for the real property is a fair and reasonable price and that the sale of the real property to XYZ Corporation is in the best interests of the respondent.

16. That the other asset of the respondent, A.B., is a bank account at the Bank of Montreal, l0th Street and Rosser Avenue, in the City of Brandon, in Manitoba, which contains approximately $9,500.00.

17. That the respondent's income consists of monthly income from Old Age Pension and Guaranteed Income Supplement totaling $_____.00.

18. That the said Bank of Montreal has not provided us or our lawyer with the balance in the said bank account because the bank states that the information is confidential and that we have no legal right to that information.

19. That in addition to decisions concerning property, decisions are required on the respondent's behalf concerning personal care. The respondent no longer seems able to understand her needs, and does not understand when asked her wishes concerning proposed medical treatment.

20. The respondent requires decisions to be made on her behalf concerning ongoing medical treatment.

21. That we make this affidavit bona fide in support of our application to this Honourable Court to be appointed committees of both the property and the personal care of A.B. and for an order for sale of the aforementioned real property.

SWORN severally before me at the)
)
City of Brandon, in the Province)
)
of Manitoba, this day of)
)
, 20__.)

_____
E.F.

_____
C.D.

_____
A Commissioner for Oaths in and
for the Province of Manitoba.
My Commission Expires:_____

7. Affidavit of Doctor

THE KING'S BENCH
BRANDON CENTRE

IN THE MATTER OF: Section 71 of *The Mental Health Act* S.M. 1998, c.36

AND IN THE MATTER OF: A.B.

BETWEEN:

C.D. and E.F.

applicants,

-and-

A.B.

respondent.

AFFIDAVIT OF DR. WILLIAM GEORGE HAMM

I, WILLIAM GEORGE HAMM, of the City of Brandon, in the Province of Manitoba, consultant in geriatric medicine, make oath and say:

1. That I am a medical doctor duly authorized and licensed to practise medicine in the Province of Manitoba, and in such capacity I have examined the respondent, A.B., since April 20__, and have recently examined her.

2. That based upon my examinations as aforesaid, it is my opinion that the respondent, A.B., is suffering from a primary degenerative dementia which appears to have been present since about 20__ when she had a period of severe post-operative confusion. Mrs. B. is poorly oriented to time but well oriented to place. Her ability to calculate is severely impaired to the point that she becomes anxious and agitated, wanting to stop the tests from proceeding. Her short term memory is impaired and she also has some difficulty in expressing herself and has experienced some language deficiency. It is my impression that Mrs. B. suffers from a primary degenerative dementia, probably of the Alzheimer type, which is likely to deteriorate and to cause further impairment of her intellectual and cognitive functions. I believe that she will be forever incapable of managing her own affairs.

3. I am further of the opinion that A.B. is unable to understand her ongoing need for medical treatment, and is incapable of providing informed consent for same. A.B. requires ongoing treatment for her longstanding condition of diabetes, as well as for maintaining her general health. Decisions are required from time to time on her behalf for such treatment.

4. That in my opinion, the respondent, A.B., is incapable of managing her property and personal care. I would advise that a responsible person or persons be appointed as her committee or committees.

5. That in my opinion, service of notice of these proceedings and any other related documentation on the respondent, A.B., would be impractical and of no merit. It might unduly upset her and, in any event, in my opinion, she would be incapable of understanding the nature of these proceedings.

6. That I make this affidavit *bona fide* in support of an application to have a committee appointed for both the property and personal care of A.B.

SWORN before me at the City of Brandon, in the Province of Manitoba, this day of , 20__.

_____

A Commissioner for Oaths in and for the Province of Manitoba.
My Commission Expires:_____

_____

WILLIAM GEORGE HAMM

8. Affidavit of Doctor

THE KING'S BENCH
BRANDON CENTRE

IN THE MATTER OF: Section 71 of *The Mental Health Act* S.M. 1998, c.36

AND IN THE MATTER OF: A.B.

BETWEEN:

C.D. and E.F.

applicants,

-and-

A.B.

respondent.

AFFIDAVIT OF BERNARD DAVID SHAW

I, BERNARD DAVID SHAW, of the City of Brandon, in the Province of Manitoba, medical doctor, make oath and say:

1. That I am a medical doctor duly authorized and licensed to practise medicine in the Province of Manitoba, and in such capacity I have examined the respondent, A.B., on several occasions.

2. That based upon my examinations, it is my opinion that the respondent, A.B., exhibits paranoid behaviour associated with Alzheimer's disease and depression. In my opinion, she has no capacity to understand her business affairs because of forgetfulness, confusion, disorientation and inaccurate judgments. I believe that she will be forever incapable of managing her property.

3. It is also my opinion that A.B. no longer understands her medical condition, or her need for ongoing medical treatment. I do not believe she is capable of giving informed consent to medical treatment.

4. That the above opinion is based upon my examination of A.B. on several occasions since April 9, 20__, when she was admitted to Personal Care Home Inc.

5. That in my opinion, the respondent, A.B., is incapable of managing both her property and her personal care. Accordingly, I would advise that a reasonable person or persons be appointed as her committee or committees.

6. That in my opinion, service of notice of these proceedings and any other related documentation on the respondent, A.B., would be impractical and of no merit. It might duly upset her and, in any event, in my opinion, she would be incapable of understanding the nature of these proceedings.

7. That I make this affidavit *bona fide* in support of an application to have committees appointed for both the property and personal care of A.B.

SWORN before me at the City of Brandon, in the Province of Manitoba, this day of , 20__.

_____

A Commissioner for Oaths in and for the Province of Manitoba.
My Commission Expires:_____

_____

BERNARD DAVID SHAW

9. Order Appointing Committees of Property and Personal Care

THE KING'S BENCH
BRANDON CENTRE

THE HONOURABLE)
) Tuesday, the day of , 20__.
MR. JUSTICE)

IN THE MATTER OF: Section 71 of *The Mental Health Act* S.M. 1998, c.36

AND IN THE MATTER OF: A.B.

BETWEEN:

C.D. and E.F.

applicants,

-and-

A.B.

respondent.

ORDER APPOINTING COMMITTEES OF BOTH PROPERTY AND PERSONAL CARE

THIS APPLICATION made by C.D. and E.F. for an order declaring that A.B., the respondent, is incapable of managing her property and personal care as a result of mental incapacity and for an order, *inter alia,* appointing the said C.D. and E.F. as the committees of both the property and personal care of the respondent, without notice to the respondent, was heard this day at the Court House, in the City of Brandon, in Manitoba.

ON READING the joint affidavit of C.D. and E.F., and the affidavits of William George Hamm and Bernard David Shaw, and on hearing the submissions of counsel for the said C.D. and E.F.:

1. THIS COURT DECLARES that A.B., by reason of mental incapacity, is incapable of managing her property and personal care and requires decisions to be made on her behalf about that property and concerning her personal care.

2. THIS COURT ORDERS that C.D. and E.F. be and are hereby appointed committees of both the property and personal care of A.B., without security.

3. THIS COURT ORDERS that the committees immediately take custody or control of all property that is owned by the respondent, or property to which the respondent is entitled to possession of, and that the said committees immediately collect in and receive all debts owed to the respondent, and for these purposes all such property and debts are vested in the committees.

4. THIS COURT ORDERS that the committees may exercise, in addition to the powers provided under sections 80 and 90 of the Act, the following power under section 81 of the Act:

a) To sell A.B.'s interest in the property legally described as follows:

E1/2 Lots 63 & 64, Plan 184, B.L.T.O.

to XYZ Corporation upon the terms and conditions of the offer to purchase real estate from XYZ Corporation and dated September 1, 20__.

5. THIS COURT ORDERS that the committees shall, within one month from the date of signing of this Order, file a duly verified true inventory in the terms and in the form prescribed under Rule 72.03 of the rules of this court, for approval by the Master.

6. THIS COURT ORDERS that the committees shall, within one year from the date of signing this Order, make a true and just account before the Master and thereafter make a like accounting no later than the 60th day following each anniversary date of the signing of this Order; and the Master is authorized to fix costs of the passing of accounts, the compensation, if any, to be paid to the committees and the legal fees, if any, to be paid to the lawyer acting on behalf of the committee, and for such purposes the accounts are by this order referred to the Master.

7. THIS COURT ORDERS that service on the respondent of a copy of the Notice of Application, the supporting material, and a true copy of this Order be dispensed with.

8. THIS COURT ORDERS that service of a true copy of this Order be made on the Public Guardian and Trustee within 30 days from the date of signing of this Order.

SIGNED the day of , 20__.

_____

Judge or (Registrar)

Note: See Forms 72A and 72A.1 of The King's Bench Rules.

10. Enduring General Power of Attorney

I, _____ of _____
(full name) (full address)

_____
(town/city) (postal code)

DO HEREBY appoint _____
or if (s)he should predecease me, or be unwilling or unable to act or continue to act, then I DO HEREBY appoint _____
to be my true and lawful attorney for me and in my name, place and stead and for my sole use and benefit to exercise any or all of the following powers in addition to all powers otherwise conferred by any law:

If I have named two or more persons to act as my attorneys I direct that:

(a) my attorneys shall act jointly

(delete inapplicable portion)

or

(b) any one attorney may act alone

or

(c) a majority of my attorneys may act.

If one of the named persons should predecease me, then the remaining person or persons so named may act or continue to act alone (or as the case may be) and exercise all of the powers granted herein.

1.00 <u>POWER TO CONDUCT ALL BANKING MATTERS</u>

1.01 To sign, draw, make, accept, endorse my name, negotiate, issue, discount, pledge, renew, retire, transfer, pay, satisfy, or otherwise deal with cheques, promissory notes, bills of exchange, drafts, orders for payment or delivery of money, bonds, debentures, shares and every kind of security, whether negotiable or not, including goods, warehouse receipts, bills of lading, security under the *Bank Act*, negotiable or mercantile instruments or securities or written promises to give such warehouse receipts, bills of lading or security under the *Bank Act* and to receive and dispose of the proceeds thereof.

_____ _____
Initials of Witness Initials of Person Signing Enduring General Power of Attorney

1.02 To sign notices of intention to give security under the *Bank Act*; to open and or operate a bank account with any bank or other financial institution or other lender, and from time to time to draw on the account of the undersigned with the said bank or other financial institution and to overdraw the same and generally for and in the name of the undersigned to transact with any such bank or financial institution, any business matter or thing the said attorney may think fit including the right to receive all paid cheques and vouchers and to sign the bank's form of settlement of balances, release and verification.

1.03 In my name to draw upon any bank or banks, individual or individuals for any sum or sums of money that is or are or may be to my credit or which I may be entitled to receive, and to deposit same In any bank or other place and again at pleasure to withdraw from time to time as I could do.

2.00 POWER TO ENTER SAFETY DEPOSIT BOXES

2.01 From time to time to enter into any safe deposit box or vault and to take the contents therefrom or place additional items therein or otherwise deal with the contents thereof in such manner as my attorney deems advisable.

3.00 GENERAL POWER OF SALE

3.01 To sell, call in and convert into money any part of my real or personal property not consisting of money at such time or times, in such manner and upon such terms and either for cash or credit, or for part cash and part credit as my said attorney may with his uncontrolled discretion decide.

4.00 POWER TO MANAGE, LEASE, OR SUBDIVIDE PROPERTY

4.01 To take possession of and to lease, manage, improve or exchange any of my property, real or personal and from time to time to appoint any agents or servants to assist in managing the same and to displace or remove such agents or servants and appoint others using therein the same power and discretion as I might do.

4.02 To grant options, grant surrenders of lease and grant releases, discharges, or consents of any kind dealing with such property, and to subdivide such property and sign subdivision plans and to dedicate lands for public purposes in connection with such subdivision.

Initials of Witness

Initials of Person Signing Enduring General Power of Attorney

5.00 POWER TO BORROW MONEY AND GIVE SECURITY

5.01 To charge, mortgage, hypothecate or pledge all or any of my real or personal property,

5.02 To borrow money, either upon the security of all or any of my assets or without security, in such manner, on such terms and conditions, for such length of time and for such purposes connected with my affairs and in favour of or from any bank or financial institution or such other person or persons including any relative of mine, as my attorney with his uncontrolled discretion may think advisable and in my best interests.

6.00 POWER TO EXECUTE SPECIFIC DOCUMENTS

6.01 To execute and deliver all consents, releases, elections, acknowledgments, documents, forms or instruments, under or pursuant to or permitted under the provisions of:

(a) *The Real Property Act*
The Registry Act
The Homesteads Act
The Personal Property Security Act
The Provincial Park Lands Act

all of the Province of Manitoba.

(b) the *Bank Act* (Canada)

(c) any similar legislation in any other jurisdiction.

and on my behalf to give evidence by way of affidavit, statutory declaration or otherwise concerning any matters and in any form required or permitted under any of the above mentioned Acts or other similar legislation.

6.02 Notwithstanding the generality of this enduring power of attorney and in particular the appointment of _____ as my attorney generally, I appoint _____ to be my attorney to execute and deliver all consents, releases, elections, acknowledgements, documents, forms or instruments, under or pursuant to or permitted under the provisions of *The Homesteads Act*, including a transfer or conveyance of any interest in my marital home or homestead from time to time.

_____ _____

Initials of Witness

Initials of Person Signing Enduring General Power of Attorney

OR

With respect to any and all dispositions affecting my homestead, as that term is defined in *The Homesteads Act* (Manitoba), I appoint and authorise , acting alone, **or** and , acting jointly, to execute any and all consents, releases or documents required or permitted under *The Homesteads Act* (Manitoba) and amendments thereto, to give on my behalf evidence, by way of affidavit, statutory declaration or otherwise concerning any matters and in any form required or permitted under *The Homesteads Act* (Manitoba) and amendments thereto and to execute any and all dispositions of my homestead, where I have an estate or interest in that property which estate or interest is in addition to the rights that I have in the property by operation of *The Homesteads Act* (Manitoba) and amendments thereto. If is unable or unwilling to act as my attorney for the purposes as described in this paragraph then shall act in their place with the same powers and authority as described in this paragraph. Where joint appointments add: If either or are unable or unwilling to act as my attorney for the purposes as described in this paragraph then the other shall act alone.

7.00 POWER TO INSTITUTE PROCEEDINGS

7.01 To commence, institute and prosecute all actions, suits and mortgage sale, foreclosure or other proceeding which may be necessary or expedient, from time to time and to recover and receive from all persons whomsoever, and to give effectual discharges for all sums of money, securities for money, debts, legacies, goods, chattels, effects and things whatsoever, which now are or is, or which shall or may hereafter appear to be due, owing, payable or belonging to me, including without limiting the generality of the foregoing the following:

(a) rent or arrears of rent in respect of my real or personal estate and in this connection to take and use all lawful means for recovering the said rents and for ejecting from any of my property all tenants and occupants thereof who are in default and for determining the tenancy or occupancy thereof, and for obtaining, recovering and retaining possession of all or any of the property held or occupied by such person so making default

(b) principal money and interest now or hereafter to become payable to, upon or in respect of any mortgage or other security, or for interest or dividends now payable or to accrue or become payable to me for or in respect of any shares, stocks or interest which I may now or hereafter hold in any joint stock or incorporated company or companies

(c) any money or securities for money which are now or hereafter may be due or owing or belonging to me upon any bond, note, bill of exchange, balance of current account, consignment, contract, decree, judgment, order or execution

(d) any other account.

8.00 POWER TO GIVE RECEIPTS AND DISCHARGES

8.01 To receive and to sign and give receipts and effectual discharges for all or any sum or sums of money which may become due and payable to me, which receipts whether given in my name or that of my attorney shall exempt the person or persons paying such sum or sums of money from all responsibility of seeing to the application thereof.

Initials of Witness	Initials of Person Signing Enduring General Power of Attorney

9.00 POWER TO RELEASE EQUITY OF REDEMPTION

9.01 To release my equity of redemption in any real or personal property which I now own or which may hereafter be acquired by me on such terms and subject to such conditions as my said attorney or attorneys deem expedient and for that purpose to execute and deliver any and all agreements, deeds, assurances, transfers, bills of sale or other documents as shall be requisite.

10.00 POWER TO SETTLE ACCOUNTS

10.01 To examine, state, settle, liquidate and adjust all or any account or accounts, between myself and any person or person whomsoever.

11.00 TO COMPROMISE CLAIMS AND REFER DIFFERENCES OR DISPUTES TO ARBITRATION

11.01 In the case of any difference or dispute with any person or persons concerning any of the matters aforesaid, to submit any such differences and disputes to arbitration in such a manner as my said attorney or attorneys may see fit; and to compound, compromise and accept part in satisfaction of the payment of the whole of any debts or sums of money payable to me or to grant an extension of time for the payment of the same, either with or without taking security or otherwise to act in respect of the same as to my said attorney or attorneys shall appear most expedient, and to execute and deliver such agreements and to do all lawful acts necessary to effect the premises.

12.00 CORPORATE INVESTMENTS

12.01 To subscribe for, accept, purchase, sell, transfer, surrender and in every way deal with shares, stocks, bonds, debentures and securities of every kind and description on such terms and conditions as the said attorney may approve.

12.02 To vote or grant proxies to vote or act in respect thereof at meetings of shareholders, creditors or others whatever may be the purpose or object of such meetings, and to waive notice and consent to any meetings of directors or shareholders of any company or corporation and to sign any resolution of shareholders on which I would be entitled to vote at a meeting of shareholders.

Initials of Witness

Initials of Person Signing Enduring General Power of Attorney

13.00 POWER TO INVEST

13.01 To retain, invest or reinvest any cash funds or property, real or personal, constituting the whole or any part of my assets in any investments without being restricted by any law relating to investments for trust funds or otherwise, and to alter, vary and transpose investments from time to time. I hereby confirm that my attorney may delegate any or all of the investment powers contained herein, with the intent that any or all of my assets may be entrusted to an investment counsellor or investment manager as my attorney, using his sole discretion, may select.

14.00 INSURANCE, ANNUITIES, PENSIONS

14.01 To apply for and to receive for me and on my behalf any insurance, annuity or pension plan proceeds, benefits or payments whatsoever to which I am or may become entitled, including but not limited to life insurance proceeds, prepaid premium and premium on deposit, annuity payments, registered retirement savings plan payments, registered retirement income plan payments, health insurance payments, property or casualty insurance proceeds, pension plan payments or death benefit payments.

15.00 POWER TO GIVE GUARANTEES

15.01 To raise and assist in raising money for and to aid by way of bonus, loan, promise, endorsement, guarantee of securities or otherwise any person, firm or company and to guarantee the performance of contracts by any such person, firm or corporation.

16.00 POWER TO CARRY ON BUSINESS

16.01 Without being liable for any loss occasioned thereby to enter into or continue any business or businesses, whether or not owned by me, or by any corporation or corporations, including any business which I may own or in which I may be interested or which I may control at the date hereof, either alone or in partnership or association with any person or persons, for such length of time as my attorney shall determine to be in my best interests; provided that my attorney shall be indemnified out of my assets for any loss, liability, costs or expenses suffered or incurred by reason of carrying on such business or businesses.

Initials of Witness

Initials of Person Signing Enduring General Power of Attorney

17.00 POWER TO EMPLOY AGENT

17.01 Instead of acting personally, from time to time and at any time or times to employ and to pay an agent whether a solicitor, banker, stock broker, trust company or other person in the Province of Manitoba or in any other jurisdiction in which any of my assets are situated, to transact any business or do any act required to be transacted or done, to keep all or any accounts pertaining to my assets, to maintain books of account, to receive and disburse monies, and to perform any clerical duties in connection with all or part of my assets in accordance with the instructions of my attorney and otherwise to manage all or part of my assets in the manner authorized and directed by my attorney, and my attorney may terminate or revoke any such agency at any time, and for the purposes hereinbefore mentioned my attorney may pay to any such agent so employed such remuneration, including all charges and expenses so incurred, as my attorney shall consider appropriate, and my attorney shall not be responsible for the default of any such agent if employed in good faith.

18.00 POWER TO ARRANGE ACCOMMODATION

18.01 From time to time, to arrange for my personal care and accommodation in any house, apartment, hospital, nursing home, guest home or personal care facility, and to sign any application, lease or other contract or agreement for this purpose and to make all payments pursuant thereto from time to time as may be required.

18.02 If I am living in a hospital, personal care home or similar facility and there is no reasonable prospect that I will return to live in my own home, my attorney is authorized to distribute those of my personal effects that I no longer require, in accordance with any instructions contained in my last will and testament or any memorandum prepared by me, or failing applicable direction by me, as my attorney, using discretion, sees fit.

19.00 POWER TO MAKE GIFTS

19.01 I authorize my attorney to make gifts on my behalf to individuals and/or charities at such times and in such amounts as are consistent with my gift-giving in the three years immediately preceding my incapacity.

Initials of Witness

Initials of Person Signing Enduring General Power of Attorney

20.00 INCOME TAX

20.01 To deal with all matters concerning my Income Tax and I hereby authorize Revenue Canada to release any and all information with respect to my personal Income Tax to my attorney upon request by my said attorney.

21.00 RENUNCIATIONS

21.01 And to renounce all my right and entitlement to the probate and execution of any will or testamentary document of any kind in which I may be named as Executor or Executrix and to renounce all my right and title to Letters of Administration of the property of any deceased individual for whose estate I may be entitled to apply for administration, and to renounce all my right and title to be appointed as Committee of the property of any individual for whose estate I may be entitled to apply for appointment as Committee.

22.00 POWER TO APPOINT A SUBSTITUTE OR SUBSTITUTES

22.01 To appoint a substitute attorney or attorneys with the same or more limited powers as are set out herein and, at pleasure, to revoke any or all powers given to such substitute or substitutes. I hereby ratify and confirm and agree to ratify and confirm and allow all that my said attorney or such substitute or substitutes shall lawfully do or cause to be done; including in such confirmation whatsoever shall be done between the time of my decease or of the revocation of these presents, and the time of such decease or revocation being known to my said attorney or attorneys, or such substitutes.

23.00 GENERAL POWER

23.01 To act generally as my attorney in relation to the premises and all other matters in which I am interested or concerned, and on my behalf to execute all documents and do all lawful acts, which in the opinion of my attorney may be necessary or desirable. I hereby declare that my attorney or attorneys shall have all the powers in regard to my property as if my attorney or attorneys were the owner thereof and otherwise. I hereby authorize my said attorney or attorneys to do on my behalf anything I can lawfully do by an attorney. The specification of the particular powers in this Enduring General Power of Attorney shall not diminish or affect the generality of the powers conferred by this paragraph.

_____ _____

Initials of Witness

Initials of Person Signing Enduring General Power of Attorney

24.00 POWER TO BE REIMBURSED OR TO MAKE REASONABLE CHARGES

24.01 From time to time, to be reimbursed for disbursements incurred on my behalf, from my bank account or other assets.

24.02 I authorize my attorney to be paid reasonably and fairly for services performed on my behalf as my attorney, from my bank account or other assets.

24.03 I direct my attorney to provide an accounting of all fees and disbursements paid to my attorney under this Paragraph 24.00, and of all other dealings with my assets to _____ who shall be the "recipient", as that term is defined under *The Powers of Attorney Act*, for all purposes. If _____ is not living or is not able to act as recipient, then _____ is to be the recipient instead. My attorney shall provide the accounting as often as the recipient from time to time may reasonably require, but not more often than once in any twelve month period.

25.00 REVOCATION OF PREVIOUS POWERS OF ATTORNEY

25.01 I do hereby expressly revoke any power of attorney previously given by me.

26.00 MENTAL INFIRMITY

26.01 I declare that the authority in this Enduring General Power of Attorney given to my attorney is to remain in full force and effect, notwithstanding any future or periodic mental infirmity or incompetency on my part, until expressly revoked by me.

27.00 POWER TO CONTINUE UNTIL NOTICE

27.01 Any bank, financial institution or other person or persons may continue to deal with my said attorney until notice of revocation hereof has been given by me in writing to such bank, financial institution or other person or persons.

28.00 RATIFICATION OF ATTORNEY'S ACTS

28.01 Until notice of revocation as referred to above has been given, all that my said attorney(s) shall do or purport to do by virtue hereof is fully ratified and confirmed.

_____	_____
Initials of Witness	Initials of Person Signing Enduring General Power of Attorney

29.00 SINGULAR AND MASCULINE

29.01 Where the singular number and masculine gender are used throughout this instrument with reference either to the undersigned or to my attorney or attorneys herein named, the same shall be construed as meaning the plural or feminine or neuter where the context requires.

30.00 PARAGRAPH HEADINGS

30.01 The paragraph headings in this Enduring General Power of Attorney have been inserted for convenience only and are deemed not to form part of this Enduring General Power of Attorney.

SIGNED AND SEALED at Winnipeg, Manitoba, this _____ day of _____, 2___.

_____ _____ (seal)
Witness

_____

_____
Specimen Signature(s) of Attorney(s)

THE HOMESTEADS ACT

ACKNOWLEDGEMENT BY SPOUSE OR COMMON-LAW PARTNER
FOR
POWER OF ATTORNEY

I, _____, the donor named in the attached Power of Attorney appointing _____ as my attorney, acknowledge that:

1. I am executing this Power of Attorney freely and voluntarily without any compulsion on the part of my spouse or common-law partner.

2. I am aware of the nature and effect of this Power of Attorney.

3. I am executing this acknowledgment apart from my spouse or common-law partner.

(Name of Spouse/ Common-law Partner)	(Signature of Spouse/ Common-law Partner)	(Date)

(Name of Witness)	(Signature of Witness)	(Date)

A _____
in and for the Province of Manitoba.

CANADA)
)
PROVINCE OF MANITOBA)
)
TO WIT:)
)
)

I, _____
(full name of witness)
of _____
(address)
_____
(town/city) (postal code)

make oath and say as follows:

1. THAT I know _____of_____.

2. THAT I was personally present and did see _____ named in the within Enduring General Power of Attorney, who is personally known to me to be the person named therein, duly sign and execute the same for the purposes named therein. In my opinion _____ was of sound mind, memory and understanding at the time of the execution of the said Enduring General Power of Attorney.

3. THAT the same was executed by the said _____ in my presence, whereupon I did, in the presence of the said _____ attest and subscribe the said Enduring General Power of Attorney as witness.

(If the person signing the Enduring General Power of Attorney is a marksman or blind, complete the following paragraph.)

4. THAT previously to the execution of the said Enduring General Power of Attorney by the said _____, it was read over to him/her by me and the said _____ at that time had knowledge of its contents and appeared perfectly to understand it.

5. THAT I am a lawyer entitled to practise in the Province of Manitoba.

SWORN before me at the)
_____ of _____)
in the Province of Manitoba)
this _____ day of _____)
20__.)
)

_____

A _____
in and for the Province of Manitoba.

11. Plain Language Simple Enduring General Power of Attorney

Dated:_____

Mary Smith

TO

John Smith

ENDURING POWER OF ATTORNEY

POWER OF ATTORNEY

I, Mary Smith, of the City of Winnipeg, in the Province of Manitoba, appoint my brother, John Smith, to be my attorney for my sole benefit. I grant my attorney the following powers:

1. Gather in Assets

- Gather in all my money and financial assets (funds).
- Set up an account for my funds at The Fabulous Bank of Canada.
- Deposit my funds in my bank account.

2. Financial Transactions

- Conduct all my financial transactions on my behalf using my funds including paying my bills, taxes and satisfying any other of my financial obligations.

3. Application for Pensions, Benefits, etc.

- Apply for and secure for me any pensions, benefits or sources of income which I have a right to receive, and deposit them in my account.

4. Banking

- Conduct all banking transactions on my behalf for accounts owned by me except as set out below.

  _____

  _____

- Withdraw and deposit money from any bank and provide whatever appropriate discharge that may be required.

5. Safety Deposit Boxes

- Open my safety deposit box and have access to examine, deposit, remove and replace all contents of any safety deposit box in which I have an interest.
- Maintain or cancel the contract for rental of my safety deposit box.

6. Real Estate

As my attorney sees fit:

- Take possession of and lease, sell, manage and improve my real estate; and
- Mortgage or raise money on my real estate and repay the same; and
- Purchase and sell mortgages, use mortgages as security for any debt, and fully or partly discharge those mortgages; and
- appoint or remove any agents to assist my attorney in the above functions.

7. Sale of Property

As my attorney sees fit:

- Sell my real and personal property in whole or in part by public auction or private contract for amounts of money my attorney finds reasonable; and
- Transfer the property to a purchaser and allow the purchase price to be paid in whole or in part with the remaining balance to remain unpaid for whatever time and on whatever security as my attorney thinks proper.

8. Satisfaction of Debts

- Enter into any agreement or arrangement with any person to whom I am indebted to satisfy some or all of the debt.

9. Collection of Debts

- Demand from any person all sums of money, property and things which are owing to me presently or in the future for whatever reason.

10. Securities

- Conduct transactions in securities of any description by purchase or sale or in any other way.
- Vote and act in respect of securities and receive and grant receipts for all dividends due or which may later become due or otherwise payable to me.
- To attend and vote on my behalf at meetings of holders of securities.

11. Investment of Money

- Invest any of my money in (*name types of investments*) or any other type of security, in a manner and at a rate of interest and on security as my attorney sees fit.
- Vary my investments in whole or in part.

12. Homesteads Act

- With respect to any matters required or permitted under *The Homesteads Act* or related amendments, execute any consents, releases or other forms or documents and, on my behalf, give evidence by affidavit, statutory declaration or otherwise.

OR

- With respect to any and all dispositions affecting my homestead, as that term is defined in *The Homesteads Act* (Manitoba), I appoint and authorise , acting alone, **or** and , acting jointly, to execute any and all consents, releases or documents required or permitted under *The Homesteads Act* (Manitoba) and

amendments thereto, to give on my behalf evidence, by way of affidavit, statutory declaration or otherwise concerning any matters and in any form required or permitted under *The Homesteads Act* (Manitoba) and amendments thereto and to execute any and all dispositions of my homestead, where I have an estate or interest in that property which estate or interest is in addition to the rights that I have in the property by operation of *The Homesteads Act* (Manitoba) and amendments thereto. If is unable or unwilling to act as my attorney for the purposes as described in this paragraph then shall act in their place with the same powers and authority as described in this paragraph. Where joint appointments add: If either or are unable or unwilling to act as my attorney for the purposes as described in this paragraph then the other shall act alone.

13. Dispute Resolution

As my attorney sees fit:

- In case of a dispute with any person concerning any of the above matters, submit the dispute to mediation or arbitration.
- Settle any dispute by mediation.
- Accept and implement the decision of an arbitrator on my behalf.

14. Legal Action

- Initiate or respond to any proceeding in law or equity as my attorney sees fit.

15. Signing of Documents

- Sign all documents, assurances, deeds, covenants and things as are required and as my attorney sees fit for any of the above purposes; and
- Sign and give receipts and discharges for any sums of money which my attorney receives by virtue of the powers in this document.

16. General Provisions

I understand that the following general provisions apply to this Power of Attorney:

A. Compensation for Acting as Attorney

I authorize my attorney to charge fees for acting as my attorney. These fees shall be calculated as follows: (*i.e. fixed amount, amount based on time spent, percentage of income and/or assets etc.)*

B. Authority to endure any future Mental Incompetency

The authority of my attorney shall remain valid in the event that I become mentally incompetent in the future.

C. Accounting by Attorney

I direct my attorney to provide an accounting in writing of his management of my affairs to my nephew, Joe Bloggs of 123-4th Street, Winnipeg, Manitoba, upon demand by Joe Bloggs. The accounting shall contain a list of assets, liabilities, income, and expenses for the period of the accounting. *(or include whatever else the donor wants the accounting to contain.)*

D. Former Powers of Attorney Revoked

By this document I revoke any other Power of Attorney or delegation of authority previously given by me to anyone.

E. Power of Attorney Revokable

I understand that at any time while I remain mentally competent, I may revoke this Power of Attorney to John Smith by notifying John Smith in writing.

F. Ratification

I direct my heirs, executors and administrators to ratify whatever my attorney does or causes to be done by virtue of this document, including whatever is done subsequent to my death or the revocation of this document, prior to my attorney or my attorney's substitutes becoming aware of my death or revocation.

G. Number and Gender

Wherever used in this document, the word "person" includes company, corporation, partnership, firm or association. This document is to be read with all changes of number and gender as required by the context.

DATED the _____ day of _____. 2____.

_____ _____

Witness Donor

C A N A D A	)	I, Jean Brown,
	)	
PROVINCE OF MANITOBA	)	of the City of Winnipeg,
	)	
TO WIT:	)	in the Province of Manitoba,

MAKE OATH AND SAY AS FOLLOWS:

1. I am a NOTARY PUBLIC in and for the Province of Manitoba.

2. THAT I was personally present and did see Mary Smith, named in the attached Power of Attorney, who is personally known to me, sign the Power of Attorney.

3. THAT the attached Power of Attorney was signed at the City of Winnipeg, in the Province of Manitoba, on the _____ day of _____, 2____, and that I am the subscribing witness to it.

4. THAT I know Mary Smith, and she is in my belief 18 years of age or more.

5. THAT the attached Power of Attorney was read over to Mary Smith by me, and in my presence, and she seemed to thoroughly understand it.

SWORN BEFORE ME at the City)
of Winnipeg, in the Province of Manitoba,)
this _____ day of _____, 2____) _____
)

_____
A Commissioner for Oaths in and for
the Province of Manitoba.
My commission expires:_____

12. Limited Power of Attorney (Blank)

Know All Men by These Presents THAT

DO HEREBY make, nominate, constitute and appoint

true and lawful Attorney for and in name, place and stead

and for sale use and benefit to

And for all and every of the purposes aforesaid Do Hereby Grant and Give unto said Attorney full and absolute power and authority to do and execute all acts, deeds, matters and things necessary to be done in and about the premises, and also to commence, institute and prosecute all actions, suits and other proceedings which may be necessary or expedient in and about the premises as fully and effectually to all intents and purposes as could do if personally present and acting therein and also with full power and authority for said attorney to appoint a substitute or substitutes and such substitution at pleasure to revoke hereby ratifying and confirming and agreeing to ratify and confirm and allow all and whatsoever said Attorney or such substitute or substitutes shall lawfully do or cause to be done in the premises by virtue hereof

And I do hereby expressly provide that the authority of my said attorney shall not terminate but shall continue notwithstanding any mental infirmity which I may suffer.

IN WITNESS WHEREOF have hereunto set hand and seal this day of , .

SIGNED, SEALED AND DELIVERED)
)
) _____
)
_____)

(Note: Don't use the word "Seal" unless a seal is used on the power of attorney. See the comments above in paragraph E.6 titled "Signing Under Seal".)

CANADA	)	I, _____
PROVINCE OF _____	)	of the _____ of _____
TO WIT:	)	in the Province of _____

MAKE OATH AND SAY:

1. THAT I was personally present and did see _____ named in the within instrument who _____ personally known to me to be the person named therein, duly sign, seal and execute the same for the purposes named therein.

2. THAT the same was executed at the _____ of _____ in the Province of _____, and that I am a subscribing witness thereto.

3. THAT I know the said _____ and _____ in my belief is of the full age of eighteen years.

SWORN before me at the _____	)	
of _____, in the Province of	)	
_____, this _____ day of	)	
_____, 20____.	)	_____
	)	
	)	

A _____
In and for the Province of Manitoba

13. Limited Power of Attorney (Precedent)

Know All Men by These Presents THAT

RHONDA MAUREEN SMITH, of the City of Brandon, in Manitoba, Physician

DO HEREBY make, nominate, constitute and appoint

BARBARA JANE JONES, of the City of Brandon, in Manitoba, Architect

true and lawful Attorney for me and in my name, place and stead

and for sole use and benefit to

> acquire two thousand (2,000) class "A" Preferred Shares of Northern Mining & Development Corporation for an aggregate consideration of two thousand ($2,000.00) dollars, provided that, in any event, this power of attorney shall terminate and expire upon completion of the said acquisition or at midnight on the thirtieth (30th) day of January, A.D. 20__, whichever is the earlier.

And for all and every of the purposes aforesaid Do Hereby Grant and Give unto my said Attorney full and absolute power and authority to do and execute all acts, deeds, matters and things necessary to be done in and about the premises, and also to commence, institute and prosecute all actions, suits and other proceedings which may be necessary or expedient in and about the premises as fully and effectually to all intents and purposes as I, myself could do if personally present and acting therein and also with full power and authority for my said attorney to appoint a substitute or substitutes and such substitution at pleasure to revoke I hereby ratifying and confirming and agreeing to ratify and confirm and allow all and whatsoever my said Attorney or such substitute or substitutes shall lawfully do or cause to be done in the premises by virtue hereof

And I do hereby expressly provide that the authority or my said attorney shall not terminate but shall continue notwithstanding any mental infirmity which I may suffer.

IN WITNESS WHEREOF I have hereunto set my hand and seal this tenth day of January, ____

SIGNED, SEALED AND DELIVERED)
)
"Jane M. Doe")
)

"Rhonda Maureen Smith"
Rhonda Maureen Smith (seal)

CANADA	)	I, JANE MARIE DOE,
PROVINCE OF MANITOBA	)	of the City of Brandon,
TO WIT:	)	in the Province of Manitoba, Barrister-at-Law

MAKE OATH AND SAY:

1. THAT I was personally present and did see RHONDA MAUREEN SMITH named in the within instrument who is personally known to me to be the person named therein, duly sign, seal and execute the same for the purposes named therein.

2. THAT the same was executed at the City of Brandon, in the Province of Manitoba, and that I am a subscribing witness thereto.

3. THAT I know the said RHONDA MAUREEN SMITH and she is in my belief is of the full age of eighteen years.

SWORN before me at the City of Brandon, in the Province of Manitoba, this 10th day of January, 20__.

"Jane Marie Doe"

"John Law"
A Notary Public in and for the Province of Manitoba
(seal)

14. Alternative Short Form - General Power of Attorney (Blank)

GENERAL POWER OF ATTORNEY

I, _____ of _____, (occupation), appoint _____ of _____ (and/or) _____ of _____, jointly (and/or severally) to be my attorney(s) to do on my behalf anything I can lawfully do by an attorney.

The authority given herein to my attorney(s) shall include the power to execute, on my behalf, any and all consents, releases or other forms or documents required or permitted under The Homesteads Act of the Province of Manitoba and amendments thereto, and to give evidence on my behalf by way of affidavit, statutory declaration or otherwise concerning any matters and in any form required or permitted under The Homesteads Act of Manitoba and amendments thereto, or any other legislation whatsoever.

OR

The authority given herein to my attorney(s) shall, with respect to any and all dispositions affecting my homestead, as that term is defined in *The Homesteads Act* (Manitoba), include the power to execute, on my behalf any and all consents, releases or documents required or permitted under *The Homesteads Act* (Manitoba) and amendments thereto, to give on my behalf evidence, by way of affidavit, statutory declaration or otherwise concerning any matters and in any form required or permitted under *The Homesteads Act* (Manitoba) and amendments thereto and to execute any and all dispositions of my homestead, where I have an estate or interest in that property which estate or interest is in addition to the rights that I have in the property by operation of *The Homesteads Act* (Manitoba) and amendments thereto.

IN WITNESS WHEREOF I have sat my hand and seal this day of 20__.

SIGNED. SEALED AND DELIVERED)
in the presence of)
_____) _____
(Donor)

ACKNOWLEDGEMENT BY SPOUSE OR COMMON-LAW PARTNER
FOR
POWER OF ATTORNEY

I, _____, the donor named in the attached Power of Attorney appointing _____ as my attorney, acknowledge that:

1. I am executing this Power of Attorney freely and voluntarily without any compulsion on the part of my spouse or common-law partner.

2. I am aware of the nature and effect of this Power of Attorney.

3. I am executing this acknowledgment apart from my spouse or common-law partner.

(Name of Spouse/ Common-law Partner)	(Signature of Spouse/ Common-law Partner)	(Date)

(Name of Witness)	(Signature of Witness)	(Date)

A _____
in and for the Province of Manitoba.

AFFIDAVIT OF EXECUTION

I, _____ of _____ (occupation), make oath and say that:

1. I was personally present and did see the within power of attorney and acknowledgment duly signed, sealed executed by the donor of the power at the _____ of _____, in the _____ of _____, on the _____ day of _____, 20__.

2. I know the donor and (he/she) is in my belief eighteen (18) years of age or more.

3. I am a subscribing witness to the power of attorney.

SWORN before me at the)
of , in the)
of , this)
day of ,20__.)

_____

_____

A Commissioner for Oaths in and for
the Province of
My Commission expires:

15. General Power of Attorney - Springing

GENERAL POWER OF ATTORNEY - SPRINGING*

I, _____ (NAME OF GRANTOR), of the City of Winnipeg, in Manitoba, DO HEREBY appoint my _____ (relationship),

_____
(NAME OF ATTORNEY)

to be my true and lawful attorney for me and in my name, place and stead and for my sole use and benefit to exercise any or all of the following powers in addition to all powers otherwise conferred by any law; **PROVIDED** that the authority granted to my attorney herein shall not take effect until such time as two (2) physicians licensed to practice in Manitoba, at least one of whom shall have treated me as a patient for a period of at least one year, certify that I lack the mental competency to manage my own affairs.

If my attorney dies, declines to act or becomes incapable of acting as my attorney, I appoint my _____, _____, of the _____ of _____, in _____, to be my attorney in place of my _____, _____, with power to exercise all of the powers and authority conferred on my attorney, in as full and ample a manner in all respects as if the name of the substituted attorney had been inserted herein instead of my attorney.

Alternative wording for a springing power of attorney is as follows:

I intend this to be a springing Power of Attorney. The authority of my Attorney herein shall take effect on the occurrence of either of the following events described in the subparagraphs following titled "Medical Certification" and "Self Declaration" and shall continue to have effect thereafter notwithstanding my mental incapacity or mental infirmity which may continue or occur after the occurrence of either of the stated events:

Medical Certification - At such time as two medical practitioners, duly qualified to practice medicine in the jurisdiction where I am residing at the time of such declaration, declare in writing that I am no longer mentally competent to manage my own financial affairs. Such declaration shall be effective on the date that the second medical practitioner has signed the declaration following.

First Declaration: I have had the opportunity to examine , the maker of this Power of Attorney, and I am of the view that they are no longer competent to handle their own financial affairs.

[Print name of doctor] *[Signature of doctor]*

[Print address of doctor] *Date signed:*

Second Declaration: I have had the opportunity to examine , the maker of this Power of Attorney, and I am of the view that they is no longer competent to handle their own financial affairs.

[Print name of doctor] *[Signature of doctor]*

[Print address of doctor] *Date signed:*

Self Declaration - At such time as I, remaining competent to administer my affairs, declare my wish that the authority under this Power of Attorney shall come into effect. That declaration shall be effective if I have fixed my signature in the location below, signing in front of a witness, being a person other than my Attorney or a spouse or common-law partner of my Attorney.

I hereby make this power of attorney effective.

[Signature of donor]	*[Signature of witness]*
	[Print name/address of witness]
Dated:	*Dated:*

The balance of this form of Power of Attorney can be completed by using precedent #9 "Enduring General Power of Attorney" (paragraphs 1.00 to 30.00) and the accompanying acknowledgement (as required) and affidavit.

16. Health Care Directive

[Document follows on next page]

Health Care Directive

(Please type or print legibly)

This is the Health Care Directive of:

Name _____

Address _____ City _____

Province _____ Postal Code _____ Telephone _____

Part 1 – Designation of a Health Care Proxy

You may name one or more persons who will have the power to make decisions about your medical treatment when you lack the ability to make those decisions yourself. If you do not wish to name a proxy, you may skip this part.

I hereby designate the following person(s) as my Health Care Proxy:

Proxy 1

Name _____

Address _____

City _____

Province _____ Postal Code _____

Telephone _____

Proxy 2

Name _____

Address _____

City _____

Province _____ Postal Code _____

Telephone _____

(Check / one choice **only**) For an explanation of "consecutively" and "jointly" please see the reverse side of this form).

If I have named more than one proxy,
I wish them to act:

❑ **consecutively** OR ❑ **jointly**

My Health Care Proxy may make medical decisions on my behalf when I lack the capacity to do so for myself.

(Check one choice **only**)

❑ with **no restrictions** ❑ with **restrictions as follows:**

_____

_____

_____

_____

Part 2 – Treatment Instructions

In this part, you may set out your instructions concerning medical treatment that you do or do not wish to receive and the circumstances in which you do or do not wish to receive that treatment.

REMEMBER – your instructions can only be carried out if they are set out clearly and precisely. If you do not wish to provide any treatment instructions, you may skip this part.

_____

_____

_____

_____

Part 3 – Signature and Date

You must sign and date this Health Care Directive.
No witness is required.

Signature _____

Date _____

If you are unable to sign yourself, a substitute may sign on your behalf. **The substitute must sign in the presence of a witness** or you must acknowledge the signature of the substitute a witness. The proxy or the proxy's spouse cannot be the substitute or the witness.

Name of substitute _____

Address _____

_____

Signature _____

Date _____

Name of witness _____

Address _____

_____

Signature _____

Date _____

Manitoba

Health Care Directives in Manitoba

What is the purpose of a Health Care Directive?

As a Manitoba citizen you have the right to accept or refuse medical treatment at any time. The Health Care Directives Act allows you to express your wishes about the amount and type of health care and treatment you want to receive should you become unable to speak or otherwise communicate this yourself. It also allows you to give another person the power to make medical decisions for you should you ever be unable to make them yourself.

Why should I fill out a form?

Due to accident or illness, you may become unable to say or show what treatment you would like, and under what conditions. If you have signed a directive, those close to you and the health care professionals treating you are relieved of the burden of guessing what your wishes might be.

How do I make a Health Care Directive?

The Manitoba government has prepared a form for your convenience (see reverse). The form serves as a guide for providing the appropriate information. However, **any paper that is signed, dated and provides the same information may be used**. A directive may be made by anyone capable of making a health care decision and understanding the consequences of that decision. If you are unable to sign the form yourself, a substitute may sign on our behalf. The substitute must sign the form in your presence and the presence of a witness, or you may acknowledge the signature of the substitute to a witness using videoconferencing. If witnessing is done through videoconferencing, you must provide the original directive signed by the substitute to the witness for signature after the videoconference. A proxy named in the directive and the proxy's spouse cannot be a witness. Further information on the remote witnessing requirements can be accessed through the following link: https://web2.gov.mb.ca/laws/regs/current/_pdf-regs.php?reg=82/2021

Who do I talk to about these decisions?

It is strongly recommended you talk to your doctor before completing the directive. This will ensure your instructions are clear and easily understood by those who provide treatment. Your choices should then be clearly typed or printed.

What is a proxy?

A proxy is someone you choose and name in your directive to act for you in the event you are not able to make such judgments and speak on your own behalf. Because it is not possible to anticipate every set of circumstances, your proxy has the power to make health care decisions for you based on what you have told your proxy about your wishes and the information in your directive.

Who do I choose as my proxy?

The choices you make in a directive are very personal. The person(s) you choose to represent you should be close friends or relatives who are willing to accept this responsibility. You should discuss your wishes openly and in detail with them. It is wise to name more than one proxy in case one is not available when needed.

If you designate two proxies, you must decide how you want them to work, either independently or together as a team. If you decide the two proxies should act **jointly**, they will act together on your behalf. If you decide they should work **consecutively**, the second proxy will be contacted if the first is not available or is unwilling to make the required decision at the required time.

It is important to make sure that your proxy (or proxies) understand(s) what is expected and is willing to speak and act for you.

Can I change my mind about my directive?

A Health Care Directive should be a record of your current wishes. If at any time you wish to change the content or the proxies you have listed, all copies of your old directive should be destroyed and a new directive written.

What is the effect of a Health Care Directive?

The wishes you express in your directive are binding on your friends, relatives and health care professionals (unless they are not consistent with accepted health care practices) and will be honoured by the courts. However, health care professionals treating you are not obliged to search for or ask about a signed directive. It is important to be sure that family, friends, your doctor and your proxy know you have a directive and know where it can be found.

Can a proxy give consent for Medical Assistance in Dying (MAID) in Manitoba?

No, a proxy or substitute decision maker cannot provide consent for MAID. For more information on MAID, please visit https://www.gov.mb.ca/health/maid.html

For more information contact:

your regional health authority