

INSURANCE ISSUES: *Risk Management*

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What you need to know about changes to adult guardianship legislation

LAWYERS PRACTISING IN the adult guardianship, estate planning and elder care areas should familiarize themselves with the changes introduced by the *Adult Guardianship and Planning Statutes Amendment Act, 2007* (the "Act"), which came into effect on September 1, 2011. The Act makes fundamental changes to various statutes relating to adult guardianship, enduring powers of attorney and elder care in British Columbia.

This *Insurance Issues* focuses on changes that may expose unwary lawyers to negligence claims if acting as property guardians or attorneys, or preparing or executing enduring powers of attorney.

Acting as property guardians or attorneys

The Law Society's professional liability insurance policy generally covers mistakes made by a lawyer who acts for a client as a property guardian under the *Adult Guardianship Act* (the "AGA") or as an attorney under the *Power of Attorney Act* (the "PAA"). The services provided must be connected with and incidental to the lawyer's practice of law.¹

The Act codifies various obligations and duties of property guardians and attorneys under both the AGA and the

PAA. Lawyers will want to consider those duties carefully before agreeing to act, given the potential liability for any breach. The following obligations are of particular importance:

- to exercise the care, diligence and skill of a reasonably prudent person (AGA s. 19(1); PAA s. 19(1)(b));

- to act in the adult's best interests, taking various factors into account, such as the adult's expressed instructions and known values (AGA s. 21(2); PAA s. 19(2));
- with limited exceptions,² to invest the adult's property only in accordance with the *Trustee Act* (AGA s. 21(3)(a));



(PAA 19(3)(b));

- not to dispose of property known to be subject to a specific testamentary gift in the adult's will, unless "necessary to comply with" the duties of a property guardian or attorney (AGA s. 21(3)(c) and (5); PAA, s. 19(3)(d)).

A lawyer who acts as a property guardian should also be aware that the duties continue after the adult's death until a grant of probate or letters of administration is issued and served.

Enduring powers of attorney

Lawyers involved in the preparation and execution of enduring powers of attorney should pay particular note to amendments made by the Act to the PAA.

Capacity

The PAA now sets out a test as to the requisite capacity to make an enduring power of attorney. An adult "is incapable of understanding the nature and consequences of a proposed enduring power of attorney" if unable to understand all of the matters specifically enumerated in s. 12(2), or as may be prescribed by regulation. Lawyers should carefully assess whether an adult is capable of making an enduring power of

attorney in accordance with the test, and should retain notes or other documentation relating to that assessment. A lawyer who fails to make appropriate inquiries as to capability may later face a claim from the adult, or representative of the adult, if a power of attorney is abused by the attorney.

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Section 14 stipulates that an enduring power of attorney *must* indicate whether the attorney may exercise authority while the adult is capable or only while the adult is incapable, and that the attorney's authority continues despite the adult's incapability. Lawyers drafting enduring powers of attorney should ensure that the elements required by s. 14 are included, as appropriate.

"Springing" powers of attorney

Section 26(2) provides that, if an enduring power of attorney is to take effect when a subsequent event occurs, the adult *must* state in the document how, and by whom, the event is to be confirmed. Lawyers drafting springing powers should take care in describing the triggering event and how the s. 26(2) requirements will be met.

Execution

Section 16(1) provides that an enduring

power of attorney must be signed and dated by the adult in the presence of two witnesses, and by the witnesses in the presence of the adult. Only one witness is required if the witness is a practising lawyer or notary (s. 16(4)). Certain people are not to act as witnesses. (s. 16(6)).

Remember as well that, to be effective for *Land Title Act* purposes, an enduring power of attorney must be executed and witnessed in accordance with the *Land Title Act* (s. 16(5)).

If execution is flawed, an application may be brought under s. 36(3) for an order that the power of attorney is valid despite any defect in its signing. The lawyer involved in execution may, however, face a claim for the cost of such an application or of an application for appointment of a property guardian.

¹ For a review of issues relating to insurance coverage for lawyers acting as trustees or executors or other similar fiduciary capacities, review the summary at lawsociety.bc.ca (Lawyers > Insurance > Professional liability insurance (Part A) > Coverage > Trustees and executors).

² Section 19(3)(b) of the PAA provides that an attorney must invest the adult's property only in accordance with the *Trustee Act* "unless the enduring power of attorney states otherwise."