

**Legislative Review
Adults in Vulnerable Circumstances
Consultation Paper December 2011**

I. Introduction

In 1994 the Departments of Justice, Social Services, Health and Labour formed a committee to study the abuse of adults in vulnerable circumstances. The committee examined services available for abused adults and legislative responses to that abuse. The interdepartmental committee was expanded in fall 1995 to form the Steering Committee on the Abuse of Adults in Vulnerable Circumstances, which Committee included interested organizations and members of the public. The Committee released a consultation document and conducted consultations across the province, which resulted in the release in December 1997 of a Report that included 37 Recommendations respecting legislative review and reform, programming and the expansion of resources available to vulnerable adults and their families. Since 1997 the Government of Saskatchewan has continued to review and update legislation affecting adults in vulnerable circumstances.

Several pieces of legislation affect the well being, care, property and support of vulnerable adults, both directly and indirectly. An inter-ministerial committee has formed to review legislation that affects adults in vulnerable circumstances. Each of the Ministries of Health, Justice and Social Services reviewed the legislation within their purview to identify issues affecting adults in vulnerable circumstances. The inter-ministerial committee then reviewed the legislation and identified several issues and potential legislative amendments for discussion.

The Ministries of Health, Justice and Social Services are consulting interested parties and organizations to obtain their views on the issues and legislation identified below.

II. General Issues

(i) Eliminating Certain Terms

Antiquated and offensive language continues to be used in some of Saskatchewan's legislation. For example, the term lunatic still appears in a handful of provincial Acts and some Acts continue to use the term "of unsound mind," which outdated language should also be updated. The use of terms such as "incapacity", "incapacitated", and "incompetent" should also be reconsidered in favour of descriptions that support a view of capacity on a continuum, such as "diminished capacity".¹

¹ Doug Surtees, "The Evolution of Co-decision-Making in Saskatchewan" (2010) 73(1) Sask L. Review 75 at 81.

There is no doubt that at least the term “lunatic” should be removed from provincial legislation and replaced with more respectful and person-first language, but it is not clear with which term it is most appropriately replaced. Some of the options are “person unable to exercise legal capacity” or “person unable to manage his or her affairs.”

1. **We would appreciate your comments with respect to which terms should be used to replace antiquated terms such as lunatic.**

(ii) Solicitation of Adults in Vulnerable Circumstances

Sometimes adults, because of age or disability, are vulnerable to solicitation by vendors as well as charitable organizations. *The Consumer Protection Act* at section 5 makes it an unfair practice for a supplier to take advantage of a consumer if that person knows or should reasonably be expected to know that the consumer is not in a position to protect his or her own interests or is not reasonably able to understand the nature of the transaction. This provision protects adults in vulnerable circumstances where a supplier is trying to sell them goods or services, but does not protect that adult from the solicitation of charitable organizations. Section 103 of *The Funeral and Cremation Services Act* prohibits the solicitation of a resident of a hospital, health centre, residential-service facility, special-care home or personal care home, but this restriction is limited to the solicitation of funeral or cremation services. *The Charitable Fund-Raising Businesses Act* at section 22 allows a person to require that a charitable organization, licensee or representative refrain from making solicitations to that person, but there is no restriction from proceeding with a donation where the charitable organization, licensee or representative knows or ought reasonably to know that the person they are speaking to is not reasonably able to understand the nature of the transaction.

2. **We are interested in your views and experiences regarding the solicitation of adults in vulnerable circumstances by charitable organizations and businesses, the nature and frequency of such solicitations, and if this is an area where greater protection is needed.**

(iii) Beneficiary Designations

British Columbia’s new *Wills, Estates and Succession Act, 2009*, which has been passed but is not yet in force, includes the following provisions that allow an attorney or guardian to designate a beneficiary, where the designation is not in a will:

- (a) Subsection 85(3) allows an attorney or guardian to make a beneficiary designation for a grantor or incapable person, respectively, if expressly authorized to do so by the court and the beneficiary designation is not in a will; and

- (b) Section 90 allows a new designation to be made for the same beneficiary if the designation renews, replaces or converts an existing benefit.

Subsection 85(3) may be triggered where an attorney or guardian invests in an RSP or RIF on behalf of the adult. In this case the attorney or guardian may designate a beneficiary only by court order. This ensures that the attorney or guardian does not make themselves the beneficiary. Section 90 would arise where the adult has an existing asset, for example an RSP, and wants to transfer the RSP to another investment vehicle, but not lose the beneficiary designation.

The provisions were added as a result of the B.C. Court of Appeal's decision in *Desharmais v. Toronto Dominion Bank*.² In *Desharmais*, an attorney transferred funds from an RSP, where she was the beneficiary, to another plan where a beneficiary was not designated. As a result, when the adult died the funds in the new plan went to the estate instead of to the beneficiary. The Court noted that the transfer was illegal since it in effect changed the beneficiary, and that the attorney did not have the authority to effect that change. In some circumstances an attorney or guardian may need to transfer investments in order to best benefit the estate of the adult. In these cases the attorney or guardian may be prohibited from designating a beneficiary.

3. **We would appreciate your views on if attorneys and guardians should have the power to designate beneficiaries and accordingly if designated beneficiary provisions should be enacted in Saskatchewan?**

III. Legislation

(i) *The Adult Guardianship and Co-decision-making Act*

The Adult Guardianship and Co-decision-making Act sets out the procedures for the appointment of a personal or property decision-maker to assist in the day to day affairs or property management of adults who are incapable of managing their own personal or financial matters. The Act also establishes the duties and requirements placed on an individual appointed to act as personal or property decision-maker.

This Act recognizes a continuum of capacity for adults who may require some assistance or full guardianship. On application, the court may appoint a co-decision-maker to assist an adult in making decisions, or a decision-maker to make decisions on behalf of the adult. Alberta's *Adult Guardianship and Trusteeship Act* at section 4 goes one step further by establishing a "supported decision-making authorization". This additional provision allows an adult to make an authorization while he or she still has capacity for another person, a "supporter" to assist him or her

² *Desharmais v. Toronto Dominion Bank*, 2002 BCCA 640.

in decision-making. The authorization is revoked when a personal directive takes effect or a co-decision-maker, guardian or trustee is appointed for the adult. Adding a similar category of decision-making to Saskatchewan's legislation is another way adults with diminishing capacity can have control over their day to day decision-making. Presently, an adult may appoint a power of attorney to step in if he or she loses capacity, but this appointment does not generally allow the adult to continue to be involved in decision-making.

Another provision being considered would protect third parties who receive requests and instructions from a person with apparent authority. A similar provision is already included in each of *The Powers of Attorney Act, 2002* and *The Health Care Directives and Substitute Health Care Decision Makers Act*.

4. **The Committee would like to hear any concerns you may have with adding a provision that protects third parties against actions where they have relied on the apparent authority of a guardian.**
5. **We would like your opinion on extending the range of decision-making to allow an adult to make a supported decision-maker authorization and if such an authorization has a place in Saskatchewan?**

(ii) *The Dependants' Relief Act*

The Dependants' Relief Act establishes a mechanism by which a dependant, including a spouse or child, of a deceased can apply to the court for an order for reasonable maintenance. This Act is used where provision is not made for a dependant in a will, or a dependant does not receive a portion of the estate, or a sufficient portion pursuant to *The Intestate Succession Act*. The Court may make an order with respect to any portion of the estate of the deceased as defined in the Act. "Estate" is defined to mean all the property that a deceased had the power to dispose of by will. This definition does not include property that may have been distributed through a beneficiary designation or property disposed of prior to death. The effect of this is that there may not be enough funds in the "estate" as defined to distribute to dependants of the deceased.

6. **We would appreciate your comments on if the definition of "estate" should be expanded to include property that does not traditionally pass through the estate, such as life insurance, or property transferred within a certain period prior to death?**

(iii) *The Health Care Directives and Substitute Health Care Decision Makers Act*

The Health Care Directives and Substitute Health Care Decision Makers Act gives adults the ability to be involved in their health care decision making even when they are incapable of making a decision, by allowing any person over 16 years of age, who has capacity, to make a health care

directive for future treatment they might undergo. The Act also allows any person to appoint a proxy to make treatment decisions on his or her behalf should he or she become incapable. If an adult does not have a directive in place, has not appointed a proxy, and there is no personal guardian, the adult's nearest relative can make decisions respecting treatment. Where there are no relatives to provide consent to treatment, treatment may be provided where a treatment provider believes the treatment is needed, it is in an individual's best interests, and another treatment provider agrees in writing.

While this process addresses most situations, it often does not address the situation of individuals with disabilities living in residential facilities (e.g. group homes) who lack capacity to make health care decisions and who do not have families or formal substitute decision makers. Under the current process, individuals in this circumstance do not have another option for a substitute health care decision maker. This includes other individuals who may have a relationship with and knowledge of the adult's needs and wishes, such as friends or agency staff, but who do not have the legal authority to provide direction regarding healthcare decisions and are prohibited from acting on behalf of or assisting the adult. Accordingly, the utility of establishing a limited proxy has been raised for day to day treatments like flu shots or dentist appointments for persons who reside in care homes.

Additional areas have been identified for improvement. For example, while the legislation provides for the default of two treatment providers where there are no relatives to provide consent, often in small communities it is hard to find two treatment providers and appears to be a cumbersome process for a doctor to solicit the consent of another practitioner. Also, in contrast to who can be appointed an attorney or guardian, there are currently no restrictions on who can be named a proxy. In order to be appointed as a guardian, a person must be 18 or older, cannot provide personal care or health care services to the adult for remuneration and cannot have interests that conflict with the adult's interests. Additional questions have arisen with respect to priority between interested parties and when the authority to make treatment decisions terminates. This may arise where, for example, a proxy has been appointed with respect to health care decisions, but a personal guardian has also been appointed and when each is entitled to act. Finally, the Act does not explicitly provide that a proxy or substitute health care decision maker can make decisions about an adult's residence following treatment. If a personal guardian is not in place, some proxies and substitute health care decision makers take the position that decisions with respect to residence are within the scope of their powers, but the Act is not explicit. This has become a concern where upon discharge a patient decides to return to his or her residence, but is likely unable to care for him or herself.

Other Provinces

Most other provinces have established legislation that allows for a substitute decision-maker for health care treatments. In Alberta, a Government registry has been established for personal directives. Health care providers can register to have access to the registry in order to determine if a patient has a directive or has appointed a proxy. Such a registry ensures that an adult's health

care decision is accessible by health care providers even where the adult lacks the capacity to communicate his or her wishes. Also in Alberta, the *Personal Directives Act* allows the Public Guardian to receive and investigate complaints into the failure to comply with a directive. Ontario's *Health Care Consent Act* includes provisions that explicitly allow a substitute decision-maker under the Act to consent to an adult's admission into a care facility where he or she is incapable of making the decision themselves.

7. The Committee is interested in your comments with respect to the following:

- (a) There are no restrictions on who can be named a proxy, should there be?**
- (b) Provisions respecting priority can help avoid disagreements between interested persons. Do the current provisions respecting priority require clarification?**
- (c) An adult is presumed to have the ability to determine where he or she resides, unless a personal attorney or personal guardian is acting on his or her behalf. Should Saskatchewan's Act be amended to explicitly include decisions respecting an adult's residence upon discharge following treatment as in Ontario?**
- (d) Where a proxy or family member is not readily available, would the creation of a limited proxy respecting day-to-day medical requirements, such as dental work or flu shots, assist in the ongoing care of some adults in vulnerable circumstances?**
- (e) Would creating a health care directive registry enhance an adult's ability to determine future health care decisions?**

(iv) *The Mentally Disordered Persons Act*

Thirteen provisions of *The Mentally Disordered Persons Act* are still in force. The rest of the Act was repealed by *The Dependent Adults Act*, which was subsequently repealed and replaced by *The Adult Guardianship and Co-decision-making Act*. The provisions of *The Mentally Disordered Persons Act* that remain in force allow the Public Guardian and Trustee to act as property guardian for an adult unable to manage his or her estate, where the Public Guardian and Trustee has received a Certificate of Incompetence signed by the Chief Psychiatrist. The Public Guardian and Trustee's authority commences with the signing of an acknowledgement that he or she is acting. There is no requirement for a guardianship application or court order. A Certificate of Incompetence lapses one year after issue, unless the Public Guardian and Trustee is acting as property guardian, a property guardian has been appointed by the court, or proceedings have started to appoint a property guardian. A Certificate of Incompetence may be appealed to the review board immediately after the certificate is issued, and thereafter an appeal may be made every time an in-patient is released and has been declared incompetent, or every time a request for re-examination has been made. The review panel's decision may in turn be appealed to the Court of Queen's Bench and further to the Court of Appeal.

Other Provinces

In 2009 Alberta passed a new *Adult Guardianship and Trusteeship Act*, in which the concept of statutory guardians/trustees was entirely eliminated. Under the new Act, the public trustee must apply to the court for a trusteeship order in the same manner as every other individual. However, a transitional provision was established to allow the public trustee to act under certificates issued before the coming into force of the new Act. On the other hand, Ontario has maintained the concept of statutory guardianship within its *Substitute Decisions Act*. British Columbia, in not yet in force provisions from the *Adult Guardianship and Planning Statutes Amendment Act, 2007*, also maintains the concept of statutory guardianship without a court order where a certificate of incapability is provided. In British Columbia's proposed provisions, all reviews of findings of incapability go to the court instead of to a review panel. Other provinces that still include the concept of statutory guardianship include these provisions within their Mental Health Services Acts or their Adult Guardianship Acts.

8. **We would like your view on whether *The Mentally Disordered Persons Act* should be repealed.**
9. **If the Act is repealed, should the provisions that allow the Public Guardian and Trustee to act as a statutory property guardian be retained in other legislation for example *The Adult Guardianship and Co-decision-making Act*?**

(v) ***The Parents' Maintenance Act***

The Parents' Maintenance Act was introduced in 1923 and has undergone no substantial changes since that time. The Act allows a parent, who is unable to maintain him or herself, to apply to a provincial magistrate or two justices of the peace for an order that his or her son or daughter pay support. The Act limits the amount of support payable to \$20 per week, an amount that has been in place since 1923. In Saskatchewan there is only one reported decision from 1929³ of an action pursuant to this Act, and there have been no recent applications pursuant to this Act.

There has been recent interest in this area given the aging population, and a suggestion that there may be an increase in actions for parental support.⁴ However, there is also support for the repeal of parental support provisions as the Act was created prior to government support programs being in place.

³ *Ste. Marie et al v. Ste Marie* [1929] 1 W.W.R., 890.

⁴ "My Parents' Keeper", Canadian Lawyer Magazine, March 2011 at page 39.

Other Provinces

Some other provinces also continue to have legislation that provides for support payable to parents by their adult children. Manitoba's *Parents' Maintenance Act* is the most similar to our Act, however it has been updated in a few key areas. For example, applications for the support of parents can be made before a Provincial Court or Queen's Bench judge and can be enforced in the same manner as a child support order. Other provinces, such as British Columbia and Ontario, provide for support for parents in the same legislation as child and spousal support. In British Columbia, parental support is provided for in *The Family Relations Act* and enforceable under *The Family Maintenance Enforcement Act*. In 2007 the British Columbia Law Institute reviewed the parental support provisions and recommended they be repealed.⁵ British Columbia is currently undertaking a comprehensive review of *The Family Relations Act* and in a consultation document released in 2010 also recommends repeal of the parental support provisions.⁶ Still, parental support matters in British Columbia continue to be heard such as the ongoing *Anderson v. Anderson* action where a mother is seeking support of \$750 per month against her four children. In Ontario support for a dependent parent is considered in *The Family Law Act*, which establishes factors for the court to consider in making an order including the child's relationship with the parent. In contrast, Alberta has eliminated provisions respecting the support of dependent parents.

10. Should provisions for parental support be maintained, and if so could these provisions be incorporated into *The Family Maintenance Act, 1997*?

(vi) *The Powers of Attorney Act, 2002*

The Powers of Attorney Act, 2002 provides for the use of enduring or contingent powers of personal and property attorneys. These are powers of attorney that continue or commence when the grantor has lost capacity. The advantage of appointing an attorney is that it allows an individual to choose the person who will look after personal and financial affairs when he or she has lost capacity to do so. The Act establishes the powers and duties of personal and property attorneys, and includes provisions for the accounting and removal of attorneys who fail to undertake their duties. Additional duties are placed upon property attorneys by *The Trustee Act, 2009*, as trustee is defined to include a property attorney.

⁵ "Report on the Parental Support Obligation in Section 90 of The Family Relations Act", British Columbia Law Institute Report No. 28, March 2007.

⁶ "White Paper on *Family Relations Act* Reform, Proposals for a new Family Law Act", British Columbia, Ministry of Attorney General Justice Services Branch Civil Policy and Legislation Office, July 2010 at 130.

Although Saskatchewan's Act provides substantial protections for grantors, powers of attorney are still regularly raised as documents that are subject to fraud and abuses of power. These concerns will only continue given our aging population. Recent amendments to *The Adult Guardianship and Co-decision-making Act* added new provisions respecting gifts and the creation of a fee schedule, as well as revising the provisions respecting accounting, including establishing a time line for filing and requiring that the prescribed form be used.

Similar amendments to *The Powers of Attorney Act, 2002* may be helpful in curbing incidents of financial abuse. For example, the Act currently includes accounting provisions that allow the Public Guardian and Trustee to require an accounting, however no time lines are established and there is no prescribed form to outline the type of information required. Further, unlike in a guardianship situation where the Public Guardian and Trustee automatically receives a copy of the guardianship order and a copy of the annual accounting, where an attorney is concerned the Public Guardian and Trustee would only request an accounting where a complaint is made, as the office would have no other way of knowing that an attorney was acting and charging a fee (which triggers the accounting.) The fact that the Act is silent with respect to notification that an attorney has begun acting, means that where family members are not diligent in requiring accountings, abusive attorneys may fly under the radar. While the attorney gains his or her authority from the grantor's appointment and not from the court, it may be beneficial to require a person acting pursuant to an enduring or contingent power of attorney to provide notification that he or she is acting, either through the creation of a registry or otherwise.

Western Law Reform Agencies 2008 Report

In 2008 the Western Canada Law Reform Agencies released its final report titled "Enduring Powers of Attorney: Areas for Reform" which makes several recommendations with respect to powers of attorneys. Many of the recommendations made in the Report exist in some form in our Act. One of the more intriguing recommendations in the Report was to establish a requirement to file a Notice of Attorney Acting, with a specified person or the Public Guardian and Trustee, once the attorney begins acting. The Report recommended the Public Guardian and Trustee only receive Notices where there was no family member available in order to uphold grantor privacy. The Report recommended against establishing a public registry for Notices for a variety of reasons including: who will have access to the registry, if it would be mandatory or voluntary and that it would be an intrusion on privacy.⁷ However, a public registry would allow at least certain groups, such as financial institutions, to determine if a power of attorney is still valid and from which date the attorney began acting. It would also make the Public Guardian and Trustee's office aware of all powers of attorney and may assist in determining if a request for accounting is appropriate.

⁷ Western Canada Law Reform Agencies 2008 Report on Enduring Powers of Attorney page 63

The Report also recommended: that the power of attorney be signed by the grantor when physically apart from the attorney, that the grantor be expressly permitted to acknowledge his or her signature in front of witnesses, and that the proxy be prohibited from also being a witness. In relation to witnesses the Report recommends that only one witness be required. Our Act requires one witness who is a lawyer, or two witnesses. This is in line with *The Wills Act, 1996* that requires two witnesses, but out of line with *The Health Care Directives and Substitute Decision-Makers Act* that requires only one witness. Finally, the Report makes recommendations with respect to duties, standard of care and remuneration, suggesting that fees only be payable where specifically contemplated in the power of attorney.

11. The Committee is interested in your comments with respect to the following:

- (a) Should restrictions be placed on attorneys with respect to payments out of an estate for items such as gifts?**
- (b) Is there any benefit to creating a fee schedule to outline what fees attorneys can charge?**
- (c) Should the accounting provisions be amended to ensure greater protection for grantors, for example by establishing a time line and prescribed form for accounting and allowing the Public Guardian and Trustee to request an accounting wherever an attorney is acting? Should an inventory requirement be added?**
- (d) Would requiring an attorney to provide a notice/acknowledgment once they start to act infringe on the privacy of the grantor?**
- (e) Do the benefits of creating a registry outweigh the concern respecting the privacy of the attorney?**
- (f) Should the witness provisions be revised to change the number of witnesses and prohibit a proxy from being a witness?**

IV. Other Issues

(i) *The Mental Health Services Act*

The Mental Health Services Act came into force in 1986 and replaced *The Mental Health Act*. The overall goal of Saskatchewan's mental health services is to promote, preserve and restore the mental health of the population. The Act authorizes regional health authorities to establish and operate mental health programs, while ensuring the protection of individual rights.

The Ministry of Health is consulting with stakeholders regarding potential revisions to *The Mental Health Services Act* and the accompanying Regulations. This process started fall 2011. An advisory committee to the Ministry of Health has been formed, and an external consultant has been hired to provide and prepare an options paper on the areas to be reviewed. For more information please contact:

Jamie Petty
Mental Health Consultant
Ministry of Health
Community Care Branch
3475 Albert Street
Regina, SK S4S 6X6
Phone: (306) 787-3299
Fax: (306) 787-7095
Email: jpetty@health.gov.sk.ca

(ii) *The Residential Tenancies Act, 2006*

The Residential Tenancies Act, 2006 establishes the rights and obligations of landlords and tenants in most residential housing in Saskatchewan. The regulations exempt a number of types of residential tenancies from the operation of the Act. For those that are not covered by the Act, *The Landlord and Tenant Act* and the general law deal with the landlord and tenant relationship. One of the exemptions relates to “living accommodation that includes the provision of meals in the consideration paid by the tenant for the rental unit, but only if the rental unit is offered exclusively to tenants who are over 55 years of age”. This exemption forces tenants in this situation to go to Small Claims Court to resolve landlord-tenant issues, such as reimbursement of rent for a partial month or reimbursement of their damage deposit, instead of through the Office of Residential Tenancies. The tenants in these types of situations are typically older adults and these facilities are sometimes referred to as assisted living facilities, retirement homes or seniors’ retirement communities.

The Ministry of Justice and Attorney General is consulting with stakeholders regarding potential revisions to this exemption in *The Residential Tenancies Regulations*. Please provide your feedback to:

Mary Ellen Wellsch
Senior Crown Counsel
Legislative Services Branch
Saskatchewan Justice and Attorney General
800 – 1874 Scarth Street
Regina, SK S4P 4B3
Fax: (306)787-9111
Email: MaryEllen.Wellsch@gov.sk.ca

(iii) Manitoba's Adult Abuse Registry

Manitoba recently passed legislation to establish an Adult Abuse Registry to monitor individuals convicted of an offence under any Act involving the abuse or neglect of a specified adult.⁸ The Act will also allow an appointed committee to review complaints to determine if the person against whom the complaint is made should also be added to the Registry. We will monitor the progress of *The Adult Abuse Registry Act* to see how effective it is.

V. Conclusion

If you have any comments regarding the issues discussed in this consultation document, please provide them prior to **February 15, 2012** to:

Maria Markatos
Crown Counsel, Legislative Services
Ministry of Justice and Attorney General
800 - 1874 Scarth Street
REGINA SK S4P 4B3
Phone: (306) 787-5461
Fax: (306) 787-9111
Email: maria.markatos@gov.sk.ca

⁸ "Specified Adult" is defined in *The Adult Abuse Registry Act* to mean a vulnerable person within the meaning of *The Vulnerable Persons Living with a Mental Disability Act*, however additional Acts may be designated in the Regulations.