CONFLICT OF LAWS ISSUES IN DRAFTING AND USING POWERS OF ATTORNEY FOR THE MOBILE CLIENT*

*Margaret R. O'Sullivan***

I. INTRODUCTION

There is a convergence of factors that will cause all of us to think longer and harder about what we need to do to best plan for our clients' financial incapacity. Our clients are living longer, travelling more, and are increasingly residing in other jurisdictions for protracted periods of time.

As well, depressed real estate prices in many of the most desirable places in the world are helping many of our older clients to achieve what seemed only to be a dream on their wish list.

Our affluent middle-aged clients are becoming less domestically focused. They are acquiring second homes outside their home province — whether a ski chalet in the mountains, a golf villa in a sunny climate, or a country home in a rural setting. And if our clients are not purchasing another residence, they may be renting and spending significant time outside their home province, as well as acquiring financial assets abroad.

Our clients of all ages are increasingly pursuing employment and business opportunities outside their home jurisdictions, often leaving a rather chaotic trail of real estate and financial assets spread around the globe.

These trends will likely only increase. As our clients become more

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** O'Sullivan Estate Lawyers, Toronto. The author would like to thank her colleague Jenny Hughes of O'Sullivan Estate Lawyers for her assistance in preparing the chart accompanying this paper and Marilyn Piccini Roy of Borden Ladner Gervais for reviewing the sections dealing with Québec law.

mobile, so does their property. How we advise our clients in planning for incapacity needs to be more thoroughly considered to ensure our clients' best interests are served.

Many of us are very familiar with the use of multiple wills where our clients have assets in different jurisdictions. But what about multiple powers of attorney or parallel planning options? How much thought and effort goes into ensuring our increasingly international clients have the right protective legal instruments in place? In simpler cases, greater consideration will need to be given to using powers of attorney that goes beyond a purely domestic approach. In more complex situations, a variety of planning structures may be appropriate.

Incapacity planning is a fundamental game changer for estate planners. Traditional estate planning has given primacy to planning for death, a static and one-time event, often relegating incapacity planning to a secondary role or a mere afterthought. Changing demographics, and the reality of an aging population where many of us will live for many years in various stages of diminished capacity and in numbers our world has never seen before, will push incapacity planning to the fore.

This change will bring with it new challenges, and the development of more refined, nuanced and sophisticated approaches. Financial incapacity[1] by its nature is a moving continuum, and is both fluid and dynamic, unlike death. And planning for incapacity must reflect this reality.

Incapacity planning raises a broad array of concerns and issues that go far beyond the issues typically dealt with in estate planning for death because, of course, our client is still alive. Assets often need to be administered and health and other personal care matters dealt with quickly, efficiently and responsibly to ensure our incapable client's well-being, best interests and dignity are protected and enhanced. Our tools and procedures for doing so will need to be efficacious, but perhaps more importantly, will need to recognize the critical importance of enabling our client's independent decision-making and self-determination as far as reasonably possible.

The duty and responsibility of ensuring the welfare of a significant sector of an aging society who are incapable and

1. Financial incapacity is, for example, defined in s. 6 of Ontario's *Substitute Decisions Act, 1992*, S.O. 1992, c. 30, as not being able to understand information that is relevant to making a decision in the management of a person's own property, or not being able to appreciate the reasonably foreseeable consequences of a decision or a lack of decision.

vulnerable and who cannot ensure it for themselves are sobering ones. It is a sacred trust in which we as professional advisors will play an important role. But will our legal systems and infrastructure, both domestically and internationally, and the institutions and professional advisors involved in these matters, be adept enough to respond and adapt to our changing world?

II. THE SPECTRE OF LACK OF HARMONIZATION

At this point in the development of the law, there is a lack of harmonization among many jurisdictions in respect of what effect the primary instrument used in incapacity planning, a power of attorney or its equivalent, will have in a foreign jurisdiction.

It must be dismaying to clients to learn that there is no simple, universal, turn-key solution which allows their chosen decision maker to easily act on their behalf in whichever jurisdiction they choose to own property, should they become incapable. Instead, the legal reality is that each jurisdiction has its own unique laws, approaches and requirements which make it very difficult to navigate across borders. Compounding the issues are outdated legislation or, in many parts of the world, no legislation which deals with incapacity at all.

The utopian dream of a universal international power of attorney is one that has historically been attempted but primarily for commercial purposes. Various attempts at uniform legislation and model acts have been made. For example, in 1934, a committee was appointed by the Pan American Union to prepare draft uniform legislation for the purpose of utilizing powers of attorney abroad, which in 1940 culminated in a Protocol subsequently ratified by four Latin American countries and the United States. In 1975, the Organization of American States adopted the *Inter-American Convention on the Legal Regime of Powers of Attorney to be Used Abroad*, which has been ratified by 16 Latin American countries. One of the most recent initiatives which offers hope for harmonization and where substantial progress is being made is in the European Union by way of the *Hague Convention of 13 January 2000 on the International Protection of Adults,* which is discussed in further detail below ("Convention XXXV"). Convention XXXV is a major attempt to harmonize conflict of laws rules applicable to incapable adults, including with regard to the formalities and recognition of powers of attorney surviving incapacity, a form of "power of representation" under Convention XXXV.

Closer to home, in August 2015 the Uniform Law Conference of

Canada (the "ULCC") approved the *Recognition of Substitute Decision-Making Documents Act* (the "Uniform Act") at its annual meeting. The Uniform Act is a joint project of the Uniform Law Commission of the United States (the "ULC") and the ULCC, which was specifically undertaken to promote the cross-border portability and utility of substitute decision-making documents for property and personal care. The ULC adopted its version at its annual meeting in July 2014. This new uniform legislation in each jurisdiction marks a significant step forward in promoting cross-border effectiveness of powers of attorney, and it will be interesting to see how each individual U.S. and Canadian jurisdiction will react and take steps to implement it going forward. At the time of writing, Idaho is the only U.S. jurisdiction to enact the Uniform Act, while Connecticut is currently considering it. In early 2015 Colorado had been considering the legislation, but has indefinitely postponed its consideration.

III. WHAT PLANNING TOOLS ARE AVAILABLE?

1. Using Multiple Separate Situs Powers of Attorney

At this point in the development of the law, there is a lack of harmonization between many jurisdictions in respect of what effect a power of attorney prepared in one jurisdiction will have in another jurisdiction, in particular powers of attorney for personal care and advance health directives.

Due to this lack of certainty, and also the time, expense, delays and lack of certainty of success that may result in seeking legal opinions and other processes to try to validate powers in another jurisdiction, a practical approach is to advise a client to put in place a local power of attorney for property and for personal care or equivalent instrument in each jurisdiction where he or she has assets, in particular real estate, or spends significant time.

For this purpose, it is important to carefully review a client's assets and understand his or her lifestyle and residence patterns. How much time is spent outside their home province and in which jurisdictions? Does he or she have assets, in particular real estate, outside their home province? How is title held? Solely in the client's name, jointly or otherwise? What is his or her age and general health? Based on these inquiries, an assessment can be made for which jurisdictions powers of attorney in local form should be prepared and where one may not be necessary, for example, where it is possible to change ownership or re-title assets, such as from sole

to joint ownership, taking into account all relevant considerations, including tax consequences of any transfer and the loss of control over the assets.

A number of special considerations need to be factored in when using multiple powers of attorney, including the following ones.

(a) Revocation

It is important in drafting and executing multiple powers of attorney that one does not by inadvertence revoke a pre-existing power of attorney which is meant to be preserved and that express provisions are included in each power of attorney to ensure they are preserved and not revoked. This can be accomplished by specifically referring in each power of attorney to other pre-existing ones and expressly confirming they are not to be revoked.

It should be noted that each jurisdiction can have different laws with regard to whether or not a power of attorney, unless otherwise directed, automatically revokes any prior ones.

For example, in Ontario, ss. 12(1) and 53(1) of the *Substitute Decisions Act* (the "SDA")[2] provides that a new power of attorney for property or a new power of attorney for personal care will revoke a previous one unless the grantor provides for there to be multiple powers of attorney.

In many other jurisdictions, however, execution of a new power of attorney does not automatically revoke a prior one. For example, under the *Power of Attorney Act* in British Columbia,[3] s. 30(4) provides, in part, that an enduring power of attorney for property terminates according to the terms of the enduring power of attorney or if the enduring power of attorney is revoked. With respect to revocation, s. 28(1) provides that subject to any limits or conditions in the document, a capable adult who has made an enduring power of attorney may revoke it. The B.C. statute does not, however, expressly speak to the manner in which a power of attorney may be legally revoked or state that a new power of attorney will automatically revoke a previous one.

As well, s. 7 of Prince Edward Island's *Powers of Attorney Act*[4] states that a power of attorney for property document that survives incapacity may be revoked by the donor at any time while the donor has legal capacity. Unlike the Ontario statute, however, P.E.I.'s

2. *Substitute Decisions Act, 1992*, S.O. 1992, c. 30.
3. R.S.B.C. 1996, c. 370.
4. R.S.P.E.I. 1988, c. P-16.

legislation does not state that execution of a new power of attorney for property in that province will automatically revoke a prior one.

As a further example, s. 709.2109(1)(d) of the 2015 *Florida Statutes* states that a power of attorney for property terminates when the principal revokes the power of attorney. Subsection 709.2110 goes on to provide that unless a revocation clause is included in a subsequently executed power of attorney, the execution of a subsequent power of attorney alone does not revoke a power of attorney that was previously executed by the principal.

(b) Multiple Attorneys

It is important to try to make each separate situs power of attorney as parallel as possible to the principal power of attorney to ensure wherever possible the same set of decision-makers are appointed, unless there are particular reasons why this is not advisable. This is not always possible since local legislation varies, and in some jurisdictions it is not possible to have co-appointments of multiple attorneys. In other jurisdictions, it may be possible to do so, but the appointments can only be joint, not several or by majority rule. There may also be limitations on where the appointed substitute decision-maker may reside. For example, under applicable legal and regulatory requirements governing securities dealers, a Canadian investment advisor may be unable to take instructions from a non-resident attorney for property, including a U.S. resident attorney for property.

(c) Termination

Local law may vary with regard to termination of a power of attorney. In some jurisdictions, the death of the grantor automatically terminates a continuing power of attorney for property. This may not be the case for financial powers of attorney in other jurisdictions where death may not automatically terminate them. As well, in some jurisdictions marriage and divorce automatically terminate a power of attorney.

(d) Compensation of Attorneys

It is important to understand what compensation is permitted, if at all, to attorneys and ensure this issue is properly addressed and integrated with the principal power of attorney, and that there is no possibility of double or over-compensation.

(e) Standard of Care

The standard of care in the local jurisdiction may differ from that under the local law, or what is provided for under the power of attorney may set a lower standard for family members who act for no compensation and a higher standard for those who act for compensation. To ensure consistency, to the extent it is permissible under local law, a similar standard should be adopted.

(f) Execution Requirements

Each jurisdiction will have its own unique formalities for executing powers of attorney. Some are intricate and require a sworn statement by one of the witnesses before a notary, as well as initials placed in several parts to indicate which provisions are to be adopted or not based on several options. It is important to liaise with local counsel when supervising execution to ensure all formalities are properly observed.

The length and intricacy of powers of attorney vary widely, including in the United States, where some states have simple approaches, and others have lengthy, detailed and often confusing ones, and some are in the middle.

(g) Advance Health Care Directives

It is common in many U.S. states to have very detailed, lengthy health care directives which allow a person to decide on many aspects of their health care. This approach is not typical in most Canadian provinces, which tend to be more aspirational and generic than specific.

2. Using a Power of Attorney Prepared in a Canadian Jurisdiction in another Jurisdiction

Many jurisdictions now have legislation dealing with powers of attorney for property and for personal care or parallel instruments. Some legislation, but not all, has conflict of laws rules with regard to the formal validity of a power of attorney connected with another jurisdiction. Is recognition of a power of attorney drawn in another jurisdiction the way forward? Or does the approach of recognition raise its own issues, which make it unreliable or otherwise problematic?

In Canada, property rights as well as matters involving mentally incapable persons are under exclusive provincial jurisdiction, and

each of the provinces has legislation to deal with such matters. Each of the Canadian provinces has legislation dealing with powers of attorney for property and for personal care. Some, but not all, provincial legislation has conflict of laws rules with regard to the formal validity of powers of attorney which are connected with another jurisdiction.

(a) Statutory Conflict of Laws Provisions: How do they work?

Where express rules allow for the recognition of a power of attorney for property or equivalent in a jurisdiction where the power of attorney is to be used, they facilitate its use without the need to rely on private conflict of laws rules and possible court intervention or other legal process to substantiate validity.

As an example of statutory conflict of laws provisions, s. 25 of Manitoba's *The Powers of Attorney Act*[5] provides that a power of attorney for property executed outside Manitoba is valid as an enduring power of attorney in Manitoba if:

(a) it is valid according to the law of the place where executed; and
(b) it provides that it is to continue despite the mental incompetence of the donor after the execution of the document.

Section 10 of Manitoba's *The Health Care Directives and Substitute Health Care Decision Makers Act*[6] deals with directives and provides that "a directive made outside Manitoba that complies with the requirements of this Act is deemed to be a directive made under this Act."

As another example, s. 85 of Ontario's SDA provides that a continuing power of attorney or a power of attorney for personal care or their revocation is valid with regard to its formality if it complies with the internal law of any of the following:

(i) place of execution;
(ii) domicile of the grantor; or
(iii) habitual residence of the grantor.

The attached chart sets out which provinces and territories have conflict of laws provisions, and a summary of such provisions for those that do with regard to the formal validity of extra-provincial

5. C.C.S.M. c. P97.
6. C.C.S.M. c. H27.

or extra-territorial powers of attorney, as well as for two key jurisdictions for some Canadian-based estate planning — Florida and Arizona. The relevant provisions contained in the ULC and ULCC uniform acts, as well as Convention XXXV are also included.

Based on the summary contained in the chart, the following observations can be made with regard to whether under statute a power of attorney executed in one province will be valid in these jurisdictions or not.

By way of summary, all of the Canadian provinces and territories with the exception of New Brunswick, Prince Edward Island, Nova Scotia and Newfoundland and Labrador have provisions with respect to the formal validity of a foreign power of attorney for property or equivalent. As well, all of the Canadian provinces with the exception of New Brunswick and Newfoundland and Labrador have provisions with respect to the formal validity of a power of attorney for personal care or equivalent. Both Florida and Arizona have such legislation as well for both types of power of attorney or equivalent, however Arizona's laws only apply to instruments executed in a U.S. jurisdiction.

In all of the Canadian provinces and territories, the term "*enduring* power of attorney" is used to describe a financial power of attorney that survives incapacity, with the exception of Ontario which is singular in using the term "*continuing* power of attorney" and Québec which has three possible instruments: (i) general power of attorney; (ii) mandate in anticipation of incapacity; and (iii) a general power of attorney coupled with mandate in anticipation of incapacity.

Generally, in the Canadian provinces that have statutory provisions, a foreign power of attorney will be valid if it complies with the law of the place where it is executed. Ontario adds as well compliance with the place where the grantor was domiciled or had his or her habitual residence, and Québec adds compliance with the law of the place where the property is situated where the instrument is to be used, or the law of domicile of one of the parties. As well, in Québec the foreign power of attorney may require homologation by the court upon the occurrence of incapacity before it is effective for use by the attorney. Homologation is a court process whereby the court, based on appropriate evidence, confirms the incapacity of the donor and the existence and validity of the instrument.

It is of interest that Convention XXXV, which is discussed in further detail below, allows for an express choice of law in which any of the law of (i) the donor's nationality, (ii) former habitual

residence or (iii) place where the property is located may be chosen, otherwise it is the law of the donor's habitual residence at the time of execution that governs validity and other formalities in respect of a power of attorney.

Under the ULCC Uniform Act, which differs from the ULC one, two options are provided in the model legislation for determining the applicable law for a "substitute decision-making document". Under the first option, the formal validity and essential validity of the document are treated separately, with a slightly broader provision governing formal validity. A substitute decision-making document will be formally valid under option one if it complies with any of: (i) the law indicated in the document, or if none, (ii) the law of the jurisdiction in which it was executed, (iii) the law of the jurisdiction in which the individual was habitually resident, or (iv) the law of the place it is to be used.

The second option contained in the Canadian model legislation follows the approach taken in s. 15 of Convention XXXV in determining applicable law, whereby no distinction is made between formal and essential validity. Instead, the "existence, extent, modification and extinction" of a substitute decision-making document are determined by one law. Under this second option, a substitute decision-making document will be formally valid if it complies with either: (i) the law indicated in the document provided that the donor is a national or former habitual resident of that jurisdiction or the powers given are to be exercised with respect to the donor's property located in that jurisdiction; or (ii) the law of the jurisdiction in which the donor was habitually resident at the time of making the document.

Based on the above analysis, in Canada, it would seem there are helpful express rules for powers of attorney for property or equivalent where they need to be used in Québec and all jurisdictions west of it, and in all but two jurisdictions for powers of attorney for personal care or equivalent, which should be helpful where one seeks to use a power of attorney in those Canadian jurisdictions, without the need to rely on private conflict of laws rules and possible court application to substantiate validity.

(b) Developments in the European Union: Convention XXXV

Significant progress has been made in the European Union to harmonize conflict of laws rules applying to incapable adults through ratification of Convention XXXV. These rules deal with

issues involving jurisdiction, applicable law, and recognition and enforcement of court orders involving guardianship or similar protective regimes in other jurisdictions. Convention XXXV also provides rules with regard to the formal validity of powers of attorney surviving incapacity which are a form of "powers of representation" — the term Convention XXXV employs.

Austria, Czech Republic, Estonia, Finland, France, Germany, Scotland and Switzerland have each ratified Convention XXXV, and ratification is pending in Ireland. England and Wales have not yet ratified Convention XXXV, but they have been under pressure to do so. England and Wales have, however, amended their mental capacity legislation to incorporate almost identical provisions to those in Convention XXXV. Canada is not a signatory to Convention XXXV, although it has been supported by the Canadian Bar Association. It should be noted that the Uniform Law Conference of Canada in 2001 prepared and adopted model legislation to implement Convention XXXV, called the *Uniform International Protection of Adults (Hague Convention) Implementation Act*.

Under Convention XXXV, an adult person can choose the law to be applied to a power of attorney, including which law governs amendment, termination, validity, and its scope, otherwise the law of one's habitual residence at the time of the grant of authority will apply.

The law of any of the following can be chosen:

(i) the law of the state where the person is a national;
(ii) the state of former habitual residence; or
(iii) the state where the adult person's property is located.

Accordingly, it is possible under Convention XXXV for a power of attorney to be valid in a jurisdiction which does not have such instruments.

The manner of exercising such power of representation is governed by the law of the state in which it is exercised. Accordingly, Convention XXXV gives primacy to the local law and any mandatory laws it may have, which could impact for example the use of advance health directives if they are not in accordance with the public policy of the jurisdiction where they are sought to be used. These provisions apply even if the law designated is the law of a non-contracting state to Convention XXXV.

It can be seen that Convention XXXV will be helpful in fostering cross-border advance incapacity planning and requires each contracting state to have familiarity with the various planning

regimes in existence in other jurisdictions. Convention XXXV also provides for a Certificate of Representation which confirms a person's authority to act and their powers.

Convention XXXV can have application to Canadian clients, even though Canada has not signed it. For example, an Alberta power of attorney for a client who is habitually resident in Alberta would be automatically valid when an attorney seeks to use it on behalf of an incapable person in a contracting state. Query however the extent that a power of attorney for personal care would be effective to carry out a person's wishes in a contracting state based on differences in local law and public policy considerations.

As noted above, Canada has not signed Convention XXXV, and neither has the United States. The National Wills and Trusts Section of the Canadian Bar Association in a letter dated May 16, 2007 recommended to the Minister of Justice and Attorney General of Ontario that each Canadian province and territory convey their support for Convention XXXV to the federal government and urged Canada to consider being a signatory, but it appears little movement has occurred in the Canadian setting with respect to adoption and implementation of Convention XXXV.

(c) Uniform Act on Interjurisdictional Recognition of Substitute Decision-Making Documents

As noted above, the U.S. ULC adopted its version of the Uniform Act in July 2014 and the ULCC approved its version in August 2015. This was the first time both bodies worked together on a joint project of this nature. As explained in the prefatory notes to each Uniform Act, the uniform acts reflect the reality that because the majority of substitute decision-making legislation in Canadian and U.S. jurisdictions do not have portability provisions to ensure recognition of the validity of documents created in another jurisdiction, and do not protect good faith reliance on them, the purpose of a substitute decision-making plan can be defeated.

The notes to each of the uniform acts expressly recognize that such lack of recognition and acceptance of a substitute decision-making document often results in guardianship, placing burdens on judicial resources and most importantly undermining individual self-determination.

Each uniform act has a three-pronged approach of recognizing validity of documents created under the law of another (*i.e.*, external) jurisdiction (the "governing law"), preserving the meaning

and effect of a document defined by the governing law under which it was created, and protecting acceptance or rejection of a document in the province, territory or state that has enacted the particular uniform act (the "enacting jurisdiction"). With respect to an enacting jurisdiction's ability to refuse the application of the governing law, the Canadian Uniform Act states that the enacting jurisdiction can refuse only if the governing law's application would be manifestly contrary to the public policy of the enacting jurisdiction. The commentary to the Canadian Uniform Act indicates that the invocation of this exception is likely to arise with respect to decisions involving personal care including certain medical procedures, and in particular in regard to forgoing procedures such as artificially supplied nutrition and hydration.

The Acts provide for the ability of a third party in the enacting jurisdiction to rely on a document created under the governing law of another jurisdiction as well as, subject to certain exceptions, the obligation of third parties within a reasonable time to accept such a substitute decision-making document and not require an additional or different form or authority. The Uniform Acts also provide for a court order mandating acceptance and liability for legal costs for refusal to accept a substitute decision-making document in violation of each Uniform Act.

This new uniform legislation goes a long way in not only providing for recognition but also including provisions to ensure acceptance by third parties in enacting jurisdictions, which has been a major and practical challenge faced in using these documents, by way of providing for liability for costs of obtaining a court order to compel acceptance. It will be of interest to see what impact this uniform legislation will have in the Canadian and U.S. settings if it becomes law in specific provinces, territories and states. As noted earlier, Idaho is the only U.S. state to date to enact the ULC's uniform legislation, which has been included as an addition to its *Uniform Probate Code*. While Idaho's legislation previously contained recognition provisions similar to those in the ULC Uniform Act with respect to powers of attorney for property, which the Uniform Act amendments defer to in respect of such documents, its recognition provisions with respect to personal care substitute-decision making documents were quite limited. The addition of the Uniform Act provisions to Idaho's legislation thereby bolsters and broadens its recognition provisions with respect to powers of attorney for personal care.

(d) Private International Law Principles Relating to Applicable Law Where No Statutory Provisions

Where a power of attorney from a Canadian jurisdiction is to be used in a jurisdiction which has no conflict of laws provisions in its legislation with regard to the validity of foreign powers of attorney, or if it does, such provisions do not have sufficient scope to permit their validity, which conflict of laws rules apply to determine these issues?

The law is somewhat mixed on these issues. Often an analysis involving the law of agency is the one utilized on the basis that a power of attorney is a form of agency.

It is fair to say that notwithstanding the ubiquitous use of powers of attorney, including in the commercial context, there is scant literature or case law which deal with the issue of conflict of laws and powers of attorney, and what exists needs to be extracted through review of conflict of laws rules as they apply to agency.

In respect of the formal validity of a power of attorney, the issue arises of which choice of law rule applies under conflict of laws rules. The general rule is based on *locus regit actum*, that is, the law of the place of execution governs the validity of the form of a legal act.

With regard to the applicable law which governs the relationship between principal and agent, Dicey, Morris and Collins[7] state that the applicable law is in general the proper law applicable to the contract or other relationship between them. The proper law of a power of attorney is often considered to be where the services are to be performed by the agent as established by *Chatenay v. Brazilian Submarine Telegraph Co*.[8]

A strictly contractual approach which looks to the relationship between principal and agent as a type of contract has been subject to significant legal criticism.

Seavey has stated that "agency is the power of one person to affect the legal relations of the others, which power results from the grant of authority by P and the assumption of the fiduciary obligation by A: it is not founded on contract, although there may be a contract governing the rights and obligations of P and A *inter se*."[9]

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7. A.V. Dicey, J.H.C. Morris, and Lawrence Collins, *Dicey, Morris and Collins on The Conflict of Laws*, 15th ed. (London, Sweet & Maxwell Thomson Reuters, 2012), at p. 2109.
8. (1890), [1891] 1 Q.B. 79 (Eng. C.A.).
9. As cited by E. Goldfarb in "Agency and the Conflict of Laws: a critical reassessment" (1977), 35 U. Toronto Fac. L. Rev. 26.

Goldfarb suggests it is important to not resolve choice of law issues simply by a mechanical application of the rules but to adopt an approach which is purposeful.

In respect of the choice of place of execution to govern formal validity, there does appear to be a clear purpose for such choice.

Using the law of the place of execution arguably facilitates international transactions, and it has been asserted that form should generally be a matter of indifference to the parties, as opposed to substance which is of import, "Therefore, as to form they should be permitted the speediest and easiest path, which is obviously by adherence to the . . . place of execution."[10]

Notwithstanding private international rules which look to the place of execution to substantiate formal validity, it seems that in many jurisdictions there is still a tendency to either by local law or in practice based on requirements of third parties including financial institutions, title companies and others, to often insist on conformity with local law, even as to execution requirements and other formalities which only serves to undermine the purpose of general private law rules allowing for validity of foreign powers of attorney.

Where it is anticipated that a power of attorney from a Canadian jurisdiction may need to be used in another jurisdiction, a precaution is to have a Notary witness it and prepare a certificate to such effect, which may facilitate recognition in other jurisdictions, in particular civil law jurisdictions. As well, it is preferable to add express powers in the power of attorney so there is more clarity on the attorney's powers.

In attempting to use a power of attorney from a Canadian jurisdiction in another jurisdiction, although it may be formally valid, local law where it is to be used will dictate what substantive effect can be given to it, the rights and obligations of the donor and the attorney, including the scope of the attorney's authority, and any public policy considerations with regard to its use.

As an example, a power of attorney may authorize an attorney to have all the powers of the donor, with the exception of making a will. However, when used in foreign jurisdictions, although the power of attorney may be formally valid, local law could have requirements that circumscribe an attorney's powers by excluding further matters an attorney may not perform, apart from making a

10. Citing H. Batiffol, *Les Conflits de Lois en matiere de contrats* (Paris, Recueil Sirey, 1938), p. 364, in "Powers of Attorney in International Practice", by P.J. Eder, (1950), 98 U. Pa. L. Rev. 840, at p. 851.

will. As an example, there could be more or different restrictions on the making of gifts by the attorney, if they are allowed at all.

3. Incapacity Planning Options other than a Power of Attorney for Financial Matters, in Particular Using Trusts

For the client with simpler assets, a power of attorney may be adequate to deal with their incapacity. For clients with more complex assets and issues, including those with assets in more than one jurisdiction, other approaches may be preferable which do not rely on a delegation of authority and the often tenuous recognition of such delegation in another jurisdiction, but are instead based on a more robust approach which restructures title and beneficial ownership by the use of one or more of an *inter vivos* trust, a corporation with multiple directors and other legal entities. These vehicles can often also facilitate dealing with assets both on incapacity and death by consolidating the "chains of ownership" of myriad financial assets under an umbrella structure which can be continuously managed under the common authority of trustees, and/or directors and others on incapacity and death.

At this point in professional practice, in many common law jurisdictions, the use of a trust is a far less popular choice than a power of attorney as a basic incapacity planning tool. The primary reason is likely cost. Establishing and funding a trust by transfer of most of one's assets to trustees is an expensive process relative to preparing a simple power of attorney. However, it is submitted that the use of a trust will become increasingly popular as an incapacity planning tool because it offers many advantages over a power of attorney, including those set out below, which arguably make it a superior choice.

(a) Management of Multijurisdictional Assets

In the event of incapacity, failing the existence of powers of attorney prepared in each jurisdiction in local form which survive incapacity, or validity of a power of attorney in multiple jurisdictions, the prospect arises of having to commence court proceedings in each jurisdiction for a guardian, committee, curator or equivalent legal representative to be appointed, an extremely expensive, lengthy and time-consuming process. In addition, local rules may prescribe that only a resident of the jurisdiction may be appointed by the court.

The use of a trust circumvents the need for multiple powers of

attorney, as well as the problems encountered if local law does not allow for continuing or durable powers of attorney which survive a donor's incapacity to the extent the authority of the trustees is recognized. A caveat is that depending on the jurisdiction, issues can arise with regard to the recognition of a common law trust in a civil law and certain other jurisdictions, in particular those in which the *Hague Convention on the Recognition of Trusts* does not apply.

(b) Comprehensive

Using a trust agreement, one may choose individuals to act in the event of one's incapacity, who are subject to comprehensive terms providing for the trustees' specific duties and powers, tailored to meet one's individual circumstances. In contrast, a power of attorney is typically simpler and does not contain detailed provisions providing a framework for the management of property, including special assets such as business assets or real estate.

(c) Protection

A trust arguably offers superior protection to a power of attorney in the event of one's financial incapacity. The property held under the trust can be managed by one's trustees, and the ability to continue to independently deal with assets, once incapacity has been determined, can be terminated in accordance with the procedure stipulated under the trust agreement, usually by medical opinions or a qualified capacity assessment.

In a situation where there is a potential for undue influence and "overreaching" by friends and relatives or others, a trust arrangement is more protective than a power of attorney. Because one will not have independent control of one's assets, and the involvement of one's trustees will be necessary, a wall of protection is created. In contrast, under a power of attorney, the donor can still continue to act unilaterally. How "protective" the trust will be depends on how its terms have been structured, including whether one has reserved a power to remove the trustees or to revoke the trust arrangement.

(d) Continuity

While a trust continues after death, a power of attorney usually does not. Uninterrupted management by the trustees can continue after death or incapacity without the need to wait until executors

and estate trustees have probated a will to establish their authority to third parties.

(e) Privacy and Control

A trust arrangement has historically been a highly private arrangement. Its use results in less involvement of the courts or government regulatory bodies such as public guardians and trustees, than if a power of attorney is used. A power of attorney will usually terminate if a guardian is appointed by the court. As a result, it cannot be relied on to secure one's choice of who should manage one's affairs in the event of incapacity, since this issue may always become subject to court determination. If one's assets are settled on trust, they will not be subject to such intervention — instead, only assets one directly retains will be. Accordingly, a trust can be more effective in ensuring continued private and confidential control and management of one's assets and affairs, without the intervention of outside regulatory government bodies or the courts.

(f) Trust vs. Agency

It is important to appreciate that a power of attorney has a different legal nature than a trust. The primary legal basis for a continuing power of attorney lies in agency, not in trust law. The law of agency is concerned with the authority provided by a principal to his or her agent. Powers of attorney authorize actions, but unless mandatory statutory provisions provide otherwise, powers of attorney do not typically provide directions and instructions obligating an attorney to carry out certain acts, unlike a trust agreement which can create a mandatory regime for property management, and legal obligations to carry out specific acts once the trustee accepts the trusts under the trust agreement.

4. Case Study Involving Multiple Powers of Attorney

An Ontario-born couple with adult children are based in Boston, Massachusetts where one spouse is C.E.O. of a large, multinational corporation. They have financial assets in Ontario, primarily significant registered plans. They have a condominium on the Turquoise Coast in Antalya, Turkey and large bank deposits and investment accounts in New York City and London, United Kingdom, as well as a country home in Provence, France. After sorting out their succession planning and its intricacies, it is now time to ensure proper planning for incapacity. You gather further

information from your clients and find out that they do not spend any significant time in London or New York City, but that they primarily live each year in Turkey for part of July and August, frequently visit Ontario where they have relatives and intend to return to live eventually on retirement, and spend about two months each year in France.

In conjunction with your clients, you conclude that it would make sense to have a financial power of attorney in each jurisdiction for each spouse, and if possible, a power of attorney for personal care or its equivalent in each of Ontario, Turkey, France and Massachusetts for each spouse. You consult with local counsel in each jurisdiction who prepare drafts for your review and you establish the following:

New York: In New York, a Power of Attorney governs financial matters as provided under New York General Obligations Law. A separate Health Care Proxy must be executed for health care decisions. Where more than one attorney is appointed, they must act together unless a statement in the power of attorney provides they may act separately. The Power of Attorney does not revoke prior powers of attorney, unless it states otherwise. Express powers are set out in the Power of Attorney. In order to empower the attorney to make gifts over $500, the power of attorney must provide so and a Statutory Gifts Rider must be executed at the same time as the Power of Attorney. Attorneys are allowed reimbursement for reasonable expenses but compensation only if the Power of Attorney provides for same. The Power of Attorney must be signed before a Notary Public.

Massachusetts: The Massachusetts Power of Attorney is a simple general power of attorney and sets out the express powers of the attorney. It is executed before a Notary Public. A separate Living Will and Health Care Proxy is executed to deal with health care decisions. A separate authorization is executed to authorize release of medical information and records to the named health care agents.

France: In France, a power of attorney which survives incapacity is called a "mandat de protection future", and is quite onerous. Under art. 481 of the *French Civil Code*, it will become effective once incapacity is established, at which point it must be registered for it to take effect. French counsel confirm that an Ontario power of attorney for property and for personal care will be valid under Convention XXXV on the basis of the clients' Canadian nationality and Ontario domicile and for such purpose it should make such

choice of law. As well, to ensure it will be effective, it should be executed with a notary as witness so that it can be legalized and the notary's status authenticated by legalization — the process by which legal documents are certified in order to facilitate the documents' use in foreign jurisdictions.

With respect to Canadian documents, legalization is accomplished through diplomatic channels — first by submitting the original documents to Foreign Affairs, Trade and Development Canada in Ottawa for authentication. As mentioned above, the original documents must be signed and sealed by a Canadian notary. Before the clients execute the powers of attorney, it is important to consider whether French translations may be required for use in France. If so, translations must be prepared in advance by a certified translator and both the English and French versions must be signed by the clients and the notary. Once the documents have been authenticated by the Canadian government, the diplomatic "chain of legalization" will be completed by submitting the documents to the French Embassy or Consulate General of France in Canada in order to have the signature of the Canadian government official authenticated (or submitted to the appropriate high commission in the case of Commonwealth countries). Once authenticated by French officials, the documents will be considered legalized for use in France.

If, however, the documents originate from and will be used in jurisdictions that are each parties to the *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents,* the simplified Apostille process may be used. Similar to the legalization process, an Apostille only certifies the authenticity of the signature and capacity of the person or authority signing the document — it does not certify the content. The Apostille process only applies, however, if the document is considered a *public* document as determined by the law of the issuing country. Presumably if the document is not, at law, a public document of the issuing country, the lengthier legalization process would need to be used instead.

United Kingdom: In the United Kingdom, two "lasting" powers are required–one for property and the other for health care. The form for each is prescribed under the *Mental Capacity Act, 2005*. A certificate provider who is an independent person must certify that the donor understands the Lasting Power of Attorney and is signing it voluntarily. The Lasting Power of Attorney is not valid unless it

has been registered with the Office of the Public Guardian, and cannot be used until registration is completed.

Turkey: Turkish counsel confirms there are no simple parallel documents for use under Turkish law which survive incapacity, although Turkish law does provide for powers of attorney. One approach is to have the Ontario powers of attorney sworn before a Notary, which can be legalized as described above, with the objective of attempting to secure its recognition in Turkey.

After several weeks of corresponding with counsel, all of the documents are executed and finalized, and at some considerable cost. However, the alternative of not having proper incapacity planning would be disastrous and extremely expensive, possibly including court proceedings in six different jurisdictions, two of which are not common law and where English is not an official language. Your client appreciates your efforts, and you have been careful to keep them up to date throughout the process and inform them of the importance of this planning.

IV. CONCLUSION – THE CHALLENGES AHEAD

Incapacity planning will move increasingly to the forefront in estate planning, and with that an understanding of the array of available and appropriate planning options will correspondingly increase in importance as well. But this understanding must go beyond domestic borders to encompass any jurisdiction where our clients spend time or own assets. The convergence of a world getting only smaller because of globalization, but also getting older because of demographic change means estate planners and advisors can look forward to being a force to create solutions that effectively cross borders to ensure the best interests and welfare of our most vulnerable clients. Without effective planning solutions, individual self-determination is undermined and often results in intrusive protective proceedings such as guardianship.

We can all play a role in creating and implementing these solutions. At the micro level, each professional advisor needs to throw aside a parochial approach and expand their professional expertise to be able to competently serve their client's cross-border incapacity planning needs. Financial institutions must follow suit, and develop a culture of comity and co-operation which goes beyond a purely domestic approach in recognizing planning instruments prepared in other jurisdictions, rather than insisting

on local ones. They need to develop proficiency and protocols which facilitate, not frustrate their client's needs.

Our law-makers must also rise to the challenge by enacting modern mental capacity legislation and adopting more uniform approaches. They must recognize that an important goal in any legislative change should be harmonization of law for a populace that increasingly defines itself less by local geographic borders, and looks to the law to assist, not obstruct by creating unnecessary obstacles. Recent initiatives toward creating uniform legislation in the United States by the ULC and in Canada by the ULCC recognizes the importance and relevance of the recognition of substitute decision-making documents in a cross-border Canadian-U.S. setting, and is a laudable testimony to bilateral cooperation.

Professional organizations, such as the Canadian Bar Association and the Society of Trust and Estate Practitioners, can and have played, and will continue to play a critical role in leading the way to creating a culture of internationalism in the planning community. Exciting times, indeed.

Table 1: Powers of Attorney for Property or Equivalent

Province/ Territory	Name of Legislation	Type of Document	Express Statutory Provisions for Validity of a Foreign Document?	Substance of Provision (if applicable)
British Columbia	*Power of Attorney Act*, R.S.B.C. 1996, c. 370 - - *Representation Agreement Act*, R.S.B.C. 1996, c. 405	Enduring power of attorney - - Representation agreement (for "routine management of the adult's financial affairs", ss. 7(b))	Yes - - Yes	Section 38: Subject to any limitation or condition set out in the regulations, a power of attorney that (a) applies or continues to apply when an adult is incapable, (b) was made in a jurisdiction outside British Columbia, and (c) complies with any prescribed requirements is deemed to be an enduring power of attorney made under this Act. - - Section 41: Subject to any limitation or condition set out in the regulations, an agreement that (a) performs the function of a representation agreement, (b) was made in a jurisdiction outside British Columbia, and (c) complies with any prescribed requirements is deemed to be a representation agreement made under this Act.
Alberta	*Powers of Attorney Act*, R.S.A. 2000, c. P-20	Enduring power of attorney	Yes	Subsection 2(5): Notwithstanding subsection (1), a power of attorney is an enduring power of attorney if, according to the law of the place where it is executed, (a) it is a valid power of attorney, and (b) the attorney's authority under it is not terminated by the mental incapacity or infirmity of the donor that may occur after the execution of the power of attorney.
Saskatchewan	*The Powers of Attorney*	Enduring power of at-	Yes	Section 13: (1) An extra-provincial power of attorney is an enduring power of attorney if: (a) it is a valid power of attorney according to the law of the place

Province/ Territory	Name of Legislation	Type of Document	Express Statutory Provisions for Validity of a Foreign Document?	Substance of Provision (if applicable)
	Act, 2002, S.S. 2002, c. P-20.3	torney		where it is executed; and (b) it provides that the attorney's authority under the power of attorney is not terminated by a lack of capacity of the grantor that occurs after the power of attorney has been executed. (2) An extra-provincial power of attorney is an enduring power of attorney containing a contingent appointment if: (a) it is a valid enduring power of attorney according to the law of the place where it is executed; and (b) it provides that an appointment comes into effect on a specified future date or on the occurrence of a specified contingency.
Manitoba	*The Powers of Attorney Act*, C.C.S.M. 1997 c. P97	Enduring power of attorney	Yes	Section 25: A power of attorney executed in a place outside the province is valid as an enduring power of attorney in the province if (a) it is valid according to the law of that place; and (b) it provides that it is to continue despite the mental incompetence of the donor after the execution of the document.
Ontario	*Substitute Decisions Act, 1992*, S.O. 1992, c. 30	Continuing power of attorney for property	Yes	Section 85: (1) As regards the manner and formalities of executing a continuing power of attorney..., the power of attorney is valid if at the time of its execution it complied with the internal law of the place where, (a) the power of attorney was executed; (b) the grantor was then domiciled; or (c) the grantor then had his or her habitual residence. (2) For the purpose of subsection (1), "internal law", in relation to any place, excludes the choice of law rules of that place.
Québec* *NOTE: Generally, in practice, powers of attorney for	*Civil Code of Québec,* S.Q. 1991, c.6	1. General power of attorney - - 2. Mandate	1: Yes, but inoperative upon occurrence of incapacity - -	*Formal Validity* – Article 3109: The form of a juridical act is governed by the law of the place where it is entered into. A juridical act is nevertheless valid if it is made in the form prescribed by the law applicable to the content of the act, by the law of the place where the property which is the object of the act is situated when the act is concluded or by the law of the domicile of one of the parties when the act is concluded.

Province/ Territory	Name of Legislation	Type of Document	Express Statutory Provisions for Validity of a Foreign Document?	Substance of Provision (if applicable)
property and for the person are combined in one document.		in anticipation of incapacity 3. General power of attorney coupled with mandate in anticipation of incapacity	2 & 3: Yes, but may require homolgation by the court upon occurrence of incapacity in order to be used by substitute decision-maker	- - Article 3110: An act may be executed outside Quebec before a Quebec notary if it pertains to a real right the object of which is situated in Quebec or if one of the parties is domiciled in Quebec. *Substantive Validity* – Article 3111: A juridical act, whether or not it contains any foreign element, is governed by the law expressly designated in the act or whose designation may be inferred with certainty from the terms of the act. Where a juridical act contains no foreign element, it remains nevertheless subject to the mandatory provisions of the law of the State which would apply in the absence of a designation. The law may be expressly designated as applicable to the whole or to only part of a juridical act. Article 3112: If no law is designated in the act or if the law designated invalidates the juridical act, the courts apply the law of the State with which the act is most closely connected in view of its nature and the attendant circumstances. Article 3113: A juridical act is presumed to be most closely connected with the law of the State where the party who is to perform the prestation which is characteristic of the act has his residence or, if the act is concluded in the ordinary course of business of an enterprise, has his establishment.
New Brunswick	*Property Act*, R.S.N.B.	Power of attorney	No	Act is silent

Province/ Territory	Name of Legislation	Type of Document	Express Statutory Provisions for Validity of a Foreign Document?	Substance of Provision (if applicable)
	1973, c. P-19			
Prince Edward Island	*Powers of Attorney Act*, R.S.P.E.I. 1988, c. P-16	Power of attorney	No	Act is silent
Newfoundland	*Enduring Powers of Attorney Act*, R.S.N.L. 1990, c. E-11	Enduring power of attorney	No	Act is silent
Nova Scotia	*Powers of Attorney Act*, R.S.N.S. 1989, c. 352	Enduring power of attorney	No	Act is silent
Yukon	*Enduring Power of Attorney Act*, R.S.Y. 2002, c. 73	Enduring power of attorney	Yes	Subsection 3(5): Despite subsection (1), a power of attorney is an enduring power of attorney if, according to the law of the place where it is executed, (a) it is a valid power of attorney; and (b) the attorney's authority under it is not terminated by the mental incapacity or infirmity of the donor that may occur after the execution of the power of attorney.

Province/ Territory	Name of Legislation	Type of Document	Express Statutory Provisions for Validity of a Foreign Document?	Substance of Provision (if applicable)
Northwest Territories	*Powers of Attorney Act*, S.N.W.T. 2001, c. 15	Enduring power of attorney or springing power of attorney	Yes	Section 25: A power of attorney executed in a place outside the Northwest Territories is valid as a springing or enduring power of attorney in the Northwest Territories if (a) it is valid according to the law of that place; and (b) it provides the appropriate statement as to its commencement or continuation, as referred to in paragraph 13(1)(e).
Nunavut	*Powers of Attorney Act*, S.Nu. 2005, c.9	Enduring power of attorney or springing power of attorney	Yes	Section 26: A power of attorney executed in a place outside Nunavut is valid as a springing or enduring power of attorney in Nunavut if (a) it is valid according to the law of that place, and (b) it provides the appropriate statement as to its commencement or continuation, as referred to in paragraph 10(1)(e).
Florida	2015 *Florida Statutes*, Chapter 709	Durable power of attorney	Yes, but only if executed in accordance with Florida law, or, if not, if executed in accordance with the law of the U.S. jurisdiction in which it was exe-	Section 709.2102: As used in this part, the term: . . . (2) "Another state" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. Section 709.2106: (1) A power of attorney executed on or after October 1, 2011, is valid if its execution complies with s. 709.2105. (2) A power of attorney executed before October 1, 2011, is valid if its execution complied with the law of this state at the time of execution. (3) A power of attorney executed in another state which does not comply with the execution requirements of this part is valid in this state if, when the power of attorney was executed, the power of attorney and its execution complied with the law of the state of execution. A third person who is requested to accept a power of attorney that is valid in this state solely because of this subsection may in good faith request, and rely upon,

Province/ Territory	Name of Legislation	Type of Document	Express Statutory Provisions for Validity of a Foreign Document?	Substance of Provision (if applicable)
			cuted	without further investigation, an opinion of counsel as to any matter of law concerning the power of attorney, including the due execution and validity of the power of attorney. An opinion of counsel requested under this subsection must be provided at the principal's expense. A third person may reject a power of attorney that is valid in this state solely because of this subsection if the agent does not provide the requested opinion of counsel, and in such case, a third person has no liability for rejecting the power of attorney. This subsection does not affect any other rights of a third person who is requested to accept the power of attorney under this part, or any other provision of applicable law.
Arizona	*Arizona Revised Statutes,* Title 14	Durable general power of attorney Durable specific power of attorney	Yes, but only if executed in another U.S. jurisdiction	Section 14-5501: ...C. A power of attorney executed in another jurisdiction of the United States is valid in this state if the power of attorney was validly executed in the jurisdiction in which it was created.
U.S. Uniform Law Commission (ULC)	*Uniform Recognition of Substitute Decision-Making Documents Act,* October 1, 2014	Substitute decision-making document	Yes	*Formal Validity:* Section 3(a): A substitute decision-making document for property executed outside this state is valid in this state if, when the document was executed, the execution complied with the law of the jurisdiction indicated in the document or, if no jurisdiction is indicated, the law of the jurisdiction in which the document was executed. *Meaning and Effect:* Section 4: The meaning and effect of a substitute decision-making document and the authority of the decision maker are determined by the

Province/ Territory	Name of Legislation	Type of Document	Express Statutory Provisions for Validity of a Foreign Document?	Substance of Provision (if applicable)
				law of the jurisdiction indicated in the document or, if no jurisdiction is indicated, the law of the jurisdiction in which the document was executed.
Uniform Law Conference of Canada – Civil Law Section (ULCC)	*Recognition of Substitute Decision-Making Documents Act*[11]	Substitute decision-making document	Yes	*Applicable Law - Option 1:* Section 2: (1) A substitute decision-making document executed by an individual outside of [this province or territory] is formally valid in [this province or territory] if, when it was executed, the execution complied with (a) the law of the jurisdiction indicated in the document or, if no jurisdiction is indicated, the law of (i) the jurisdiction in which it was executed, or (ii) the jurisdiction in which the individual was habitually resident; or (b) the law of [this province or territory]. (2) The existence, extent, modification and extinction of the powers of the decision maker under a formally valid substitute decision-making document are governed by (a) the law of the jurisdiction expressly indicated in the document, if (i) the individual is a national or former habitual resident of that jurisdiction, or (ii) the powers in question are to be exercised in relation to the individual's property located in that jurisdiction; or (b) the law of the jurisdiction of which the individual was a habitual resident at the time of executing the document, if the document does not indicate a jurisdiction or the jurisdiction indicated is not a jurisdiction described in clause (a). (3) The laws of [this province or territory] apply to the manner in which the powers of a decision maker are or may be exercised. *Applicable Law - Option 2:* Section 2: (1) The existence, extent, modification and extinction of the powers of

11. Unfinalized version as at September 28, 2015.

Province/ Territory	Name of Legislation	Type of Document	Express Statutory Provisions for Validity of a Foreign Document?	Substance of Provision (if applicable)
				the decision maker under a substitute decision-making document are governed by (a) the law of the jurisdiction expressly indicated in the document, if (i) the individual is a national or former habitual resident of that jurisdiction, or (ii) the powers in question are to be exercised in relation to the individual's property located in that jurisdiction; or (b) the law of the jurisdiction of which the individual was a habitual resident at the time of executing the document, if the document does not indicate a jurisdiction or the jurisdiction indicated is not a jurisdiction described in clause (a). (2) The laws of [this province or territory] apply to the manner in which the powers of a decision maker are or may be exercised.
Hague Conference on Private International Law	*Hague Convention on the International Protection of Adults* (concluded 13 January 2000)	Powers of representation	Yes	Article 15: (1) The existence, extent, modification and extinction of power of representation granted by an adult, either under an agreement or by a unilateral act, to be exercised when such adult is not in a position to protect his or her interests, are governed by the law of the State of the adult's habitual residence at the time of the agreement or act, unless one of the laws mentioned in paragraph 2 has been designated expressly in writing. (2) The States whose laws may be designated are (a) a State of which the adult is a national; (b) the State of a former habitual residence of the adult; (c) a State in which property of the adult is located, with respect to that property. (3) The manner of exercise of such powers of representation is governed by the law of the State in which they are exercised.

Table 2: Powers of Attorney for Personal Care or Equivalent

Province / Territory	Name of Legislation	Type of Document	Express Statutory Provisions for Validity of a Foreign Document?	Substance of Provision (if applicable)
British Columbia	*Representation Agreement Act,* R.S.B.C. 1996, c. 405	Representation agreement	Yes	Section 41: Subject to any limitation or condition set out in the regulations, an agreement that (a) performs the function of a representation agreement, (b) was made in a jurisdiction outside British Columbia, and (c) complies with any prescribed requirements is deemed to be a representation agreement made under the Act.
Alberta	*Personal Directives Act*, R.S.A. 2000, c. P-6	Personal directive	Yes	Section 7.3: A directive made outside Alberta that complies with the requirements of Part 2 has the same effect as if it were made pursuant to this Act.
Saskatchewan	*The Health Care Directives and Substitute Health Care Decision Makers Act*, S.S. 1997, c. H-0.001	Directive	Yes	Section 8: A directive made outside Saskatchewan that complies with the requirements of this Act is deemed to be a directive made pursuant to this Act.
Manitoba	*The Health Care Directives Act,* C.C.S.M. c. H27	Directive	Yes	Section 10: A directive made outside Manitoba that complies with the requirements of this Act is deemed to be a directive made under this Act.
Ontario	*Substitute Decisions Act, 1992*, S.O. 1992, c. 30	Power of attorney for personal care	Yes	Section 85: As regards the manner and formalities of executing a ... power of attorney for personal care, the power of attorney is valid if at the time of its execution it complied with the internal law of the place where, (a) the power of attorney was executed; (b) the grantor was then domiciled; or (c) the grantor then had his or her habitual residence.

Province / Territory	Name of Legislation	Type of Document	Express Statutory Provisions for Validity of a Foreign Document?	Substance of Provision (if applicable)
Québec* *NOTE: Generally, in practice, powers of attorney for property and for the person are combined in one document.	*Civil Code of Québec,* S.Q. 1991, c. 64	1. General power of attorney - - 2. Mandate in anticipation of incapacity - - 3. General power of attorney coupled with mandate in anticipation of incapacity	Yes, but inoperative upon occurrence of incapacity - - 2 & 3: Yes, but may require homolgation by the court upon occurrence of incapacity in order to be used by substitute decision-maker	*Formal Validity* – Article 3109: The form of a juridical act is governed by the law of the place where it is entered into. A juridical act is nevertheless valid if it is made in the form prescribed by the law applicable to the content of the act, by the law of the place where the property which is the object of the act is situated when the act is concluded or by the law of the domicile of one of the parties when the act is concluded. Article 3110: An act may be executed outside Quebec before a Quebec notary if it pertains to a real right the object of which is situated in Quebec or if one of the parties is domiciled in Quebec. *Substantive Validity* – Article 3111: A juridical act, whether or not it contains any foreign element, is governed by the law expressly designated in the act or whose designation may be inferred with certainty from the terms of the act. Where a juridical act contains no foreign element, it remains nevertheless subject to the mandatory provisions of the law of the State which would apply in the absence of a designation. The law may be expressly designated as applicable to the whole or to only part of a juridical act. Article 3112: If no law is designated in the act or if the law designated invalidates the juridical act, the courts apply the law of the State with which the act is most closely connected in view of its nature and the attendant circumstances. Article 3113: A juridical act is presumed to be most closely

Province / Territory	Name of Legislation	Type of Document	Express Statutory Provisions for Validity of a Foreign Document?	Substance of Provision (if applicable)
				connected with the law of the State where the party who is to perform the prestation which is characteristic of the act has his residence or, if the act is made in the ordinary course of business of an enterprise, has his establishment.
New Brunswick	*Infirm Persons Act*, R.S.N.B. 1973, c. I-8	Power of attorney for personal care	No	Act is silent
Prince Edward Island	*Consent to Treatment and Health Care Directives Act*, R.S.P.E.I. 1988, c. C-17.2	Directive	Yes	Section 34: (1) A health care directive, whether it is made in Prince Edward Island or not, has the same effect as though it were made in accordance with Part III if (a) it meets the formal requirements of Part III; or (b) it was made under and meets the formal requirements established by the legislation of (i) the jurisdiction where the directive was made, or (ii) the jurisdiction where the person who made the directive was habitually resident at the time the directive was made. (2) For the purposes of subsection (1), the formal requirements are the requirements relating to the formalities of execution of health care directives. (3) A person implementing a health care directive may rely on a certification by a person purporting to be a lawyer or notary public in a jurisdiction certifying that the directive meets the formal requirements of the jurisdiction. (4) A health care directive that does not meet the formal requirements described in subsection (1) has the same effect as a health care directive that was made in Prince Edward Island but that does not meet the formal requirements of Part III. (5) In circumstances in which it is impractical to

Province / Territory	Name of Legislation	Type of Document	Express Statutory Provisions for Validity of a Foreign Document?	Substance of Provision (if applicable)
				determine whether or not a health care directive meets the formal requirements described in subsection (1), the directive has the same effect as a health care directive that was made in Prince Edward Island but that did not meet the formal requirements of Part III.
Newfound-land	*Advance Health Care Directives Act,* S.N.L. 1995, c. A-4.1	Advance health care directive	No	Act is silent
Nova Scotia	*Personal Directives Act*, S.N.S. 2008, c. 8 - - *Medical Consent Act* R.S.N.S. 1989, c. 279 (for medical care proxies named prior April 1, 2010 re consent to medical treatment or directions respecting medical treatment – the Act was repealed April 1, 2010)	Personal directive - - Authorization	Yes - - No	Section 24: An instrument authorizing a person to make personal-care decisions on behalf of another or setting out instructions, values, beliefs or wishes regarding personal care made outside of the Province has the same effect as a personal care directive made under this Act if it was made in the form required (a) in this Act; or (b) in the legislation of (i) the jurisdiction where the instrument was made; or (ii) the jurisdiction where the person who made the instrument was habitually resident at the time the instrument was made. - - Act is silent
Yukon	*Decision Making, Support and Protection to Adults Act,* Schedule B *Care Consent Act*, S.Y. 2003, c.	Directive	Yes	Section 34: A directive made outside Yukon that complies with the requirements of this Act is deemed to be a directive made pursuant to this Act.

Province / Territory	**Name of Legislation**	**Type of Document**	**Express Statutory Provisions for Validity of a Foreign Document?**	**Substance of Provision (if applicable)**
	21			
Northwest Territories	*Personal Directives Act*, S.N.W.T. 2005, c. 16	Personal directive	Yes	Section 3: . . . (2) A personal directive made in another jurisdiction has the same effect as if it were made in accordance with this Act if (a) a lawyer entitled to practice law in that jurisdiction has certified in writing that the directive meets the requirements relating to the formalities of execution for personal directives under the legislation of that jurisdiction; or (b) the directive would have met the applicable requirements of section 6 had it been made in the Northwest Territories. (3) A personal directive made in another jurisdiction that is not described by paragraph (2)(a) or (b) has no legal effect in the Northwest Territories.
Nunavut	No legislation	Not applicable	No	Not applicable
Florida	2015 *Florida Statutes*, Chapter 765 - - 2015 *Florida Statutes*, Chapter 709	Advance directives, including health care surrogate designation, living will, and anatomical donation - -	Yes - - Yes, but only if executed in another U.S. jurisdiction	Section 765.112: An advance directive executed in another state in compliance with the law of that state or of this state is validly executed for the purposes of this chapter. Section 765.103: Any advance directive made prior to October 1, 1999, shall be given effect as executed, provided such directive was legally effective when written. - - See provisions quoted above in Florida section of Power of Attorney for Property chart

Province / Territory	Name of Legislation	Type of Document	Express Statutory Provisions for Validity of a Foreign Document?	Substance of Provision (if applicable)
		Durable power of attorney specifically for health care		
Arizona	*Arizona Revised Statutes*	Health care directives, including durable health care power of attorney, living will, prehospital medial directive, and durable mental health care power of attorney	Yes, but only if prepared in another U.S. state, district or territory	Section 36-3201: In this chapter, unless the context otherwise requires . . . 5. "Health care directive" means a document drafted in substantial compliance with this chapter, including a mental health care power of attorney, to deal with a person's future health care decisions. 6. "Health care power of attorney" means a written designation of an agent to make health care decisions that meets the requirements of section 36-3221 and that comes into effect and is durable as provided in section 36-3223, subsection A . . . 9. "Living will" means a statement written either by a person who has not written a health care power of attorney or by the principal as an attachment to a health care power of attorney and intended to guide or control the health care treatment decisions that can be made on the person's behalf. 10. "Mental health care power of attorney" means a written designation of an agency to make mental health care decisions that meets the requirements of section 36-3281. Section 36-3208: A health care directive prepared before September 30, 1992, or prepared in another state, district or territory of the United States is valid in this state if it was valid in the place where and at the time when it was adopted and only to the extent

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				that it does not conflict with the criminal laws of this state.
U.S. ULC	*Uniform Recognition of Substitute Decision-Making Documents Act,* October 1, 2014	Substitute decision-making document	Yes	*Formal Validity:* Section 3(b): A substitute decision-making document for health care or personal care executed outside this state is valid in this state if, when the document was executed, the execution complied with: (1) the law of the jurisdiction indicated in the document or, if no jurisdiction is indicated, the law of the jurisdiction in which the document was executed; or (2) law of this state other than this [act]. *Meaning and Effect:* Section 4: The meaning and effect of a substitute decision-making document and the authority of the decision maker are determined by the law of the jurisdiction indicated in the document or, if no jurisdiction is indicated, the law of the jurisdiction in which the document was executed.
ULCC	*Recognition of Substitute Decision-Making Documents Act*[12]	Substitute decision-making document	Yes	*Applicable Law - Option 1:* Section 2: (1) A substitute decision-making document executed by an individual outside of [this province or territory] is formally valid in [this province or territory] if, when it was executed, the execution complied with (a) the law of the jurisdiction indicated in the document or, if no jurisdiction is indicated, the law of (i) the jurisdiction in which it was executed, or (ii) the jurisdiction in which the individual was habitually resident; or (b) the law of [this province or territory].

12. Unfinalized version as at September 28, 2015.

Province / Territory	Name of Legislation	Type of Document	Express Statutory Provisions for Validity of a Foreign Document?	Substance of Provision (if applicable)
				(2) The existence, extent, modification and extinction of the powers of the decision maker under a formally valid substitute decision-making document are governed by (a) the law of the jurisdiction expressly indicated in the document, if (i) the individual is a national or former habitual resident of that jurisdiction, or (ii) the powers in question are to be exercised in relation to the individual's property located in that jurisdiction; or (b) the law of the jurisdiction of which the individual was a habitual resident at the time of executing the document, if the document does not indicate a jurisdiction or the jurisdiction indicated is not a jurisdiction described in clause (a). (3) The laws of [this province or territory] apply to the manner in which the powers of a decision maker are or may be exercised. *Applicable Law - Option 2:* Section 2: (1) The existence, extent, modification and extinction of the powers of the decision maker under a substitute decision-making document are governed by (a) the law of the jurisdiction expressly indicated in the document, if (i) the individual is a national or former habitual resident of that jurisdiction, or (ii) the powers in question are to be exercised in relation to the individual's property located in that jurisdiction; or (b) the law of the jurisdiction of which the individual was a habitual resident at the time of executing the document, if the document does not indicate a jurisdiction or the jurisdiction indicated is not a jurisdiction described in clause (a).

Province / Territory	Name of Legislation	Type of Document	Express Statutory Provisions for Validity of a Foreign Document?	Substance of Provision (if applicable)
				(2) The laws of [this province or territory] apply to the manner in which the powers of a decision maker are or may be exercised.
Hague Conference on Private International Law	*Hague Convention on the International Protection of Adults* (concluded 13 January 2000)	Powers of representation	Yes	Article 15: (1) The existence, extent, modification and extinction of power of representation granted by an adult, either under an agreement or by a unilateral act, to be exercised when such adult is not in a position to protect his or her interests, are governed by the law of the State of the adult's habitual residence at the time of the agreement or act, unless one of the laws mentioned in paragraph 2 has been designated expressly in writing. (2) The States whose laws may be designated are (a) a State of which the adult is a national; (b) the State of a former habitual residence of the adult; (c) a State in which property of the adult is located, with respect to that property. (3) The manner of exercise of such powers of representation is governed by the law of the State in which they are exercised.