

Enduring Power of Attorney

Planning for Financial and Legal Affairs



“We thought we had everything covered with our Will and joint ownership — but we did not!”

Why is this information important?

No one—not a parent or a spouse—has automatic authority to act on an adult’s behalf if the adult needs help when alive. Adults have two choices: 1) Make a legal document to choose who will have authority; or 2) Authority is imposed.

For example: 1) The adult may make an Enduring Power of Attorney (or Representation Agreement with routine finances from section 7) that states who will make financial decisions on their behalf; or 2) The adult is declared incompetent of managing their finances and someone (or the state) assumes authority over the adult’s financial affairs.

What are some basics to know?

In BC, any type of power of attorney can only cover financial and legal matters. In BC, only a Representation Agreement can authorize someone for health (medical) and personal care matters.

What is an Enduring Power of Attorney?

An Enduring Power of Attorney is a legal planning document under Parts 2&3 of the BC [Power of Attorney Act](#) (PoA Act). It is a way (when you are mentally capable) to give legal authority to a person to act on your behalf for financial and legal matters EVEN if you later become incapable.

What is a non-enduring Power of Attorney?

A non-enduring Power of Attorney (PoA) **ends** if the person who makes it becomes mentally incapable. This type of power of attorney is common for businesses—for example, to allow a CEO to act on behalf of the company.

An Enduring Power of Attorney (EPA or EPoA) **continues** or ‘endures’ beyond mental incapability. It is for personal life—check if qualify to make it.

What wording is used for an EPA?

Special wording makes a type of power of attorney ‘Enduring.’ Section 14 of the PoA Act suggests:

My attorney may exercise the authority granted by this Enduring Power of Attorney while I am capable of making decisions about my financial affairs, and this authority continues despite my incapability to make those types of decisions.

BC’s PoA Act was amended (changed) as of September 1, 2011. If an EPA was made before that date, look for different wording:

In accordance with the Power of Attorney Act I declare that this power of attorney may be exercised during any subsequent mental infirmity on my part.

Do you qualify to make an EPA?

To make an EPA under BC law:

1. You must be **at least 19 years old** (the age of adulthood in BC is 19); AND
2. You must be **mentally capable to understand** the nature of an EPA (what an EPA is for) and the effect or consequences of making it. (This is the traditional definition of mental capability, which is solely based on cognitive ability.)

When the BC PoA Act was amended, the age requirement was added for the EPA. The mental capability requirements were broken down into six items and are listed in section 12.

To make an EPA, **you must understand** ALL of the following **six items** (here in plainer language):

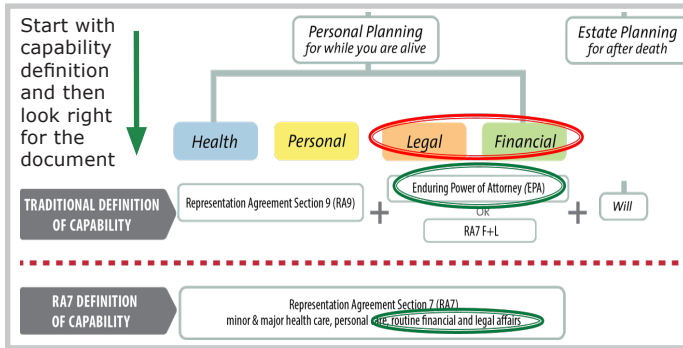
- What you own and the approximate value;
- The obligations you owe to your dependants, such as a spouse and minor children;
- That the person you appoint will be able to deal with any financial and legal affairs on your behalf that you could do if capable, except make a Will for you. Their authority is also subject to any conditions or restrictions set out in the EPA;
- That, unless the person you appoint manages your affairs responsibly, the value of what you own may go down (decrease);
- That the person you appoint might misuse their authority; and
- That you may, if capable, revoke (cancel) the EPA.

Legal professionals often take notes to back up their opinion that you understand all six items.

The law says that the way an adult communicates is not a factor in determining incapability. An adult may communicate understanding in various ways.

NOTE: Some adults do not qualify to make an EPA. This might be an adult who has advanced dementia or suffered a serious stroke or an adult with a disability from birth or childhood that affects their cognitive capability to understand (or to demonstrate they understand).

These adults may make a Representation Agreement under section 7 (RA7) with the included authority for 'routine finances.' The Representation Agreement Act (a BC law) has a different view of capability, for Agreements made under section 7, than required for making an EPA.



FREQUENTLY ASKED QUESTIONS

What does an EPA authorize?

An EPA without restrictions authorizes those appointed to make decisions on your behalf and to do anything with respect to your financial, business and legal affairs that you can lawfully do when mentally capable. You can modify or add some authorities with specific statements in the EPA.

An EPA made under the BC PoA Act may NOT apply to things you own (like real estate) in a different province/territory or country. Check with a lawyer or notary public.

What can an EPA not authorize?

An EPA can NOT authorize an attorney to do something that is against the law (for example, participate in money laundering) or refuse to do something that is required by law (for example, not file a tax return in a year that you owe money).

The BC PoA Act also says the attorney cannot make or change a Will on your behalf.

Why is joint ownership not a substitute?

Owning real estate or a motor vehicle jointly with your spouse is common but only has benefits when the joint owner spouse dies. It is not designed if your joint owner spouse becomes incapable. If a joint owner becomes mentally incapable the other owner(s) cannot sell the real estate or motor vehicle unless someone has legal authority to act on behalf of the joint owner who is mentally incapable.

What type of document do you have?

People often say they are the 'power of attorney.' This is wrong and confusing. There is a difference between the document and the roles. You would not say 'I am the Will.' You might say 'I am the will-maker' or 'I am the executor' or 'I am a beneficiary.' The Will is the term for the document. Will-maker, executor and beneficiary are roles in a Will.

It is important to know and use the correct term for the **document**. Is it:

- A non-enduring Power of Attorney? or
- An Enduring Power of Attorney? or
- A Representation Agreement under section 7 (RA7) that includes authority for routine finances?

What are the roles to appoint in an EPA?

An EPA has two roles:

1. Attorney, and
2. Alternate attorney.

The term 'attorney' does not refer to a lawyer.

- The BC PoA Act says you can appoint an **individual** (see restrictions below).
 - » People usually appoint a spouse, family member, or friend.
 - » It is common for spouses to appoint each other, but they will each want to appoint someone else as a back-up.
 - » Those you appoint do not have to live in BC, but if not, there can be practical challenges.
 - » If you appoint someone who lives in the USA, they need to file a form called FBAR with Internal Revenue Services (USA) when they start acting on your behalf.
 - » You may appoint someone who is 18 years old; they cannot act until they are 19 years of age.
 - » You can appoint more than one attorney and/or more than one alternate.
 - » Sometimes people appoint a professional like an accountant. You are appointing the individual, not the firm.
- The only **institutions** you can appoint are:
 - » The Public Guardian and Trustee, or
 - » A financial institution that can do trust business under the Financial Institutions Act.

The law has **restrictions**. You can NOT appoint:

1. An individual who is compensated to provide health or personal care services to you (for example, a paid caregiver); or
2. An individual who is an employee of a facility where you live and where the facility provides health or personal care services to you.

The above restrictions do NOT apply if the individual is your spouse or is your parent or child (by birth or adoption).

What term is used for person making an EPA?

In the past, legal professionals used the term 'donor' to refer to the person who makes/owns the EPA. Today, the modern term is 'adult' or 'maker'.

Where do I get the form to make an EPA?

The Nidus Resource Centre strongly recommends:

- 1) Get informed about what you want to include in the EPA. Discuss with those you want to appoint. Go to www.nidus.ca > Information (top menu bar) > Enduring Power of Attorney
- 2) Prepare for meeting with legal professional by gathering information. They may provide a list. See also *Preparing for Meeting Legal Professional*.
- 3) Meet with a lawyer or notary public. They will draft the EPA form for you. They generally do not witness forms drafted by someone else.

Phone the Lawyer Referral Service at 604.687.3221 or 1.800.663.1919. Or, contact the Society of Notaries Public of BC at 604.681.4516 or 1.800.663.0343.

What are the duties of an attorney in the EPA?

Duties of an attorney(s) also apply to the alternate(s). An attorney must act honestly and in good faith. They must act according to your EPA—including any restrictions. They must also act according to the legal duties outlined in section 19 of the BC Power of Attorney Act. Details are found in the *Role of an Attorney*.

In discussions about duties, you may hear the term 'fiduciary.' This means, when acting for you, an attorney is in a position of trust and must act responsibly for your benefit, not theirs.

What is the liability of an attorney in an EPA?

Being appointed in your EPA does not make the attorney personally liable for your debts.

When acting as your attorney they may not be liable for any loss or damage to your financial affairs as long as they follow their duties and any directions given by the Supreme Court of BC.

Does my attorney get paid?

Your attorney can be paid a fee or receive a personal benefit only if you specify this in writing. As of Sept. 1/11 you must specify this in the EPA and any fee must give an amount or rate.

If nothing is specified, an attorney must not receive any personal benefit for acting as your attorney. This includes taking a fee or borrowing your money or giving themselves 'birthday money' even if it was your practice to do this.

If you appoint a professional or an institution as your attorney they will require a fee for services.

An attorney has the **right to be reimbursed** for reasonable out-of-pocket expenses they may spend when carrying out their duties. You do not have to mention this in the EPA.

When does an EPA take effect?

Nidus recommends your EPA has wording that it is in effect while you are capable and continues if you become incapable. See wording on page 1.

Why would you want an EPA to be in effect while you are capable? For flexibility. Being in effect while you are capable does not prevent you from managing your own affairs while capable to do so.

On the other hand, many different situations can arise. You may be mentally capable and want someone to act for you because:

- An illness or injury affects your energy or concentration, or
- You are out-of-town or in hospital and cannot physically manage your finances.

You may also want flexibility if you are mentally capable of managing SOME things and only need help with certain matters. Mental incapability is not 'all or nothing.' It can be gradual or it can fluctuate (come and go), such as with dementia.

It might be tempting to ask a legal professional to use wording that says the EPA only comes into effect when you become mentally incapable. Some refer to this as a 'springing clause' or 'trigger event.' Although this idea may seem logical, it is generally NOT helpful. Assessments of incapability can create delay, be costly and cause stigma. You may incur debts, interest charges and even be evicted due to non-payment of rent because those you appointed in the EPA cannot act until you are assessed as mentally incapable to manage ALL of your financial and legal matters.

If the reason for not giving the attorney authority to act while you are capable is because you do not trust them to act only when needed, do not appoint them.

What about witnessing requirements?

You, the adult, must sign the EPA and your signature must be witnessed. As of Sept. 1/11, you need two witnesses. However, only one witness is required if that witness is a BC lawyer or a notary public who is a member of the Society of Notaries Public of BC.

As of Sept. 1/11, each attorney you appoint must also sign the EPA and their signature must be witnessed in order for their authority to be in effect. You and your attorney do not have to sign at the same time or with the same witness(es).

What about Land Title requirements?

If your EPA might be used for real estate matters, it must meet requirements of the [Land Title Act](#).

The lawyer or notary who drafts your EPA can make sure these are addressed in case the EPA is needed for real estate matters:

- Your name (the adult) on the EPA should match your name as it appears on the 'title' of any real estate you own.
- Your EPA needs to include a statement called 'Officer Certification' when the EPA is made.
- Your attorney(s) will need to sign a form to say they are 19 years or older and named in your EPA. The form is like an affidavit and must be witnessed as such.
- Your EPA can be registered with land titles for any length of time. An EPA does not become invalid after 3 years like a non-enduring PoA can. Your EPA does not need wording to exclude the effect of section 56(1) of the Land Title Act.

When does an EPA end?

An EPA ends when you die. It also ends if you revoke (cancel) it, or if someone is appointed to be your legal guardian (committee of estate) through the Supreme Court of BC, or if the Public Guardian and Trustee takes over your financial affairs. See more at *Lifespan of an EPA*.

Can I revoke (cancel) an EPA?

Yes, if you are capable of making an EPA, you are considered capable of revoking (cancelling) an EPA. Making a new EPA does NOT automatically revoke a previous one. The BC Power of Attorney Act outlines specific requirements for revoking an EPA—a statement in the new EPA may not be good enough. Someone else can NOT revoke an EPA on your behalf. Read *Revoking an EPA*.

Can an attorney resign from an EPA?

If an attorney or alternate has signed the EPA with witness(es), then they are authorized to act. However, they may later decide to resign. The BC Power of Attorney Act outlines specific requirements for resigning. See information on *Resigning as an Attorney or Alternate in EPA*.

What is a Bank Power of Attorney?

A Bank Power of Attorney is limited by scope—it only applies to accounts specific to the financial institution. Times have changed—the Bank/Credit Union forms were not designed for today's needs. They do not cover things like dealing with Canada Revenue (your taxes) or dealing with government agencies (for your benefits and/or pensions).

A Bank Power of Attorney used with a financial institution in BC must comply with the BC Power of Attorney Act, including the mental capability qualifications and witnessing requirements.

What about documents made outside BC?

Sometimes people move to BC and bring their legal planning document with them. A legal planning document for financial affairs you made outside BC and that is intended to be in effect while you are incapable can be accepted as an EPA as if made under BC law. However, to be accepted, it must be accompanied by a Certificate of Extrajurisdictional Solicitor signed by a lawyer in the province/territory or qualified country where the document was made [section 38, PoA Act]. More details in *Documents Made Outside BC*

Where can I register the EPA?

The Nidus Registry, operated by the Nidus Resource Centre, is the only registry in BC for types of power of attorney and Representation Agreements. You can securely store information and a copy of your document and arrange access for others who may need to know. The Nidus Registry is online for 24/7 access. Learn more at <https://nidusregistry.ca/faqs/>

NOTE: What about abuse? In our experience, lack of education and mixed messaging can be factors.

- An attorney appointed in your EPA needs information about their role and duties.
- Many parents tell their children 'you are going to inherit it all anyway.' This is not a good message when you can't predict the future cost of your own care needs.
- Some professionals who give advice on financial planning suggest that their clients include an estimate of what they expect to inherit or be gifted by parents or others. This can give the wrong message.

If you are capable and have concerns, revoke your EPA and make a new one with different people.

If you know someone who is incapable and you have evidence of abuse using the EPA, contact the Public Guardian and Trustee at 604-660-4444.

TIPS AND RESOURCES

How do I get started?

Do NOT start with the document name. The first step is to consider mental capability requirements. See p. 1 for EPA qualifications and chart on p. 2.

Where to find more resources?

Go to www.nidus.ca > Information (top menu bar) > select Enduring Power of Attorney or Representation Agreement or other topic.

Thanks from the Nidus Resource Centre to donors for funds to produce this and other resources.