

Lifespan of an Enduring Power of Attorney

Introduction

This information is based on Parts 2 & 3 of the [Power of Attorney Act](#) of BC as amended September 1, 2011. It focuses on when an Enduring Power of Attorney (EPA) **comes into effect and when it ends**—the lifespan. It is not intended for a non-enduring Power of Attorney.

This information is also not intended for a 'Bank Power of Attorney,' which is likely an enduring-type of power of attorney and would have to meet the requirements of the BC Power of Attorney Act. However, a Bank Power of Attorney may have different conditions affecting lifespan, depending on the financial institution.

When Does an Enduring Power of Attorney Come Into Effect?

Check the wording in the EPA

If the EPA does not say when it comes into effect, then it means immediately when all required signing and witnessing are complete.

Rarely, the EPA may say it comes into effect on a specific future date.

Sometimes the EPA will describe an event or condition that will 'trigger' when the EPA comes into effect. A common trigger event is when the adult becomes mentally incapable. This may also be referred to as a 'springing EPA.' This approach may not be helpful as shown in examples that follow.

If the EPA has wording to come into effect when the adult is incapable, the EPA must describe how incapability will be determined and who will confirm this. If this cannot be confirmed as described or nothing is listed, a qualified health care provider may do the confirmation.

A word about capability/incapability

We often think of mental incapability as 'all or nothing' but it is much more 'gray' than black and white. People with dementia will report having good days and bad days. They sometimes feel they are in a fog and other times things are perfectly clear. This means an attorney may need to step forward and act at certain times and step into the background when they are not needed.

Other illnesses and injuries may require an attorney to provide temporary or periodic help. This means attorneys will need flexibility for when they can act.

If the EPA has wording to say it only comes into effect when the adult is incapable, it may cause delay. The adult's affairs may be on hold until someone evaluates the conditions spelled out in the EPA for determining incapability and therefore whether the attorney can act.

EPA comes into effect immediately

Most EPAs come into effect immediately. The EPA would have wording that it is in effect while the adult is capable and continues to be in effect (endures) despite incapability. Why would this be helpful? Example:

Elsie made an Enduring Power of Attorney for financial and legal affairs and a Representation Agreement for health and personal care before her elective surgery. She wanted to be prepared if anything happened.

As it turned out, there was a general meeting of Elsie's Strata while she was in hospital and she asked her son (appointed in the EPA) to participate on her behalf and deal with any issues. Elsie's son reported to her on the Strata meeting and other matters she asked him to handle for her. After Elsie returned home from hospital, the EPA went back in the drawer and Elsie continued to manage her own affairs.

EPA comes into effect later, when a trigger event has occurred

The BC Power of Attorney Act (PoA Act) says you can state in your EPA that it will come into effect only when the adult becomes incapable (this is a type of 'trigger event').

Why is a trigger event or springing EPA not helpful? Example:

Geraldine was recently diagnosed with dementia and is planning to make an Enduring Power of Attorney (EPA) and Representation Agreement section 9 (RA9) to plan for the future.

Geraldine thought she would put a trigger event in her EPA to say the EPA comes into effect when her doctor determines she is incapable.

However, Geraldine is re-thinking putting a trigger event in her EPA after she spoke to Sandi, the daughter of a former support group member whose dementia is more advanced.

Sandi said she is having a lot of problems helping her father with his finances because, although she is appointed the attorney, her father's EPA states that EPA comes into effect when the

doctor says her father is incapable. But the doctor does not find her father to be incapable.

Sandi wants her father to be seen as capable but sometimes he gets confused and needs her to do things for him.

Without the EPA, Sandi cannot help her father by paying his bills or setting up direct bill payment. It is frustrating, not just for Sandi, but especially for her father. Her father became very upset when he realized he was being charged for late payments as he always took pride in not owing interest.

Trigger events can be helpful:

If an adult has a recurring/episodic mental illness such as a mood disorder, the adult can use their insight about the symptoms of their mental illness to 'trigger' certain actions to be taken during an episode. For example, maybe during a manic episode, the adult will 'max out' their credit cards, which leads to immense debt. To prevent this, the adult wants their attorney to be able to cancel the adult's credit cards when symptoms of the adult's mania (as described in the EPA) appear. Obviously there has to be some protection for the attorney as it may take time to get the attention and cooperative action of Credit Card Companies.

When does an attorney's authority begin?

When EPA is in effect and all other requirements are met

As of September 1, 2011, an attorney must sign the EPA with witness(es) before the attorney has authority to act. The requirements are outlined in the BC PoA Act, section 17.

Sometimes the attorney signs at the same time as the adult when the adult is making and signing their EPA. The adult and the attorney may be able to use the same witness(es).

However, the BC PoA Act says that an attorney does not have to sign in the presence of the adult (who made the EPA) or any other attorney.

Only one witness is required for the attorney's signature if that witness is a BC lawyer or a notary public who is a member of the Society of Notaries Public of BC.

Otherwise, two witnesses are required for an attorney's signature.

The two witnesses must each meet the following qualifications:

- Be 19 years or older (19 is the age of adulthood in BC), and
- Understand the type of communication used by the attorney, and
- Not be an attorney appointed in the EPA, and
- Not be the spouse (legally married or common law) or the parent or child (by birth or adoption), employee, or agent of an attorney appointed in the EPA.
- An employee or agent of an attorney appointed in the EPA may be a witness, if the attorney is a lawyer (member of the Law Society of BC), or is a member in good standing of the Society of Notaries Public of BC, the Public Guardian and Trustee of BC, or is a financial institution authorized to do trust business under the Financial Institutions Act.

If the EPA needs to be used for **Land Title** purposes (for example, selling real estate), there are some additional requirements. These are discussed in the basic information on the EPA and information on *Role of Attorney*. Land title matters can involve more than buying and selling real estate as discussed in details on *Authorities*.

If more than one attorney is appointed to act

An attorney's authority to act may depend on another attorney if the EPA appoints more than one. Check the wording of the EPA.

The BC PoA Act, amended Sept. 1/11, says that if an attorney decides not to sign the EPA (and therefore activate their authority), it does not affect the authority of any other attorney, unless the EPA says it does.

If the EPA says attorneys must act together (jointly) and does not have wording to anticipate that this might not be possible, then it could be a problem if more than one attorney is appointed and an attorney does not sign.

When does an attorney's authority end?

If the attorney dies or is incapable

An attorney's authority ends if, for example, the attorney becomes mentally incapable or dies.

If the attorney resigns

An attorney can resign. See information on *Resigning as an Attorney in EPA*.

If an attorney is the adult's spouse and their relationship ends

Unless the EPA has specific wording, the authority of an attorney who is the adult's spouse automatically ends when their relationship breaks down. The BC PoA Act references the Divorce Act and Family Law Act for determining when a relationship breaks down.

The BC PoA Act defines "spouses" as a couple who are legally married or living in a marriage-like relationship. This includes common-law and same sex spouses. There is no requirement on how long spouses must have been together.

If the attorney is bankrupt or is convicted

An attorney's authority automatically ends if the attorney is bankrupt, or is convicted of an offence in which the adult who made the EPA is a victim.

If the EPA is suspended

The EPA and authority of all attorneys are suspended if a Certificate of Incapability to Manage Finances has been issued by two qualified health care providers and the Public Guardian and Trustee (PGT) becomes the adult's statutory property guardian (also referred to as committee of estate).

The Patients Property Act section 19.1 says the PGT can determine if the PGT needs to take over management of the adult's financial and legal affairs or if the suspended EPA may continue.

The reason a health care provider would likely initiate the statutory property guardian procedure is because they do not know there is an EPA, the EPA has restrictions on the attorney's authority and might not be able to manage financial matters the health care provider believes are needed, or the health care provider is concerned about abuse, neglect or self-neglect of the adult.

When specified in the EPA

The EPA may list conditions when some or all of an attorney's powers are suspended (on hold) or are ended.

The BC PoA Act says that even if an attorney's authority ends, anything lawfully done by the attorney on behalf of the adult, including making an agreement (contract), remains binding on the adult.

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

When does the EPA end?

When the adult who made the EPA revokes it

The EPA ends (and the authority of all attorneys) when the adult who made the EPA revokes (cancels) the EPA. The BC PoA Act sets out requirements for how to revoke an EPA. See *Revoking EPA*.

When the adult who made the EPA dies

The EPA ends when the adult who made it dies.

When specified in the EPA

The EPA may list conditions when the EPA ends.

If all attorneys and alternates cannot act

The EPA ends if no one appointed in it is able or willing to act.

The adult may be capable to make a new EPA. If the adult does not meet the mental capability requirements to make a new EPA, the adult may make a Representation Agreement under section 7 (RA7) and include authority for routine financial affairs.

If the Public Guardian and Trustee takes over

If the PGT becomes the adult's statutory property guardian (also called committee of estate), and the PGT determines the PGT is best suited to manage the adult's financial and legal affairs, any existing EPA is ended. See information on *Statutory Property Guardianship*.

If a judge appoints someone as committee of estate/guardian of the adult's financial affairs

Someone may apply to the Supreme Court of BC under the Patients Property Act to be appointed committee of estate (to take over the adult's financial and legal affairs). If the judge finds the adult mentally incompetent of managing their finances, the EPA ends. See information on *Adult Guardianship/Committeeship*.

If cancelled by the Supreme Court of BC

A judge of the Supreme Court of BC can end the EPA in response to an application requesting this from the PGT or someone who makes a complaint to the PGT about abuse or neglect of the adult.

INFORMATION AND RESOURCES

Where to find more information?

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