

Role of an Attorney Appointed in 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 the **duties, authorities and rights of an attorney** appointed in an Enduring Power of Attorney. 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 including the duties of the attorney. However, a Bank Power of Attorney is very limited in scope and some authorities discussed will not apply.

Getting to know terms and jargon

Enduring Power of Attorney (EPA) is the **document**.

There are **two roles** that can be appointed in an EPA: attorney and alternate attorney. Attorney does not mean lawyer—it is the name of the role.

What if more than one attorney is appointed?

The EPA may appoint more than one attorney and/or more than one alternate. If more than one role is appointed to act at the same time, the EPA must state how the authorities/powers are shared—separately or together (jointly). If nothing is stated, then they must act together. Acting together means all attorneys must give the okay before an action can proceed.

Where are the duties and authorities listed?

The duties of an attorney appointed in an EPA used to be 'understood' under common law. Now these are spelled out in legislation, which increases accessibility, especially to those who are expected to know and follow their duties.

Key duties are outlined in **section 19** of the BC Power of Attorney Act (PoA Act). The authorities or powers of the attorney are described in **section 20**. See later headings for more detail.

It is also essential to **read the EPA document** for specific or additional authorities and for any restrictions or conditions. The maker of the EPA should go over their document with those appointed to answer questions and explain.

When is authority of attorney in effect?

Check the wording in the EPA. The EPA may have no specific reference to when it comes into effect, which means immediately—when signing and witnessing requirements are complete.

Or the EPA may have wording that it only comes into effect on a specific future date or under certain conditions.

Unless the EPA has wording about it, no assessment of the adult's mental capability is required for the EPA to come into effect.

An EPA made on or after September 1, 2011, has an additional requirement before the attorney's authority/power is in effect. The EPA must be signed by the attorney and the attorney's signature must be witnessed. If an attorney does not sign the EPA; it does not affect the authority of any other attorney or alternate who does sign. Also, the attorney who does not sign, does not have to resign.

If the EPA is used to buy or sell real estate, there are some other requirements. See heading.

Who is the attorney accountable to?

An attorney is accountable to the adult. Attorneys may also encounter questions from the Public Guardian and Trustee, Health Authorities or Community Living BC. These government agencies have a role to investigate complaints of abuse and neglect of adults who may be considered incapable.

It is important for the attorney to know and follow their duties. It is also good practice to establish positive communication with relevant institutions, professionals and family members—and thus avoid complaints.

Attorneys will want to keep track of their communications.

What is the scope of an attorney's authority?

The BC PoA Act says an EPA covers an adult's financial affairs. This is defined as including "an adult's business and property, and the conduct of the adult's legal affairs."

In legal terms, 'property' is defined quite broadly and includes: money (cash, investments), assets such as a vehicle and real estate, and personal effects such as jewellery, mobile devices, and clothes.

An EPA may include restrictions on the attorney's authority but an EPA does not (and cannot) give an attorney authority for decisions about health care or personal care matters. In BC, the legal planning document for health and personal care is a Representation Agreement.

Duties of an Attorney

BC Power of Attorney Act, sections 19, 21, 33

Act honestly

An attorney must act honestly, in good faith, and within the authority given in the EPA and the law.

Exercise care and skill

The attorney must act with the care, diligence and skill of a reasonably prudent person. This suggests the attorney must act carefully and with thought. It is a big responsibility to manage someone else's finances, especially long term.

It is hard to predict the future of the economy never mind the adult's future financial needs! If an attorney feels a lack of skill and/or knowledge, they should seek advice and help from others who may have greater expertise. Maybe the adult has provided a list of trusted advisors.

Act in the adult's best interests

The key legal responsibility of an attorney is to act in the adult's best interests. This means making decisions on the adult's behalf, based on the attorney's view of what is best for the adult.

The attorney must take into account the adult's current wishes, their known beliefs and values, and any directions set out in the EPA.

To the extent it is reasonable, the attorney must:

- Foster the adult's independence and encourage their involvement in decision making,
- Keep the adult's personal effects at their disposal, and
- Give priority to meeting the adult's health and personal care needs.

The BC PoA Act says that—if the adult is incapable—the attorney may act according to what the attorney believes is best for the management of the adult's financial affairs despite their duties to support the adult's independence and participation and to take the adult's wishes and values into account and despite the adult's objections.

Keep property separate

An attorney, must keep the adult's money and other property separate from the attorney's, unless it belonged to the attorney and the adult jointly *before* the EPA is in effect.

Invest according to the Trustee Act

The attorney must make investments on the adult's behalf according to the [Trustee Act](#). Section 15.2 of that Act sets out a standard of care such as acting like an experienced and reliable investor. See delegating and investments under authorities.

Not dispose of property the adult left to someone in their Will

The law says that an attorney cannot dispose of (sell, give away, destroy, etc.) any of the adult's property that the attorney *knows* is identified as a specific gift in the adult's Will, unless this becomes necessary in order to comply with other duties of the attorney. It is in the adult's interest to make the attorney aware of specific gifts included in the adult's Will.

Keep records

The attorney must make a reasonable effort to determine the extent of the adult's property (what they own) and liabilities (what they owe) as of the date the attorney first starts acting. It is like taking an inventory.

An attorney must keep the following records for the period they act in the role of attorney:

- A current list of the adult's property and liabilities, including an estimate of the value of each, if it is reasonable to do so.
- Accounts and other records related to any actions taken in the attorney role.
- Invoices, bank statements and other records necessary to create full accounts about receiving or spending capital or income on behalf of the adult.

A journal can help for recording dates, listing the circumstances, people and institutions involved, and noting the decision made and action taken.

Keep the adult's information confidential

An attorney must keep the adult's personal information private, except when necessary to:

- Carry out the duties of an attorney; or
- Provide information to or comply with a requirement of the Public Guardian and Trustee (a government official); or
- Make an application to the Supreme Court of BC, or comply with a court order.

At the same time, the attorney wants to ensure good relations with the adult's friends and family. To achieve this, the attorney might share information with others in very general terms.

Sometimes an attorney thinks the duty of privacy means they should not provide a copy of the EPA to third parties. The EPA is proof of authority and the attorney needs to show it when relying on the legal authority given by the EPA. The attorney might also have to show identification.

If the attorney is unclear why a third party is requesting a copy of the EPA—ask.

Not make or change the adult's Will

No one is allowed to make a Will or to change the adult's Will, on the adult's behalf.

Authorities of an Attorney

BC Power of Attorney Act, sections 20, 23, 24

General and specified authorities, restrictions

In general, the attorney has authority to do anything on behalf of the adult that the adult can do, when capable, with respect to the adult's 'financial affairs.' Some examples:

- Re-direct the mail.
- File income tax returns; get tax information from Canada Revenue.
- Deal with Service Canada (government pensions).
- Serve as an officer of a corporation or Board.
- Banking.

The EPA may restrict or put conditions on any of the general authorities.

The BC PoA Act says that additional authorities must be 'express.' This means they must be spelled out in the EPA. For example, paying the attorney a fee.

More details in *Authorities in EPA*.

Delegating

Delegating authority means giving someone else the power to make a decision about the adult's financial affairs. Unless specific wording is given in the EPA, an attorney cannot delegate any decision-making authority, except for decisions about investments.

Unless the EPA has a statement forbidding it, one of the general authorities of an attorney is that they may delegate decision-making about investments to a qualified investment specialist, including a mutual fund manager, if done according to section 15.5 of the [Trustee Act](#). The attorney is responsible for selecting the qualified specialist, clarifying if they are to make decisions about all or only some investments, and supervising their actions.

Managing investments

As noted under duties, the attorney can only manage the adult's investments according to the Trustee Act, unless the EPA has specific wording to require or allow something different of the attorney. In most cases, the attorney is likely to delegate authority for investments or seek financial advice.

Beneficiary designations

An attorney can manage the adult's beneficiary designations on their behalf. An attorney has this authority/power for all types of instruments—for example, life insurance policies, RRSPs, and RRIFs—except not for the adult's Will.

An attorney can renew, convert or replace an instrument that the adult set up while capable, as long as it is similar and **names the same beneficiary** the adult originally named.

An attorney may set up a new instrument (for example a new Tax Free Savings Account) as long as the **beneficiary designation is the adult's estate**.

To name a beneficiary other than as noted above (required by the law), an attorney must get permission from the BC Supreme Court.

Using the adult's money for the benefit of others, and making gifts or loans

An attorney's duty is to manage the adult's financial affairs for the adult's benefit. There are some situations where an attorney can use the adult's finances for the benefit of others. For example, to fulfill the adult's legal obligation to financially support their minor children.

If the adult, while capable, had a pattern of giving gifts (including charitable donations) or making loans, the attorney may continue this practice as long as there is enough money left to meet the adult's personal and health care needs and those of their dependents, and to satisfy any of the adult's other legal obligations.

The maximum value of the gifts and loans an attorney can make in one year is either 10% of the adult's taxable income for the previous year or \$5,000.00, whichever is the smaller amount.

The adult may authorize a larger amount for gifts and loans and may waive the other requirements imposed by the BC PoA Act, but this must be spelled out in the EPA.

An attorney cannot receive any benefit unless the EPA includes a statement to allow this. This restriction applies even if it was the adult's practice to give the attorney money for the attorney's birthday or at some other celebration. An attorney can maintain this practice for others (as noted above), but not for themselves unless the EPA says an attorney may receive a benefit.

When dealing with real estate matters

Unless the EPA document restricts it, an attorney may buy or sell real estate on behalf of the adult.

When an EPA is used for real estate matters, the Land Title Office of the Land Title Survey Authority (LTSA) will review the EPA. Not all requirements come from legislation, some are "we've always done it this way" practices:

- The EPA must be signed and witnessed according to the requirements of the legislation in effect at the time the EPA was made.
- An Officer Certification statement must be included and appropriately signed when the EPA is made.
- An 'I'm 19' affidavit must be completed by the attorney(s).

The Land Title Office will also check whether the adult's name on the EPA matches the name listed on the title of the real estate property. If it does not match, the attorney will have to supply documentation to prove the adult's identity.

Rights of an Attorney

BC PoA Act, sections 20, 22, 24, 25, 32, 33, 36

Accessing information

An attorney has the right to information and records the adult has a right to and that relate to the attorney's areas of authority – for example, to bank statements. The attorney also has a right to information and documents related to the adult's incapability, such as assessments.

Taking delivery of the adult's property

An attorney will need to know about and have control of the adult's financial affairs for which they are responsible. The BC PoA Act says that anyone who has custody or control of property belonging to an adult must deliver the property promptly to the attorney, if requested by the attorney appointed in the adult's EPA.

The attorney may or may not be entitled to receive the adult's Will. The adult may have given instructions to a lawyer or notary public who is in possession of the Will or included instructions in the Will that it must not be delivered to the attorney.

Being paid for out-of-pocket expenses

The attorney has a right to be refunded for reasonable expenses made when carrying out their duties. The attorney should keep records and receipts for any expense claims.

The BC PoA Act says an attorney cannot be paid a fee for acting as an attorney unless it is pre-arranged in writing. As of September 1, 2011, a fee must be spelled out in the EPA with an amount or by rate (for example, \$X per hour).

Getting help and advice

An attorney can get help and advice from a qualified individual or institution to carry out their responsibilities. For example, the attorney might need the advice of an accountant to help complete and file the adult's taxes. This is different from delegating decision-making power to the individual or institution.

An attorney may also apply to the BC Supreme Court for direction. This generally means hiring a lawyer to ensure the request is submitted in the correct format.

Resigning

An attorney may resign. The law sets out specific procedures to follow; the Nidus Resource Centre has information and a sample form.

Being protected from liability

An attorney is not liable (legally responsible) for the adult's debts.

When acting as an attorney, the attorney may not be liable for any loss or damage to the adult's financial affairs, as long as the attorney follows their duties and any specific requirements stated in the adult's EPA. The attorney must also follow the law and any directions if given by the Supreme Court of BC.

An attorney may have a duty to act, once authorized. It is best for an attorney to formally resign if they are no longer able or willing to act. See *Resigning as an Attorney in EPA*.

TIPS AND RESOURCES

Need to locate the EPA?

The **Nidus Registry**, operated by the Nidus Resource Centre, is the only registry for types of power of attorney and Representation Agreements in BC. Registration is voluntary.

The Nidus Registry securely stores information (like the location of the original) and can store a copy of the document. If, as an attorney, you do not already have access, do a basic search at https://registry.nidus.ca/pub_services/search.php or email registry@nidus.ca

Tips for the attorney

- Do not lose or give away the original of the EPA.
- Take original to financial institution and meet with branch manager who can make a 'true copy' of the original and keep the copy for its files.
- Do NOT alter the original if there is a change of address or phone number. Make changes on photocopies or give notice like you do when you move. You can also make updates to information in the Nidus Registry.

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 education resources.