

Enduring Power of Attorney

Planning for Financial and Legal Affairs

“We thought we had everything covered with our Will and joint ownership.”



This fact sheet is about an Enduring Power of Attorney made on or after September 1, 2011. For information on documents made before this date, see the Nidus fact sheet on *Amendments and Enduring Power of Attorney made before Sept. 1st*.

What is an Enduring Power of Attorney?

An Enduring Power of Attorney (EPA) is a legal document under the Power of Attorney Act. It is a way to appoint someone to act on your behalf for financial and legal affairs in case you become mentally incapable. It can also be effective when you are capable.

For example, John and Mary want to plan for the future in case they need help managing their financial and legal affairs due to an illness, injury or disability that affects their mental OR physical capability.

A 'general' EPA covers all financial and legal affairs. An EPA may be 'limited' to dealing with specific matters, such as managing a specific bank account. It may also be limited to a specific time period, such as the dates John and Mary are away.

What is a Bank Power of Attorney?

Banks and Credit Unions may provide EPA forms you can use to cover financial affairs specific to that institution. This may be convenient for banking matters, but is not sufficient for other kinds of matters. For example, if Mary signs a form at her financial institution, it will let John deal with her account, but not with Canada Revenue Agency if he needs to help Mary with her taxes.

What is not covered by an EPA?

An EPA only covers financial and legal affairs, *not* health care or personal care matters. A Representation Agreement is the *only* way in B.C. to appoint someone to act on your behalf for health care and personal care matters. See the Nidus fact sheet on *Representation Agreements*.

Who can make an EPA?

You may make an EPA if you are an adult (19 years of age or older), unless you are incapable according to the requirements of the Power of Attorney Act.

The Power of Attorney Act says that until it is shown otherwise, you are presumed capable of understanding the nature and consequences of making an EPA. The Act also says that the way you communicate is not a factor in determining whether you are incapable of making an EPA.

The Power of Attorney Act says you must understand the nature and consequences of all of the following six factors, or you are considered incapable of making an EPA:

1. the property you have and its approximate value;
2. the obligations you owe to your dependants;
3. that your attorney will be able to do on your behalf anything in respect of property that you could do if capable, except make a Will, subject to the conditions and restrictions set out in the EPA;
4. that, unless the attorney manages your business and property prudently, their value may decline;
5. that the attorney might misuse their authority; and
6. that you may, if capable, revoke the EPA.

For example, if due to dementia, Mary is not able to recall or understand what she owns (bank accounts, investments, vehicles, real estate, etc.) she would be considered incapable of making an EPA. However, she may make a Representation Agreement under Section 7 to cover routine finances and legal affairs because the Representation Agreement Act has a different requirement for incapability. See the Nidus fact sheet on *Representation Agreement with Section 7 Standard Powers*.

When should I make an EPA?

It is important to make an EPA before a crisis happens. This could be when you turn 19 years old, the age of majority in B.C. – when parental rights end. As an adult, no one, not even a spouse, has legal authority over your financial or legal affairs.

Owning real estate or a motor vehicle jointly with your spouse or anyone else is an estate planning tool for when an owner dies. It does not apply if an owner becomes incapable. For example, if John and Mary are named jointly on a motor home, and Mary becomes mentally incapable, John would not have the legal authority to sell their motor home on his own. If Mary made an EPA or a Representation Agreement with routine finances, John would have legal authority to sell the motor home.

Who should I appoint in my EPA?

There are two roles within an Enduring Power of Attorney: 1) attorney, and 2) alternate attorney. The term ‘attorney’ does not refer to a lawyer. People usually appoint a spouse, family member or friend. The people you appoint do not have to live in B.C. It is common for spouses to appoint each other, but they will want to appoint someone else as a back-up. For example, John and Mary can appoint each other, but they may also want to each appoint their daughter Anna as an alternate.

The law has some restrictions. You cannot appoint: 1) someone who is compensated to provide health or personal care services to you (e.g. a paid caregiver); or 2) an employee of a facility where you live if the facility provides health or personal care services to you. These restrictions do not apply if the person is your spouse, parent or child.

Sometimes people appoint a Trust Company, a Credit Union, or a professional. These parties will charge a fee for their services and special wording is required in the EPA to cover this.

What are the duties of an attorney?

An attorney must act honestly and in good faith. They must act within the authority given in the EPA and follow any directions you included. There are a number of other responsibilities required by law. See the Nidus fact sheet on the *Role of an Attorney*.

Does my attorney get paid?

Unless you state it in your EPA, an attorney must not receive any personal benefit from acting as your attorney; this includes taking a fee or borrowing your money. An attorney can be reimbursed for reasonable out-of-pocket expenses. They must keep records and receipts of any claims.

When does an EPA take effect?

Enduring Powers of Attorney are called ‘enduring’ because they are effective even when you are mentally incapable. You can also say that your EPA will be in effect while you are capable. This does not prevent you from continuing to manage your own affairs for as long as you are capable.

Why would you want it to be in effect while you are capable? It is important to realize that mental incapability is not ‘all or nothing.’ It can be gradual, such as with dementia. There are other conditions where you are capable, but may want help because an illness or injury is affecting your energy or concentration. You may also need assistance because you are physically unable to manage your financial affairs such as when you are on vacation or in hospital with a broken leg.

To be effective, an EPA must also meet specific signing and witnessing requirements. You, the adult, must sign the EPA, and your signature must be witnessed. Only one witness is required if the witness is a notary public or lawyer. Each attorney you appoint must also sign the EPA before they can act, and their signature must be witnessed. You and the attorney do not have to sign at the same time.

When does an EPA end?

An Enduring Power of Attorney ends when you die; then your Will takes over. It also ends if you revoke it or if someone is appointed to be your legal guardian (i.e. Committee of Estate) through the B.C. Supreme Court or if the Public Guardian and Trustee takes over your affairs. See the Nidus fact sheet on *Lifespan of an Enduring Power of Attorney*.

Can I revoke my EPA?

Yes. If you are capable of making an EPA, you are capable of revoking it. Making a new EPA does *not* automatically cancel your previous one. The Power of Attorney Act outlines specific requirements for revoking. For more details, see the Nidus fact sheet on *Revoking an Enduring Power of Attorney*.

How do I make an EPA?

Most people will go to a notary public or a lawyer to make an EPA. To find a lawyer, call the Lawyer Referral Service at 604.687.3221 or 1.800.663.1919. To locate a notary public near you, contact the Society of Notaries Public of B.C. at 604.681.4516 or 1.800.663.0343 or search at www.notaries.bc.ca.

See *Making EPA* under Self-Help for tips to help you prepare for the meeting.