

Making an Enduring Power of Attorney



This Booklet is for Albertans who are thinking about writing or changing an Enduring Power of Attorney (EPA). An EPA allows you to plan for the future by appointing someone else to manage your financial affairs while you are still alive but no longer have the ability to do so. This booklet gives general information only, not legal advice. If you need more detailed help or advice, see the end of this booklet for more resources.



You should **NOT** rely on this booklet for legal advice.
It provides general information on **Alberta law only**. 2019

DISCLAIMER

The contents of this booklet are provided as general information only. It is not legal advice. If you have a legal problem, you should consult a lawyer.

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What is an Enduring Power of Attorney?

A **Personal Directive**

is a written, signed, dated and witnessed document that appoints someone else (your Agent) to look after your personal matters (non-financial only).

For more information on Personal Directives, see CPLEA's booklet called **Making a Personal Directive**.

For more information about General Powers of Attorney, see CPLEA's booklet called **General Powers of Attorney**.

In Alberta, the *Powers of Attorney Act* creates Enduring Powers of Attorney.

An Enduring Power of Attorney ("**EPA**"), is a written, signed, dated and witnessed legal document. It gives someone else the right to act on your behalf with respect to your financial affairs while you are still alive.

An EPA does **not** give someone authority to make decisions about your health care or personal decisions – for that you need a separate document called a **Personal Directive**.

When you make an Enduring Power of Attorney, you are the "**Donor**" and you give your authority to another person (your "**Attorney**") to deal with your financial affairs. Your EPA only applies while you are alive and comes to an end when you die.

An EPA must state that it is to continue in effect even after you lose mental capacity. If your EPA does not specify this, then it is not an Enduring Power of Attorney, and it cannot be used once you lose **mental capacity**.

Mental capacity means the ability to understand information that is relevant to making a decision and the ability to appreciate the reasonably foreseeable consequences of the decision.

You should have an Enduring Power of Attorney because, if you suffer a serious injury or illness, you may become incapable of looking after your financial matters on your own. This is mental incapacity or infirmity. The law in Alberta does not allow for another person to automatically make financial decisions for you. By preparing an Enduring Power of Attorney now, while you have mental capacity, you have more control and can ensure that your financial decisions will be made by someone who knows you and what you want.

Without an Enduring Power of Attorney, your family or another interested party will have to apply to the court under Alberta's *Adult Guardianship and Trusteeship Act* to become your **trustee**. This court process can take months, is complex, and can be very expensive. It may also result in someone managing your finances that you would not have chosen.

An Enduring Power of Attorney may not be effective outside Alberta.

An Enduring Power of Attorney lasts until:

- you die;
- you revoke (cancel) it;
- a court determines that the Enduring Power of Attorney no longer has effect;
- a court grants a **trusteeship order** in respect of you; or
- your Attorney dies or quits or a trusteeship order is granted over that person and there is no **Alternate Attorney** to take over.

More than one EPA can be valid at the same time. For example, you might have different documents for different purposes. It can become confusing though if more than one EPA provides the same powers to different people. As well, if your EPAs contradict each other on certain things, then the direction in the newest EPA is valid and the direction in the older EPA is not.

A **trustee** is a person named as a trustee in a trusteeship order made under section 46 of Alberta's *Adult Guardianship and Trusteeship Act*. The trustee of an adult has the authority to make financial decisions for that adult.

A **trusteeship order** is an order of the court made under section 46 of Alberta's *Adult Guardianship and Trusteeship Act* in response to an application by a person requesting to be named the adult's trustee.

An **Alternate Attorney** is a person named in a Power of Attorney to act if another Attorney cannot act.

Making an Enduring Power of Attorney

In Alberta, an Enduring Power of Attorney must be in writing, and must be dated and signed by both you (the Donor) and a witness, in the presence of each other. You must be 18 years of age or older, and you must, at the time of signing, understand the nature and effect of the document.

If you are physically unable to sign, your EPA may be signed by another person on your behalf – but that person cannot be the Attorney being named or the **spouse** or **adult interdependent partner** of your Attorney.

In addition, in order for the document to be an Enduring Power of Attorney, it **must** indicate that it is either to continue, or spring into effect, when the Donor loses mental capacity.

You can make your own EPA or you can get a lawyer to help you.

Mental Capacity

Having the mental capacity required for making an Enduring Power of Attorney means that you:

- know what property you have and its approximate value;
- are aware of your obligations to the people who depend on you financially;
- know what authority you are giving to your Attorney;
- know that your Attorney is required to account for the decisions they make about your financial affairs;
- know that, as long as you are mentally capable, you can revoke (cancel) your EPA;
- understand that if your Attorney does not manage your property well, its value may decrease; and
- understand that there is always a chance that your Attorney could misuse their authority.

If you are worried that someone might challenge your mental capacity, you should have a lawyer prepare your Enduring Power of Attorney. You could also ask your doctor for a letter stating that you are mentally capable.

Even if you take these steps, it is always possible for someone to ask a judge to terminate your EPA, and a judge may do so if they consider it to be in your best interests.

Appointing an Attorney

The term “Attorney” refers to the person or persons you chose to act on your behalf with regard to your financial affairs. Your Attorney must be at least 18 years of age and be mentally capable.

Your Attorney should also:

- be honest and trustworthy;
- be capable of doing a good job;
- have the time and willingness to do the job;
- be aware of your wishes and general intent; and
- be someone who you can depend on to act in your best interests.

It is convenient, but not mandatory, for your Attorney to live in the same province as you do.

You can name one or more Attorneys to act at the same time (**Co-Attorneys**). You can require that your Co-Attorneys act together (“jointly”) or you can have them act separately as well as together (“severally and jointly”). If they can act severally and jointly, then either of your Attorneys will be able to act alone on your behalf. If one is away or sick, for example, the other would still be able to sign cheques or give instructions on your behalf. If you do not indicate that they can act severally, they will have to do everything together. Be aware that naming Co-Attorneys may make things more complicated if decisions need to be made quickly.

If you name Co-Attorneys, you should include some way for them to resolve disputes if they arise.

A **spouse** is a person to whom one is legally married.

An **adult interdependent partner** is a person with whom you are in an adult interdependent relationship.

An **adult interdependent relationship** is a term unique to Alberta for relationships outside of marriage and governed by Alberta's *Adult Interdependent Relationships Act*.

For more information about the responsibilities of an Attorney, see CPLEA's booklet called **Being an Attorney Under An Enduring Power of Attorney**.

Assets are what you own. Assets can include things such as money, land, investments and personal possessions like jewelry and furniture.

A **trust** is a way of holding property. An individual or a company, called the trustee, holds and manages the property for the benefit of another person or persons, called the beneficiaries.

A **beneficiary** of a trust is a person (individual or organization) who receives a benefit from a trust.

You should also name at least one **Alternate Attorney** who can act if your Attorney dies, becomes mentally incapacitated or otherwise cannot act for you. If you name several alternatives, you should be clear in what order they should act.

If your Attorney wants to quit once your Enduring Power of Attorney is in effect and your Attorney has begun to act, your Attorney must apply to the court for permission to quit. This is called "renouncing". If the court allows your Attorney to renounce, your Attorney must provide you with notice of their renunciation.

If none of the Attorneys, Co-Attorneys or Alternate Attorneys named in your Enduring Power of Attorney can act, your EPA will not be valid, and you should make a new one.

Witnesses to the Enduring Power of Attorney

Anyone who is 18 years of age or older and is mentally capable may witness your Enduring Power of Attorney. You and your witness must be present together and see each other sign the document in order for it to be valid. A witness must act in good faith and should refuse to witness the EPA if they have reason to question your mental capacity.

Some people cannot act as witnesses:

- anyone under the age of 18;
- anyone who is mentally incapacitated;
- the person being named as the Attorney (including Co-Attorney or Alternate Attorney);
- the spouse or adult interdependent partner of the person being named as the Attorney;
- the spouse or adult interdependent partner of the Donor;
- a person who signed the EPA on behalf of the Donor; or
- the spouse or adult interdependent partner of the person who signed the EPA on behalf of the Donor.

Attorney Powers

Your Attorney will be able to do almost anything that you can do concerning your finances, unless you specifically limit their powers.

You should consider what kinds of financial decisions your Attorney will need to make. Will it be simple banking and paying bills? Or do you have investments or rental properties that your Attorney will need to manage?

Your Attorney can:

- deal with your real estate, including buying and selling property (if you specifically give them this power);
- prepare and submit your income tax returns and make any other tax decisions for you;
- use your **assets** for your maintenance, education, benefit, medical care and support;
- use your assets for the maintenance and support of your spouse or children;
- hire people to help you, such as service providers, lawyers, or accountants;
- maintain **trusts** for children or other beneficiaries;
- deal with any business interests or investments you have; or
- pay costs for personal decisions made under your Personal Directive.

Attorneys must follow the rules about financial investments set out in Alberta's *Trustees Act*. The *Trustees Act* sets out rules about the kinds of investments that trustees can make on behalf of someone else.

Your EPA might be in effect for only a short period or it may be in effect for a long period of time. It is important to plan for the long-term.

An Attorney cannot:

- change or make a new Will for you;
- change or make a new Enduring Power of Attorney for you;
- change or make a new Personal Directive for you;
- change your designation of beneficiary on your RRSPs, pensions or life insurance policies; or
- make decisions about your health care or personal matters.

Remember that if you limit your Attorney's powers, then they will not be able to make decisions on things that are outside their powers. If no one has authority to make these decisions, then someone will have to apply to the court to become your **trustee**.

If you want your Attorney to be paid for acting for you, you must specifically state this in your EPA. If you do not say anything in your EPA, then your Attorney can apply to the court for reasonable and fair compensation for acting as your Attorney.

You may want to include a provision that states your Attorney is required to keep your financial information confidential. Your Attorney needs to disclose enough information to carry out their duties and to obey the law. Otherwise, your Attorney must respect your privacy.

Coming into Effect

Your Enduring Power of Attorney can come into effect in one of two ways:

1. It can come into effect immediately once it is signed and continue on even if you become mentally incapable at some later date; or
2. It can take effect on a specific future date or upon when a specific event occurs. A specific event might be when you lose mental capacity. This may be called a "springing" EPA as it "springs" into effect when the specific event happens.

You EPA should state who must make a written declaration that this specific date or event has occurred. You can give this power to your Attorney or to another person. If your EPA does not state who makes this written declaration, then two medical practitioners must make a written declaration.

Where to Keep your Enduring Power of Attorney

Once your EPA is completed and signed, you can do one or more of the following with it:

1. You can put your original EPA in a safe place that your Attorney knows about and can access quickly if needed.
2. You can execute multiple originals of your EPA so that you can keep one original and also give originals to your Attorney and Alternate Attorneys.
3. You can leave the original with a trusted person, such as a lawyer, with specific instructions about when to release it. If you do this, however, remember that it may be years, if ever, before your EPA is needed, and the person you left it with may have moved or died in the meantime.
4. You can let your family members, accountant or other trusted advisors know that you have an EPA. You may also leave a copy with them. You should make a list of the people you give a copy to so that you can let them know of any future changes as well.

In most situations, a photocopy of your EPA will not be enough. The people or companies you are dealing with will require to see either an original or a **notarized copy**.

A **notarized copy** is a document that has been certified by a notary as a true copy of the original.

In Alberta, a notary is a person given powers by the *Notaries and Commissioners Act* to certify documents.

Reviewing an Enduring Power of Attorney

Review your Enduring Power of Attorney:

- at least once a year;
- whenever there are important changes in your relationships with others;
- if any of your family members, or others close to you, get divorced, married or die;
- if your Attorney dies or says that they are no longer able or willing to act for you; or
- if there are any significant changes in your health.

After you review your EPA, you can decide if it needs to be updated.

**If you are First Nations and ordinarily live on-reserve,
the law may be different.**

The *Indian Act* applies to you.

For more information, contact:

Bearpaw Education

780.428.0187 or www.bearpaweducation.ca or

Indigenous and Northern Affairs Canada

[https://www.aadnc-aandc.gc.ca/
eng/1100100032357/1100100032361](https://www.aadnc-aandc.gc.ca/eng/1100100032357/1100100032361)

Revoking an Enduring Power of Attorney

In Alberta, getting married or entering into an adult personal relationship do not affect the validity of an Enduring Power of Attorney. Neither does separation, divorce or death.

As long as you have mental capacity, you can revoke your EPA at any time. This can be done in several ways:

1. Your EPA might state that it is revoked on a certain event happening and so your EPA is revoked on the date of that event.
2. You can make a new EPA that contradicts an earlier EPA. Your old EPA is revoked with respect to the contradiction only and the rest of it is still valid.
3. You can make a new EPA that clearly states it revokes all previous EPAs.
4. You can write a statement that clearly states you are revoking your EPA.

No matter how you revoke your EPA, in each case the document must be in writing.

Once you revoke your EPA, you should:

- immediately tell your Attorney because they no longer have authority to act on your behalf. If you do not tell your Attorney, they may not know they no longer have authority and so they might continue to act. You might then be bound by any actions your Attorney takes until you let them know that you have revoked the EPA; and
- inform other people that are involved with your financial matters, such as accountants, lawyers, business partners, banks, etc. so that they do not take any further instructions from your Attorney; and
- get the original (and now revoked) EPA back from your Attorney, and any else who has copies or originals, and destroy them all to avoid confusion.

If you own a home or other real estate, you can have a lawyer register notice of the revocation on title to the property to prevent any unauthorized dealings.

Mismanagement Issues

It is against the law to misuse an Enduring Power of Attorney. Your Attorney must act in your best interests.

If your Attorney is not acting in your best interests, there are a few options:

1. If you still have mental capacity, you can choose to revoke your EPA and make a new one (and name a different Attorney); or
2. You can demand a full accounting from your Attorney of all decisions they have made under your EPA. If your Attorney does not provide this information, you can ask the court to order that the Attorney provide an accounting. If you no longer have mental capacity, any **interested person** can apply to the court for this order for you. The court can grant whatever order for accounting it considers appropriate in the circumstances.
3. Any **interested person** can apply to the court for an order terminating the EPA. The court can terminate the EPA if the court believes that to be in your best interests. The court cannot name a new attorney but it can direct that the interested person bring an application for a trusteeship order and it can appoint someone to be your interim trustee until a **trusteeship order** is granted.

The *Powers of Attorney Act* does not define who is an “interested person”. The court has the power to decide this.

Glossary

adult interdependent partner

A person with whom you are in an adult interdependent relationship.

adult interdependent relationship

A term unique to Alberta for relationships outside of marriage and governed by Alberta's *Adult Interdependent Relationships Act*.

It is a "relationship of interdependence" between two people who:

- have lived together for three years or more; or
- live together and have a child together, by birth or adoption; or
- have signed an adult interdependent partner agreement.

A "relationship of interdependence" exists where two people:

- share one another's lives; and
- are emotionally committed to one another; and
- function as an economic and domestic unit.

Agent

A person named in a Personal Directive to make personal decisions on behalf of the Maker.

Alternate Attorney

A person named in a Power of Attorney to act if another Attorney cannot act.

Attorney

A person who is named to act on behalf of the Donor in a Power of Attorney or an Enduring Power of Attorney.

beneficiary

Of an **estate**, a person (individual or organization) who inherits all or part of a deceased person's estate.

Of a **trust**, a person (individual or organization) who receives a benefit from a trust.

Co-Attorney

An Attorney who has powers at the same time as another Attorney. The powers may be over the same financial decisions or over different financial decisions. Co-Attorneys can have 'joint' powers (they must decide things together) or 'joint and several' powers (either Attorney can decide).

Donor

A person who makes a Power of Attorney or an Enduring Power of Attorney.

Enduring Power Of Attorney

A type of Power of Attorney that continues on even if you lose mental capacity.

mental capacity

The ability to understand information that is relevant to making a decision and the ability to appreciate the reasonably foreseeable consequences of the decision.

Personal Directive

A written, signed, dated and witnessed document that appoints someone else (your Agent) to look after your personal matters (non-financial only).

Power of Attorney

A written, signed, dated and witnessed document that gives someone else (your Attorney) the right to act on your behalf with respect to your financial affairs while you are still alive. A Power of Attorney can be for a specific act, a definite period of time, or general in nature.

spouse

A person to whom one is legally married.

trust

A trust is a way of holding property. An individual or a company, called the trustee, holds and manages the property for the benefit of another person or persons, called the beneficiaries.

trustee

Of an **adult**, a person named as a trustee in a trusteeship order made under section 46 of Alberta's *Adult Guardianship and Trusteeship Act*. The trustee of an adult has the authority to make financial decisions for that adult.

Of a **trust**, the person who is responsible for holding and managing the property in a trust for the benefit of the beneficiaries.

trusteeship order

Of an **adult**, an order of the court made under section 46 of Alberta's *Adult Guardianship and Trusteeship Act* in response to an application by a person requesting to be named the adult's trustee.

Will

A legal statement of how a person wants their property to be dealt with after their death.

Resources

Legislation

Alberta Queen's Printer

For free electronic and print copies of Acts or Regulations.

www.qp.alberta.ca

Government & Court Services

Government of Alberta

www.alberta.ca

General information about EPAs

<https://www.alberta.ca/enduring-power-of-attorney.aspx>

Alberta Courts

www.albertacourts.ca

Resolution and Court Administration Services (RCAS)

Resolution and court support services across Alberta.

1.855.738.4747

<https://www.alberta.ca/rcas.aspx>

Alberta Supports

Help accessing more than 30 programs and 120 community services.

Toll-free: 1.877.644.9992

Office of the Public Guardian and Trustee

Services and support for vulnerable Albertans and their families.

Toll-free: 310.0000 then 780.422.1868

www.alberta.ca/office-public-guardian-trustee.aspx

Protection for Persons in Care (PPC)

Report abuse of adults receiving care or support from publicly funded service providers.

Toll-free: 1.888.357.9339

www.alberta.ca/report-abuse-to-protection-for-persons-in-care.aspx

Legal Services

Law Society of Alberta Lawyer Referral Service

Provides names of three lawyers. Each lawyer to provide half-hour consultation free of charge.

Toll-free: 1.800.661.1095

<https://www.lawsociety.ab.ca/public/lawyer-referral/>

Legal Aid Alberta

Toll-free: 1.866.845.3425

www.legalaid.ab.ca

Edmonton Community Legal Clinic (ECLC)

Legal clinic in Edmonton. Call for hours and eligibility.

780.702.1725

www.eclc.ca

Calgary Legal Guidance (CLG)

Legal clinic in Calgary. Call for hours and eligibility.

403.234.9266

<http://clg.ab.ca>

Community Legal Clinic – Central Alberta

Legal clinics in Central Alberta. Call for hours and eligibility.

Central Alberta: 403.314.9129

Fort McMurray: 587.674.2282

Lloydminster: 587.789.0727

Medicine Hat: 403.712.1021

www.communitylegalclinic.net

Grande Prairie Legal Guidance

Legal clinic in Grande Prairie. Call for hours and eligibility.

780.882.0036

www.gplg.ca

Lethbridge Legal Guidance

Legal clinic in Lethbridge. Call for hours and eligibility.

403.380.6338

<http://www.lethbridgelegalguidance.ca/>

Dial-A-Law

Pre-recorded legal information available 24 hours a day, 7 days a week.

Toll-free: 1.800.332.1091

<http://clg.ab.ca/programs-services/dial-a-law/>

Canadian Legal FAQs: Wills and Estates

<https://www.law-faqs.org/alberta-faqs/wills-and-estates-in-alberta/>

Resources for Seniors

Older Adult Knowledge Network

Legal information on Canadian law for older adults.

www.oaknet.ca

Seniors Association of Greater Edmonton (SAGE)

780.423.5510

www.MySage.ca

Kerby Centre (Calgary)

403.265.0661

<https://www.kerbycentre.com/>

Golden Circle Senior Resource Centre (Calgary)

403.343.6074

www.goldencircle.ca

Making an Enduring Power of Attorney

This booklet is one of many publications produced by the Centre for Public Legal Education Alberta. All publications can be viewed and downloaded for free by visiting www.cplea.ca/publications or **you may order pre-printed publications to be sent to you by visiting www.cplea.ca/store**

Other publications related to this topic that may interest you include:

- Making a Will
- Making an Enduring Power of Attorney checklist
- Making an Personal Directive
- Being a Personal Representative
- Being an Attorney Under an Enduring Power of Attorney
- Being an Agent
- General Powers of Attorney
- *Adult Guardianship and Trusteeship Act*

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You should **NOT** rely on this booklet for legal advice.
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