

Being an Attorney

under an Enduring Power of Attorney



This booklet is for Albertans who want to learn more about what is involved in being named an Attorney under someone's Enduring Power of Attorney. This booklet gives general information only, not legal advice. If you need more detailed help or legal advice, see the Resources section at the back of this booklet.



You should **NOT** rely on this booklet for legal advice.
It provides general information on **Alberta law only**. 2020

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 Attorney?

An **Enduring Power Of Attorney** is a type of Power of Attorney that continues on even if you lose mental capacity.

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

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

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).

An Attorney is the person named in an **Enduring Power of Attorney (EPA)** who can make financial decisions on behalf of the **Donor**. An Enduring Power of Attorney can come into effect in a few different ways. The Attorney usually starts acting when the Donor loses **mental capacity**.

An EPA must state that it continues in effect even after the Donor loses mental capacity. If the EPA does not specify this, then it is not an Enduring Power of Attorney, and it cannot be used once the Donor loses mental capacity.

Financial decisions are decisions about financial matters. A **financial matter** is any matter relating to buying, selling, managing or protecting property. Essentially, a financial matter refers to anything you can own (including money). Financial decisions include paying bills, filing taxes, investing money or selling a home (if the EPA gives the Attorney that power).

An Attorney does not make decisions about **personal matters**. A **Personal Directive** is for personal decision-making.

In this booklet, the term “Attorney” refers to an Attorney appointed under an Enduring Power of Attorney. There is another type of Power of Attorney called a non-enduring or limited or ordinary Power of Attorney. These Powers of Attorney do not continue in effect if the Donor loses mental capacity. If you are an Attorney under a non-enduring Power of Attorney, see CPLEA’s booklet called ‘General Powers of Attorney’.

Attorney Requirements

Any person appointed to be an Attorney:

- must be 18 years or older and mentally competent;
- must act in the Donor's best interests;
- should be trustworthy and reliable;
- should be aware of the Donor's wishes and general intent;
- should have the time, confidence and ability to act on behalf of the Donor;
- should be willing to do the job.

It is most convenient if the Attorney lives in the same city, or at least in the same province, as the Donor.

You can still be an Attorney if you are a **beneficiary** in the Donor's **Will**. If you are the Donor's **spouse, adult interdependent partner** or dependent child, you can be the Attorney and use your authority for your own maintenance. However, you must not let your entitlement under the Will or EPA cloud your judgement as to the Donor's best interest while the Donor is still alive.

You cannot be an Attorney if you signed the EPA as a witness.

You do not have to agree to be an Attorney if you do not want the job.

Attorney Responsibilities

An Attorney:

- confirms that the Enduring Power of Attorney is in effect;
- makes the financial decisions of the Donor for as long as the EPA is in effect;
- keeps a record of financial decisions the Attorney makes on behalf of the Donor.

Attorneys are also encouraged to consult with people who are knowledgeable in the area of concern, as well as those affected by the decision.

An Attorney must always act to protect the best interests of the Donor.

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

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

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

A **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 on adult interdependent relationships, see CPLEA's booklet called **'Living Together'**.

Print and electronic copies of the *Trustee Act* are available at qp.alberta.ca

An Attorney can be paid for their time if stated in the EPA. Usually a family member or friend acts as the Attorney and does not receive payment. However, the Donor can appoint a lawyer, or a bank or trust company to be their Attorney. A Donor usually has to pay these types of Attorneys for their services. The Donor pays any expenses the Attorney incurs.

Before an EPA comes into effect, the Attorney should gather or note:

- a notarized copy of the EPA;
- the location of the original EPA;
- the process for the EPA coming into effect;
- whether anyone will be reviewing the Attorney's decisions;
- clarification on whether the Attorney will be paid a fee for their services;
- the names and contact details of other people who have a copy of the EPA;
- the names and contact details of people that the Attorney must inform when the EPA comes into effect; and
- the name and contact details of who has been named as an Agent under any Personal Directive made by the Donor.

The Attorney should also:

- discuss the instructions in the EPA with the Donor;
- talk to family members, the beneficiaries or anyone who may be affected by their appointment as Attorney;
- stay up to date on any changes to the EPA;
- recommend that the Donor carries a note with them at all times (such as in their wallet) indicating that you are the Attorney; and
- if the Donor regularly spends time outside Alberta, recommend that the Donor complete a similar document that will be valid in that other place.

Being an Attorney can be a simple task if the Donor does not have a lot of property or financial obligations. However, the job of an Attorney can become more complicated if:

- the Donor owns a business;
- the Donor has a lot of investments or debts;
- the Donor has minor children;
- someone challenges the EPA.

In these cases, being an Attorney can take a lot of time, energy, careful attention to detail and diplomacy. The amount of work will also depend on whether you are the only Attorney or if you are acting with a Co-Attorney.

Attorney Powers

An Attorney can do almost anything the Donor can do concerning their finances, unless the Donor specifically limits the Attorney's powers.

An Attorney can:

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

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.

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

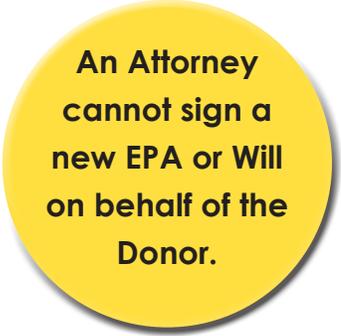
The **beneficiary** of a **trust**, is a person (individual or organization) who receives a benefit from a trust.

If the EPA does not give the Attorney certain powers, then the Attorney cannot make decisions on those items. For example, if the EPA says you only have power over the Donor's investment portfolio, then your power is limited to that asset. You would not have power to deal with the Donor's other property, such as sell the Donor's home.

The Donor can give their Attorney a power of investment in an EPA. This gives the Attorney the power to invest the Donor's money. If this is the case, the Attorney must follow sections 2 to 8 of Alberta's *Trustee Act*. The *Trustee Act* sets out rules about the kinds of investments that trustees can make on behalf of someone else.

An Attorney cannot:

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



**An Attorney
cannot sign a
new EPA or Will
on behalf of the
Donor.**

Once an Attorney starts to act, they cannot renounce (quit) unless they have the court's permission to do so. If there is a Co-Attorney named in the EPA, the court can direct that the Co-Attorney take over as the only Attorney. If there is an Alternate Attorney named in the EPA, the court can direct that the Alternate Attorney take over.

Your responsibilities as an Attorney end:

- if the EPA includes a date or circumstance when it can be revoked or changed;
- the Donor revokes the EPA while they still have mental capacity;
- if the Donor dies;
- if a court determines the EPA ceases to have effect;
- if a court gives you permission to renounce as the Attorney; or
- when you die.

How an Enduring Power of Attorney Works

An Enduring Power of Attorney is a written, signed, dated and witnessed legal document. It gives someone the right to act on the Donor's behalf with respect to the Donor's financial affairs while they are still alive.

An EPA can come into effect in one of two ways:

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

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

An EPA must be:

- dated;
- signed by the Donor in the presence of a witness, or another person on behalf of the Donor in the presence of both the Donor and the witness if the Donor is physically incapable of signing; and
- signed by the witness in the presence of the Donor.

Once the EPA is in effect, the Attorney can act on behalf of the Donor.

An EPA from another province is valid in Alberta if it meets two conditions:

1. it is a valid power of attorney according to the law in the place where it was made;
2. the Attorney's authority does not end if the Donor loses mental capacity after it is signed.

Things an Attorney Should Know

If you agree to be someone's Attorney, you should ask the following questions to help you understand what you will have to do as their Attorney:

- Where is the original EPA kept? How can you access it?
- Has the Donor provided you with a notarized copy of the EPA that you can keep and have available if it comes time to use it?
- What property does the Donor own? Where is it located (addresses of real estate, banks for accounts, etc.)? What debt does the Donor have?
- Is any of the Donor's property owned jointly with others? If so, does the Donor own the property as joint tenants or tenants in common? Who are the other owners, and do you have contact info for them?
- Are beneficiaries named for specific property, such as insurance plans or investment accounts?
- What are the Donor's financial wishes? Do you or the Donor think there could be issues with other people about the Donor's wishes?
- How does the EPA come into effect? If the EPA comes into effect on the Donor's mental incapacity, does the EPA clearly state how this is determined?
- Are other Attorneys named in the EPA? Who else has copies of the EPA?
- Does the Donor have a Personal Directive? If so, who is the Agent named in it?
- Will you be paid a fee for acting as Attorney?
- Who do you need to contact when the EPA comes into effect (along with contact info)?
- Will anyone be reviewing your decisions as Attorney? Who do you need to notify of your decisions?
- Does the Donor own property outside of Alberta? Is the EPA valid in that other jurisdiction?

The Donor may not want to share all of this information with you in advance. However, the Donor should know that you need this information once your powers take effect. Be sure to ask the Donor to let you know if they update or change their EPA, Personal Directive or Will. The Donor should give you updated copies of these documents if they make changes.

Reviewing Attorney Decisions

Alberta's *Powers of Attorney Act* allows for certain people to apply to the court for an order directing the Attorney to give an accounting of all transactions the Attorney has entered into on the Donor's behalf.

The people that can apply to the court are:

- the Donor;
- the Donor's **Personal Representative** or a trustee of the Donor's estate;
- any interested person (if the Donor is unable to make reasonable judgements about their estate). The *Act* does not define who an interested person is so it is up to the court to decide.

The Donor and the Attorney must be served (given) a copy of any application made to the court. The court can then make any order it considers proper in the circumstances.

An Attorney or Donor cannot contract out of this accounting requirement. The right to an accounting exists under the *Act* even if an agreement or waiver says otherwise.

A **Personal Representative** is the person named in a Will who is responsible for managing the testator's estate and for carrying out the instructions in the Will.

A **trusteeship order** of an **adult**, 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.

The **trustee** of an **adult**, 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.

For more information on trusteeship orders, see CPLEA's booklet called '**Adult Guardianship and Trusteeship Act**'.

When Problems Arise

Original EPA Cannot Be Found

Sometimes the original EPA cannot be found, even after a thorough search of the Donor's belongings. Without at least a copy of the EPA, it is impossible for you to act. You must apply to the court for a **trusteeship order**.

Disagreements with another Attorney

An EPA can set out how disagreements between Co-Attorneys should be resolved. If the EPA does not say anything about resolving disputes, the Co-Attorneys can apply to the court for advice and direction.

Disagreements with Family Members

An Attorney must follow the wishes of the Donor as expressed in the EPA. Sometimes loved ones are not happy with the decisions the Attorney is making. The Attorney is obligated to follow the instructions in the EPA, regardless of others. The Attorney can also apply to the Court of Queen's Bench of Alberta for advice and direction if disputes cannot be resolved.

Donor's Money Runs Out

If it looks like the Donor's money may run out, get immediate advice from a lawyer so that you do not become personally liable for any of the Donor's debts. You may wish to contact government and social services agencies to find out if there is funding you can apply for. Take these steps well in advance of the money actually running out.

Attorney Makes a Mistake

Remember that no one is perfect. You are legally responsible for the financial situation of another person and the situation should be treated with great care. Consider talking to your lawyer about the issue and, if necessary, apply to the Court of Queen's Bench of Alberta to ask for advice and direction.

When the EPA Comes Into Effect

1. Locate the EPA. Read it as soon as possible.

Most people keep their original EPA in a safety deposit box. To look in the safety deposit box, contact the bank and take the safety deposit key, your copy of the EPA and your identification. Tell the bank that you are the Attorney and are looking for the original EPA. If the EPA is there and names you as an Attorney, they should let you take the document. The lock can be drilled open for a fee if the key cannot be found.

Once you have the original, you should make many notarized copies, as most service providers will want to see and keep a **notarized copy**.

2. Confirm the proper procedure has been followed to bring the EPA into effect.

If the EPA says that it comes into effect when the Donor loses mental capacity, make sure that the proper procedure has been followed for determining the Donor has lost mental capacity. If the EPA does not say who makes this determination, then two medical practitioners must make a declaration.

3. Immediately inform everyone who needs to know.

An EPA might say who to inform that the EPA is in effect. This could include family members or other people. Practically speaking, you will have to inform the Donor's banks, financial advisors, etc. that the EPA is in effect.

4. Find out if there is a Personal Directive.

The Attorney can also be the Agent under the Personal Directive. If not, the Attorney will have to work with the Agent if healthcare decisions that the Agent is making require money.

5. Find out if there is a Will.

If you are the Personal Representative under the Will, you will want to address any conflicting issues about your roles and actions. The Will may contain information that can help you make decisions.

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.

6. Make a list of the Donor's assets, payments, debts and other financial matters.

You should also try to find out the value of the Donor's assets and debts. You may have to contact an investment advisor (for investments) or the municipality (for the Property Assessment Notice) or a real estate agent.

7. Protect the assets.

As the Attorney, you are responsible for protecting the Donor's assets for future use and in the Donor's best interests.

TASKS

Specific tasks might include:

- Gain access to and make a list of the contents in the Donor's safety deposit box.
- Arrange for safe storage of valuable items.
- Collect any monies owed to the donor.
- Gain access to the donor's motor vehicle and ensure it is stored in a safe place until you decide what to do with it.
- Gain access to the Donor's home to take care of pets, make sure appliances are off, mow the lawn, collect the mail and newspaper, etc.
- If the Donor rented their home (and only if appropriate), arrange with the landlord to remove the Donor's property, terminate the lease or arrange a sub-lease, depending on the circumstances.
- If appropriate, cancel and request refunds for the Donor's driver's licence, magazine and newspaper subscriptions, cable television, club memberships, telephone service, etc.
- Apply for benefits, such as the Canadian Pension Plan or other pension plan, disability payments, Old Age Security benefits, Registered Retirement Income Fund (RRIF) payments.
- Ensure there is enough insurance coverage (for the Donor, the Donor's property, etc.).
- Get information on outstanding credit card balances. Cancel cards (if appropriate).
- Contact Canada Post to reroute the donor's mail.
- Send change of address forms to organizations you will be working with as the Attorney.

8. Deal with the assets.

You should make the necessary decisions as they come up, in the order that makes sense. When making decisions, you must:

- follow any clear instructions set out in the EPA;
- if there are no clear instructions, make the decisions you believe the Donor would have made and in the best interests of the Donor.

9. Keep proper records.

One of your duties as Attorney is to keep complete and detailed records of the decisions you make. Keeping complete and detailed accounts includes:

- documenting the dates of your decisions;
- keeping a list of all decisions you make as the Attorney;
- keeping all documents for all decisions you make as the Attorney;
- keeping a copy of the EPA and court orders, and any other documents that relate to your authority.

The EPA may say what records you are to keep and what you are to do with them.

You should keep these records until:

- you stop being the Attorney and receive a release from someone authorised to give one;
- another person gets authority to manage the Donor's property and you give the records to that person;
- the donor dies and you give the records to the Donor's Personal Representative.

10. Keep people informed.

The EPA may say who you should inform (or not inform) of decisions you make. Other people may have their own ideas about what is in the Donor's best interests and what the Donor's decision would be. You must act according to the terms of the EPA.

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.

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.

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.

financial matter

Any matter relating to buying, selling, managing or protecting property. Essentially, a financial matter refers to anything you can own (including money).

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).

Personal Representative

The person named in a Will who is responsible for managing the testator's estate and for carrying out the instructions in the Will.

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.

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.

Will

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

Resources

Government & Court Services

Government of Alberta

Enduring Power of Attorney in Alberta

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

Alberta Courts

www.albertacourts.ca

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

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 Centre (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/>

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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 www.cplea.ca/store

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

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

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