

## Enduring Power of Attorney

Planning for Financial and Legal Affairs

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



### What is the purpose of this fact sheet?

This fact sheet is about requirements for making an Enduring Power of Attorney on or after September 1, 2011 (when the law changed). Some aspects apply to documents made before that date.

Nidus is a non-profit, charitable organization and has various educational resources available on its website. Some links are provided throughout the fact sheet. Resources are listed on pages 3-4.

### What is an Enduring Power of Attorney?

An Enduring Power of Attorney (EPA) is a legal document. It is a way to appoint someone to act on your behalf for financial and legal affairs in case you become mentally incapable. It is highly recommended your EPA 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 their physical capability.

### What is the difference between Enduring Power of Attorney and Power of Attorney?

The key **difference** between an Enduring Power of Attorney (EPA) and a Power of Attorney (PoA) is that a Power of Attorney **automatically ends** if you become mentally incapable.

An EPA continues or ‘endures’ if you become mentally incapable.

Both types of legal documents have some **similarities**:

- Both are governed by the Power of Attorney Act. The PoA is outlined in Part 1. An EPA is outlined in Parts 2 & 3 of the Act.
- Both **ONLY** cover financial and legal affairs—not health and personal care matters.
- Both can have ‘general’ powers or be limited to a specific task (such as, managing a specific bank account) or be limited to a specific time period (such as, dates while on vacation). It is generally **NOT** helpful to limit an EPA.

### How do I know if I have an EPA?

Any EPA made on or after September 1, 2011 should be titled ‘Enduring Power of Attorney’ given how the legislation is now organized. An EPA made before that date will likely be titled ‘Power of Attorney.’ See the Nidus fact sheet to [check for EPA wording](#) or see how to find resources on page 4.

### What is a Bank Power of Attorney?

Banks and Credit Unions may provide forms for PoA or EPA. These forms only cover accounts specific to that institution. The Bank/Credit Union forms do not give someone authority to deal with your taxes or benefits or auto accident claims. This approach is an old practice and not useful for future planning—it can also conflict or cancel other legal documents you make. You do not have to use the Bank/Credit Union forms and, if you did, consider revoking (cancelling) it.

### What is not covered by an EPA?

An EPA can cover the most financial and legal matters possible, but can **NOT** give authority for any health and personal care matters. A Representation Agreement is the **ONLY** way in BC to appoint someone to act on your behalf for health and personal care. Click to read about [Representation Agreements](#) or see page 4.

### Who can make an EPA?

In BC, making an EPA depends on:

- Age; and
- Capability requirements.

You must be **at least 19 years old** (the age of adulthood in BC) in order to make an EPA.

You must also meet the capability requirements listed in section 12 of the Power of Attorney Act. **You must understand the nature and consequences** of ALL of the following **six factors** (provided in plain language):

1. What you own and the value of each item;
2. The obligations you owe to your dependants, such as a spouse and minor children;

3. That the person you appoint will be able to deal with any financial and legal affairs on your behalf that you could do if capable, except make a Will for you. Their authority is also subject to any conditions or restrictions set out in the EPA;
4. That, unless the person you appoint manages your affairs responsibly, the value of what you own may decrease;
5. That the person you appoint might misuse their authority; and
6. That you may, if capable, revoke (cancel) the EPA.

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

**NOTE:** *Some adults may not meet the EPA capability requirements. The Representation Agreement Act has a different view of capability for Agreements under section 7. See pages 3-4.*

For example if, due to advanced dementia, Mary is not able to recall or understand the value of what she owns (bank accounts, investments, vehicles, real estate, etc.) Mary could 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 different capability requirements. To help someone like Mary, go to [www.nidus.ca](http://www.nidus.ca) — click on the third heading/photo at the home page.

### When should I make an EPA and why?

If you meet the capability requirements, it is important to make an EPA before a crisis happens or before you develop a health condition that affects your mental capability to understand.

Once you are an adult, no one—not parents or even a spouse—has legal authority over your financial and legal affairs simply based on their relationship to you. Also, each person needs to make their own legal document. Spouses can NOT make one document to cover both of them.

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. Nidus has a fact sheet on [Cautions About Joint Ownership](#).

For example, if John and Mary have joint ownership with right of survivorship for their motor home, and Mary becomes mentally incapable, this does NOT give John the legal authority to sell Mary's half of the motor home. However, if Mary made an EPA ahead of time or she now makes a Representation Agreement under section 7 (with routine finances),

then whoever she appointed can sell Mary's half of the motor home on her behalf. Mary's share of the money is used for her benefit and quality-of-life.

### Who should I appoint in my EPA?

There are two roles available for an EPA:

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 BC. 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.

You may appoint someone who is 18 years old; they cannot act until they are 19 years of age.

The law has restrictions. You can NOT appoint:

1. Someone who is compensated to provide health or personal care services to you (for example, a paid caregiver); or
2. An employee of a facility where you live and that 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, Credit Union, or professional. These parties will charge a fee for their services. 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. There are a number of duties required by the 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 for acting as your attorney; this includes taking a fee or borrowing your money or giving themselves 'birthday money' even if it was your practice to do this.

If you have a spouse and/or minor children, you will want to consider including a specific statement to allow the use of your money for the benefit of others. See the Nidus fact sheet on [General and Specific Authorities in an EPA](#).

An attorney has the right to be reimbursed for reasonable out-of-pocket expenses they may spend when carrying out their duties. 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.

It might be tempting to ask a legal professional to use wording that says the EPA only comes into effect when you become mentally incapable. Some refer to this as a 'springing clause' or 'trigger event.' Although this idea may seem logical, it is NOT helpful, given the number of unknowns that can arise—including if others need to assist you with certain things but cannot do so unless or until you are found incapable of managing ALL of your financial and legal affairs.

Why would you want an EPA to be in effect while you are capable? Mental incapability is not 'all or nothing.' It can be gradual or fluctuating (off and on), such as with dementia. Also, you may be capable and want help because:

- An illness or injury is affecting your energy or concentration.
- You are out-of-town on vacation or in hospital and cannot physically manage your finances.

**What about witnessing requirements?**

To be effective, an EPA must also meet specific signing and witnessing requirements. Some EPAs made on or after September 1, 2011 have been rejected by the Land Title Office because they do not meet the new witnessing requirements.

As of September 1, 2011, you, the adult, must sign the EPA and your signature must be witnessed by two witnesses. Only one witness is required if the witness is a BC lawyer or a BC notary who is a member of the Society of Notaries Public.

Now, each attorney you appoint must also sign the EPA before they have authority to act and their signature must be witnessed. You and your 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 (cancel) it, or if someone is appointed to be your legal guardian (committee of estate) through the Supreme Court of BC, or if the Public Guardian and Trustee takes over your financial and legal affairs. See the Nidus fact sheet on [Lifespan of an Enduring Power of Attorney](#).

**Can I revoke (cancel) my EPA?**

Yes, if you are capable of making an EPA, you are capable of revoking (cancelling) it. Making a new EPA does NOT automatically cancel a previous one. The Power of Attorney Act outlines specific requirements for revoking an EPA. For more details, see the Nidus fact sheet on [Revoking an Enduring Power of Attorney](#).

**How do I make an EPA?**

Nidus strongly recommends reading other materials on its website to get informed and prepared for meeting with a legal professional. It can save time and lead to a better discussion.

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 BC at 604.681.4516 or 1.800.663.0343 or search at [www.notaries.bc.ca](http://www.notaries.bc.ca)

**How do I get started on making my plans?**

Nidus has many educational materials for self-help—from videos to fact sheets to FAQs.

Use the Nidus **Choose to Plan** packages. Follow these steps:

1. Consider the capability requirements; then
2. Click on the matching photo/heading at the website home page (see chart below).

Usually people have a good sense about an individual's capability from reading the fact sheet and from other experiences. Formal assessments can be intimidating and stigmatizing. Also, medical assessments are not equal to legal requirements.

For example, John goes to the Nidus website and clicks on the middle photo to make his Representation Agreement for health and personal care. He also learns about the EPA before he goes to meet with a legal professional. Mary might go with John to see about making an EPA. If Mary is considered incapable, John goes to the Nidus website and clicks on the third photo to help Mary make an RA7 All. With the RA7 All Mary can get help with routine finances as well as minor and major health care and personal care matters to protect her quality-of-life.

Go to [www.nidus.ca](http://www.nidus.ca) — click on the photo/heading at the home page that **matches** the situation.

<i>Helping a Relative with a DISABILITY</i>	<i>I'm planning on the FUTURE PATH</i>	<i>Caring for an Adult Who NEEDS HELP NOW</i>
<b>Helping an adult with a disability from birth or childhood?</b>	<b>Are you like John?</b>	<b>Are you helping someone like Mary?</b>
Info & Forms for RA7 <i>Adult may make even if considered incapable to understand.</i>	Info & Forms for health & financial <i>For those capable to understand—don't wait for a crisis!</i>	Info & Forms for RA7 <i>Adult may make even if considered incapable to understand.</i>
Click <b>FIRST</b> photo	Click <b>MIDDLE</b> photo	Click <b>THIRD</b> photo

### Is there is a universal definition of capability?

There is NO universal definition of capability or incapability—although many have tried and continue to try and create one. The origins of the legal definition of capability likely stems from the ownership of real estate property and from concerns that such matters not be left to people who might have a mental disorder or disability. In earlier times, slaves and women could not own property either and were considered to be property and not persons with decision making abilities.

The traditional legal standard for capability is that an individual must 'understand the nature and effect' of the document they are making. This definition only considers a single factor (the cognitive dimension) and what is 'normal' for a particular segment of society and for a specific time period. The capability requirements are very similar among the laws for making a Will, Enduring Power of Attorney, Power of Attorney and other legal documents.

**The traditional legal standard goes back hundreds of years** and is taught in law schools and to potential notaries. Legal professionals who work in government, academia, and the private sector closely guard this standard.

In the late 1980's, BC citizens and community groups, along with progressive legal and health professionals, became involved in a grass-roots law reform of adult guardianship. Through a partnership with the provincial government, **a new legal standard of capability** was introduced in the Representation Agreement Act (for Agreements made under section 7). This law came into effect in February 2000. The reason for this change was to make planning accessible for ALL adults, even if they do not meet the traditional legal standard that is rooted in a very different social context.

The new law is important for an **aging population** and addresses concerns about sustainability, self-determination, and social support. It serves as a legal alternative to adult guardianship—this means adults in need can now get help without losing their rights or becoming a non-person through guardianship.

Currently, **BC is the only place in the world** that has made a change to the view or definition of capability in legislation. While the change was supported by all political parties each time it came before the legislature, no government has provided education on Representation Agreements in any sector.

**Nidus was set up to be a resource** on the new legislation and does its best to provide accurate and up-to-date education for the public and professionals about this dynamic and evolving field. Despite its unique and significant expertise, Nidus currently receives NO funding from government, foundations, or the United Way to do this education and to promote access to justice.

The lack of education makes it very difficult for the public when dealing with systems and institutions on behalf of:

- Aging parents;
- Relatives with disabilities;
- Spouses with dementia;
- Friends with acquired brain injury; and
- Many others.

### Where to find more resources from Nidus?

Making an EPA or related documents affects your quality-of-life. Getting informed is not only important for people who are 'making' their documents, but equally or perhaps even more important for those who are appointed in them!

#### Go to [www.nidus.ca](http://www.nidus.ca)

Click **Information** (top blue menu bar) > Enduring Power of Attorney  
> [EPA Overview](#)  
> [More EPA Resources](#)

Click **Information** (top blue menu bar) > Representation Agreement  
> [RA Overview](#)  
> [More RA Resources](#)

Click **Get Help** (top blue menu bar)  
> [Videos](#)  
> Discussion Tools > [Values & Beliefs Discussion Guide](#)

Click **Registry** (top blue menu bar)  
> [Registry Instructions](#)

Be sure to search for an existing Registry Account before setting up a new one. The Registry is online. Do NOT mail any paperwork to Nidus.

Step one—create a Registry Account;  
Step two—make a registration.

*Thanks to Nidus donors for funds to produce this fact sheet and other education resources.*