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UNIVERSITY OF  
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A LEGAL INFORMATION  
GUIDE FOR SENIORS



# **ENDURING POWER OF ATTORNEY (EPA) AND PERSONAL DIRECTIVE (PD)**

## *Planning for the Future*

*Caveat: This information applies to Alberta only.*

*This resource does not contain legal advice.*

*This resource was prepared with the assistance of PBSC Calgary Law student volunteers, supervised by Carina Au (Barrister and Solicitor). PBSC volunteers are not lawyers, and they are not authorized to provide legal advice. This resource contains general discussion of certain legal and related issues only. If you require legal advice, please consult with a lawyer.*



## WHAT IS AN EPA AND WHAT IS A PD? (A CLEAR COMPARISON)

- EPAs and PDs are both legal documents that individuals can create to ensure their wishes are respected in case of incapacity or inability to make decisions for themselves
- However, understanding their differences is important to make informed decisions about future healthcare and financial matters
- Benefit of creating both documents:
  - Prevents court intervention if incapacity arises. Having clear legal instructions and designated agents eliminate the need for costly and time-consuming court proceedings
  - Provides a framework for clear decision-making —> can ease burden on family members in event of incapacity

*Note: both documents are revocable (see more in table)*



## EPAs

- An Enduring Power of Attorney (EPA) allows a person (the donor) to appoint another person (the attorney/agent) to manage their financial and property affairs, including related legal decisions and transactions (e.g., safety deposit boxes, company shares).
- The EPA can be customized to be as broad or as limited as the donor chooses.
- An EPA does not need to be registered and cannot be registered anywhere.
- The attorney's authority usually begins when the donor becomes mentally incapable of managing their finances.
  - The EPA can specify what triggers it to come into effect (e.g., upon a certain date or event)

Note: EPAs are limited to financial matters, they cannot grant authority to make decisions about healthcare or personal matters

- EPA requirements:
  - Must be written while you have capacity
  - State when the agent/attorney has authority to make decisions

Importance of EPAs:

- Allows for competent handling of finances, property, and legal decisions according to your wishes
- By determining who will act on your behalf ensures your interests are protected
- Saves costly and time-consuming process of applying for a Trusteeship (if you become incapacitated and there is no EPA, loved ones will need to apply for a trusteeship through the courts)

## PDs

- Allows an individual to appoint a trusted person ("agent") to make decisions about personal and healthcare matters in the event of incapacity
  - For example, the agent can make decisions about medical treatments you would or would not want, living arrangements, and end-of-life care
  - Personal matters can include recreation, employment, and education
- PDs come into effect when the individual is unable to make their own healthcare decisions due to mental incapacity (often verified by a healthcare professional)

Importance of PDs:

- Allows for your wishes about healthcare and personal matter to be fulfilled
- Allows for certainty, if you lose capacity, the person named in your PD can begin acting on your behalf right away and according to your instructions



## WHEN AND HOW THEY COME INTO EFFECT

- An EPA Can Come into Effect in 1 of 4 Ways:
  - As soon as it is signed
  - On a specified date
  - For a specific purpose (e.g., to sell a house)
  - When a specific triggering event occurs (e.g., mental incapacity)
- An EPA ends when one of the following occurs:
  - Upon death
  - Upon revocation while you have capacity
  - Court decides EPA no longer in effect
  - Court grants trusteeship order that names a trustee to make financial decisions for you
  - Attorney/agent dies, quits, or loses capacity and EPA does not name an alternate attorney to take over
- A PD Comes into Effect in 1 of 2 ways:
  - A person can be named in a PD who must talk with a doctor or psychologist to decide whether you have lost capacity
  - If someone is not named, two service providers must decide whether you have lost capacity
  - Overall, PDs come into effect if you are found to lack capacity — when you are unable to make your own decisions
- A PD ends when one of the following occurs:
  - You regain capacity
  - Upon death
  - You revoke the PD while you have capacity
  - Court decides PD is no longer in effect
  - Agent dies, quits, or loses capacity and PD does not name an alternate agent



# ROLES AND RESPONSIBILITIES OF THE ATTORNEY AND AGENT

- An **agent/attorney** has the legal fiduciary duty to act in your best interests and keep your personal information private. This prohibits the agent/attorney's personal interests from conflicting with such obligations
- An **agent/attorney** must act in accordance with the instructions set out by the donor
- Even if the donor has been declared incapacitated, the **agent** must consult with them where possible and regularly consider whether they have regained capacity. If there is evidence of regained capacity, a reassessment must be done.
- The **agent** must maintain a record of all decisions made on the donor's behalf and financial records including receipts
- Given an attorney's authority to manage finances under an EPA, **attorney** responsibilities include:
  - Using the donor's assets to support and care for the donor
  - Oversee the investment, management and care of the donor's assets
  - Paying the donor's bills
  - Preparing and submitting tax returns
  - Dealing with any legal and accounting matters

# HOW TO CREATE, UPDATE, OR REVOKE A PERSONAL DIRECTIVE

To prepare and create a personal directive, you must:

1. Talk to the person or persons you wish to act as your agent so that they can agree to make decisions for you, and so they know what your instructions are
2. Write your personal directive. There are three options for this second step:
  - Refer to the personal directive Form outlined on the Alberta.ca website as a starting point.
  - Use the Alberta.ca Personal Directives form as a guide for writing your own directive.
  - If you would like, contact a lawyer for advice to ensure your Personal Directive includes all of your wishes.
3. Sign the Personal Directive; you and a witness must sign the document to make it legally binding. There are some requirements for your witness, including:
  - They must be over 18.
  - They are not your spouse or partner.
  - They are not your agent.
  - They are not your agent's spouse or partner.
4. Make copies to give to key people in your life, such as your doctor and agent.

You can also register your personal directive with the province, which allows doctors to know if you have a Personal Directive and lets them know how to contact your agent. However, remember that if you update your Personal Directive, you must also update the registry with the Public Guardians office.

A Personal directive can be updated and revoked in the following ways:

- When the entirety or part of the personal directive is revoked on a specified date or event.
- If a new personal directive is made and it conflicts with the old version, the part that disagrees with the new directive can be revoked.
- If you make any new document, including a new Personal Directive, that states you want to cancel part or all of a previous Personal Directive.



## **HOW TO CREATE, UPDATE, OR REVOKE AN ENDURING POWER OF ATTORNEY**

There are no specific forms required to create an EPA; however, it is best to create one with a lawyer to ensure your financial interests are protected and that it is legally valid.

If you need to make any updates to your EPA, you usually need to create a new one to meet Alberta's legal requirements. These updates could include changes to terms or changing your selected attorney among other things.

An Enduring Power of Attorney can be terminated, unless it is an irrevocable power of attorney, and despite any agreement or waiver saying otherwise, in the following ways:

- It is revoked in writing when the donor can understand the effect of termination.
- The attorney renounces the appointment and gives notice to the donor.
- A termination order is granted by the court.
- A trusteeship is granted.
- Upon the death of the donor.



# KEY CONSIDERATIONS WHEN CHOOSING A DECISION MAKER

- Consider the people that you trust and choose someone who will manage your money and property in your best interest. Some questions to ask yourself about choosing a decision maker include, but are not limited to:
  - Is this person able to act in my best interest?
  - Have I known this person long enough or well enough to feel confident that they can make decisions for me that are in my best interest?
  - Does this person manage finances well, and do I feel they will manage my finances well?
  - Are they easy to contact and readily available?
  - Is this person willing to take on this responsibility?

## WHERE TO GET ASSISTANCE WITH PD AND EPA

- You can find further information on the Alberta.ca website, which includes a Personal Directive Kit to assist you in creating the document.
  - <https://www.alberta.ca/wills-in-alberta>
  - <https://www.alberta.ca/enduring-power-of-attorney>
  - <https://www.alberta.ca/personal-directive>

Legal Aid Alberta may also be able to provide assistance.

Note: To act for you, both your agent and attorney must be at least 18 years old and have capacity themselves.

## ADDITIONAL POINTS OF INFORMATION

### What is an Adult Interdependent Relationship?

- An interdependent relationship is when two people who are not married to each other share their lives together, are emotionally committed to each other, and share a combined domestic and economic living situation.
- These relationships do not have to be marriage-like, they can be between two individuals in a non-romantic relationship or two family members.

### What are the requirements for an Adult Interdependent Relationship?

- There are three different ways to meet the requirements of an Adult Interdependent Relationship:
  - When two people have lived together for a continuous period of at least 3 years
  - If the couple has lived together for some time (less than 3 years) but they have a child together
  - If the couple has entered into an adult interdependent agreement

### How does an Adult Interdependent Relationship affect my Will?

For the purposes of your will an Adult Interdependent Relationship partner is considered a 'dependent' so they can apply for support from your estate if there are not adequate provisions for them in your will.

## **When do I need to change my Will?**

An out-of-date Will could cause issues as financial and personal situations change; therefore, it is important to review and update your Will whenever big life changes occur such as divorce, children, or marriage.

## **Including Grandchildren in your Will**

- To include your grandchildren in your Will, you must name them as beneficiaries and indicate the inheritance intended for them.
- If your grandchildren are minors, you should determine at what age(s) you would like them to receive their shares, and potentially if you would like it to be received through trust or staged distribution.

## **What is a trust vs staged distribution**

- A trust is a way to hold and manage assets for a beneficiary if you determine they are unable to manage them on their own. To receive the assets, the beneficiary must fulfil certain conditions.
- A staged distribution is the release of trust assets in portions over a period, rather than all at once. These time periods can relate to specific events in your grandchild's life, like graduation or at specific ages, among other options.

## **Grandchildren as a "Class" of Beneficiaries**

- Your grandchildren can be included in your Will as a "class" of beneficiaries, which means they are a group identified by a shared characteristic or relationship to you, rather than being named individually.
- Gifts given as a class gift are treated differently from individual gifts, so consult with a lawyer to determine if this would fulfil what you want in your Will.

## **What if I separate from my partner without updating my Will?**

- If you have not updated your Will before your death, a Court may revoke the provisions of your Will about a previous partner unless there is other evidence indicating they should remain.
- The situations where a Court may revoke the provisions include instances where you have:
  - Divorced your partner.
  - The Court has voided your marriage.
  - Your partner stops being your interdependent partner.

## **What is a blended family?**

A blended family is when adults re-partner and bring children from previous relationships into a new family unit.

## **How does my blended family impact my Will?**

To begin, stepchildren are not automatically considered beneficiaries in Alberta unless they are specifically mentioned in your Will. Therefore, if you wish to include your stepchildren, you must explicitly name them.

## **Blended family and Mutual Wills**

Mutual wills are agreements between two individuals to create a common Will. These can be used to make sure that assets are distributed in a particular way after both spouses have passed.

## **Blended Families, Spousal Trusts, and Living Trusts**

These are estate planning tools that can provide for your spouse while also ensuring that assets are preserved for your children from a previous relationship. A lawyer would be able to assist in the creation of these trusts.