

Be an Attorney



**Enduring
Power of
Attorney**

About CPLEA

The Centre for Public Legal Education Alberta, also known as CPLEA, is a not-for-profit, non-government organization committed to making the law understandable for Albertans. We offer **free** legal information and learning resources in plain language.

Our resources increase awareness and understanding of the law and empower Albertans to take action and, ultimately, gain better access to justice.

Visit www.cplea.ca to learn more about the laws that impact your life.

CPLEA is the operating name for the Legal Resource Centre of Alberta Ltd.

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Disclaimer

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Introduction

This booklet summarizes key information you should know before and while acting as an attorney under someone's Enduring Power of Attorney. The law can be complicated but understanding your responsibilities doesn't have to be.

This booklet replaces CPLEA's previous "Being an Attorney under an Enduring Power of Attorney" booklet.

Don't miss these related CPLEA resources!

- Estate Planning 101
- Capacity
- Be an Agent
- Be a Personal Representative
- Adult Guardianship and Trusteeship Act (AGTA)
- Getting a Grant of Probate or Administration

Find the above resources as well as more information about planning ahead in different formats, including info sheets, FAQs, videos and blog posts.



Get started at cplea.ca/planning-for-future-care/
and cplea.ca/willsandestates/

GENERAL POWER OF ATTORNEY

A General Power of Attorney names an attorney to make financial decisions while the donor still has capacity. The donor can give the attorney broad powers or very specific powers. For example, you may have a power of attorney to pay the donor's bills while they're out of the country or sign papers on their behalf to buy a house if the donor cannot meet with the lawyer. If you're an attorney under a General Power of Attorney, you have the same responsibilities set out in this booklet ***except that*** you cannot act if the donor loses capacity.

What is an Attorney?

An attorney is the person named in an **Enduring Power of Attorney (EPA)** to make financial decisions for its donor.

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

Financial decisions are about buying, selling, managing or protecting property. Simply put, they're decisions about anything the donor can own, including their home, money and belongings.

To act as an attorney, you must be 18 years or older and have **capacity**. These two requirements must be true both at the time the donor makes the EPA and when the EPA comes into effect.

The EPA may name you to be an attorney, co-attorney or alternate attorney.

- If you're named as the sole attorney, you alone make decisions for the donor.
- If you're named as a **co-attorney**, you share attorney responsibilities with other named co-attorneys. The EPA should say whether you must act **jointly** (together) or **severally and jointly** (both alone or together). If the EPA does **not** say anything, you must act jointly, meaning you and the other co-attorneys must make all decisions together.
- If you're named as the **alternate attorney**, the EPA should say in what order you act. For example, if you're the first alternate attorney, then you only act if the first-named attorney can no longer act.

An attorney **cannot** make personal decisions. Only an **agent** named in a **Personal Directive** or a guardian named in a guardianship order can make personal decisions for the maker.

Someone may name you to be both their agent in their Personal Directive and their attorney in their Enduring Power of Attorney. While this gives you the power to make both personal and financial decisions for the person, you must separate your responsibilities. You have different legal obligations as an attorney than you do as an agent.

Alberta's *Powers of Attorney Act* sets out the law for Enduring Powers of Attorney and attorneys. The *Trustee Act* sets out rules for attorneys when they're investing money.



Learn more about Personal Directives and Enduring Powers of Attorney in CPLEA's Estate Planning 101 booklet: www.cplea.ca/estate-planning-101.pdf

How an Enduring Power of Attorney Works

An Enduring Power of Attorney (EPA) is a legal document used while its donor is still alive but does not have **capacity**, meaning they can no longer make decisions for themselves.

To be valid, an EPA must be in writing, dated, and signed by the donor and at least one witness. It also must say it either comes into effect (starts) when the donor loses capacity or it continues to have effect once the donor loses capacity. This requirement separates an EPA from a General Power of Attorney.

An EPA says when it comes into effect (starts). Often, the EPA will say it comes into effect when the donor does not have capacity to make financial decisions for themselves.

An EPA may:

- name an attorney and alternate attorneys
- describe the attorney's authority to make all or some financial decisions for the donor
- say when it comes into effect and who decides when it comes into effect

In their EPA, the donor may describe how they want you to deal with their finances and property, but they don't have to. An EPA can be very vague, which empowers you to make financial decisions for them based on what you know or think they would have wanted.

Attorney Powers and Responsibilities

As an attorney, you have legal powers and responsibilities that are set out in both the Enduring Power of Attorney (EPA) and the law.

When your role starts and ends

Your powers and responsibilities **start** when the EPA comes into effect (starts). The EPA will say when this happens.

Your powers and responsibilities **end** when one of the following happens:

- the donor regains capacity
- the donor dies
- the EPA says when it ends and that event happens
- a court decides the EPA is no longer in effect or you are no longer the attorney
- a court grants a trusteeship order for the donor
- you lose capacity
- you die

While the donor has capacity, they can revoke (cancel) their EPA or change it to name a different attorney.

Once you start acting as attorney, you **cannot renounce** (quit) unless the court allows you to do so. If the court allows you to stop acting and the EPA names an alternate attorney, that person can start acting as attorney. If the court allows you to stop acting and the EPA doesn't name an alternate attorney, then the EPA ends, and someone will have to apply to court to become the donor's trustee.



Learn more about trusteeship orders in CPLEA's **Adult Guardianship and Trusteeship Act** booklet: www.cplea.ca/AdultGuardianshipAndTrusteeAct.pdf

Your powers and responsibilities

The EPA will say what powers you have, either full or limited, to make financial decisions for the donor. If the EPA limits your powers, it must be clear what powers you have. If the EPA gives you full powers, this means you can make all financial decisions for the donor except for those listed below.

As an attorney, you **cannot**:

- change or make a new Will for the donor
- change or make a new EPA for the donor
- change or make a new Personal Directive for the donor
- change the designated beneficiary of the donor's investments, pensions or life insurance policies

Unless the EPA says otherwise, an attorney has the power to:

- prepare and submit the donor's tax returns and make other tax decisions for the donor
- use the donor's assets for the donor's maintenance, education, medical care, support and other benefit
- use the donor's assets to support the donor's spouse, adult interdependent partner or dependent children
- hire people to help the donor, such as service providers, lawyers, accountants, investment managers, etc.
- maintain trusts for the donor's children or other beneficiaries
- deal with any business interests or investments the donor may have
- pay costs for personal decisions the donor's agent makes under their Personal Directive

You can deal with the donor's real estate, including buying and selling their property, **only if** the EPA specifically gives you this power.

If you invest the donor's money, you must use the care, diligence and skill that a prudent investor would in making investments. If you work in a job that requires a higher skill level when it comes to investments, such as a banker or financial advisor, you must use that greater degree of skill in making investments as an attorney. You're not liable for investment losses as long as you made reasonable investment decisions.

You also have legal **responsibilities** towards the donor. You must:

- if possible, talk with the donor about their wishes before you make a decision for them
- follow all lawful instructions in the EPA, even if you don't agree with them
- keep their personal information private
- record all decisions you make on behalf of the donor
- act in the best interests of the donor, not yourself or anyone else

Before You Agree to Act

Below are some things you should think about before agreeing to act as an attorney.

Do you want to act?

The donor of an Enduring Power of Attorney (EPA) should talk to you before they name you as their attorney. You can decide at that point whether you are willing to act if the EPA comes into effect.

If you decide you don't want to be an attorney at any time before the EPA comes into effect, talk to the donor right away so they can change their EPA.

If the EPA comes into effect, you can renounce (quit) **before** you take any steps as the attorney. Once the EPA is in effect and you start acting as the attorney (or agree to be the attorney), you cannot renounce unless the court allows you to.

What is your relationship with the donor?

You may be a family member or close friend of the donor. It's important to know the donor well enough to feel comfortable making important financial decisions for them.

What kind of financial obligations does the donor have?

Being an attorney can be complicated if:

- the donor owns a business
- the donor has a lot of investments or debts
- the donor has minor children, including if they must pay child support
- the donor has lots of real estate or other belongings

Do you have the time to be an attorney?

Being an attorney can take a lot of time and effort. The donor may live for many years with the EPA in effect, during which time you'll have to make decisions for them.

Are you well-suited to make financial decisions for the donor?

Making financial decisions for the donor can be stressful and requires you to be good with money. You may have to sort through their belongings or sell their home. You may have to decide how to invest the donor's money to support them long-term.

Do you want to be paid?

The donor must pay you for any expenses you incur while acting for them, such as for photocopying and parking. You can also receive payment for your time. If the EPA doesn't mention payment, you can apply to court for reasonable and fair compensation. Talk to the donor about whether you want them to pay you. If the donor doesn't have a lot of assets, you'll be volunteering your time.

Are you organized?

You must record all the decisions you make and keep copies of all documents.

What are the donor's family dynamics?

The donor can instruct you to share information with family members. Dealing with others can be challenging depending on their relationship with the donor.

If You Agree to Act

If you agree to act as the donor's attorney, there are several steps you can take while the donor still has capacity to help you perform your role.

Ask the donor for either a copy or original of the EPA

If you don't have the original EPA, make sure you know where to find it quickly. You'll need the original to start acting for them if the EPA comes into effect.

Ask the donor if they also have a Personal Directive and a Will

If they don't, suggest they make both documents.

If they do, ask who are their agent (under their Personal Directive) and **personal representative** (under their **Will**). You may be filling one or both of these roles too. If you're not the agent and personal representative, you'll likely have to work with them. The agent will make personal decisions for the donor that you may have to pay for as the attorney. Once the donor passes away, you may have to hand over information to the personal representative to allow them to wrap up the maker's estate.

Talk with the donor about what property they have

- Do they own or rent their home?
- Do they own other real estate? If so, where is it? Do they own it alone or with others?
- Do they own other valuable property, such as art, jewelry or vehicles? If so, where is this property?
- Do they own any property with others? If so, who are the other owners? Do they own the property as **joint tenants** or **tenants in common**?
- Where are their bank accounts? Do other people have access to the accounts?
- Do they have credit cards? If so, where are they?
- Do they have debts? If so, who do they owe money to, when and how much?
- Do they receive any government benefits? If so, which ones?
- Do they have investments, pensions or life insurance policies? If so, who administers these accounts? Has the donor named beneficiaries for these accounts?
- Does their Will give specific gifts, meaning have they named certain beneficiaries for certain property? If so, what property?
- Do they have specific wishes for any property, such as to keep, sell or give away?
- Where do they keep their important documents?

Talk with the donor about any specific wishes they have for their property while they're still alive

- Do they have a spouse, adult interdependent partner or dependent children to support?
- Do they make regular donations to a church or charity?
- Do they have property they want to keep because they've gifted it to someone in their Will?

Ask the donor who you should inform that the EPA is in effect

If the EPA comes into effect, the donor may want certain people to know. They may also want you to keep these people informed as you make decisions. The donor may say who ***not*** to inform.

When the EPA Comes Into Effect

If the triggering event, such as the donor losing capacity, has happened, you must first activate the Enduring Power of Attorney (EPA) before you start making decisions for the donor. Follow the steps below.

1. Activate the Enduring Power of Attorney

Read the EPA. It will say when and how it comes into effect.

Usually, the EPA will say it comes into effect when the donor loses capacity. The EPA may name you or someone else who should declare in writing that the donor has lost capacity. If the EPA doesn't name someone, or that person doesn't want to decide whether the donor has lost capacity, two doctors must declare in writing that the donor has lost capacity.

Instead of coming into effect when the donor loses capacity, the EPA may say it comes into effect on a certain date or event. For example, the donor may choose for it to come into effect when they reach a certain age. The EPA should name you or someone else who should declare in writing that the triggering event has happened and that the EPA is now in effect.

There's no specific form to use to declare in writing that the donor has lost capacity or the triggering event in the EPA has happened.

Once you have in writing that the EPA is in effect, keep this document with you when performing your attorney duties. Others may ask to see it as proof you have authority to act for the donor.

2. Inform everyone who needs to know

The EPA may list, or the donor may have told you, who you need to inform that the EPA is now in effect. The EPA or donor may also say who **not** to inform.

To carry out your duties, you'll have to inform the donor's banks, financial advisors, etc. that the EPA is in effect.

3. Figure out the donor's financial obligations

As soon as you start to act as the attorney, you'll have to quickly figure out what bills and expenses the donor has. You must either continue to pay those expenses using the donor's money or cancel services the donor no longer needs.

Examples of bills and expenses include:

- ☐ mortgage payments
- ☐ rent
- ☐ property taxes
- ☐ utilities (water, gas, electricity, phone, Internet, etc.)
- ☐ streaming services (such as Netflix)
- ☐ subscriptions (such as Amazon Prime and newspapers)
- ☐ monthly donations to charities
- ☐ monthly contributions to investments

4. Protect the donor's assets

You must protect the donor's assets for future use. Examples of tasks include:

- ☐ access and make a list of what's in the donor's safety deposit box
- ☐ arrange to safely store valuable items
- ☐ collect from others any monies owed to the donor
- ☐ make sure the donor's vehicle is safely stored until you decide what to do with it
- ☐ make sure the donor's home is secure and maintained (check appliances are off, mow the lawn, shovel the snow, lock the doors, install security cameras if necessary)
- ☐ make sure the donor's pets are cared for
- ☐ if the donor rented their home and it's appropriate to do so, arrange with the landlord to remove the donor's property and end the lease or arrange a sub-lease
- ☐ 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 for the donor, their property, etc.
- ☐ get information on the donor's credit cards and pay or cancel them as appropriate
- ☐ contact Canada Post to reroute the donor's mail to you
- ☐ send change of address forms to organizations you will be working with as the attorney, such as banks

5. Make decisions for the donor

Once the EPA is in effect, you can make financial decisions for the donor as if the donor was making the decisions themselves.

How do you make decisions?

First, read the EPA. If it gives **instructions** on how to make certain decisions, you must follow those instructions.

If the EPA does not leave clear instructions, then you must make the decision you **believe the donor would have made** in the situation. Maybe they previously gave you instructions or shared their wishes with you.

If you don't know what the donor would have done, you must make a decision that **best protects the donor's interests**. For example, this may mean paying bills, filing taxes, investing money or selling their home.

You can hire professionals to help you if the donor has enough money to pay them. For example, you may hire an accountant to file the donor's taxes, an investment manager to invest the donor's money, a realtor to sell the donor's home or a lawyer to deal with a legal issue. However, you are still responsible for all decisions.

6. Keep records of your decisions

You must record all financial decisions you make for the donor. Keeping complete and detailed records includes:

- safekeeping the original EPA
- a list of all decisions you make, including dates, amounts and other relevant information
- the declaration that the EPA is in effect
- all financial documents, including contracts, bills, receipts and account statements
- all decisions of the Office of the Public Guardian and Trustee (OPGT) and courts
- any other documents relating to your authority

It's important to keep these records organized. You may need to show them to others if the court orders you to provide an accounting of your decisions.

Learn more about providing an **accounting** on page 16.

You should keep these records until:

- you stop being the attorney and receive a release from someone authorized to give one
- another person gets authority from the court 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

When Problems Arise

Issues may come up. You may not be able to find the original Enduring Power of Attorney (EPA). An interested person may ask for an accounting of all transactions you've made. You and your co-attorney may disagree on how to make a decision. Or you may not agree with a family member or professional.

If you cannot find the original Enduring Power of Attorney

If you cannot find the original EPA, you may be able to act if you have a copy of the EPA. However, it's a good idea to get legal advice before you start acting as the attorney.

If you can't find the original or any copies, you cannot act. The person with priority in law will have to apply to the court for a trusteeship order to manage the donor's finances.



Learn more about trusteeship orders in CPLEA's **Adult Guardianship and Trusteeship Act** booklet: www.cplea.ca/AdultGuardianshipAndTrusteeAct.pdf

If you need advice or direction

You can apply to the court for its opinion, advice or direction about anything to do with managing the donor's property.

If someone asks the court for an accounting

The following people can apply to court for an order directing you to give an accounting of all transactions you've made on the donor's behalf:

- the donor, if they have capacity
- the donor's personal representative or a trustee of the donor's estate
- any other interested person if the donor cannot make reasonable judgements about their estate

The law does not define who an "interested person" is. The court decides.

If the 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 don't become personally liable for the donor's debts. You may contact government and social services agencies to see if there are benefits or funding you can apply for. Take these steps well before the money actually runs out.

If you and a co-attorney disagree

If you and your co-attorneys disagree on how to make a decision, review the EPA. If it gives a process for resolving disagreements, follow the process. If the EPA doesn't say how to resolve disagreements, you can apply to the court for its opinion, advice or direction.

If you and family or advisors disagree

Remember, you have a legal duty to act for the donor. You must follow the donor's lawful instructions in the EPA. If there are no clear instructions, you must make the decision that best protects the donor's interests, not anyone else's. Loved ones or professional advisors may have opinions about what decision you should make, but you alone should make the decision after reviewing the EPA and talking to the donor. You can also ask professionals for advice or apply to the court for its opinion, advice or direction.

If you make a mistake

No one is perfect. As an attorney, you are legally responsible for the donor's finances. If you've made a mistake, get legal advice or apply to the court for its opinion, advice or direction.

Glossary

An **adult interdependent partner**, or **AIP**, is a person in an adult interdependent relationship.

An **adult interdependent relationship**, or **AIR**, is unique to Alberta and describes an unmarried couple who live together, with or without children. It exists in three situations:

1. Two people have signed an Adult Interdependent Partner Agreement.
2. Two people have lived together in a relationship of interdependence for three or more years.
3. Two people live together in a relationship of interdependence and have a child together, by birth or adoption.

A relationship of interdependence exists where two people share one another's lives, are emotionally committed to one another and share their home and finances.

An **agent** is a person named in a Personal Directive to make personal decisions for the maker.

An **attorney** is a person named in an Enduring Power of Attorney to make financial decisions for the donor.

Capacity means a person can understand and appreciate the nature of their decisions.

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

An **Enduring Power of Attorney (EPA)** is a legal document that names an attorney to make financial decisions for the donor while they are still alive but do not have capacity.

Joint tenants are co-owners of property where each owns the whole property. When one co-owner dies, the other joint tenants continue to own the property through the right of survivorship.

A **maker** is the person who makes a Personal Directive.

A **Personal Directive** is a legal document that names an agent to make personal decisions for the maker while they are still alive but do not have capacity.

A **personal representative**, also known as an executor, is a person named in a Will to deal with the testator's estate when they die.

Tenants in common are co-owners of property where each owns a share of the property. Each tenant in common can decide what to do with their share, including selling it or giving it away in their Will.

A **testator** is a person who makes a Will.

A **Will** is a legal document that sets out the testator's wishes for their property after they pass away. It names a personal representative to deal with the testator's estate. It can also name guardians for the testator's minor children and what the testator wants to happen with their body.

More Resources

Legal Support

Free legal clinics in Alberta

List of legal clinics across Canada that provide free legal support to those who qualify: www.cplea.ca/legalhelp/

Alberta Legal Coaches and Limited Services

Lawyers who provide coaching and limited services, for a fee: albertalegal.org

Law Society of Alberta Lawyer Directory

Find a lawyer in Alberta by name, location, practice areas, language(s) spoken, gender and whether they offer limited scope retainers: www.lawsociety.ab.ca/public/findalawyer/

Government & Court Services

Alberta Law Libraries

Free legal information and resources available at courthouse libraries across Alberta. Some services are also available online: lawlibrary.ab.ca

Government of Alberta

Services and information about advance care planning: www.alberta.ca/decision-making-advance-planning

Office of the Public Guardian and Trustee

An Alberta government office providing services and support for vulnerable Albertans and their families, including help with guardianship and trusteeship orders: www.alberta.ca/opgt-supports

Alberta King's Printer

For free online and print copies of Alberta laws: kings-printer.alberta.ca/Laws_Online.cfm

Still have questions? CPLEA has you covered!

More on this topic

Check out more booklets, checklists, blog posts and videos from the Centre for Public Legal Education Alberta (CPLEA) about estate planning, including about:

- Capacity
- Make a Personal Directive checklist
- Make an Enduring Power of Attorney checklist
- Make a Will checklist
- Be an Agent
- Be an Attorney
- Be a Personal Representative
- Getting a Grant of Probate or Administration
- Beneficiaries: Dying without a Will
- Adult Guardianship and Trusteeship Act

Visit www.cplea.ca/planning-for-future-care and www.cplea.ca/willsandestates to learn more!

Other legal topics

CPLEA also offers free legal information about other legal topics, including:

- Abuse and protection
- Consumer, money and debt
- Family and relationships
- Housing
- Recreation
- Resolving disputes
- Work

Visit www.cplea.ca to get started!