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Can i write my own enduring power of attorney

By the legal staff of the BC CEAS Elder Law Clinic What is a Power of Attorney? A power of attorney is a legal document that gives another person the power to take care of your financial and legal matters for you. The person you give this power to is called the "attorney," and you are called the "donor." (Here, "attorney" does not mean lawyer.) A power of attorney gives your attorney the authority to take care of only your financial and legal affairs. This could include paying bills, doing banking, or selling real estate on your behalf. It does not allow him or her to make decisions about your personal or health care. What are Powers of Attorney Used For? There are many reasons why a person might choose to make a power of attorney. One reason is that they may need temporary help taking care of their financial matters if they will be away for a while. For example, if you are going on vacation and will need some banking done while you are gone, you can have a power of attorney drawn up giving a family member or other person the power to take care of this while you are away. You could also have a power of attorney drawn up if an illness or injury makes it difficult for you to handle your own financial affairs. People also commonly make a power of attorney as a form of advance planning, to ensure that a family member or other person of their choice is legally able to take care of their financial affairs if they become "mentally incapable" of managing their own finances in the future. This kind of power of attorney is often called an "enduring" power of attorney. It continues in effect - or "endures" - even if you become mentally incapable. It is important to know that, if you should become mentally incapable of making a power of attorney, it is "too late" to do so if you don't already have one in place. You have to plan ahead and do it in advance. If you do not have a legal power of attorney appointing someone to act for you in place when you become mentally incapable, then your loved ones will need to go to court to get "committeeship" (the legal authority to handle your affairs). Going to court is an expensive and time consuming process, and there is no guarantee that the court would decide to grant the legal powers asked for. An enduring power of attorney is a simple tool that ensures that the person of your choice is able to easily step into your shoes and manage your finances when you become incapable of doing so, without having to go through the court process. To create an enduring power of attorney, you should ensure that the following sentence is included in your power of attorney document: "In accordance with the Power of Attorney Act, I declare that this power of attorney may be exercised during any subsequent mental infirmity on my part." Who Should I Name as My Attorney? You can choose any capable person to act as your attorney, so long as he or she is 19 years of age or older and willing to act as your attorney. It is very important that you give careful consideration to who you choose to act as your attorney. He or she will have significant power over your financial affairs, and significant responsibilities. Choose someone who you absolutely trust, and who is good at handling money. While most people choose their spouse, child or other loved one to be their attorney, careful thought should always be given to the appropriateness of the appointment. In addition to the skills and trustworthiness of the person, you might consider whether the responsibility of acting as your attorney could cause undue stress or strain on the person or on your relationship. If you wish, you can choose more than one attorney. If you do this, you need to write in the document whether you want them to have to act together, or whether they can act independently. You can also name one or more alternate attorneys who can take over if your first attorney becomes unable or unwilling to act. If you have no relatives or friends who are willing and able to serve as your attorney, you can choose a trust company, or the Public Guardian and Trustee (a government official), to act as your attorney. In either case, you will be charged fees for their services. Your Attorney's Powers The breadth of your attorney's powers depend on what powers you give them. For example, if you create a limited power of attorney giving your son only the power to deposit your pension cheques, then your son will have the legal power to do only that - deposit your pension cheques. However, if you create a general power of attorney that does not have any limits in it, then your attorney will generally have the power to do anything financial or legal that you can do for yourself. This could include, for example, cashing your cheques, withdrawing money from your bank account, dealing with your income taxes or buying or selling property on your behalf. (However, there are special requirements that apply if you want your attorney to be able to deal with real estate property - see Powers of Attorney for Real Estate below.) Your Attorney's Responsibilities Your attorney is legally required to act honestly and in good faith, in your best interests. Your attorney must keep careful records of the financial activities done on your behalf and give the records to you upon your request, and must keep your affairs separate from his or her own. When Powers of Attorney Start and End A power of attorney comes into effect as soon as it is signed, however it does not have to be used right away if you do not need help yet. Make sure your attorney knows when you want him or her to start acting on your behalf. If you prepare a limited power of attorney for a specific purpose or a specified period of time (for example, to handle your banking while you are out of town), your power of attorney will expire when the stated tasks have been completed and/or on the end date noted in the document. If you instead prepare a general attorney, subject to some exceptions your power of attorney will normally continue in effect indefinitely until you revoke it or until you or your attorney die (unless you have named more than one attorney or an alternate to act in the event an attorney dies). Also, unless you have created an "enduring" power of attorney by including an enduring clause as discussed above, your power of attorney will end if you become mentally incapable. Revoking a Power of Attorney As long as you are still mentally capable of doing so, you can normally revoke (cancel) your power of attorney at any time. To revoke a power of attorney, you should notify your attorney in writing that the power of attorney is revoked effective immediately. Also notify in writing all banks, businesses, organizations and individuals that your attorney deals with, advising them that the power of attorney has been revoked and asking them to destroy all copies of the document they have. Making a new power of attorney does not automatically cancel an old one. It is possible to have more than one power of attorney in effect at the same time. If you want to make sure you have only one power of attorney in effect, when you make a new power of attorney ensure that you write at the beginning "I revoke any and all powers of attorney I have previously made." Banks' Power of Attorney Forms Banks often have their own power of attorney forms they want their customers to use. If you have your own power of attorney that covers banking matters, they have no right to require you to use their form. You could ask to speak with the bank manager or, if necessary, call a lawyer. Powers of Attorney for Real Estate If you want your attorney to have the power to sell your real estate property or deal with mortgages or easements for you, there are special requirements. You must sign the power of attorney in the presence of a lawyer or notary (and the lawyer or notary must also sign), and you must register the power of attorney at the land title office and comply with other legal requirements. If you want your power of attorney to include these powers, consult with a lawyer for advice. Preparing a Power of Attorney Document There are power of attorney forms in the Schedule to the British Columbia Power of Attorney Act, available online on the Internet. There are also sample BC power of attorney forms and kits available online and in legal publications you can find in the library and in bookstores. However, it is best to get some professional help, especially if you have a complicated or unusual situation. As noted above, if your power of attorney is to deal with real estate, you must go to a lawyer or notary public. Pre-planning for Health Care Decisions A power of attorney covers financial and legal matters only. If you want to plan ahead and choose who will make health care and treatment decisions for you when you no longer can, you can make what is called a "Representation Agreement" naming whoever you want to make those decisions. Nidus Registry for Enduring Powers of Attorney and Representation Agreements The Representation Agreement Resource Centre has an online registry called the Nidus Registry where you can register your enduring power of attorney or representation agreement, if you wish. The fees are \$25.00 for set-up and the first registration, and \$10.00 for each additional registration. You can register yourself by going to www.nidus.ca on the Internet, or ask family or friends to help. You can also phone the Nidus Registry and Resource Centre for help with registering. Their phone number is (604) 408-7414. This BC Centre for Elder Advocacy and Support public legal education article was written in 2009. It contains general information only and is not a substitute for getting legal advice about your particular situation. Protection of Personal and Property Rights Act 1988, ss 99, 99A If you want you can appoint the same person to be both your attorney for personal care and welfare and your attorney for property, or you can choose different people (and you can have more than one person for the property EPA). In making your decision, remember that the personal skills needed to look after someone's personal care and welfare are different from those needed to look after someone's finances and property, which usually require some business knowledge. If you do appoint different people, they have to consult with each other regularly. In September 2008 new and additional requirements were introduced for making a legally valid enduring power of attorney. This section of the chapter explains all the current requirements. If you made your EPA before 25 September 2008, your signature only had to be witnessed by an independent person and there was no requirement for your witness to complete and attach a certificate. The new requirements introduced in 2008 place more responsibility on your witness - they have to be a lawyer or someone with professional knowledge about EPAs and they have to explain to you the effect of your EPA. Protection of Personal and Property Rights Act 1988, ss 94A, 95, 112, Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008 To be valid, your enduring power of attorney has to meet these requirements: The right form - You have to use a particular form when you make your enduring power of attorney. These are available from lawyers, Public Trust and other trustee companies. You can also download a copy of the form from the Office of Senior Citizens website - www.superseniors.msd.govt.nz/finance-planning/enduring-power-of-attorney/Signatures - You and your attorney (or attorneys) must sign the EPA. Witnesses - Your signature has to be witnessed by either a lawyer, a qualified legal executive with at least one year's experience (they must be working for and directly supervised by a lawyer), or someone from a trustee company like Public Trust. The attorney's signature also has to be witnessed, but this can't be by you or your own witness. The witness to your signature has to be independent of your attorney. However, if the attorney is a trustee company, a person from that company is allowed to witness your signature, and if you're appointing your attorney in their capacity as a lawyer, another lawyer or legal executive from the same law firm can witness your signature. The witness also has to sign a certificate saying that they're independent of your attorney (unless one of those exceptions for trustee companies or lawyers applies). Understanding the EPA - Before you sign the EPA, your witness must explain its effects and implications to you. They must also explain your legal rights, including your right to suspend or cancel the power of attorney. Your witness has to provide a statement (in a certificate attached to the EPA form) saying they believe on reasonable grounds that you understand the EPA and its potential risks and consequences, and that you're not being pressured by anyone to sign the EPA. This certificate also has to say that the witness has no reason to suspect you may be mentally incapable. Note: Despite the requirement for independent witnesses, if a couple or any other two people appoint each other as attorneys they can use witnesses who work in the same law firm or trustee company as each other. They're even allowed to use the same person as witness, if that witness is satisfied there's no real risk of a conflict of interest. Protection of Personal and Property Rights Act 1988, s 94A You're not legally required to have a lawyer, as your witness for the EPA can be either a lawyer, a qualified legal executive, or a representative from a trustee corporation. However, there are a number of advantages to getting full, independent advice from a lawyer with experience in this area. They can advise you about what terms you might want to include in the EPA and they can make sure it properly expresses what you want to happen. Protection of Personal and Property Rights Act 1988, ss 97, 99A, 99B, 107 There are some issues that an EPA must deal with - for example, an EPA for property must state whether your EPA decision-maker (attorney) can start making decisions on your behalf immediately while you're still "mentally capable", or whether they can do this only if and when you lose your "mental capacity". An EPA can also include a number of optional provisions: Consultation - You can name people who your attorney has to consult with whenever the attorney makes decisions or particular kinds of decisions. People who have to be kept informed - You can name people who your attorney has to keep informed about decisions they make under the EPA, if those people ask for this information. You can also specify the kinds of information you want your attorney to provide. Who'll assess your mental capacity - Your EPA can specify the particular type of health professional who'll do the assessment, such as a geriatrician (a doctor who specialises in the conditions that commonly affect older people), so long as it's an area of practice that includes assessing people's mental capacity. Benefits for the attorney - If you make a property EPA, you can say whether your attorney is allowed to do things that will benefit them financially or benefit some third person. With some exceptions, attorneys can't benefit themselves or other people if the EPA doesn't specifically allow this. Back-up attorneys - Your EPA can specify another person (a "successor attorney") who'll take over as your attorney if the first attorney becomes unable to act - for example, if they die or become ill. Wills - An EPA can specify that your property attorney can make a will for you, if the Family Court has authorised the attorney to do this. Note: As well as making your EPA, you also might want to consider making an advance directive about future medical treatment. This is a set of instructions about the kinds of treatment you do or don't want to receive if you lose the ability to give informed consent (for example, if you're in a coma after a car accident). For information about advance directives (sometimes called "living wills"), see the chapter "Disability rights", under "Health and disability services". Protection of Personal and Property Rights Act 1988, s 97 When you make an EPA for your property, you should tell your EPA decision-maker what you own, where your possessions and documents are kept, and what your exact wishes are. You should: list all your main assets, including your house, car, bank accounts, life insurance policies, furniture and jewellery. You should also list any money owed to you or other assets that you've lent out. list your debts and other liabilities (for example, that you're a guarantor for someone's loan) tell your attorney where you keep your important documents, like the title deed to your house, birth certificate, and insurance policies decide what things you want your attorney to be able to do on your behalf - these powers can be as limited or as wide as you choose specify when the EPA comes into effect - this can be immediately, or only if and when you lose "mental capacity" and become unable to manage your property affairs. If you specify in your EPA that it will take effect only when you become mentally incapable, your attorney can't act on your behalf unless a doctor or other appropriate health professional has certified that you're mentally incapable or the Family Court has decided this.

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