

Smart Planning: Enduring Power of Attorney

What is an “Enduring Power of Attorney”?

An “Enduring Power of Attorney” is a legal document that gives your “Attorney” – which in this case means the person you appoint, and does not mean ‘lawyer’ – the power to carry out financial and legal transactions on your behalf.

You, the maker of an EPA, can give your Attorney authority over all of your affairs, or over only some of your affairs (for example, over one bank account).

Your EPA DOES NOT give your Attorney the right to make decisions about your health care. To do that you will need a “Representation Agreement”.

An **Enduring** Power of Attorney is made when the maker wants the document to continue to have effect if they lose mental capacity – for example, be in a coma after an accident, or develop dementia.

A general Enduring Power of Attorney gives your Attorney all the power you have: and the Attorney can therefore steal your money easily. Be careful!

When should I make an EPOA?

The simple answer: before you need it!

No one, not even your spouse, has authority over your financial affairs if you lose capacity.

But We Have Joint Assets – Isn't that enough?

Even if you have assets in joint names with your spouse (a house, a car) your spouse cannot sell those assets if you become incapable, because they do not have authority to sign documents on your behalf.

So you need an Enduring Power of Attorney to give your spouse that authority. Otherwise they will have to get a court order for sale.

Can you appoint anyone you want as an Attorney?

There are some limits.

You cannot appoint:

- Someone who is paid to be your caregiver or an

employee of a care facility if you are in a care facility, unless that person is your spouse

- Someone who is under 19 years old
- Someone who themselves does not have mental capacity

If you want, you can appoint a trust company, a credit union, or a lawyer: they will require that you put wording into your document to permit them to be paid for the work.

Does my Attorney get paid?

Your Attorney only gets paid if you specify payment in the document you create.

What duties does my Attorney have?

Your Attorney must:

- Act in your best interests
- Keep your assets separate from their own (unless they were in a joint account between you and your Attorney)
- Keep books outlining the expenditures they make
- Not sell anything you have identified as a gift in a will (for example: I give my grand piano to my granddaughter...)

Are there things my Attorney cannot do?

Unless you say otherwise (and you can give any instructions you want in your EPOA) there are some things that your Attorney CANNOT do:

- They cannot borrow money from you
- They cannot mix your money with theirs (except if you already had a joint account) They cannot make changes to your beneficiary designation (for example, to RSP's or benefit plans or insurance policies) unless they are signing a renewal of such a document and the beneficiary stays the same, or they get a court order
- They cannot borrow money from you.
- They cannot provide financial assistance to family members or others. If you have a blended family, in particular, you may want to make provisions with respect to that support.
- They cannot make donations to charity
- They cannot change your Will
- They may be restricted in making changes to your asset structure to minimize future taxes

Your attorney cannot undercut your Will by setting up a joint account that transfers your money to them.

If an attorney sets up a joint account, they are considered to hold the amount in trust for your estate, unless you have specified otherwise in your Will.

How long does the EPOA last?

Your Attorney's power has unlimited duration **except with respect to transferring real property** from the time you make it, until you die.

The Land Title Office will recognize a Power of Attorney only for 3 years after it is made, unless there is a specific clause in the document saying that the EPOA lasts indefinitely.

Are there other issues I should consider?

You might consider putting in a clause that says your Attorney must account to a family member on request. That enables people to know, before you die, what your Attorney is spending money on.

You can write your own EPOA – but there is a risk of not writing it in a way that banks etc will accept later.

It is worth paying a lawyer or notary public to prepare a power of attorney for you. They can discuss with you what clauses you want to include.

The information in this booklet is current to November 2016.

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