

Practice Bulletin No. 02-11

TITLE: Enduring Powers of Attorney

ISSUER: Director of Land Titles

APPLICATION: All Land Title Offices

RELATIONSHIP TO PREVIOUS POLICY: Version 1.1

APPROVAL:

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a horizontal line.

Craig D. Johnston, Director of Land Titles

EFFECTIVE DATE: October 10, 2012

FILE NUMBER: *Land Title Act*

Change Record			
Version	Date	Page	Description
1.0	November 18, 2011	All	Initial Statement
1.1	August 30, 2012	All 5	Updates to Witnessing requirements, Extra jurisdictional requirements Under <i>EPOA's made in a foreign jurisdiction</i> , the paragraph following bullet points has been moved to left, indicating it applies to both bullets points.

Background

Amendments to the *Power of Attorney Act*, R.S.B.C. 1996, c.370 ("*Act*") which came into force September 1, 2011 have resulted in a variety of new requirements relating to Enduring Powers of Attorney ("EPOA"). These new requirements and amendments include:

- additional executions and specific witnessing requirements,
- a specific amendment related to the effective date of an EPOA,
- recognition of alternate attorneys,
- "springing" or "contingent" EPOA's, and
- EPOA's made in a foreign jurisdiction

Although the standard form of EPOA published by the Ministry of Attorney General is not mandatory, the use of this standard form will assist drafters of EPOA's in meeting the new requirements of the *Act*. The standard form also specifically deals with the practice issues noted below in the practice section. This standard form of EPOA can be accessed from the Ministry of Attorney General's website at the following link: <http://www.ag.gov.bc.ca/incapacity-planning/>

Issue

Questions have arisen as to how land title office practice is affected by the September 1, 2011 amendments to the *Act* relating to EPOA's.

This Practice Bulletin sets out the practice requirements that have been introduced regarding the filing of EPOA's.

Practice

The following practice requirements apply to all EPOA's executed on or after September 1, 2011.

Executions and witnessing

The execution and witnessing requirements for both the adult and the attorney are set out in ss. 16 and 17 of the *Act*.

Execution by the adult (s. 16)

An EPOA must be signed by the adult whose signature must be witnessed in the presence of:

- a notary public, who is a member of the Society of Notaries Public of British Columbia, in accordance with Part 5 *Land Title Act*, or
- a British Columbia lawyer in accordance with Part 5 *Land Title Act*, or
- any other person who may act as an officer under the *Evidence Act* in accordance with Part 5 of the *Land Title Act*, along with a second witness whose signature must be proven by affidavit of witness covering the matters noted in s. 16(6) of the *Act* unless that second witness is also an officer, or

- two witnesses, who are not officers under the *Evidence Act*, whose signatures must be proven by affidavit of witness covering the matters noted in s. 16(6) of the *Act* and s. 49 of the *Land Title Act*.

In the event the adult's signature is witnessed by two witnesses, the adult must sign the EPOA in the presence of both witnesses and both witnesses must sign in the presence of the adult. Consequently, the registrar will refuse to register EPOA's in the event the EPOA is witnessed by two witnesses on separate execution dates. A statutory declaration may be used to clarify any ambiguity related to this requirement.

Execution by the attorney (ss. 16 and 17)

An EPOA must be signed by the attorney whose signature must be witnessed by:

- a notary public, who is a member of the Society of Notaries Public of British Columbia, or
- a British Columbia lawyer, or
- if not witnessed by a British Columbia lawyer or British Columbia notary public, two witnesses whose signatures must be proven by affidavit of witness covering the matters noted in s. 16(6) of the *Act*.

The witnessing of execution by the attorney does not need to meet the requirements of Part 5 of the *Land Title Act*.

Section 17 of the *Act* requires the attorney to execute the EPOA. Consequently, drafters of EPOA's should be aware that the requirements of s. 17 are not met by virtue of the attorney solely executing supporting documentation (such as a "proof of age" declaration).

Affidavit of Execution

Attached as Schedule B to this practice bulletin is a suggested form of affidavit that may be used to address any witnessing limitations noted in s. 16(6) of the *Act*. In addition, this suggested form of affidavit also covers the matters noted in s. 49 of the *Land Title Act* in the event neither of the witnesses is an officer pursuant to the *Evidence Act*. This additional wording relating to s. 49 of the *Land Title Act* will ensure the EPOA has been executed and witnessed in accordance with s. 16(5) of the *Act* and Part 5 of the *Land Title Act*.

Effective date of EPOA's (s. 26)

Pursuant to s. 26 of the *Act*, an EPOA is effective on the latest of:

- the date by which the EPOA has been signed both by the adult under s. 16 and by an attorney under s. 17,
- a date stated in the EPOA as being its effective date,
- the date an event described in the EPOA as bringing the power of attorney into effect is confirmed to have occurred.

Land title forms already executed by an attorney under a deficient EPOA will have to be re-executed by the attorney subsequent to the deficient EPOA being rectified. The re-execution by the attorney on the land title form is required because the previous execution by the attorney occurred at a date when the EPOA was not effective in accordance with s. 26.

Appointment of alternate attorney

Pursuant to s. 18(5) of the *Act*, an EPOA that appoints an alternate attorney must set out:

- the circumstances in which the alternate attorney is authorized to act in place of the attorney, including, for example, if the attorney is unwilling to act, dies or is for any other reason unable to act, and
- the limits or conditions, if any, on the exercise of authority by the alternate.

If an alternate attorney executes a land title form, the registrar will require satisfactory evidence, generally in the form of a statutory declaration, confirming that the circumstance contemplated in the power of attorney has occurred.

"Springing" or "Contingent" EPOA's (s. 26)

Pursuant to s. 26(2) of the *Act*, an EPOA that is effective after a specified event occurs must state in the EPOA how and by whom the event is to be confirmed.

The registrar requires that an instrument executed by way of a springing or contingent EPOA be accompanied by satisfactory evidence from the person named in the EPOA that the event stated in the EPOA has occurred.

EPOA's made in a foreign jurisdiction (Power of Attorney Regulation, B.C. Reg. 20/2011, s.4)

An EPOA made in a jurisdiction outside British Columbia is deemed to be enduring unless it is "made"

- by a person who was, at the time of its making, ordinarily resident
 - in a jurisdiction outside of British Columbia but within Canada, or
 - in a jurisdiction outside of British Columbia but within the United States of America, the United Kingdom of Great Britain and Northern Ireland, Australia or New Zealand,
- and is accompanied by a "[Certificate of Extrajurisdictional Solicitor](#)", that is completed by a solicitor in the jurisdiction in which the extrajurisdictional EPOA was made, pursuant to *Power of Attorney Regulation*, B.C. Reg. 20/2011, s.4.

A power of attorney that has not been made in Canada or within the jurisdictions contemplated in *Power of Attorney Regulation*, B.C. Reg. 20/2011 s. 4(2)(b)(ii) cannot be enduring.

In accordance with Part 2 of the "Certificate of Extrajurisdictional Solicitor", this certificate is required in order to confirm foreign EPOA's were "validly made according to the laws of the jurisdiction in which the adult was ordinarily resident and in which the power of attorney was made".

A "Certificate of Extrajurisdictional Solicitor" is required where

- the adult's address is outside of BC (meaning they are not "ordinarily resident" in BC), and
- it is not evident the EPOA was made according to British Columbia laws (i.e. it doesn't reference the British Columbia Power of Attorney Act and does not include the officer certification statement)

The registrar will determine whether the "deemed" EPOA was made in an acceptable jurisdiction, in accordance with *Power of Attorney Regulation*, B.C. Reg. 20/2011 s. 4(2)(b), by referring to the accompanying "Certificate of Extrajurisdictional Solicitor".

An EPOA that references the British Columbia *Power of Attorney Act* and includes the Officer Certification statement does not require a "Certificate of Extrajurisdictional Solicitor", even if it was executed outside of British Columbia and the adult's address denotes they are not ordinarily resident in British Columbia. This is because an EPOA that references the British Columbia *Power of Attorney Act*, that also includes the officer certification statement (as this references the British Columbia *Evidence Act* and *Land Title Act*), is sufficient evidence to confirm the EPOA was "validly made" according to the laws of British Columbia.

EPOA's that are accompanied by a "Certificate of Extrajurisdictional Solicitor" are defined in s. 4 of the *Power of Attorney Regulation*, B.C. Reg. 20/2011 as a "deemed enduring power of attorney". A "deemed enduring power of attorney" need only meet the requirements of section 4 as the additional requirements in the *Power of Attorney Act* relate to an "enduring power of attorney" as opposed to a "deemed enduring power of attorney". A "deemed enduring power of attorney" must still meet the requirements of s. 51 of the *Land Title Act*.

SCHEDULES

- Schedule A consists of pertinent excerpts from the *Act* and *Power of Attorney Regulation*, B.C. Reg 20/2011
- Schedule B consists of a suggested form of affidavit of witness

SCHEDULE A

Power of Attorney Act

Adult must sign enduring power of attorney

- 16** (1) Subject to subsections (2) to (6), an enduring power of attorney must be in writing and signed and dated by
- (a) the adult in the presence of 2 witnesses, and
 - (b) both witnesses in the presence of the adult.
- (2) Subject to subsection (3), an enduring power of attorney may be signed on behalf of an adult if
- (a) the adult is physically incapable of signing the enduring power of attorney,
 - (b) the adult is present and directs that the enduring power of attorney be signed, and
 - (c) the signature of the person signing the enduring power of attorney on behalf of the adult is witnessed in accordance with this section, as if that signature were the adult's signature.
- (3) The following persons must not sign an enduring power of attorney on behalf of an adult:
- (a) a witness to the signing of the enduring power of attorney;
 - (b) a person prohibited from acting as a witness under subsection (6).
- (4) Only one witness is required if the witness is a lawyer or a member in good standing of the Society of Notaries Public of British Columbia.
- (5) If an enduring power of attorney is to be effective for the purposes of the *Land Title Act*, the enduring power of attorney must be executed and witnessed in accordance with the *Land Title Act*.
- (6) The following persons must not act as a witness to the signing of an enduring power of attorney:
- (a) a person named in the enduring power of attorney as an attorney;
 - (b) a spouse, child or parent of a person named in the enduring power of attorney as an attorney;
 - (b.1) an employee or agent of a person named in the enduring power of attorney as an attorney, unless the person named as an attorney is
 - (i) a lawyer,
 - (ii) a member in good standing of the Society of Notaries Public of British Columbia,
 - (iii) the Public Guardian and Trustee, or
 - (iv) a financial institution authorized to carry on trust business under the *Financial Institutions Act*;
 - (c) a person who is not an adult;
 - (d) a person who does not understand the type of communication used by the adult, unless the person receives interpretive assistance to understand that type of communication.

Attorney must sign enduring power of attorney

- 17** (1) Before a person may exercise the authority of an attorney granted in an enduring power of attorney, the person must sign the enduring power of attorney in the presence of 2 witnesses.
- (2) The signing of an enduring power of attorney by an attorney is not required to be in the presence of the adult or any other attorney.

- (3) Section 16 (4) and (6) applies to witnesses of an attorney's signature and, for this purpose, the reference in section 16 (6) to the adult is to be read as a reference to the attorney.
- (4) A person named as an attorney in an enduring power of attorney who has not signed the enduring power of attorney is not required to give notice of any kind that the person is unwilling or unable to act as an attorney.
- (5) If a person named as an attorney does not sign the enduring power of attorney, the authority of any other attorney is not affected, unless the enduring power of attorney states otherwise.

Who may act as attorney

- 18** (1) An adult may name one or more of the following persons as an attorney:
- (a) an individual, other than an individual who
 - (i) provides personal care or health care services to the adult for compensation, or
 - (ii) is an employee of a facility in which the adult resides and through which the adult receives personal care or health care services;
 - (b) the Public Guardian and Trustee;
 - (c) a financial institution authorized to carry on trust business under the *Financial Institutions Act*.
- (2) Despite subsection (1) (a), an individual described in subsection (1) (a) (i) or (ii) who is a child, parent or spouse of the adult may be named as an attorney.
- (3) If an individual who is not an adult is named as an attorney, the individual must not act as attorney until that individual is an adult.
- (4) An adult who names more than one attorney may assign to each of them
- (a) a different area of authority, or
 - (b) all or part of the same area of authority.
- (5) If all or part of the same area of authority is assigned to more than one attorney, the attorneys must act unanimously in exercising the authority, unless the adult does one or more of the following in the enduring power of attorney:
- (a) describes the circumstances in which the attorneys need not act unanimously;
 - (b) sets out how a conflict between attorneys is to be resolved;
 - (c) authorizes an attorney to act only as an alternate attorney and sets out
 - (i) the circumstances in which the alternate is authorized to act in place of the attorney, including, for example, if the attorney is unwilling to act, dies or is for any other reason unable to act, and
 - (ii) the limits or conditions, if any, on the exercise of authority by the alternate.

When enduring power of attorney is effective

- 26** (1) An enduring power of attorney is effective on the latest of
- (a) the date by which the enduring power of attorney has been signed both by the adult under section 16 and by an attorney under section 17,
 - (b) a date stated in the enduring power of attorney as being its effective date, and
 - (c) the date an event described in the enduring power of attorney as bringing the power of attorney into effect is confirmed to have occurred.
- (2) If the enduring power of attorney, or a provision of it, is effective after a specified event occurs, the adult must state in the enduring power of attorney how and by whom the event is to be confirmed.
- (3) If the adult specifies that the enduring power of attorney is effective when the adult is incapable of making decisions about the adult's financial affairs, and the person named to confirm the adult's incapability is incapable, unwilling or unable to act, a qualified health care provider may confirm whether the adult is incapable.

Power of Attorney Regulation

Extrajurisdictional powers of attorney

- 4** (1) In this section, "**deemed enduring power of attorney**" means an instrument made in a jurisdiction outside British Columbia that is deemed under subsection (2) to be an enduring power of attorney made under the Act.
- (2) Subject to subsection (3), an instrument is deemed to be an enduring power of attorney made under the Act if the instrument
- (a) grants a power of attorney to a person that continues to have effect while, or comes into effect when, the adult is incapable of making decisions about the adult's financial affairs,
 - (b) was made by a person who was, at the time of its making, ordinarily resident
 - (i) outside British Columbia but within Canada, or
 - (ii) within the United States of America, the United Kingdom of Great Britain and Northern Ireland, Australia or New Zealand,
 - (c) was validly made according to the laws of the jurisdiction in which
 - (i) the person was ordinarily resident, and
 - (ii) the instrument was made, and
 - (d) continues to be effective in the jurisdiction in which the instrument was made.
- (3) To be effective in British Columbia, a deemed enduring power of attorney must be accompanied by a certificate, as set out in the Schedule, from a solicitor permitted to practise in the jurisdiction in which the deemed enduring power of attorney was made indicating that the deemed enduring power of attorney meets the requirements set out in subsection (2) (a) to (c).
- (4) A person named as an attorney in a deemed enduring power of attorney must not, in British Columbia, exercise any powers or perform any duties as an attorney
- (a) that could not lawfully be exercised or performed by an attorney
 - (i) under the Act, or
 - (ii) in the jurisdiction in which the deemed enduring power of attorney was made, and
 - (b) unless both the person who made the deemed enduring power of attorney and the attorney are at least 19 years of age.
- (5) Unless the adult is ordinarily resident in British Columbia, sections 34 and 35 of the Act do not apply in relation to an adult who makes, or an attorney who acts for an adult under, a deemed enduring power of attorney.

SCHEDULE B

SUGGESTED FORM OF AFFIDAVIT OF WITNESS

Affidavit of Witness for enduring power of attorney

The affidavit of witness is needed to confirm compliance with Part 5 of the LTA and s. 16 of the Power of Attorney Act. If the execution block does not confirm that the Power of Attorney was signed and dated by the adult in the presence of 2 witnesses and both witnesses in the presence of the adult, then this will need to be addressed in the affidavit of witness as well.

1. I am not any of the following:
 - (a) a person named in the enduring power of attorney as an attorney;
 - (b) a spouse, child, parent, employee or agent of a person named in the enduring power of attorney as an attorney;
 - (c) a person who is not an adult,
 - (d) a person who does not understand the type of communication used by the adult/donor, or
 - (e) an employee or agent of a person named in the enduring power of attorney as an attorney.

(If the person is an employee or agent of a person named in the enduring power of attorney as an attorney, then paragraph 1(e) should be deleted and replaced with the following paragraph:

2. I am an employee or agent of a person named in the enduring power of attorney as an attorney, but the person named as an attorney is *(cross out those that do not apply)*
 - (a) a lawyer,
 - (b) a member in good standing of the Society of Notaries Public of British Columbia,
 - (c) The Public Guardian and Trustee, or
 - (d) A financial institution authorized to carry on trust business under the *Financial Institutions Act*.
3. I am acquainted with the person named in the enduring power of attorney as the adult/donor.
4. I am acquainted with the signature of the adult/donor and believe that the signature subscribed to the instrument is the signature of the donor adult/donor.
5. The signature of the adult/donor was not certified by an officer under Part 5 of the Land Title Act, R.S.B.C. 1996, c. 250 because [set out reason].
6. This enduring power of attorney was signed and dated by the adult/donor in my presence and in the presence of [insert name of other witness]. Both witnesses to this enduring power of attorney signed and dated it in the presence of the adult/donor.