

# 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 1.3

**APPROVAL:**



Carlos MacDonald, Director of Land Titles

**EFFECTIVE DATE:** January 1, 2023

**FILE NUMBER:** *Land Title Act*

<b>Change Record</b>			
<b>Version</b>	<b>Date</b>	<b>Page</b>	<b>Description</b>
1.0	November 18, 2011	All	Initial Statement
1.1	August 30, 2012	All 5	Updates to Witnessing requirements, Extra jurisdictional requirements Under <i>EPOAs made in a foreign jurisdiction</i> , the paragraph following bullet points has been reformatted to indicate it applies to both bullets points.
1.2	January 25, 2018	5	Under <i>EPOAs made in a foreign jurisdiction</i> , corrected word error and formatting errors in first paragraph [“unless” changed to “if”, first bullet brought into introductory sentence].
1.3	January 1, 2023	3-6, 9-17	Added guidance and statutory references related to the alternative process for remote witnessing. Updated the suggested forms of affidavit in Schedule B.

## Background

Amendments to the *Power of Attorney Act*, R.S.B.C. 1996, c.370 ("*Act*") which came into force September 1, 2011 establish new requirements relating to Enduring Powers of Attorney ("EPOA"). The requirements 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" EPOAs, and
- EPOAs made in a foreign jurisdiction

The *Act* has been further amended to authorize the establishment of alternative processes for signing of EPOAs. The amendments come into force on January 1, 2023, along with amendments to the Power of Attorney Regulation that establish processes for the remote witnessing of EPOAs.

Although the standard form of EPOA published by the Ministry of Attorney General is not mandatory, use of the standard form will assist drafters of EPOAs in meeting the 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/>

## Practice

This Practice Bulletin sets out land title practice in regards to the filing of EPOAs executed on or after September 1, 2011, and EPOAs executed on or after January 1, 2023 under the prescribed process for remote witnessing.

### *Executions and witnessing*

The execution and witnessing requirements for both the adult and the attorney are set out in ss. 16, 17 and 17.1 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*, and 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*.

If 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. The registrar will refuse to register EPOAs where the EPOA has been 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 be done in accordance with Part 5 of the *Land Title Act*.

Section 17 of the *Act* requires the attorney to execute the EPOA. Drafters of EPOAs 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).

#### Remote Witnessing

Section 17.1 of the *Act* authorizes the establishment by regulation of an alternative process for signing EPOAs. Section 2.1 of the Power of Attorney Regulation, B.C. Reg. 20/2011, sets out an alternative process for remote witnessing of the execution of EPOAs by the adult and the attorney. An EPOA that is remotely witnessed under the alternative process must:

- include a B.C. lawyer or B.C. notary public as the officer that does the remote witnessing
- include a statement that the EPOA was signed and dated in accordance with the alternative process under the *Power of Attorney Regulation*
- be signed and dated by signing and dating complete and identical copies of the EPOA in counterpart. The EPOA submitted to the Land Title Office must include the EPOA that includes the signature of the witnessing officer and the copy of the EPOA that includes the signature of the adult and/or attorney, as applicable.
- include an affidavit under s. 49 of the *Land Title Act (LTA)* where the execution of the adult is remotely witnessed. The remote witnessing of an EPOA under the alternative process does not meet the Part 5, *LTA* requirement for the adult to be in the physical presence (appear before) the witnessing officer. Consequently, a s. 49 affidavit is required to ensure the execution of the EPOA is in accordance with the *LTA*. The s. 49 affidavit must be from the officer who remotely witnessed the EPOA, as this is the individual who can attest to the information required under s. 49. See the "Affidavit of Execution" guidance below for information on the suggested form of affidavit when an

EPOA is executed by an adult and remotely witnessed.

- A s. 49 affidavit is not required when the signature of the attorney on the EPOA is remotely witnessed, as the execution of the attorney does not need to meet the requirements of Part 5, *LTA*.

### Affidavit of Execution

Attached as Schedule B to this practice bulletin are suggested forms of affidavit that may be used:

- to address any witnessing limitations noted in s. 16(6) of the *Act*,
- to cover the matters noted in s. 49 of the *LTA* in the event neither of the witnesses is an officer pursuant to the *Evidence Act* to ensure the EPOA has been executed and witnessed in accordance with s. 16(5) of the *Act* and Part 5 of the *LTA*,
- by the witnessing officer when the execution by the adult is remotely witnessed in accordance with the alternative process under the *Power of Attorney Regulation*, to ensure the execution of the EPOA is in accordance with Part 5, *LTA*.

### ***Effective date of EPOAs (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" EPOAs (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.

### ***EPOAs 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 if it is made by a person who was, at the time of its making, ordinarily resident:

1. in a jurisdiction outside of British Columbia but within Canada; or
2. in a jurisdiction outside 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](#)" 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 EPOAs 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.

EPOAs 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 suggested forms 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.

#### **Signing enduring power of attorney – alternative process**

- 17.1 (1) A requirement in section 16 (1) that a person sign and date an enduring power of attorney in the presence of another person is satisfied if the enduring power of attorney is signed and dated in accordance with an alternative process established by regulation, if any, for witnessing the signing and dating.
- (2) The requirement in section 17 (1) that a person sign an enduring power of attorney

in the presence of another person is satisfied if the enduring power of attorney is signed in accordance with an alternative process established by regulation, if any, for witnessing the signing.

### 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***

#### **Alternative process for witnessing signing and dating**

2.1 (1) In this section:

“communicate” means communicate using audiovisual communication technology, including assistive technology for individuals who are hearing impaired or visually impaired, that enables individuals to communicate with each other by hearing and seeing each other;

“electronic presence” or “electronically present” means the circumstances in which 2 or more individuals in different locations communicate simultaneously to an extent

that is similar to communication that would occur if all the individuals were physically present in the same location.

(2) For the purposes of section 17.1 (1) [signing enduring power of attorney – alternative process] of the Act, an enduring power of attorney may be signed and dated while the following are in each other’s electronic presence:

(a) the adult who makes the enduring power of attorney, and, if applicable, the person signing the enduring power of attorney on behalf of the adult who makes the enduring power of attorney;

(b) the witness.

(3) For the purposes of section 17.1 (2) of the Act, before exercising authority granted in an enduring power of attorney, the enduring power of attorney may be signed while the attorney and the witness are in each other’s electronic presence.

(4) For certainty, in the case of a person signing the enduring power of attorney on behalf of the adult who makes the enduring power of attorney,

(a) the adult who makes the enduring power of attorney and the person signing on behalf of that adult must be in each other’s physical presence, and

(b) the person signing on behalf of the adult who makes the enduring power of attorney and the witness may be in each other’s electronic presence.

(5) The witness referred to in subsections (2), (3) and (4) must be a lawyer or a member in good standing of the Society of Notaries Public of British Columbia.

(6) An enduring power of attorney may be signed and dated, as applicable, by signing and dating, complete and identical copies of the enduring power of attorney in counterpart.

(7) Copies of an enduring power of attorney are identical even if there are nonsubstantive differences in the format between the copies.

(8) An enduring power of attorney made in accordance with the alternative process established in this section must include a statement that it was signed and dated in accordance with the alternative process.

#### **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 FORMS OF AFFIDAVIT OF WITNESS**

The following describes common execution scenarios and the suggested form of affidavit for EPOAs that are to be used for land title purposes.

#### **Execution by an Adult**

Scenario A: One witness who is not a B.C. lawyer or B.C. notary public but is an officer under the *Evidence Act*, together with a second witness who is not an officer.

The following form of affidavit is required from the witness who is **not** an officer, to cover the matters under s. 16(1) and (6) of the *Act*:

1. 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.
2. 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:*

3. 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*.

Scenario B: Two witnesses, who are not officers under the *Evidence Act*, to cover the matters under s. 16(1) and (6) of the *Act* and s. 49 of the *Land Title Act*:

Paragraphs 1, 2 and (if applicable) 3 from Scenario A above (to cover the matters under s. 16(1) and (6) of the *Act*) and paragraphs 4, 5 and 6 below (to cover the matters under s. 49 of the *Land Title Act*):

4. I am acquainted with the person named in the enduring power of attorney as the adult/donor.
5. 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.
6. 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].

Scenario C: A B.C. lawyer or B.C. notary public who remotely witnessed the execution by the adult in accordance with the alternative process under the *Power of Attorney Regulation*, to cover the matters under s. 49 of the *Land Title Act*:

1. I am 16 years of age or older and am acquainted with the person named in the instrument as the adult.
2. I am acquainted with the signature of [enter name of adult] and believe that the signature subscribed to the instrument is the signature of the adult.
3. The signature of the adult on the Enduring Power of Attorney was remotely witnessed by me as the witnessing officer in accordance with the alternative process under the Power of Attorney Regulation, and this s. 49 affidavit is made to provide evidence of compliance with the requirements of Part 5 of the *Land Title Act*.

### **Execution by an Attorney**

Scenario D: Two witnesses, who are not a B.C. lawyer or B.C. notary public, to cover the matters under s. 16(1) and (6) and 17(1) of the *Act*:

1. This enduring power of attorney was signed and dated by the attorney 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 attorney.
2. 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:*

3. 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*.