Mi'kmaw Wills & Estates:

A Guide For Nova Scotia Mi'kmaq

Book Three: How to Write a Power of Attorney & Personal Directive

March 2012

IMPORTANT

This publication contains general information and educational material about Wills and Estates to assist you in writing your own Will. We have avoided technical legal jargon in order to provide a practical plain language publication accessible to non-lawyers. It does not provide specific legal advice. You may have a very unique set of circumstances, and should you have specific legal questions about your Will or your Estate, we recommend that you speak to a lawyer.

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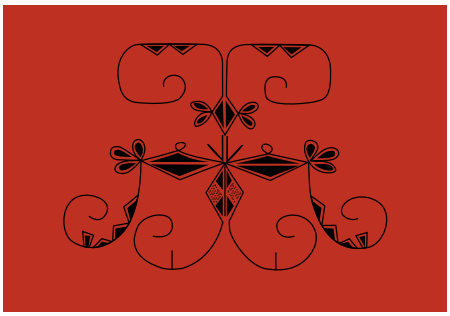


Introduction

You may be a well-organized person. You may have all your financial papers filed and ready to access if something should happen to you. You may even have your Will in place so that your family is well taken care of in the event of your death. However, what would happen if you suddenly became incapable of managing your own affairs (i.e., you became very ill)? Who would manage your financial affairs? And who would make the tough decisions regarding your health care?

Having a **Power of Attorney** (POA), an **Enduring Power of Attorney** (EPOA), and a **Personal Directive** (PD) in place ensures that your legal, financial, and medical issues are taken care of on your behalf. This guide provides information for **Status Indians** who are **Ordinarily Resident on Reserve** about POAs, EPOAs, and PDs. It also provides guidance for those who want to prepare their own documents. Among other things, this guide answers the following questions:

- What are POAs and EPOAs? How are they different?
- What is a PD?
- What is an Attorney? A Delegate? What responsibilities do they have?
- How do I revoke or cancel a POA, an EPOA, and a PD?
- What events will result in the termination of a POA, an EPOA, and a PD?
- How do I write my own POA, EPOA, and PD?

It is important to have these documents in place as part of your planning for a safe, comfortable future. Use this guide as a tool to prepare your own POA, EPOA, and PD if:

- You are a Status Indian;
- You are Ordinarily Resident on Reserve;
- You are 19 years of age or older;

Power of Attorney (POA): A legal document that lets you give another person authority to make financial decisions on your behalf.

Enduring Power of Attorney (EPOA): A power of attorney that specifically provides for the power to remain in force if the donor becomes mentally incompetent.

Personal Directive (PD): A legal document that allows you to name a person you trust to make personal and home care decisions for you when you are not capable of making those decisions for yourself.

Status Indian: A person who, in accordance with the *Indian Act*, is registered in the Indian registry system maintained by AANDC.

Ordinarily Resident on Reserve: This means that the person has a) never lived away from the reserve; or b) lived off the reserve for a period of time in order to attend school, to work, to receive medical attention, or to serve in the military; or c) lived off reserve for most of their life but moved to the reserve and was living on the reserve at the time the person became Mentally Incompetent. AANDC has the jurisdiction over the Living Estates of Status Indians who are Ordinarily Resident on Reserve.

- You are of sound mind (i.e., not **Mentally Incompetent**).

This guide does not provide specific legal advice; it only provides general information. You may have a unique set of circumstances that will require you to talk to a lawyer. A good rule of thumb is "when in doubt, talk to a lawyer," especially if:

- You are concerned about a loved one whose health is failing and who seems unable to manage their personal and financial affairs;

- You have been managing the personal and financial affairs of someone who has been diagnosed as Mentally Incompetent, and they do not have a POA or PD in place. You and your lawyer should also contact Aboriginal Affairs and Northern Development Canada (AANDC) because they have exclusive jurisdiction over the Property of Mentally Incompetent Status Indians who are Ordinarily Resident on Reserve.

Please see Part Seven of this guide for more information on "Hiring a Lawyer."

Mentally Incompetent: The *Indian Act* defines a Mentally Incompetent Indian as someone who has been declared mentally defective or incompetent for the purposes of any laws of the province in which that person lives. According to Nova Scotia's *Incompetent Persons Act*, this means someone who, because of a mental infirmity, cannot manage their own affairs. See *Incompetent Persons Act*, R.S.N.S. 1989, c. 218.

Part One

What is a Power of Attorney?

A POA is a legal document that gives another person the power to manage your **Property** and legal affairs on your behalf when you are unable to do so on your own (e.g., when you're on vacation, travelling for work, etc.). In the POA document, the person you choose to appoint to act on your behalf is called an "**Attorney**," while you are known as the "Donor."

Depending on your preference, your POA may grant specific powers, or it may grant a general power to your Attorney to do whatever they need to do to manage your affairs. Appointing someone to act under your POA does not remove your legal ability to act on your own behalf as long as you remain Mentally Competent. However, if you become Mentally Incompetent, your POA becomes invalid, unless it is an EPOA, which is discussed more in "Part Two – What is an Enduring Power of Attorney?"

Property: Land, possessions, and other items over which a person has legal ownership. This means that they are recognized and held responsible by law as the owner of the Property. There are two forms of Property: Real Property and Personal Property.

Attorney: A person authorized under a POA and EPOA to make decisions, on the Donor's behalf, concerning the Donor's financial and legal affairs.

Why Do I Need a POA?

There are many good reasons for having a POA in place. These can include, but are not limited to, the following:

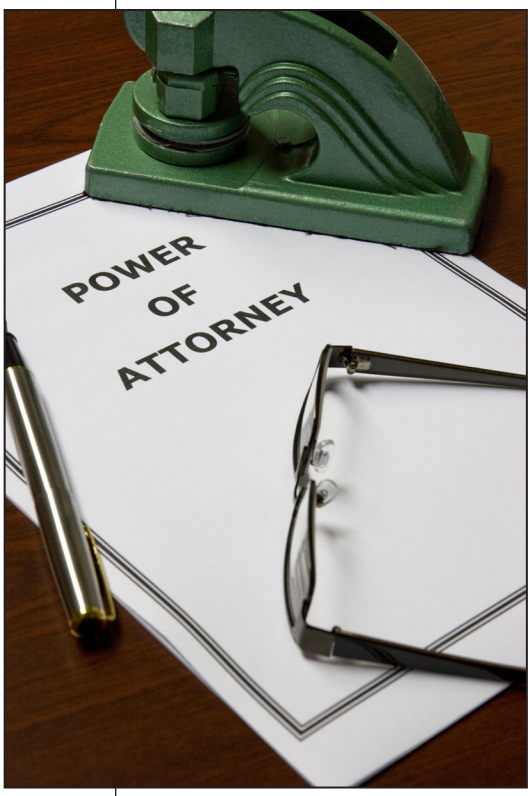
- You are too ill to manage your own affairs, and you would like someone to help you until you are feeling better;
- You have a disability that prevents you from getting around, so you want to give someone the power to deposit and withdraw money from your bank account, pay bills, and so forth;
- You intend to travel or work away from home and need someone to look after your affairs while you are away.

How Do I Make Sure My POA Is Valid?

Under the *Powers of Attorney Act*, a POA is only valid if:

- You are 19 years or older when giving your POA;
- The appointed Attorney is 19 years old or older;
- It is in writing;
- You are Mentally Competent;
- The POA is signed by you.

Your POA might stop being valid if you move outside of Nova Scotia. In this case, you may need to draft a new POA in accordance with the laws of the province or territory you are moving to.



How Do I Begin Writing My POA?

The *Indian Act* does not describe how a POA should be written, but the *Powers of Attorney Act* of Nova Scotia provides basic guidelines for what a POA must contain. A POA generally contains the following:

- A statement that the document is a Power of Attorney ("This is a Power of Attorney given by me…");
- Your full name and address, including (in brackets) any nicknames by which you are also known;
- A statement that you cancel or revoke all previous Powers of Attorney made by you;
- A statement appointing your "Attorney" ("I appoint my brother, John Doe, to act as my Attorney");
- A statement that names an alternate Attorney in the event that your primary Attorney is unable or unwilling to act;
- The date when the POA is to become effective (e.g., a specific future date or immediately);
- The date when the POA will end (e.g., a specific future date or after the completion of a specific transaction);
- A list of what powers and responsibilities your Attorney will have (i.e., general powers or specific powers);

- Your signature and the date.

Although not legally required, it may also be a good idea to initial and number each page so it cannot be altered by someone other than you. Have your signature witnessed by someone competent, other than the Attorney or your spouse.

Where Should I Store My POA?

Your document should be kept in a safe place (e.g., a fireproof safe). Make sure your Attorney knows where you are keeping your POA. We suggest that you do not keep it in a safety deposit box at the bank because this will make it more difficult for your Attorney to access it should something happen to you.

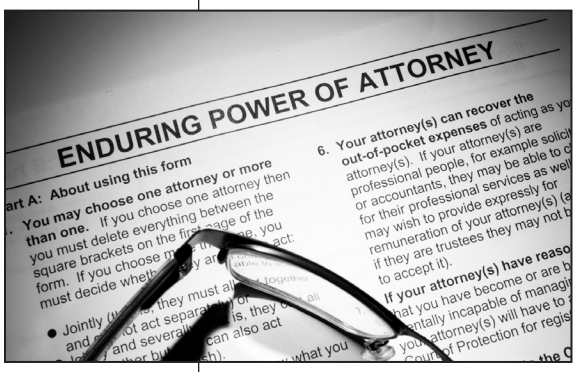
Additionally, if you want your Attorney to step into the role immediately, then you or your Attorney should give copies of your POA to any parties (including financial institutions) that your Attorney will be dealing with on your behalf. However, if your POA is only going to take effect after you have become Mentally Incompetent, then have someone you trust hold on to a **Certified Copy** until it is needed.

Certified Copy: This is photocopy of a document, judgment, or record that is signed and attested to by a lawyer or Notary Public as an accurate and complete reproduction of the original document.

Part Two

What is an Enduring Power of Attorney?

An EPOA is another type of POA, and it grants the same powers as an ordinary POA. However, it is different from an ordinary POA in that it specifically states that your Attorney will have the power to act on your behalf even after you have become Mentally Incompetent.



The type of POA you choose will depend on your circumstances. Nevertheless, it is important to note that if you want your chosen Attorney to be able to act on your behalf after you have become Mentally Incompetent, then you will need to have an EPOA in place. A POA that is not an EPOA will end and cannot be used if you become Mentally Incompetent. If this were to happen, loved ones would then have to have a **Guardian** appointed over you and your Property. Alternatively, AANDC or the Provincial Court may appoint a person or a group to look after your legal and financial affairs on your behalf. You may not want this to happen, especially because AANDC or the court could appoint someone you do not know or trust.

Why Do I Need an EPOA?

Just as a **Will** is important for having someone administer your **Estate** after death, an EPOA is equally important for having someone manage your affairs in the event that you become Mentally Incompetent. An EPOA is great tool to have:

- If you want to avoid involving AANDC in your personal affairs.
- If you have been diagnosed with an illness that will reduce your mental capacity or physical mobility (e.g., cancer, dementia, Alzheimer's, etc.).
- If you simply want to make arrangements now while you are healthy and Mentally Competent, just in case something unforeseen takes place that limits your ability to manage your own affairs. Remember, accidents that result in permanent or temporary incapacity happen every day, so it is always a good idea to plan ahead.

Guardian: The person named in a Will or appointed by the courts to care for minor children of the deceased or for Mentally Incompetent persons.

Will: A legally binding document written by the deceased that describes how they want their debts paid and property distributed after death. The document also names an Executor, who is responsible for carrying out the deceased's final wishes.

Estate: Any property the deceased owned at the time of death (i.e., home, car, bank accounts, household goods, investments, etc.). The deceased's debts also form part of their Estate.

If you do not have an EPOA, then you will have no control over who your Guardian will be. Not having an EPOA could also subject your loved ones to a time-consuming and expensive legal process.

How Do I Make Sure My EPOA is Valid?

In addition to the rules set out for an ordinary POA on pages 2 and 3, an EPOA has three additional requirements for it to be valid:

- It must be witnessed by someone who is 19 years or older and of sound mind;
- Your witness must not be your spouse or your Attorney;
- It must state that it is to continue to be effective in the event that you become Mentally Incompetent.

How Do I Begin Writing My EPOA?

Writing an EPOA is very similar to writing an ordinary POA (see page 3). However, there are a few differences in wording, which we have underlined for you below. An EPOA generally contains the following:

- A statement that the document is an Enduring Power of Attorney ("This is an Enduring Power of Attorney given by me…");
- Your full name and address, including (in brackets) any nicknames by which you are also known;
- A statement that you cancel or revoke all previous Powers of Attorney made by you;
- A statement identifying your "Attorney" ("I appoint my brother, John Doe, to act as my Attorney");
- A statement naming an alternate Attorney in the event that

your primary Attorney is unable or unwilling to act;

- The date when the POA is to become effective (e.g., immediately) and a statement that it shall continue even if you become Mentally Incompetent;

- A list of what powers and responsibilities your Attorney will have;
- Your signature and the date;

- The witness's signature and the date.

As with an ordinary POA, it may be a good idea to initial and number each page of your EPOA so it cannot be altered by someone other than you.

Heir: For the purposes of the *Indian Act*, an Heir is a person who is legally entitled to a share of the deceased's Estate when there is no Will.

AANDC's Role & Your EPOA

Section 51 of the *Indian Act* provides specific rules for dealing with the Property of Mentally Incompetent Indians who are alive but unable to manage their own affairs. This situation could include, for example, an individual who has suffered a severe head injury due to an accident or a person who is suffering from an ongoing mental or cognitive illness (e.g., dementia). When a Status Indian is declared Mentally Incompetent, AANDC assumes jurisdiction and authority over their Property.

In the past, AANDC has been closely involved in managing the Property of Mentally Incompetent Indians who are Ordinarily Resident on Reserve through their "Living Estates Program." However, AANDC has recently changed its approach and now considers Living Estates administration to be a private family matter. Their goal is to empower First Nations members to administer the Living Estates of loved ones who have become Mentally Incompetent. As a result, AANDC has reduced its role to an "Administrator of Last Resort," meaning a departmental administrator will only be appointed if there are no eligible **Heirs** and/or family members willing and able to manage the Estate.

A. Declaration of Mental Incompetence

Whether or not you have an EPOA in place, when you become Mentally Incompetent, there is a process that loved ones should follow to ensure

that your Estate is being managed properly. First and foremost, a loved one should notify AANDC and provide proof of your incompetence.

To get proof of your incompetence, a loved one will need to go to Provincial Court to have you declared Mentally Incompetent. Your loved one will need to provide two medical certificates from doctors that state that they have examined you and have come to the conclusion that you are Mentally Incompetent. The court will then review the evidence and decide whether or not to declare you Mentally Incompetent. If the court finds that you are Mentally Incompetent, it will issue a **Court Order** and appoint a Guardian to watch over you. The Guardian appointed by the court is someone who takes care of your healthcare needs, but they will not be responsible for managing your Property.

Once AANDC has received Certified Copies of the Court Order and the two doctors' certificates, they will proceed to freeze all of your accounts. They will then determine if there is an EPOA in place. If there is, they will request a Certified Copy of your EPOA, and the Attorney you have named will officially be appointed. If there is no EPOA in place, AANDC will contact all of your family members and ask if anyone wishes to be appointed as your Attorney. This could take some time. During that time, AANDC will keep everything on hold until the appropriate appointment is made. While AANDC has control, they will have the same powers and responsibilities as an Attorney.

The Supreme Court of Canada is located in Ottawa. It is the highest legal authority in Canada and it's decisions are binding on all other Courts in Canada.

Court Order: A written direction, finding, or command delivered by a court or judge.

Part Three

Your Attorney under a POA & EPOA

What is an Attorney?

The person you appoint under a POA and an EPOA is called your "Attorney." This is the person you authorize to act on your behalf in legal and financial matters. In a POA and EPOA, you are known as the **"Donor"** because you are the person giving the authority.

Donor: The person granting the authority for someone to act on their behalf under a POA.

Do not let the word "Attorney" confuse you: the person you choose to act does not have to be a lawyer; in fact, it can be any person you trust (e.g., your spouse, son, daughter, friend, etc.). Do not appoint a person you are currently paying to provide you with personal or health care unless that person is a family member. Appointing a care provider could create a conflict of interest situation where your Attorney is acting as employer and employee.

Unanimously: All of your Attorneys are in complete agreement.

Majority Decision: More than half of your Attorneys agree on a decision.

An Attorney under the *Powers of Attorney Act* of Nova Scotia will be authorized to make decisions regarding all of your legal and financial matters. In a POA and an EPOA, you can name one person you trust to make these decisions for you, or you can name multiple people. If you decide to name more than one person, you need to specify in the document how the Attorneys must act. For example, do you want them to act **Unanimously** or by a **Majority Decision**? You should also specify what should happen if one or more of your Attorneys is unable or unwilling to act. Will the remaining Attorney(s) continue to act alone? Whatever you decide, it should be stated clearly in your document.

A. Is My Attorney Paid?

Generally, your Attorney is only paid or reimbursed for reasonable out-of-pocket expenses (e.g., postage and parking) associated with acting as your Attorney. However, payment will depend on whether you have appointed a loved one, friend, lawyer, or trust company. You can pay a loved one or friend if you want, but they will only be paid if you have specifically stated it in your document; they are not automatically

entitled to a fee. In contrast, a lawyer or a trust company will charge a fee to act as your Attorney. Prior to accepting the appointment, a lawyer and/or trust company will usually have a fee agreement for you to sign as the Donor.

Who Should I Choose To Be My Attorney?

It is very important that the person you choose be someone who understands and is familiar with your current practices with respect to money management. Because a POA can cause financial hardship for you if misused, the person should be someone you know will use good judgment when acting on your behalf.

When deciding who to choose to act as your Attorney, you should consider:

- Whether or not this person will want to act as your Attorney;
- Whether or not the person will be easy to get in touch with (i.e., lives reasonably close to you) so that they can act on your behalf;
- Whether or not the person will get along with your loved ones;
- Whether or not the person can handle stressful situations;
- Whether or not the person is in good health;
- Whether or not the person is familiar with managing money and Property.

One or more persons, acting together or separately, can be appointed as your Attorney. It is a good idea to name a substitute Attorney, just in case your original Attorney is unable or unwilling to act. Remember that the person you appoint as your Attorney has a legal duty to act only in your best interests. Your Attorney is prevented from using your Property for their own benefit and must be able to resolve any conflicts of interest in your favour.

What Powers Can I Give To My Attorney in a POA & EPOA?

As mentioned earlier, you have control over what powers your Attorney will have. You can be very specific, or you can be general in what powers you grant your Attorney. A **General POA** allows your Attorney to make any type of decision with respect to managing your financial affairs. In this case, you can give your Attorney the power to deal with all of your financial matters at any time. In contrast, a **Specific POA** is more restricted. You may simply want a POA in place so that your Attorney can complete a specific financial transaction for you while

General POA: This gives your Attorney full authority to manage all of your legal and financial affairs.

Specific POA: This sets out specific powers that you are giving your Attorney. It limits what they can do on your behalf.

you are, for example, away on vacation or ill and/or hospitalized. Additionally, you can limit the powers granted in a POA to a specific period of time. The following information sets out what powers you might want to grant to your Attorney.

A. Banking

When drafting a POA or an EPOA, you can include a Banking clause. With this clause in your POA or EPOA, the document will be accepted at all banks, and the powers will be unlimited, depending on your preferences. For example, your Attorney could do all of your banking, including opening an account, managing your investments, signing cheques, borrowing money, and accessing your safety deposit boxes. Your Attorney would also be able to access any bank account with any financial institution that you deal with on a day-to-day basis.

Most banks have their own POA forms for you to fill out if you do not have your own (they do not have EPOAs, generally). Each bank has its own forms for you to fill out and steps to follow. They will also ask you to provide them with your Attorney's signature. Unfortunately, a bank's forms will only allow your Attorney to deal with that particular bank. So if you have bank accounts at more than one bank, then you will need to fill out a POA form for each of them. Additionally, these forms may limit your Attorney's power to deal with particular accounts, investments, and so forth.

It is recommended that you give your bank(s) a Certified Copy of your POA and EPOA to have on file in the event that something happens to you.

B. Real Property

Your POA or EPOA can be used to grant your Attorney the power to buy and sell **Real Property**. It is important to note, however, that the way in which Real Property is dealt with on reserve and off-reserve differs. For example, not everyone on reserve owns their land; in fact, most reside in a band-owned home. This kind of Property cannot be sold.

Real Property: An interest in land, a home, or a building.

Some individuals do hold a **Certificate of Possession** (CP). A CP is the highest form of ownership one can hold over Property located on

Certificate of Possession: A document prescribed under the *Indian Act* confirming that a status Indian is legally entitled to occupy and possess a specific piece of reserve land, as defined in the document.

reserve. If you are someone who holds a CP, then you may grant your Attorney the power to sell your Property to another band member. To do so, your Attorney will need to comply with certain procedures set out in the *Indian Act*, and they will need to comply with any restrictions or conditions placed on the sale by the Band Council. In most cases, the actual sale must be completed by AANDC or the Band that governs the reserve on which the Property is located. Nothing prevents your Attorney from purchasing a CP on your behalf. However, you should make sure that AANDC has a Certified Copy of your POA or EPOA so that they are aware that your Attorney has been granted this power.

In accordance with the *Land Registration Act* of Nova Scotia, in order to permit your Attorney to buy or sell Real Property located off-reserve, you will need to register your POA or EPOA with the Land Registration Office of Nova Scotia. The POA or EPOA must be signed under seal and have an **Affidavit of Execution** attached before it is accepted for registration. Once the POA or EPOA has been accepted, your Attorney will have the authority to sell or purchase lands or buildings, execute deeds, and obtain a mortgage on your behalf.

Affidavit of Execution: A statement sworn by a witness in which the witness confirms that they saw you sign the POA.

C. Canada Revenue Agency (CRA)

Your Attorney will have the authority to prepare and file income tax returns on your behalf, when necessary. Additionally, you can include statements that give your Attorney the authority to:

- Obtain any relevant information and documents (e.g., previous tax assessments) in the possession of CRA.
- Execute on your behalf any income tax returns or other documents relating to any tax liability or refund to which you may be entitled.
- Accept and endorse any cheques for refunds or other amounts payable to you by CRA.

However, in order for your Attorney to have these powers, you need to state specifically in your POA or EPOA that you permit them to deal directly with CRA on your behalf.

D. Collection of Income

In a POA or EPOA, you can grant your Attorney the authority to collect your income from your employer for you while you are away or in the hospital or if you have become Mentally Incompetent. You may

also want to grant your Attorney the authority to collect any pension benefits, rents, dividends, bonuses, profits, interest, commissions, fees, salaries, wages, and debts owed to you. If this is a power you would like to grant to your Attorney, then you should also include the authority to collect, to give receipts, and to initiate legal proceedings for the recovery of any debts owed to you, if necessary.

E. Professional Assistance

If you feel that managing your Estate may become too overwhelming for your Attorney, then it may be a good idea to grant your Attorney the right to employ and pay professionals or other individuals who could assist your Attorney with carrying out their responsibilities. For example, your Attorney may need to go to court on your behalf and, as a result, require the assistance of a lawyer. By granting the authority to your Attorney to hire a lawyer, you will be removing a large burden. Some other agents your Attorney could hire include an investment banker, a real estate agent, and so forth.

Litigation Guardian: A Guardian appointed by the court to appear in a lawsuit (or any matters involving court procedures) on behalf of an incompetent person or minor.

F. Litigation Guardian

It is a good idea to give your Attorney the authority to act as your **Litigation Guardian**. A Litigation Guardian is someone who makes decisions for you in a court proceeding or initiates a court proceeding on your behalf. For example, if you were incapacitated because of a motor vehicle accident, your Attorney could sue the other party and appear in court on your behalf. Additionally, your Attorney could settle any new or ongoing lawsuits on your behalf (e.g., a Residential School Survivor claim). However, lawsuits are not the only instances when a Litigation Guardian would be useful: there are other instances (e.g., family matters, criminal matters, etc.) when you might need someone to go to court for you, so it is important to use language that is broad and not too specific and restrictive when giving this authority.

What Legal Duties Will My Attorney Have?

There is a larger burden put on your Attorney under an EPOA than under an ordinary POA. Under an ordinary POA, your Attorney is able to receive guidance from you, whereas under an EPOA (after you have become Mentally Incompetent), your Attorney must use their own good judgment when making legal or financial decisions on your behalf. As a result, your Attorney must:

- Act honestly and in good faith;
- Act in your best interests while taking into account your known beliefs and values as well as any directions that you may have left them in writing;
- Not sell, gift, or get rid of any Property that they know you have gifted in your Will, unless it is in your best interests to do so;
- Keep your Assets separate from their own Assets;
- Keep a proper accounting of all your Property and liabilities.

What if My Attorney Mismanages My Financial Affairs?

If you or a loved one suspects that your Attorney is mismanaging your financial affairs, you or a loved can do any of the following:

- Request an accounting of all financial transactions completed to date;
- Pay close attention to what your Attorney is doing;
- Have your Attorney removed (see pages 15 and 16);
- Name more than one Attorney to manage your affairs and require that the two must make decisions together;
- Contact a lawyer or the police – it is a criminal offence (e.g., fraud, theft, criminal breach of trust, etc.) for an Attorney to use your POA or EPOA for their own financial gain.

Part Four

How Do I Change or Cancel My POA & EPOA?

You should review your POA or EPOA regularly. You may want to change or cancel it if you experience significant life changes, such as marriage, divorce, your child reaching the age of majority, or a death in the immediate family.

How Is a POA and EPOA Cancelled or Revoked?

A. Notice by the Donor

You end a POA or EPOA by giving notice to your Attorney in writing. This procedure is called ending by "Notice by the Donor," and the document must be dated and signed by you. Additionally, you must write to all the people and banks that may have dealt with your Attorney to inform them of the change. You should also contact AANDC and the Land Registration Office of Nova Scotia and inform them that the POA or EPOA is no longer in effect. Keep a copy of all the letters that you send out to these individuals and entities.

B. Notice by the Attorney

Under your ordinary POA, your Attorney can give you notice that they no longer want to act on your behalf. If this happens, you must write to those individuals and entities mentioned above to notify them that your current Attorney no longer has the authority to act on your behalf. If you have not named an alternate Attorney, your POA document will cease to have legal force once you have been given notice.

If you have named an alternate Attorney, then you should ask if they are willing to act on your behalf. If they agree, your alternate Attorney takes over the authority to act on your behalf, and your POA document remains in force. In this case, you should inform all relevant parties of the change. Most banks will ask for your new Attorney's signature to keep on file.

If you are Mentally Incompetent and your Attorney no longer wants the role and you have not named an alternate Attorney, then your Attorney will need to give notice to AANDC. AANDC will then follow the

process set out on pages 7 and 8 and either appoint someone to act on your behalf or manage your Property on your behalf.

C. Mental Incompetence

If you become Mentally Incompetent, your POA will automatically be cancelled; however, your EPOA will remain in effect. Additionally, if your Attorney becomes Mentally Incompetent and you have not named an alternate, your POA will automatically be cancelled. To make sure that you are protecting your Estate for you and your family's future well-being, it is a good idea to create an EPOA and to name an alternate Attorney, just in case something unforeseen should happen. See pages 7 and 8 for more information on what a loved one should do if you become Mentally Incompetent.

D. Death

Your POA and EPOA end with your death, and all powers that your Attorney holds cease. Upon death, your Will takes effect, and your **Executor** administers your Estate in accordance with your Will's instructions.

If your Attorney dies (unless you have named an alternate Attorney), your POA or EPOA is cancelled. In the case of Mental Incompetence, your Estate will then revert back to AANDC, and they will either appoint someone new to act or manage your Estate on your behalf.

Executor: The person named in a Will to carry out the Will's instructions or to administer an Estate. More than one Executor can be named in a Will.

E. Bankruptcy

If you declare bankruptcy, your POA or EPOA is cancelled, and someone else is appointed by the courts to administer your affairs. That person is known as a "Trustee in Bankruptcy," and they take control of all your financial affairs.

If your Attorney declares bankruptcy, your POA or EPOA is not automatically cancelled unless the bankruptcy makes

your Attorney unfit to carry out their duties (i.e., they mismanaged their own money). If your Attorney is unfit and incapable of managing your financial affairs, then your alternate Attorney, if you named one, will take over the authority to act on your behalf.

How Can I Change My POA & EPOA?

You can only change your POA or EPOA by creating a new document and including a statement that revokes or cancels all previous POAs or EPOAs made by you. Be sure to destroy all copies of your previous POAs or EPOAs.

Part Five

What is a Personal Directive?

Say you suffered severe brain damage in an accident and have been placed on life support. The machines could keep you alive for years despite the fact that you may never regain consciousness, but would you want to remain on life support indefinitely? A Personal Directive (PD) is a legal document that allows you to set out what, how, and/or by whom personal and home care decisions will be made for you if you cannot make those decisions for yourself. In a PD, the person you appoint to make these decisions is called a "**Delegate**," whereas you are known as the "Maker."

Delegate: A person authorized under a Personal Directive to make, on the Maker's behalf, decisions concerning the Maker's personal and home care.

Why Do I Need a PD?

Whenever you consent to any kind of medical treatment, your doctor must be sure that you are competent and capable of agreeing to the treatment. This means that you must understand the proposed treatment's risks and benefits, and you must show that you understand the information that the doctor is providing to you about your particular situation. If your doctor feels that you are confused about what is taking place or seem incapable of understanding the treatment options, then they will ask questions to determine whether or not you are capable of making important medical decisions on your own. To avoid any delays or to make it less difficult for your doctor to receive consent for a particular treatment, it is recommended that you create a PD.

How Do I Make Sure My PD Is Valid?

Under the *Personal Directives Act* of Nova Scotia, a PD must follow certain rules in order to be considered valid. Your PD will be considered valid if:

- At the time of signing, you are competent and capable of understanding what a PD is and what it means to have a PD;
- Your PD is in writing and dated;

- You sign the PD in the presence of a witness – if you are physically unable to sign the PD but are mentally competent, then another person can sign for you, as long as you and a witness are present; however, the person who signs for you cannot be your spouse or your appointed Delegate.

Your witness cannot be any one of the following individuals:

- Your spouse;
- Your Delegate;
- The person who signed the PD on your behalf;
- The spouse of the person who signed the PD on your behalf.

Each province and country has different PD laws; whether or not your Nova Scotia PD is valid depends on where you are. As with POAs, most places have similar documents and similar laws, but there may be differences as well. If you are moving out of the province, it is best to have a new PD put in place to ensure that your documents are valid under the laws of your new place of residence.

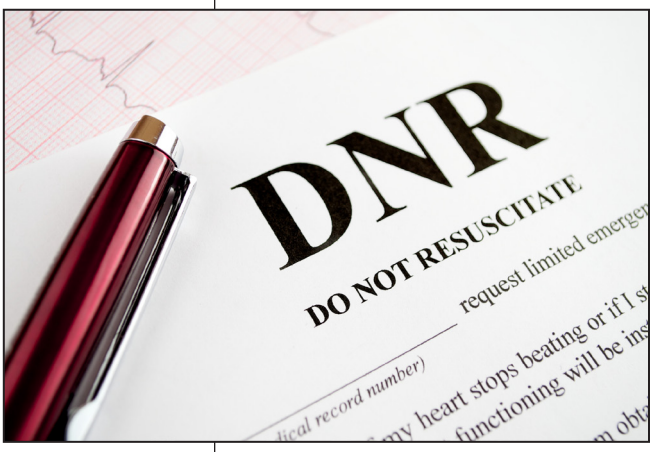
How Do I Begin Writing My PD?

Similar to a POA and an EPOA, the *Indian Act* does not describe how a PD should be written. As a result, PDs are governed by provincial legislation (i.e., the *Personal Directives Act* of Nova Scotia).

Just as with your Will, your POA, and your EPOA, you can prepare your own PD. Should you wish to do so, you can download a PD form from the Government of Nova Scotia's website: http://www.gov.ns.ca/just/pda/. The *Personal Directives Act* of Nova Scotia provides basic guidelines for what a PD must contain:

- A statement that the document is a Personal Directive ("This is a Personal Directive given by me…");
- Your full name and address, including (in brackets) any nicknames by which you are also known;
- A statement that you cancel or revoke all previous Living Wills, Medical Consents, and Personal Directives made by you;

- A statement identifying your "Delegate" ("I appoint my brother, John Doe, to act as my Delegate");
- A statement naming an alternate Delegate who will act in the event that your primary Delegate is unable or unwilling;
- Broad or specific instructions to help guide your Delegate in making decisions concerning your personal or home care (e.g., do not resuscitate, no life support, placement in a continuing-care facility, etc.);
- If desired, a statement that directs your Delegate to consult with someone before making any decisions on your behalf and names that individual;
- Your signature and the date;
- The witness's signature and the date.



Remember, your PD does not take effect until you are unable to make your own decisions. If you regain the capacity to make personal care and home care decisions on your own, then your PD is no longer effective.

How Do I Change or Cancel My PD?

If you need to change or cancel your PD, then you should destroy all copies of your old PD. Although it is enough to write your intention to cancel the old PD and have that document signed and witnessed, to avoid confusion, it is best simply to destroy any older versions. However, if you are going to destroy your old PD, then it is a good idea to have a new one put in place right away.

It is a good idea to review your PD every year to ensure it still reflects your wishes. At the very least, you should review it whenever you or your Delegate experiences a significant change in health.

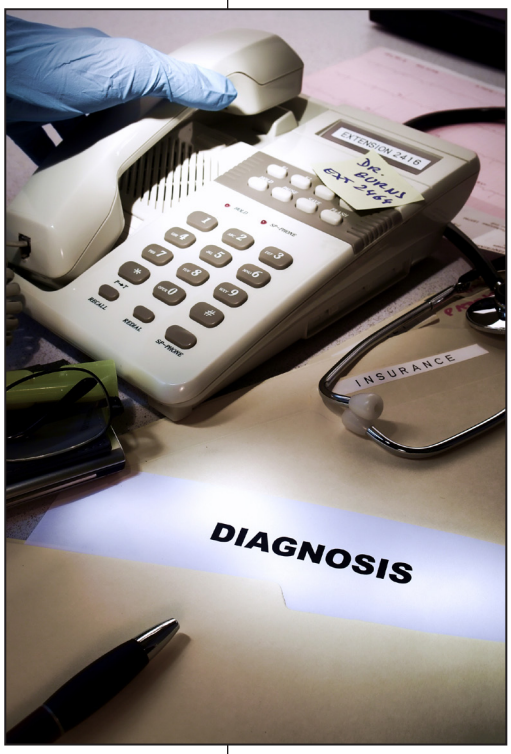
Where Should I Store My PD?

Your PD should be kept in a safe place. Wherever you decide to store it, make sure your Delegate knows where it is being kept. It is a good idea to give a copy of your PD to your appointed Delegate; they will need it should a medical emergency occur. You may also want to leave a copy with a trusted family member and your family doctor. If you are travelling, it is a good idea to take a copy of your PD with you.

What Happens if I Don't Have a PD?

AANDC has no jurisdiction over your healthcare decisions under a PD. As a result, if you become incapable of making decisions about your personal care (e.g., whether or not to keep you on life support) and/or home care (e.g., whether or not to use a continuing-care facility or homecare services) and you do not have a PD in place, the *Personal Directives Act* applies. Under the Act, your doctor will ask an eligible person (see the list below) to make personal and home care decisions for you. The doctor will start at the top of the list and work their way down until they find a decision maker who has been in regular contact with you over the past year and who is willing and able to act on your behalf:

- Spouse (includes married, common-law, and registered domestic partner);
- Child (including adopted child);
- Parent;
- Person who stands in place of a parent;
- Sibling;
- Grandparent;
- Grandchild;
- Aunt or Uncle;
- Niece or Nephew;
- Other relative;
- Last resort: the Public Trustee's office.



It is just as important to have a PD in place as it is to have a Will and an EPOA. You do not want someone you do not trust making these important healthcare decisions on your behalf. As such, plan ahead, speak to the people that you are closest to, and make sure they are willing to take on these responsibilities.

Part Six

Your Delegate under a PD

What is a Delegate?

The person you appoint under a PD is called your "Delegate." Under the *Personal Directives Act*, a Delegate is authorized to make decisions about your medical treatments as well as your personal or home care. In a PD, you can name one person you trust to make all personal and home care decisions for you, or you can choose to name different people to act as your Delegate for different types of decisions. However, you cannot name two people to make the same types of decisions.

A. Is My Delegate Paid?

Generally, your Delegate is only reimbursed for reasonable out-of-pocket expenses (e.g., postage and parking) associated with acting as your Delegate. They are not automatically paid for taking on the role. However, you can choose to pay your Delegate and define a payment agreement in your PD.

Who Should I Choose To Be My Delegate?

Your Delegate needs to be someone you trust, someone who knows you very well, someone who is willing to respect your wishes and values, and someone who is able to make difficult decisions at a difficult time. Most people will name a loved one, but this is not always the best choice: sometimes they are too emotionally attached to make decisions in your best interest. Additionally, your Delegate must be 19 years of age or older.

You should also be sure to name an alternate Delegate who will act in the event that your first Delegate is unable or unwilling to act. Although you should only name one person to make all decisions respecting your home care and personal care decisions, you can name different people to act as your Delegate for different decisions. However, it is very important to remember that two Delegates cannot make the same types of decisions. For example, you cannot have your spouse and child make the decision about whether or not to take you off life support. Legally, only one of the two can make this decision.

What Powers Can I Give My Delegate in a PD?

Your Delegate will be tasked with making different types of decisions with respect to your personal and home care. These may vary depending on the circumstances. You can give your Delegate specific powers to deal with the following types of healthcare decisions:

- Medication
- Nutrition
- Clothing
- Shelter (e.g., continuing home care)
- Surgical procedures, etc.

These are decisions that will need to be made when you are, for example, hospitalized or undergoing surgery. Alternatively, you may become Mentally Incompetent due to an ongoing illness (e.g., dementia, Alzheimer's, etc.) and need someone to give consent on your behalf. As a result, it is very important to speak to your Delegate and inform them of your current wishes.

What Legal Duties Will My Delegate Have?

The *Personal Directives Act* defines the duties of a Delegate. Your Delegate's most important duty is making personal and home care decisions that are best for you. When making these decisions, it is your Delegate's responsibility to follow the instructions you have set out in your PD. However, if an unforeseen circumstance arises, your Delegate must base their decision on their knowledge of your values and beliefs as well as on any other instructions you have given them.

If your Delegate is unsure of what you would have wanted in a given situation, then they will need to make a decision that they believe is in your "best interests." The *Personal Directives Act* sets out a list of what your Delegate should consider when making a decision that is in your best interests:

1. Whether your condition or well-being is likely to improve by the proposed care or deteriorate because of it;

2. Whether your condition or well-being is likely to improve without the proposed care or likely to deteriorate without it;

3. Whether or not the benefits you are expected to get from the proposed care outweigh the risk of harm or other negative consequences;

4. Whether or not the benefits of a less restrictive or less intrusive form of available care outweigh the risk of harm or other negative consequences.

Finally, if you set out instructions stating that you want your Delegate to talk to a particular person (e.g., your family doctor or child) when making decisions on your behalf, it will be their responsibility to do so. However, in the end, they will have to make the final decision.

What Happens if My Doctor Cannot Locate My Delegate?

If your PD sets out specific instructions that relate to a decision that needs to be made and your Delegate cannot be reached, your Doctor will follow your instructions as set out in your PD. For example, imagine you go in for a routine surgery and your heart stops. Your doctor will respect your wishes as they are set out in your PD: if your PD states that you do not want to be resuscitated, your doctor will not perform CPR. However, in the case of a non-emergency that does not require an "on-the-spot" decision, your doctor will make the effort to contact your Delegate so that they can make the decision on your behalf. As you can see, though, it is very important to make sure your doctor is aware of your PD and your wishes should an emergency situation arise.

Part Seven

Hiring a Lawyer

Writing your POA, EPOA, and PD may seem overwhelming, and it may not be something you are comfortable doing yourself. In this case, you may need a lawyer who practices Estate Planning and who has knowledge of the rules that apply to Status Indians who are Ordinarily Resident on Reserve.

When meeting with a lawyer for the first time, be sure to ask if you will be charged for the visit because some lawyers may charge you a fee. During the initial visit, you may want to ask the following questions:

- How long have you been practicing in the area of Wills & Estates law?
- What are the procedures involved in managing an Estate of someone who is Mentally Incompetent?
- What are the complications that might arise in managing this particular Estate?
- Do you bill at an hourly rate or on a flat fee?
- Will I be charged for disbursements (e.g., faxing, phone calls, photocopying, postage fees, etc.)?

You should request a retainer letter stating what legal services the lawyer agrees to provide to you and their fee. If circumstances change and the fee increases, then your lawyer should advise you immediately and obtain instructions from you before doing any other work on your behalf.

When you go to see a lawyer for the first time, you should bring all of the documentation and information that you have collected in order to manage the Estate. You should be prepared for a lot of questions. If you do not have information on something they have requested, make a note of it and tell them that you will collect it and bring it to the next meeting. If you do not understand what they are asking you, then make sure you tell them.

For more information on how to hire a lawyer, contact the Nova Scotia Barristers' Society at (902) 422-1491, or visit them online at http://www.nsbs.ns.ca/why.html.

For More Information

Aboriginal Affairs and Northern Development Canada
10 Wellington, North Tower
Gatineau, Quebec

Postal Address:
Ottawa, Ontario K1A 0H4

Toll-Free: 1-800-567-9604
Website: http://www.aadnc-aandc.gc.ca/eng/1100100010002

Band Governance & Estates of Lands and Trust Services
P.O. Box 160
40 Havelock St.
Amherst, Nova Scotia B4H 3Z3

Toll-Free: 1-800-567-9604
Tel: 1- 902-661-6200

Legal Information Society of Nova Scotia
5523 B Young Street
Halifax, NS

Toll-Free: 1-800-665-9779
Tel: 1-902-454-2198
Website: http://www.legalinfo.org/

The Confederacy of Mainland Mi'kmaq
PO Box 1590
Truro, NS B2N 5V3

Toll-Free: 1-877-892-2424
Tel: 1-902-895-6385
Website: www.cmmns.com

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Indian Estate Regulations, R.S.C., 1978, c.954.

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About the Authors

Angeline Gillis, B.A., LL.B., was born in Sydney, Nova Scotia and was raised in East Bay, Nova Scotia. Although a member of the Eskasoni First Nation, Angeline and her siblings were raised off reserve by her parents, Fred Gillis and Donna Stevens. She is the granddaughter of the late Andrew J. Stevens, a former Keptin of the Sante' Mawi'omi.

Angeline earned her undergraduate degree from Dalhousie University in 2005 and her LL.B from the Schulich School of Law (formerly Dalhousie Law School) in 2009. After completing her articling with Boyne Clarke Barristers and Solicitors, Angeline was called to the Bar in June 2010, having performed her affirmation in both English and Mi'kmaq. She then went on to become a Senior Wills & Estates Planner with Scotia Private Client Group. Angeline has worked in various areas of law; however, her primary focus has been in Wills, Estates and Trusts.

Angeline began practicing with The Confederacy of Mainland Mi'kmaq in October 2011 as a Wills & Estates Legal Advisor. In addition to her work with The Confederacy, Angeline also maintains her own practice as a Barrister & Solicitor. In her free time, she sits as the Vice President of and is a coach in the Sackville Storm Minor Basketball Association. She is also a member of the Canadian Bar Association as well as Halifax's Estate Planning Counsel and is commissioned as a Notary Public.

Shelly Martin, B.A. (Hons), M.A., LL.B., was born in Halifax, Nova Scotia and raised in nearby Mount Uniacke. A member of the Millbrook First Nation, she was raised off reserve by her parents, grandparents, and many aunts, uncles and cousins.

After completing undergraduate and graduate degrees in history, Shelly enrolled at the Schulich School of Law (formerly Dalhousie Law School) in 2003. After articling with Boyne Clarke Barristers and Solicitors, she was called to the Bar in October 2007, the first Mi'kmaq to swear her oath in English and Mi'kmaq under the new Legal Professions Act. Shelly began practicing with The Confederacy of Mainland Mi'kmaq in 2007. In addition to her work as Chair of the Justice Committee for the Halifax Aboriginal People's Network, Shelly sits on the Advisory Council of the Indigenous Blacks and Mi'kmaq Initiative at the Schulich School of Law and is a member of the board of the Halifax and Region Military Family Resource Centre. She currently resides in Fall River with her son, James, and her daughter, Meadow.

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Enduring Power of Attorney

This is an Enduring Power of Attorney made by me, **JOHN JAMES DOE**, of Pictou Landing First Nation, Nova Scotia.

1. **Revocation.** I revoke all Powers of Attorney and Enduring Powers of Attorney previously made by me.

2. **Appointment.** I appoint my wife, **JANE ELIZABETH DOE**, of Pictou Landing First Nation, Nova Scotia, to be my Attorney. If my wife is unable or unwilling to act as my Attorney or is unable or unwilling to continue to act as my Attorney, I appoint my son, **JEFFREY JOSEPH DOE**, of Halifax, Nova Scotia, to act as my Attorney in her place.

3. **Effective Date.** This Enduring Power of Attorney shall become effective immediately and may be exercised during any legal incapacity on my part. I intend this to be an Enduring Power of Attorney under the *Powers of Attorney Act* of Nova Scotia, and it is not terminated by or invalidated by reason of my legal incapacity.

4. **Proof of My Incompetence, if Required.** If you are required to prove that I am incompetent before you act under this appointment, you may prove my incompetence by a certificate from a qualified medical doctor certifying that I am incompetent. That certificate shall be sufficient proof of my incompetence for those relying on this appointment without further inquiry.

5. **Authority.** You have a general authority to make all decisions and to do all acts and things as fully and effectively on my behalf as I could do if personally present, including all acts of ownership generally. You have general authority to make decisions and act on my behalf to manage all my property and affairs.

6. **Hospitals.** You will manage my property and affairs for the purposes of the *Hospitals Act* in the event that there is a declaration of my incompetency; therefore, the provisions of that Act permitting the Public Trustee to manage my property and affairs will not apply.

7. **Compensation.** You are entitled to receive compensation from my property for acting as my Attorney during any legal incapacity on my part at the rates permitted, by law, for trustees. At reasonable intervals, you may take amounts that you reasonably anticipate you will request on passing your accounts. However, if the amount subsequently awarded by a court is less than the amount taken, you will repay the difference immediately without interest.

IN WITNESS WHEREOF I have subscribed my name to this my Enduring Power of Attorney, this 15th day of June, 2012.

John James Doe

Witness [Insert Name]

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Personal Directive

This is a Personal Directive made by me, **JOHN JAMES DOE**, of Pictou Landing First Nation, Nova Scotia.

1. **Revocation.** I revoke all Living Wills, Medical Consents, and Personal Directives previously made by me.

2. **Appointment.** I appoint my wife, **JANE ELIZABETH DOE**, of Pictou Landing First Nation, Nova Scotia, to act as my Delegate to make personal care and home care decisions on my behalf for all personal matters, of a non-financial nature, that relate to me. If my wife is unable or unwilling to act or is unable or unwilling to continue to act, I appoint my son, **JEFFREY JOSEPH DOE**, of Halifax, Nova Scotia, to act as my Delegate in her place.

3. **Effective Date.** This Personal Directive is made pursuant to the *Personal Directives Act* of Nova Scotia and takes effect when I am not capable of making a decision regarding my personal care and home care.

4. **Consultation When Assessing Capacity (Optional).** The person making the assessment of my incapacity is to consult with the following person when making the assessment.

   Name:_____

   Address:_____

Phone:_____

5. **Specific Instructions.** I instruct my Delegate to carry out the following specific instructions when making decisions about my personal care and home care.

_____
_____
_____
_____

6. **Values, Beliefs, and Wishes.** I provide the following information to help my Delegate understand my values, beliefs, and wishes when making decisions about my personal care and home care.

_____
_____
_____
_____

IN WITNESS WHEREOF I have subscribed my name to this my Personal Directive, this 15th day of June, 2012.

_____

John James Doe

_____

Witness [Insert Name]

Notes

Notes

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