

Enduring Powers of Attorney

Being an Attorney



Public Legal Education
and Information Service
of New Brunswick

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This guide provides information about the role of an attorney appointed in an enduring power of attorney. It does not contain a complete statement of the law on this topic. Anyone needing specific advice on their situation should consult a lawyer.

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A. Introduction

What is the purpose of this guide?

The purpose of this guide is to provide information for people who have been appointed as an *attorney* in an *enduring power of attorney* (EPA). An EPA is a legal document that a person can use to prepare for the possibility that they may lose their *capacity* (their ability to make their own decisions) in the future. It allows the person (known as the *grantor*) to appoint one or more persons (known as their *attorney(s)*) to make decisions and act on their behalf.

Being an attorney is an important responsibility. Your role is to act on behalf of the grantor by following the terms of the EPA and the legislation, which is called the *Enduring Powers of Attorney Act*. This guide is intended to help you do this. It explains the different aspects of your role, and it includes optional forms for keeping records and for capacity assessments. These forms are available on the PLEIS-NB website in a fillable and printable format.

The guide also provides information about the role of a *monitor* – a person who a grantor can appoint to provide oversight of the conduct of their attorney(s) (see *Monitors and Misuse of EPAs*, page 20).

Changes in terminology

If you were appointed as an attorney in an EPA that was made in New Brunswick before July 1, 2020, it will likely be titled “power of attorney” rather than “enduring power of attorney”. Also, it might use terminology from the old legislation, such as “mental incompetence” (rather than “lack of capacity”) and “donor” or “principal” (rather than “grantor”).

If you were appointed as a proxy in a health care directive, you are now considered an attorney for personal care.

Who does the information in this guide apply to?

The information in this guide applies to anyone who is acting as an attorney under an EPA in New Brunswick. This includes anyone who was appointed in an EPA made under the *Enduring Powers of Attorney Act*, which came into effect on July 1, 2020. It also includes anyone who was appointed in a document that was made under the old legislation, or outside of New Brunswick, but is considered to be an EPA according to the *Enduring Powers of Attorney Act*. This includes:

- a power of attorney made under the *Property Act* and/or the *Infirm Persons Act* that is “enduring” (the attorney is authorized to act when the grantor lacks capacity or is “mentally incompetent”);
- a health care directive made under the *Advance Health Care Directives Act* that appoints a “proxy” (decision-maker);
- an EPA or similar document from another province or country, including a health care directive that appoints a proxy or similar decision-maker.

The information in this guide does not apply to an attorney who was appointed in a power of attorney that is not “enduring” – in other words, a power of attorney that does not authorize the attorney to act when the grantor lacks capacity.

If you have been appointed to act on someone’s behalf and you aren’t sure whether the document is an EPA, you should consult a lawyer.

What is capacity?

Throughout this guide, there are references to *capacity*. For example, the guide explains that an attorney can act on behalf of the grantor when the grantor lacks capacity.

Capacity is the ability to make one's own decisions. A person has capacity if, when they are making decisions, they are able to understand the relevant information and appreciate the consequences that may arise as a result of the decisions (the "reasonably foreseeable" consequences). In other words, a person has capacity if they can **understand and assess the options** when they are making decisions. If they cannot do this, they lack capacity.



It's important to keep in mind that capacity is not "all or nothing". A person can have the capacity to make some kinds of decisions but not others. For example, a person could have the capacity to make decisions about personal matters but not finances. Also, capacity can change over time. A person can lose the capacity to make decisions about something and then regain that capacity at a later point.

The legislation on EPAs says that everyone is presumed to have capacity unless it is determined otherwise. This means that a grantor can continue making their own decisions until someone determines that they lack capacity (see *When an Attorney Can Act*, page 10).

B. Being an Attorney – Your Role

What is my role as an attorney?

Your role as an attorney is to make decisions and act on behalf of the grantor who appointed you. You must follow the terms of the EPA and the legislation on EPAs, which is explained in this guide. You may be responsible for the grantor's property/finances, their personal care (including health care), or both.

What are the different types of attorneys?

A grantor can appoint two different types of attorneys in an EPA:

- **Attorney for property** – This is someone who makes decisions and acts on behalf of the grantor in relation to their finances and property (house, land, vehicles, etc.). Depending on what the grantor decides, an attorney for property can start acting either as soon as the EPA is complete or only when the grantor lacks capacity (see *When can I start acting as an attorney?*, page 10).
- **Attorney for personal care** – This is someone who makes decisions and acts on behalf of the grantor in relation to their health care and other personal care matters. An attorney for personal care cannot start acting until the grantor lacks capacity.

The EPA should indicate which type(s) of attorney you are. If you aren't sure, you should consult a lawyer.

If someone has appointed you in an EPA to act on their behalf, they are known as the **grantor** and you are known as their **attorney**.

Note: An attorney does not have to be a lawyer.

Can the grantor appoint more than one attorney?

The grantor has a number of options when it comes to appointing their attorneys. The grantor can appoint you to act by yourself as both their attorney for property and their attorney for personal care. Or, the grantor can appoint you as one type of attorney and someone else as the other type. Another option is to appoint you and other people to act together as attorneys for property, attorneys for personal care, or both. Also, the grantor can appoint one or more alternates.

The grantor can use separate documents to appoint their attorneys (an EPA for property and an EPA for personal care) or they can use a combined document (an EPA for property and personal care).

Use of the term attorney

Sometimes the rules are the same for attorneys for property and attorneys for personal care. But sometimes they are different. When the rules are the same, this guide uses the term **attorney**. When the rules are different, this guide uses the more specific terms – **attorney for property** and **attorney for personal care**.

Is there anyone who is not allowed to act an attorney?

Most people are allowed to act as an attorney. However, there are some rules:

- You cannot act as an attorney if you have been convicted of an offence that involves dishonesty, such as fraud or theft, unless the grantor stated in the EPA that they are aware of the conviction.

- You cannot act as an attorney if you are paid to provide health care services or support services to the grantor, unless you are the grantor’s spouse, common-law partner or relative.
- You cannot act as an attorney if you are under 19 years old.
- You cannot act as an attorney if you were the spouse or common-law partner of the grantor and you have separated, unless the EPA says that you can act as an attorney even if you separate.
- You cannot act as an *attorney for property* if you have filed for bankruptcy and have not finished going through the bankruptcy process (in other words, you are an “undischarged bankrupt”).



What am I required to do?

When you are acting as an attorney you are required to:

- act honestly and in good faith;
- act with reasonable care;
- do only what the grantor has authorized you to do in the EPA;
- give notice when you start to act (if the EPA requires you to do so);
- keep records of your actions (see *Keeping Records*, page 18).

What authority do I have?

The EPA will explain what you are allowed to do on behalf of the grantor – in other words, what your *authority* is. The EPA may give you general authority (authority over all areas) or limited authority (authority only over certain areas).

If you are an **attorney for property** and the EPA gives you general authority, you have authority over all areas of the grantor's property and finances. For example, you can do the following on their behalf:

- pay their bills;
- manage their bank accounts and investments;
- do their taxes;
- buy and sell property.

If you are an **attorney for personal care** and the EPA gives you general authority, you have authority over all areas of the grantor's personal care. This includes:

- health care;
- diet;
- clothing;
- accommodation;
- support services;
- education;
- employment;
- recreation and social activities.

If the grantor has given you limited authority, it may become necessary for you or someone else to apply to the court to become the grantor's legal guardian.

For example, if the grantor does not give their attorney for property the authority to sell their business assets and it becomes necessary to do so, someone may have to become their legal guardian.

What am I not allowed to do?

You are not allowed to:

- make, change or revoke (cancel) a will on behalf of the grantor;

- do something that is against the law or fail to do something that is required by law.

Also, you are not allowed to do the following things unless the EPA specifically gives you authority:

- give gifts on behalf of the grantor;
- delegate your authority as an attorney to another person.



Can I get information about the grantor?

You have the same right as the grantor does to information about the grantor's capacity and information about any matter that you have authority over (unless the EPA says otherwise). For example, if you are an attorney for personal care, you are entitled to receive information about the grantor's health.

When you receive information about the grantor, you must not share it with anyone unless it is necessary to do so to fulfill your role as an attorney.

Will I be compensated (paid) for acting as an attorney?

You can only accept compensation or compensate yourself for acting as an attorney if the EPA says that you are allowed to do so.

Will I be reimbursed for my expenses?

Unless the EPA says otherwise, you are entitled to be reimbursed for reasonable expenses you incur while carrying out your duties.

What should I do if I need help?

If you have questions about your role as an attorney, you should consult a lawyer.



C. When an Attorney Can Act

When can I start acting as an attorney?

The rules about when you can start acting as an attorney (in other words, *exercising your authority*) are different depending on whether you are acting as an attorney for property or an attorney for personal care.

If you are an **attorney for property**, you can start acting as soon as the EPA is completed, unless the EPA says otherwise. For example, the EPA could say that you can act only when the grantor lacks the capacity to make decisions about property and finances. In that case, you will not be able to act until someone has assessed the grantor's capacity and determined that they lack the capacity to make those decisions.

If you are an **attorney for personal care**, you can start acting only when someone has assessed the grantor's capacity and determined that they lack the capacity to make decisions about personal care.

Who will assess the grantor's capacity?

The grantor's capacity to make decisions about property/finances or personal care will be assessed by the person named in the EPA. For example, the EPA may name the grantor's doctor, a family member, or you, the attorney, as the person who is to do the assessment. If it doesn't name anyone, or if the person named is unable or unwilling to do the assessment, any doctor or nurse practitioner can do it.

However, it is important to keep in mind that when a health care decision needs to be made and a health care provider is involved, that person will assess the grantor's capacity to make the decision, even if the EPA names someone else (and even if someone has already assessed the grantor's capacity to make health care and other personal care decisions).

How will the grantor's capacity be assessed?

The assessment process depends on the reason for the assessment. The following tables explain the two different processes.

Table 1: Capacity assessment to determine whether an attorney can start acting

A. Situation

You are an **attorney for personal care**, so you can act only when the grantor lacks the capacity to make decisions about personal care. You want to know whether you can start acting.

and/or

You are an **attorney for property** and the EPA says that you can act only when the grantor lacks the capacity to make decisions about property and finances. You want to know whether you can start acting.

B. What you should do

Make arrangements for an assessment by the person named in the EPA. If the EPA doesn't name a person, or if the person named is unable or unwilling to do the assessment, make arrangements for an assessment by a doctor or a nurse practitioner. If possible, choose a doctor or nurse practitioner who knows the grantor.

C. What will be determined in the assessment

The person who does the assessment will determine which matters (if any) the grantor lacks the capacity to make decisions about. You will then be able to make decisions about those matters.

D. Results of the assessment

The person who does the assessment should give you a document that sets out the results of the assessment. There is a form at the end of this guide that they can use for this (**Capacity Assessment Report**). They can also use their own document.

You should keep the completed form or other document. You may need to show it to someone, such as a bank employee, to prove that you have the authority to act on behalf of the grantor.

Table 2: Capacity assessment when a health care decision needs to be made

A. Situation

You are an **attorney for personal care**. A decision needs to be made about the grantor's health care, and a health care provider is involved.

In this situation, the health care provider will assess the grantor's capacity to make the decision, even if someone has already assessed the grantor's capacity to make personal care decisions and determined that they do (or don't) have the capacity to make health care decisions in general.

B. What you should do

Ask the health care provider to assess the grantor's capacity to make the decision.

C. What will be determined in the assessment

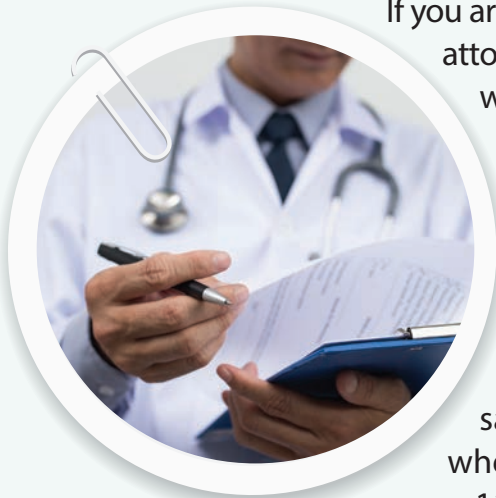
The health care provider will determine whether the grantor has the capacity to make the decision. If they determine that the grantor doesn't have this capacity, you will be able to make the decision on their behalf.

D. Results of the assessment

The health care provider will probably not give you a document with the results of the assessment. There is usually no need to ask for one, because the assessment applies only to the decision being made.

What happens if the grantor regains capacity?

A person's capacity can change over time. Sometimes a grantor will lose capacity, and the attorney will start acting on their behalf, but then the grantor will regain capacity.



If you are an attorney for personal care, or an attorney for property who has authority only when the grantor lacks capacity, you lose your authority when the grantor regains capacity. If you believe (on "reasonable grounds") that the grantor has regained capacity, you must stop acting.

If you aren't sure whether the grantor has regained capacity, you should follow the same process that you followed to find out whether you could start acting (see *Table 1*, page 11). If the person who does the assessment determines that the grantor has regained capacity, you must stop acting.

When does my role as an attorney end?

Your role as an attorney ends when the grantor dies, or if any of the following happen:

- you resign;
- an event occurs which terminates (ends) your authority according to the EPA;
- the grantor revokes (cancels) your appointment or revokes the EPA;
- you no longer have the capacity to act as an attorney or you are unable or unwilling to act;

- you are convicted of an offence involving dishonesty (for example, fraud or theft);
- you are being paid to provide health care services or support services to the grantor (and you are not the spouse, the common-law partner or a relative of the grantor);
- you are an attorney for property, and you become bankrupt;
- you are not allowed to contact the grantor due to a court order;
- you are the spouse or common-law partner of the grantor and you separate (unless the EPA says that you can act as attorney even if you separate);
- the court terminates your authority or terminates the EPA;
- the court appoints a legal guardian for the grantor.

If you are not sure whether any of those things has happened, you should consult a lawyer.

How do I resign?

The EPA may explain how you resign. If it doesn't, you can resign by giving written notice to the grantor, the monitor appointed in the EPA (if any) and the other attorneys appointed in the EPA (if any).

D. Making Decisions

How do I make decisions on behalf of the grantor?

If the grantor lacks capacity and you are making a decision on their behalf, you must consult with the grantor, if it is reasonable to do so. You must then use the following decision-making process:

1. If the grantor gave you instructions when they had capacity and the instructions are relevant to the decision, follow the instructions.
2. If the grantor did not give you any relevant instructions, make the decision that reflects the grantor's current wishes, as long as they are reasonable.
3. If you cannot determine what the grantor's current wishes are, or their current wishes are unreasonable, make the decision that you believe the grantor would make if they had capacity. Consider the grantor's values and beliefs when you do this.
4. If you don't know what decision the grantor would make, make the decision that you believe is in the grantor's best interests.

You should **not** use this decision-making process if you are acting as an attorney for property and the grantor still has the capacity to make decisions about property and finances. In that situation, you should consult with the grantor and follow their instructions.


What kinds of instructions do I have to follow?

You are required to follow any relevant instructions the grantor provided when they had capacity, except for instructions that would require you to do something that is against the law or fail to do something that is required by law. A grantor's instructions can be general or specific, and they can be given in any form, including in writing (in the EPA or another document) or orally. If the grantor provides two or more sets of instructions on the same topic, you must follow the latest ones.

Sometimes a grantor will give instructions about health care decisions in a document known as a **health care directive**. If the grantor has a health care directive, or has provided health care instructions in another way, it is a good idea to discuss their instructions with them. This can help you to understand the instructions and make the decisions they would have wanted.

Can I request medical assistance in dying on behalf of the grantor?

No, you cannot request medical assistance in dying on behalf of the grantor. At this time, medical assistance in dying can only be provided to someone who still has the capacity to make decisions about their health care or someone who made arrangements with a doctor or nurse practitioner before losing that capacity. It cannot be provided based on a request made by an attorney for personal care or a request in a health care directive.



Medical assistance in dying is when a person with a serious and incurable medical condition asks a doctor or nurse practitioner to give them a drug that will bring about their death.

If there are two or more attorneys, how do we make decisions?

A grantor can appoint two or more attorneys. They can do this by appointing two or more people to act together as attorneys for property or attorneys for personal care (or both). They can also do this by appointing different people as their attorney(s) for property and their attorney(s) for personal care.

Often, the EPA will say how the attorneys are to make decisions. For example, if the grantor appoints two attorneys for personal care, the EPA could say that they must make decisions by unanimous agreement or that they can make decisions separately. The attorneys must follow whatever the EPA says.

However, if the EPA does not say how the attorneys are to make decisions, they must follow these rules:

- If the grantor has appointed two or more people as the same type of attorney (for example, attorneys for property), they must make decisions by unanimous agreement.
- If the grantor has appointed different people as attorney(s) for property and attorney(s) for personal care and there is a decision that affects both property/finances and personal care, the attorneys must consult with each other. If they cannot agree, the attorney(s) for personal care have the final say. For example, the attorney(s) for personal care would have the final say about whether the grantor will be moved from their home into a nursing home.

Decision-making terminology

Some EPAs use the terms **jointly** or **jointly and severally** when describing how attorneys are to make decisions. **Jointly** means the attorneys must make decisions by unanimous agreement. **Jointly and severally** means they can make decisions by unanimous agreement or separately.

E. Keeping Records

What records do I have to keep?

One of the things you are required to do as an attorney is to keep records of your actions. If you are an **attorney for property**, you must keep the following records (unless the EPA sets out different requirements):

- a list of the grantor's property at the time you began acting, including the value of the property (or an estimate) and the name of any co-owner;
- a list of the grantor's debts and other liabilities at the time you began acting, including the amount (or an estimate);
- a list of the grantor's sources of income, including the amount of the payments and the frequency of the payments;
- a list of any gifts you have given on behalf of the grantor, including the date, the reason for the gift, the amount/value, and the recipient;
- a list of any compensation you have paid to yourself, another attorney, or a monitor, including the date, the amount, the calculation of the amount, and the recipient;
- a list of any money you have paid to yourself or another attorney as reimbursement for expenses, including the date, a description of the expenses, the amount, and the recipient;
- all of the documents (bank statements, invoices, bills, correspondence, etc.) that you need in order to provide a complete account of your actions. In other words, you must make sure you have a "paper trail" for all of your actions.

If you are an **attorney for personal care**, you must keep a list of decisions you have made on behalf of the grantor (unless the EPA sets out different requirements).

The list must include:

- a description of each decision you have made about the grantor's health care, accommodation or support services;
- the date of each decision;
- the reason for each decision.



Who can review the records?

The grantor, the monitor, and the other attorneys appointed in the EPA are entitled to review the records you keep. If they ask to see the records, you must provide them.

How do I keep the records?

At the end of this guide there are forms that you can use to keep the records described above. You are not required to use these forms. If you wish, you can create your own document to keep the records.

The forms in this guide may not be suitable if the EPA requires you to keep records that are different from the ones described above.

F. Monitors and Misuse of EPAs

What is a monitor?

A monitor is a person a grantor can appoint in their EPA to provide oversight of the conduct of their attorney(s). A monitor may:

- visit and communicate with the grantor at any reasonable time;
- request records from the attorney(s);
- apply for a court order, such as an order requiring an attorney to provide records or an order terminating (ending) an attorney's authority.

If the monitor has reason to believe that an attorney is taking advantage of the grantor or is otherwise misusing their authority, the monitor must tell the grantor and the other attorneys appointed in the EPA (if any).



What can I do if I am concerned another attorney might be misusing their authority?

If you think another attorney might be taking advantage of the grantor or otherwise misusing their authority, you can:

- discuss the situation with the attorney and/or the monitor;
- ask the attorney to give you the records they have kept and review them;
- consult a lawyer.

You can also contact the Adult Protection Program, which is run by the Department of Social Development. You can reach them by calling the 24-hour toll-free line: 1-833-733-7835. Depending on the circumstances, they may be able to help.

What are the consequences if an attorney is misusing their authority?

The consequences for an attorney misusing their authority may range from termination of their authority to criminal prosecution.

Forms

On the following pages there are optional forms for keeping records and for capacity assessments. Before you use the forms, you should read this guide. You can find fillable and printable versions of the forms on the PLEIS-NB website.

Record-Keeping Form: **Attorney for Property**

This is a form that an attorney for property can use to keep records (see *Keeping Records*, page 18).

[Attorney for Property](#)



Record-Keeping Form: **Attorney for Personal Care**

This is a form that an attorney for personal care can use to keep records (see *Keeping Records*, page 18).

[Attorney for Personal Care](#)



Capacity Assessment Report

This is a form that can be used to record the results of a capacity assessment. It is intended to be used when a grantor's capacity is being assessed to determine whether their attorney can start acting (see *Table 1*, page 11).

[Capacity Assessment Report](#)



Record-Keeping Form Attorney for Property

*This is a form that an attorney for property can use to keep records in accordance with the Enduring Powers of Attorney Act in New Brunswick. Before you fill out this form, you should read the PLEIS-NB guide called **Enduring Powers of Attorney: Being an Attorney.***

Name _____

Address _____ City/Prov. _____

Postal Code _____ Tel. _____ Email _____

Date of enduring power of attorney _____

Date you began acting as an attorney for property _____

Name of grantor _____

A. Property

Make a list of the grantor's property at the time you began acting as an attorney for property. Include both real property (land and buildings) and personal property (bank accounts, cash, RRSPs, investments, vehicles, valuables, etc.). If you don't know the value, enter an estimate.

Property	Co-owner (if any)	Value

Record-Keeping Form Attorney for Personal Care

*This is a form that an attorney for personal care can use to keep records in accordance with the Enduring Powers of Attorney Act in New Brunswick. Before you fill out this form, you should read the PLEIS-NB guide called **Enduring Powers of Attorney: Being an Attorney**.*

Name _____

Address _____ City/Prov. _____

Postal Code _____ Tel. _____ Email _____

Date of enduring power of attorney _____

Date you began acting as an attorney for personal care _____

Name of grantor _____

Decisions of attorney for personal care

Make a list of the decisions you have made in relation to the grantor's health care, accommodation, and support services.

Date	Decision	Reason for decision

This is a form that can be used to record the results of a capacity assessment conducted in accordance with the Enduring Powers of Attorney Act in New Brunswick. It is intended to be used when a grantor's capacity is being assessed to determine whether their attorney(s) may begin to exercise authority.

Name _____

Address _____ City/Prov. _____

Postal Code _____ Tel. _____ Email _____

A. Request for assessment

Name of person who requested assessment _____

Name of grantor (person being assessed) _____

I am authorized to assess the grantor's capacity because (*check one*):

- the grantor's enduring power of attorney designates me as the person to assess the grantor's capacity.
- the grantor's enduring power of attorney does not designate anyone to assess the grantor's capacity, or it designates a person who is unable or unwilling to do so, and I am a medical practitioner or nurse practitioner lawfully entitled to practise in New Brunswick.

Notes:

Personal care

Complete this section if you were asked to assess the grantor's capacity with respect to personal care.

- The grantor has capacity with respect to all personal care matters.
- The grantor lacks capacity with respect to all personal care matters.
- The grantor lacks capacity with respect to the following personal care matters:
 - health care
 - diet
 - clothing
 - accommodation
 - support services
 - education
 - employment
 - recreation
 - social activities
 - other: _____

Reasons for determination:

C. Reassessment (optional)

- I recommend that the grantor's capacity be reassessed.

Date for reassessment: _____

Signature _____ Date _____

