

# Powers of Attorney



Public Legal Education  
and Information Service  
of New Brunswick

## Powers of Attorney

Public Legal Education and Information Service of New Brunswick (PLEIS-NB) is a non-profit, charitable organization. Its goal is to help the public know the law. PLEIS-NB receives funding and in-kind support from the Department of Justice Canada, the New Brunswick Law Foundation and the Office of the Attorney General of New Brunswick.

The purpose of this booklet is to describe the different kinds of powers of attorney, explain how to set them up and explore some advantages of doing so. You can create powers of attorney to deal with your property and financial affairs and/or your personal care. Creating a power of attorney is one way that you can plan for the future. This booklet does not contain a complete statement of the law in this area. Laws change from time to time. For specific advice on your legal situation, you should consult a lawyer.

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**Public Legal Education  
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of New Brunswick**

P.O. Box 6000  
Fredericton, NB, E3B 5H1  
(506) 453-5369  
[www.legal-info-legale.nb.ca](http://www.legal-info-legale.nb.ca)

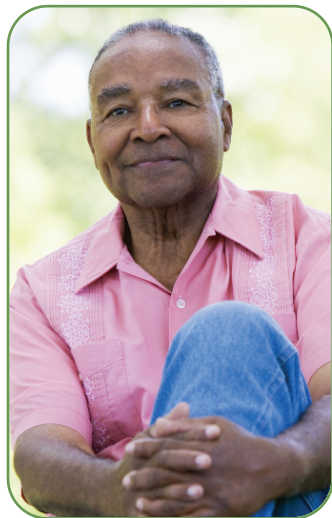
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## General Information

### What is a power of attorney?

A power of attorney is a written document. In it you give someone, or perhaps different people, the authority to act for you in relation to your property, financial affairs and/or personal care.

### What are some reasons to have powers of attorney?

It is always a good idea to plan ahead for your financial and personal affairs. Powers of attorney allow you to give another person the authority to do things for you like:

- ▶ cash/deposit cheques, withdraw money from bank accounts, make payments on bills or loans.
- ▶ purchase, sell or deal with stocks or bonds.
- ▶ collect rents, profits or commissions.
- ▶ manage, buy and sell real estate.
- ▶ conduct business operations.
- ▶ make health care decisions.
- ▶ provide consent to medical treatment.



### Don't Delay!

Having a power of attorney can give you peace of mind knowing that if you become physically disabled or mentally incompetent, the person or people that you have chosen will be able to act on your behalf. If you delay in giving the power, you may be unable to do so when you need it.

## Who are the parties to a power of attorney?

The person who **gives** the power of attorney is called the **donor** or the **principal**. The person who **receives** the power is called the **attorney, donee** or **agent**. For the purpose of this booklet, we will use the term **donee**.

## Who can give a power of attorney?

Any mentally competent person at least 19 years old can give a power of attorney.

## To whom can I give a power of attorney?

You can give a power of attorney to any person who is mentally competent and meets the other legal requirements.

## What if there is no one who can act on my behalf?

If you do not have anyone available to act on your behalf, such as a family member, you can appoint the Public Trustee to act in that capacity. You should contact the Public Trustee beforehand to get approval and to get the details on how to proceed and the fees payable for this service.



You could also appoint the Public Trustee as an alternate, in the event your chosen donee can no longer act on your behalf, for various reasons.

## What powers can I give to a donee?

Normally you can create a power of attorney which gives the donee the full authority to do anything that you could do for yourself. Your donee could act on your behalf to deal with your property, financial affairs and/or personal care.

Depending on your reasons for creating the power, you may decide to give the donee authority to act for you only in certain matters or in specified circumstances as you have described in the power of attorney.

## Do I need to have separate powers of attorney to deal with financial matters and personal care decisions?

No. You can create two separate powers of attorney if you wish. Or, you can create one power of attorney that deals with both your financial matters and personal care. Either way, you can appoint the same person to handle both your personal and financial matters, or you can name different persons to handle each.



# Powers of Attorney for Financial Matters

## When does a power of attorney take effect?

A power of attorney dealing with financial matters may take effect as soon as the donor signs it. For example, you may wish to appoint someone to handle your financial affairs or sell property while you are spending the winter in Florida.

Or, you may wish to wait and have the power of attorney come into effect at some point in the future. It is not uncommon for people to create a power of attorney for use only during the period of time when they are perhaps incapacitated by illness or disease. This consideration needs thought and appropriate planning.

You should discuss these possible situations with your lawyer and perhaps with the person or persons who you would like to act on your behalf. By planning ahead, you can clarify your wishes and help reduce any future misunderstandings.



## If I give a power of attorney, will I lose all control over my property or financial affairs?

As long as you are **mentally competent** and you did **not** create an **irrevocable power of attorney**, you can end the power if you choose to do so. By ending the power of attorney you will regain complete control over your property and financial affairs.

### What is an irrevocable power of attorney?

If you are creating a power of attorney for property or financial affairs, you can choose to make it **revocable** or **irrevocable**. It is most common for people to create a power of attorney that is **revocable**. Revocable means that the donor would have ability to change or end it at some point in the future, as long as he or she was mentally competent.



A less common type of power of attorney is an **irrevocable** power of attorney. In this case, the power includes a clause saying that the donor **cannot** end it. Since the circumstances in which you would use an irrevocable power of attorney may be complicated, you should consult a lawyer about creating this kind of power.



## Are powers of attorney useful only if I become physically disabled or mentally incompetent?

No. Powers of attorney can be useful whenever you find it convenient or necessary to give someone else authority to manage your affairs. For example you may find it useful when you are travelling, in the hospital or busy with other matters.

## Does the possibility of physical or mental incompetence give a particular reason for using a power of attorney?

Yes. A power of attorney can be an important part of your planning if you may become unable to manage your financial or personal affairs because of physical disability or mental incompetence. It is important to plan ahead. If you delay in giving the power, you may be unable to do so when you need it.



## Does the possibility of mental incompetence require particular attention?

Yes. For a power of attorney dealing with financial or property matters to operate when the donor becomes mentally incompetent, it must be created as an **enduring power of attorney**. This is also referred to as a **durable power of attorney**.

# Enduring (Durable) Powers of Attorney

## What is an enduring or durable power of attorney?

It is a power of attorney that continues to be legally effective after the donor becomes mentally incompetent.

## Is anything special required to create an enduring power of attorney?

Yes. If you wish to create an enduring power of attorney to deal with property and financial matters, you **must**

- ▶ include a specific provision in the power that says it can be exercised during your (the donor) mental incompetence;
- ▶ sign the power or ask another person to sign in your name, in your presence and at your request; and,
- ▶ have the power witnessed by an adult other than the donee.



(**Note:** A power of attorney for personal care is specifically created to be effective when you are not capable of making your own personal and healthcare decisions.)

## Can I change an existing power of attorney into an enduring or durable power of attorney?

Yes. You can change an existing power of attorney into an **enduring power of attorney**. The change must satisfy the requirements of the **Property Act**.

## What are the advantages of an enduring power of attorney?

If you become mentally incompetent without **creating an enduring power of attorney**, somebody, such as a family member, may have to apply to the court to be appointed your legal guardian. Only then would they have the authority to manage your property and financial affairs. If there is nobody willing or able to act on your behalf, the Public Trustee may be appointed.

Having an enduring power of attorney can avoid the delay, inconvenience and costs of going to court to appoint a legal guardian, since there is no need for the court to determine your mental state. The **enduring power of attorney** continues to operate whether or not you are mentally incompetent. It also allows you to choose the person who will act on your behalf. If the court appoints somebody to manage your affairs, it may not be the person or persons that you would have chosen and they may not know about your personal wishes.

## Is the enduring power of attorney useful only to the elderly?

No. Like a will, it is never too soon to give an **enduring power of attorney**. Anyone may become disabled or mentally incompetent, either temporarily or permanently, and require another person to handle their property and financial affairs.

## Can I change or end an enduring power of attorney?

Yes. As long as you are mentally competent, you can change or end the power of attorney.

# Powers of Attorney for Personal Care

## What is a power of attorney for personal care?

It is a power of attorney in which a donor names another person (called the attorney or the donee) to make some or all personal care decisions on his or her behalf.

## Is anything special required to create a power of attorney for personal care?

Yes. According to the **Infirm Persons Act**, a power of attorney for personal care must be signed by the donor in front of an adult witness. You should consult a lawyer to be sure you understand all of the legal requirements for creating a valid document.

## What are some reasons to have a power of attorney for personal care?

When you are no longer able to make your own decisions, a power of attorney for personal care can allow the donee to make decisions about things like:

- ▶ health care
- ▶ consent to medical treatment
- ▶ nutrition
- ▶ shelter
- ▶ clothing
- ▶ personal safety



## What are the advantages of a power of attorney for personal care?

If you become incapacitated or mentally incompetent and you do not have a power of attorney for personal care, it may be necessary for someone, usually a family member, to apply to the court to be appointed as your legal guardian. Only then would they have the authority to make personal care decisions on your behalf. If there is nobody willing or able to act on your behalf, the Public Trustee may be appointed.

Having a power of attorney for personal care usually avoids the delay, inconvenience and costs of having to do this. It also allows you to choose the person or people you wish to become your donee. If the



court is asked to appoint someone to make your personal care decisions, it may not be the person or persons that you would have chosen. For example, the person appointed by the court may not know about your personal care wishes.

## When does a power of attorney for personal care take effect?

Generally, a power of attorney for personal care takes effect when you (the donor) are unable to participate in the decision-making process. You can set out in the power of attorney the circumstances under which the donee would begin to make personal care decisions on your behalf. For example, you can state whether or not you wish to have a mental competency assessment before the donee could act on your behalf.

**I already have an enduring power of attorney for financial matters. If I become incompetent, would my donee be able to make personal care decisions for me?**

Even if you have an enduring power of attorney for financial matters, if it does not include provisions for personal care or you do not have a separate power of attorney for this purpose, your donee would not have the authority to make your personal care decisions.

**Can I give the donee specific directions about my personal care?**



Yes, you may give the donee specific instructions such as the medical procedures that you want, or do not want, if, for example, you were terminally ill. Or you can give general directions that allow the donee to make all personal care decisions in your best interests.

Your donee would begin to make decisions on your behalf when you are no longer able. At that time, the donee would have the authority to make the personal care decisions that you have directed him or her to make.

**If I include personal care instructions and property matters in the same power of attorney, what will happen if I become mentally incompetent?**

If your power of attorney does not include an enduring clause, the sections dealing with your financial affairs would end when you become incompetent. However, as long as your power of attorney was prepared according to requirements of the law, the authority that you gave to your donee to handle your personal care will still be valid.

## Choosing a Donee (Attorney)

### How do I choose my donee?

In choosing a donee, you should consider the person's:

- ▶ training and experience to manage your affairs.
- ▶ knowledge and understanding of your personal wishes.
- ▶ likelihood to remain in the province and to be mentally competent during the time of the power.
- ▶ age and ability to deal with others.

If you do not have anyone available to act on your behalf, such as a family member, you can appoint the Public Trustee to act in that capacity. You should contact the Public Trustee beforehand to get approval and to get the details on how to proceed and the fees payable for this service.

### How many donees can I have?

You can choose as many donees as you want. You can require the donees to act together or as alternates. If you wish, you may choose the same person or persons to act on your behalf for financial matters and personal care decisions. Or, you may choose a different person or persons to handle each of these matters.

Regardless, it is a good idea to choose one or more alternates in case a donee can no longer act on your behalf, for various reasons. Having alternate donees means that the power will not end at a future point when you are unable to do anything about it. You could also appoint the Public Trustee to act as an alternate.

## Donee's Obligations

### What are the duties and responsibilities of a donee?

The donee must carry out the power that you have given, according to your instructions. If there are no instructions, then the donee must manage your property, financial affairs, or personal care in your best interest. In carrying out the duties, the donee must act reasonably and in good faith for your benefit.

### Is the donee entitled to be paid?

The donee accepts the power voluntarily. He or she is not entitled to gain any personal benefit from managing your property or financial affairs. The donee is accountable to you for all profits or benefits that result from the management of your property and financial affairs. The donee is not entitled to any inappropriate profits. However, you may choose to pay your donee. If you have not agreed to pay for the services, you do not have to pay the donee. You should discuss this with your donee ahead of time to avoid possible conflict.





## What can I do if the donee handling my financial affairs abuses the power?

If you are mentally competent and you have reason to believe your donee has abused the power, you can revoke the power and issue a new one to a new donee. You can also apply to the court to have your donee's conduct reviewed. This means the court can order the donee to:

- ▶ provide all records, receipts, cheques and so on, to show how the attorney managed your property.
- ▶ file an affidavit to confirm the account.
- ▶ file the account and affidavit with the clerk of the court and give a copy to each person involved with the case.

## What happens if the power of attorney is abused and I am mentally incompetent?

If you are mentally incompetent, certain appropriate people, such as a family member, can apply to the court to have the conduct of your donee reviewed.

### There are two laws that govern powers of attorney in New Brunswick.

The creation of powers of attorney for financial and property matters falls under the **Property Act**. The creation of powers of attorney for personal care falls under the **Infirm Persons Act**.

You can look up these laws on the Internet at [www.gnb.ca](http://www.gnb.ca). Just scroll to the bottom of the page and click on 'Acts and Regulations'.

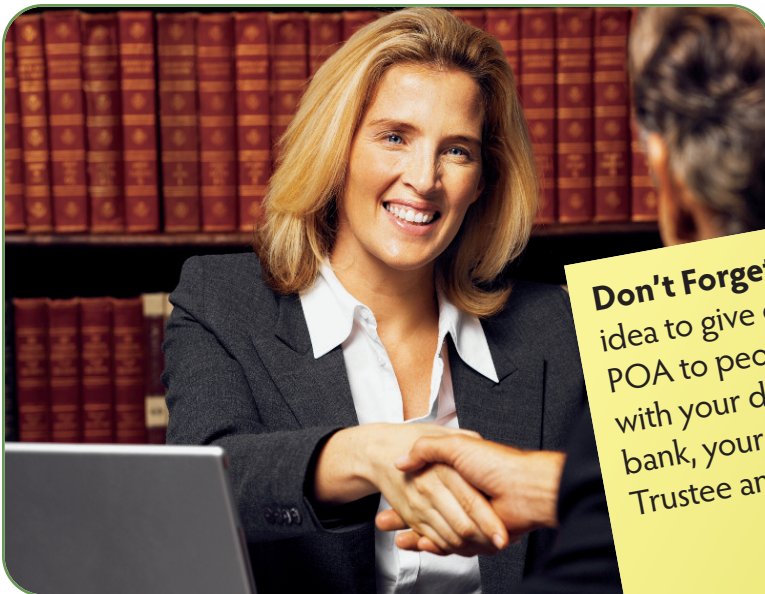
## Creating a Power of Attorney

### How do I create a power of attorney?

It is a good idea to use a lawyer to create your power of attorney whether you plan to have one power or two separate documents. This can help you make sure that the power is appropriate for your circumstances and that it is properly created.

### Are there standard forms available that I can fill out myself?

Standard forms of powers of attorney may be available from book or stationery stores, banks, trust companies and other sources. If you decide to use one of these forms, you should be aware that they may not include provisions required by law in New Brunswick for a valid power of attorney. When creating a power of attorney for personal care, the document must be under seal in order to be valid, so you should seek legal advice.



**Don't Forget** – It's a good idea to give copies of your POA to people who will deal with your donee such as the bank, your doctor, the Public Trustee and so on.

# Ending a Power of Attorney

## When does a power of attorney end?

A power of attorney comes to an end when:

- ▶ you revoke it.
- ▶ you die.
- ▶ you become mentally incompetent, if it is not an **enduring power of attorney** **AND** it gives power over property or financial affairs.
- ▶ the specific purpose you gave it for is carried out.
- ▶ the specific time period for which you gave it runs out.
- ▶ the donee resigns or dies (if you have not named an alternate donee).
- ▶ you become bankrupt.
- ▶ the court appoints someone as your legal guardian to manage your financial affairs.

## Should I give notice when the power ends?

Yes. When you end the power by your action, you should give written notice to the donee and to people who deal with the donee. If you do not and the donee continues to act on your behalf, **you can be held personally responsible to third parties.**



When the donee knows that the power has ended, the donee must inform persons with whom he or she has been dealing. A donee who continues to act under a power after finding out that it has ended can be held personally liable.

## Other Resources

Public Legal Education and Information Service of New Brunswick has other resources available that you may find useful for planning for the future. You can order copies of the following publications, or read them on the website at [www.legal-info-legale.nb.ca](http://www.legal-info-legale.nb.ca):

- ▶ [Advance Health Care Directives - A New Brunswick Guide](#)
- ▶ [Going to a Nursing Home](#)
- ▶ [The Office of the Public Trustee](#)
- ▶ [When You Can't Manage Your Affairs – Who Will?](#)
- ▶ [Mental Incompetence](#)
- ▶ [Dying Without a Will](#)
- ▶ [Protect Yourself from Abuse and Fraud: A Guide for Seniors](#)
- ▶ [Checklist for Making a Will](#)
- ▶ [Choosing an Executor](#)
- ▶ [Probate of the Will](#)
- ▶ [Being an Executor](#)
- ▶ [You and Your Lawyer](#)
- ▶ [Patients' Rights](#)
- ▶ [Making a Will](#)

