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Tribal Council Inc.

New Brunswick Law Foundation
Fondation pour le droit au Nouveau-Brunswick

WHAT YOU NEED TO KNOW ABOUT ENDURING POWERS OF ATTORNEY

Life is unpredictable. There may come a time when you are no longer able to manage your property, personal care, or both. Planning ahead can give you peace of mind.

There is a way to make sure that **if you cannot make certain decisions anymore, somebody you trust can do so for you.** That's where an Enduring Power of Attorney (**EPA**) comes in.



Please note: In this document, the term "Attorney" refers to the person you appoint to make decisions about your personal care or property in an EPA. It does not mean a lawyer.

What Is an EPA?

An EPA is a legal document that **allows someone to step in and manage your assets** (i.e., property) and personal care (i.e., healthcare), or both, if you are unable to do so yourself. It lets you decide in advance who you want to take care of these things for you.

In an EPA, the person granting authority is referred to as the **grantor,** while the individual given the legal authority to act on their behalf is called the **agent, attorney-in-fact,** or simply an **attorney.** Despite the name, this person does not need to be a lawyer. You might also hear this person referred to as a substitute decision-maker, because they are making decisions for you.

When Should I Consider an EPA?

An EPA is a way to plan ahead, in case **you lose capacity** (e.g. due to a sudden accident or illness). Capacity means being able to make your own decisions, which involves:

- Understanding the information needed to make a decision, and
- Recognizing the likely consequences of that decision.

Capacity is not absolute; it can vary at different times. You may have the capacity for some decisions but not for others. You may not have capacity on your own, but could have capacity with the help of someone else gathering information for you, or helping you understand your options. Under the law, you are assumed to have capacity unless a specific professional, such as a doctor or nurse practitioner, determines you lack capacity using a medical assessment.



An EPA is intended to protect you if in an extreme case, where you have entirely lost your capacity to make decisions about something (for instance, if you fall into coma). Other options are available for different circumstances.

For instance, there may be cases where you may have capacity to make decisions, but only with someone else's help. This may be especially relevant for people who live with developmental or intellectual disabilities, physical disabilities, or neurodegenerative conditions (such as Alzheimer's disease). In these cases, you can consider appointing a **decision-making assistant or supporter.**

A decision-making assistant or supporter can do things like gather and explain important information, help you make decisions, and communicate your decisions to service providers. However, unlike an EPA, assistants or supporters cannot override your decisions or make decisions for you.

- Please see our pamphlet on "*What is Supported Decision-Making?*" for more information.

If your goal is to give specific instructions about health care decisions, you can also consider a **health care directive.** This does not give someone a legal right to make decisions for you. Instead, it will outline your wishes regarding certain healthcare decisions (such as resuscitation, organ donation, and end-of-life interventions).



What Are Some Benefits of an EPA?

Even if you have a decision-making assistant or supporter, or a health care directive, an EPA remains an important tool. An EPA will give you more control to choose who can make decisions for you, and how, once you lost capacity. You can give your attorney specific instructions on how to deal with certain issues. It is a flexible agreement that helps clarify your wishes.

Surprisingly to some people, **your next of kin** (your closest living relatives) **do not automatically have the legal authority to make decisions** about things like your property or finances on your behalf. This is one reason why having an EPA is so valuable. Another benefit is that by naming a trusted person and clearly communicating your wishes in advance in an EPA for personal care or property, it can also help reduce the risk of future family disputes.

If you lose capacity and do not have an EPA, the court may need to appoint a **"Representative"** for you. A family member or friend will need to petition the court for permission to be appointed as your Representative. If there is no person to fulfill this role, decisions on the person's care/property can be put in the hands of the **Public Trustee.** The Public Trustee's Office is an organization made up of a team of professionals who step in to make decisions for people when no one else is able or available.



What Can an Attorney for Property or Personal Care Do for Me?

You can appoint an attorney to deal with two main areas: property and personal care. The main differences are listed below:

Attorney for property:

- Responsible for decisions related to property, such as
  - managing bank accounts,
  - handling cheques,
  - paying taxes and bills,
  - making investment decisions,
  - making everyday purchases,
  - buying, selling and maintaining property,
  - keeping required records.
- Can start making decisions for you as soon as your EPA agreement is complete, or only when you lack capacity, depending on what you decide in your agreement.

Attorney for personal care:

- Responsible for decisions related to health and personal well-being, such as:
  - medical treatments,
  - nutrition,
  - shelter,
  - clothing,
  - support services,
  - education,
  - recreation,
  - social activities.
- Cannot start making decisions for you until you lack capacity.

An attorney **cannot** make, change, or cancel a will for you. Unless you give an attorney specific permission to do so, they also cannot give gifts on your behalf or appoint someone else to be your attorney.

You can assign both roles in one document, known as an EPA for property and personal care. Or you can assign each role in separate documents: one for property and one for personal care.

How Do I Choose an Attorney?

Choosing an attorney for your EPA is an important decision. The person should be someone you trust to make decisions for you. This could be a friend or a relative. **Despite the name, it does not have to be a lawyer.**

When deciding who to appoint, think about whether they:

- Have the skills and experience to manage your affairs;
- Understand your wishes and values;
- Are likely to stay in your province of residence and remain mentally capable during the time they act as your attorney;
- Are reliable, available, and willing to take on the role; and
- Are at least 19 years old.

Certain people cannot be appointed as your attorney:

- Someone who is paid to provide you with health care or support services (unless they are your spouse, common-law partner, or relative);
- Someone who is bankrupt (this applies only to attorneys for property, not personal care); or
- Someone convicted of a dishonesty-related crime, unless the document states you are aware of the conviction.



How Do I Get an EPA?

Plan

- Decide which type of EPA (personal care, property, or both) suits your needs.
- Choose when it will take effect.
- Decide how many attorneys to appoint.
    - You can appoint two or more people to make decisions together about both your property and personal care.
    - Another option is to appoint one person to act as your attorney for personal care, and another person for your property.
    - You can also appoint a “back-up” attorney. These people will replace an attorney who has resigned or stopped acting for any reason. **It is recommended to have at least one backup attorney.**

Discuss

- Talk to the person(s) you want to appoint to ensure they’re willing to take on the responsibility.
- If you are appointing more than one attorney, make sure they can work well with each other.



Draft the EPA:

- There is no “one-size-fits-all” agreement for an EPA. Some things to consider are:
  - Whether the attorney will have limited authority over specific topics or decisions, or general authority;
  - Whether you have specific instructions for how to deal with certain issues;
  - When your attorney can begin or must stop making decisions for you;
  - Who will assess your capacity, and;
  - Whether you will compensate your attorney, and how much you will compensate them.
- You do **not** need a lawyer to make an EPA for personal care.
- However, you **do** need a lawyer to make an EPA for property, or an EPA for both property and personal care.

It is a good idea to speak with a lawyer, regardless of what agreement you are entering. A lawyer can help ensure the agreement is legally compliant under the law.

Store Documents Safely

- Keep the document in a secure place.
- Provide a copy to your bank (for property attorneys) and your doctor (for personal care attorneys).

Does Anyone Monitor My Attorney?

If you lack capacity, you may not know if your attorney is not doing their job correctly or misusing their power. This is why it is important to appoint a **Monitor**. A Monitor can visit and communicate with you, request records from the attorney, and ask the court to end the EPA agreement if they think the attorney is abusing their power.

How Do I Cancel or Change My EPA?

If you want to **cancel** your EPA, **you must have the capacity** to do so. You can:

- State in writing that you are cancelling the EPA, either in a new EPA or a separate document; or
- You can destroy your EPA, or have someone else destroy it, to cancel it. It may be worth considering shredding your EPA to avoid having it found and replicated.

If you want to **change** your EPA, you also must have the capacity to do so. However, it is recommended that you cancel (i.e., destroy) and replace your EPA rather than modifying it. Changing an EPA can be confusing, and it has the exact same requirements as replacing your EPA.

If you cancel or change your EPA, you should notify your attorney and anyone who has dealt with them (like a bank or a medical professional).

Sometimes, hospital forms have health care instructions that are different from the instructions you put in your EPA. **If you sign a hospital form like this, it will become your most recent instructions, and your personal care attorney must follow those instructions.** Make sure to read hospital forms thoroughly, or have a support person read them, and ask questions before signing.

Resources

- Public Legal Education and Information Service of New Brunswick
  Enduring Powers of Attorney: A guide to help you prepare for a possible loss of decision-making ability
- Government of New Brunswick
  Legal planning: Legalities to consider with a dementia diagnosis including Enduring Power of Attorney, writing a will and health care directives
- Public Legal Education and Information Service of New Brunswick
  Enduring Powers of Attorney: Being an Attorney
- Government of Canada
  What every older Canadian should know about: Powers of attorney (for financial matters and property) and joint bank accounts
- Financial and Consumer Services Commission of New Brunswick
  Understanding the Power of Attorney

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