

# Understanding the Power of Attorney

Has someone “given you” authority under a power of attorney? You may be wondering what this means, what your responsibilities and obligations are, what you do not have the right to do, and how you can best fulfill this role. We have put together information that may help guide you when acting on authority granted under a power of attorney for financial matters. For more information about powers of attorney, visit the [Public Legal Education and Information Services of New Brunswick’s Power of Attorney](#) webpage or speak to a lawyer.



## Section 1: What is an enduring power of attorney?

An enduring power of attorney (POA) is a legal document that gives a person the authority to stand in place of someone else and manage their affairs either financially, for personal care or both. A POA lets a person choose who they want to manage their affairs if they become unable to do so. If someone has given you authority under a POA to manage their property and financial affairs, you are called the **attorney for property**, and they are the **grantor**. If someone has given you authority under the POA to manage their personal care, you would be considered the **attorney for personal care**. A grantor is able to name the same person for both roles if they so choose. The grantor may also assign **alternates** should an attorney for property or attorney for personal care be unable or unwilling to carry out their role. They may also assign a monitor (**see Section 5**) to oversee the attorney(s). A POA for property must be witnessed by a practising New Brunswick lawyer when it is created. A POA for personal care only needs to be witnessed by a lawyer when accompanied by a POA for property. Enduring power of attorney documents continue to be in effect after the grantor no longer has capacity as long as they were made when the grantor had capacity and were signed and dated by or on behalf of the grantor as permitted under the *Enduring Powers of Attorney Act*.

### **What type of authority can be given to an attorney?**

A grantor can give someone the authority to manage their property and finances (including personal belongings and real estate) and to make decisions about their personal care. A grantor can create one POA that deals with property/financial matters and personal care, or they can create separate enduring power of attorney documents. The grantor can give authority to as many people as he or she chooses under a POA and can decide to assign separate types of authority to each or require them to work together.

### **Are attorneys for property paid for their services?**

The grantor does not have to pay their attorney(s) for property for carrying out the duties assigned to them under the POA, unless they choose to. If the grantor chooses to pay the attorney(s), it is important to discuss the terms of payment prior to drafting and signing the POA. Having authority under a power of attorney is an important responsibility and could take a significant amount of time and effort on the part of the attorney(s) for property. It is important to understand and be comfortable with what is expected of you and the amount of time it will take before agreeing to act as an attorney for property. Discussing clear terms of payment and expectations under the POA can help prevent future conflict.

### **Can attorneys be reimbursed for expenses?**

Someone acting as an attorney can claim expenses incurred in carrying out their role as an attorney – for example, gas to run errands for the grantor.

### **Can a power of attorney be terminated or changed?**

Authority under a POA ends when the grantor passes away. However, situations exist where the authority can be terminated before the grantor's death. For example, the authority is terminated if the grantor revokes the POA. A grantor can revoke the authority if they still have capacity to do so. The grantor can also revoke it in writing or destroy it or direct another person to destroy it with the intention of revoking it. The authority of an attorney can also terminate when an event specified in the POA occurs, by a court order or when an attorney becomes a person prohibited from acting as an attorney (**see Section 2**). If the grantor still has capacity, they are entitled to change their POA when it suits them.

### **Where should a power of attorney document be kept?**

A POA should be kept in a safe place. It is important that you know where the POA is kept and can access it when it is needed because you will need to show either the original or a certified true copy of the document when carrying out your duties under the POA.

## Will all financial institutions accept the POA?

Before the POA is needed, the grantor should make sure their financial institution will accept their POA. This should be done before the grantor loses the ability to manage their own affairs and while they are able to change an existing or create a new POA. Financial institutions may ask the grantor to sign a document similar to a power of attorney regarding their banking accounts. The grantor should review these documents carefully before signing them and may even consider seeking guidance of a lawyer to ensure they do not negate a carefully planned POA.

## Section 2: Should I take on the role of an attorney for property under a POA?

If you have been asked by a friend or family member to take on the role of an attorney for property under a POA, take time to think about your ability and comfort level in fulfilling the duties of this role. It is important that you fully understand the responsibilities and obligations before you commit and agree. You should consider the following questions:

- **How much time will this take?** The amount of time you will need to dedicate to fulfilling your duties under the POA will depend on the complexity of the grantor's affairs, that is, how much money and property you will be responsible for managing.
- **Are you good at record keeping?** You will be required to keep records relating to the management of the grantor's property and financial affairs, including any financial decisions you make as an attorney for property.
- **Am I a person who is eligible to act in this role?** A person may only act as an attorney for property under a POA if they are capable and meet other legal requirements. Additionally, a grantor cannot appoint the following people to act in the role:
  - a person who provides health care services or support services to them for compensation (unless that person is a spouse, common-law partner or relative)
  - a person with an undischarged bankruptcy
  - a person who has been convicted of an offence involving dishonesty, unless the enduring power of attorney states that the grantor is aware of the conviction
- **Do you live close to the grantor?** Are you planning on moving any time soon? It can be difficult to manage the grantor's affairs if you are in another country, province, or even city. It may also mean increased costs if you must travel frequently to fulfil your role.

- **Am I comfortable making decisions on the grantor's behalf?** As an attorney for property, you are responsible for the actions you take on the grantor's behalf and may be questioned by family members on your actions and decisions even after the POA has ended. You may also have to answer questions from the person appointed as monitor in the enduring POA. **See Section 5.**
- **What happens if I change my mind?** Has the grantor designated an alternate in case you are unable or no longer wish to act as their attorney for property? You should consider what will happen if you decide you no longer want to act in this role, particularly if the grantor has lost capacity at the time you change your mind. If you decide to resign your role, you will have to provide written notice to the grantor, the monitor (if one is appointed) and any other attorney appointed in the enduring POA.
- **Am I sharing the role with someone else?** If a grantor appoints two or more attorneys for property in their enduring POA, you must ensure decisions are made by unanimous agreement between all attorneys for property, unless the POA states otherwise. If a grantor appoints different people as attorney for property and attorney for personal care, and a decision is to be made on a matter that relates to both, the attorneys must consult with each other. If the attorneys cannot agree on a decision that affects both finances and personal care, the attorney for personal care will make the final decision, unless the POA states otherwise.



### Section 3: The role of an attorney for property under a POA

A POA is not a one-size-fits-all document. It can be tailored to suit the grantor's needs and can be as specific or as broad as they choose. A grantor can choose to give their attorney for property the authority to act on their behalf in all financial matters or may restrict the authority to certain tasks. For example, you may have the authority to pay the grantor's bills and make everyday purchases, but may not be permitted to make investment decisions on their behalf. A POA can be effective as soon as it is created or may only become effective in the future when certain conditions have been met. For example, an enduring POA may only become effective when the grantor loses capacity and is no longer able to manage their affairs. The grantor may outline in their POA that they require a letter from their family doctor confirming they do not have the capacity to manage their own affairs or may appoint another person to make that determination before the POA can be used.

Review the POA to be sure you know and are comfortable with the authority that has been assigned to you and that you can carry out the tasks. To make sure that you act within the boundaries of your authority, have the grantor's lawyer explain the POA to you. You should also consult a lawyer **any time** you have questions about your authority or your responsibilities.

In the role of power of attorney for property, you have three main duties. You must:

- Act honestly and in good faith.
- Exercise reasonable care.
- Act within the authority given under the enduring power of attorney.

#### **The authority granted under a power of attorney for property may impose obligations on you which include:**

- **Monitoring bank accounts:** Keeping an inventory of all the accounts for which you are responsible can help you monitor and ensure the accounts are being properly managed. Check accounts regularly for signs of fraud and accuracy of bank records.
- **Cashing and depositing cheques:** You may be required to cash or deposit cheques on the grantor's behalf. Never deposit cheques into your own account or cash cheques at a cheque cashing outlet before depositing the funds into the grantor's account. This creates confusion and makes it difficult to keep accurate records. Always deposit cheques directly into the grantor's bank account so a paper trail for the transactions you make on the grantor's behalf exists.

- **Paying the grantor's taxes:** The grantor will still be obligated to pay taxes (including property and income tax) when a POA is in effect. For information on property taxes, contact Service New Brunswick. For information on income tax, contact the Canada Revenue Agency.
- **Paying bills:** Missing a bill payment or being late with a payment by even one day can negatively affect the grantor's credit history and cause the grantor to incur late payment fees. Set up a bill payment schedule to remind you when each payment is due or set up automatic payment online to be sure that the grantor's accounts are properly managed, and bills are paid on time. Watch the bills for any unusual charges that may indicate someone else has accessed the accounts (such as a sudden increase in long distance calls, or unusual items purchased on credit).
- **Making investment decisions:** When making investment decisions on behalf of the grantor, you must make decisions that are in line with the grantor's risk tolerance and investment goals. Just because you are carrying out the decisions, they must still be suitable for the account holder. You must be careful not to make decisions based on your own comfort with risk or your own investing timeline. Get to know the individual who has been managing the grantor's investments, and ensure that you understand the goals and types of decisions made by the grantor in the past. Deal only with financial advisers and institutions that are registered with FCNB, and call FCNB if you have any concerns. For more information about registration and working with investment professionals, visit our [Working with a Financial Professional](#) page.
- **Making every day purchases:** Purchases may include items such as groceries and medication. If you are making these purchases, the grantor should not be giving you (or anyone else) their PIN number for debit or credit cards. This puts the account owner at risk not only for identity theft, but also breaks their contract with the financial institution. Contact the grantor's financial institution for information on how to access their accounts.
- **Maintaining the grantor's property:** Maintenance of the grantor's personal property and real estate may include a variety of duties such having the grantor's car repaired, repairing their home, and landscaping their yard when needed. You may perform some of these duties yourself or may need to hire someone to do the work. Before you hire, consult our [Hiring a Contractor](#) guide for tips on choosing the right contractor or service provider. Some service providers may sell their products and services door-to-door. Before hiring a door-to-door service provider, check to make sure they are licensed with FCNB. For more information on door-to-door sales, visit the [Direct Sellers](#) page on our website.

- **Making sure the grantor is properly insured:** This involves making sure that the grantor has adequate coverage, coverage does not lapse because of non-payment and the grantor is not paying for more insurance than they need. Our resources on [types of insurance](#) can help you understand the different insurance products available. If you have to make changes to the grantor's coverage, it is very important to choose a policy based on the coverage as well as the price, and not just the price.
- **Making sure you keep required records:** Keeping records to reflect your actions while acting as attorney for property will show you acted appropriately to handle the grantor's affairs and you acted reasonably and in good faith. You may be required to provide these records to the grantor, another attorney named under the POA or the monitor, if requested.

**A power of attorney does not give you the authority to:**

- Make or revoke a will for the grantor.
- Change the grantor's will.

**Unless the grantor gives specific authority under an enduring power of attorney, the attorney does not have the authority to:**

- Assign the authority that the attorney has been given to someone else.
- Make a gift on behalf of the grantor.





## Section 4: Being a responsible attorney for property

When exercising your authority as an attorney for property under a POA, it is important that you act only within the limits of your authority.

When deciding on behalf of a grantor who lacks the capacity to make the decision, the attorney should consult the grantor if it's reasonable to do so and should do the following:

- Make the decision in accordance with any relevant instructions given by the grantor when the grantor had capacity;
- In the absence of any instructions, make the decision in accordance with the current wishes of the grantor, if the wishes are reasonable;
- If the wishes of the grantor cannot be determined or are unreasonable, make the decision that the attorney believes the grantor would make if the grantor had the capacity to make the decision, taking into consideration the values and beliefs of the grantor; or
- If the attorney is unable to determine what decision of the grantor would make, make the decision that the attorney believes is to be in the best interests of the grantor.



Keeping the following information in mind can help you when carrying out your obligations:

- 1) **Carefully manage their affairs:** Avoid conflict of interests when carrying out the duties assigned to you in the POA and always act in the grantor's best interest. This means putting their interests first, and not considering your interests or the interests of others when making decisions.

A conflict of interest occurs when a decision or action benefits someone other than the grantor at the grantor's expense. Some conflicts of interest, such as buying yourself lavish gifts with the grantor's money, are very obvious; however, others may be more difficult to detect. Here are some examples:

*Ex 1: The grantor's car needs repairs. Instead of calling repair shops to get the best price, you hire a member of your family to do the work. Even if the car legitimately needed to be repaired, this could be perceived as a conflict of interest because you put your family member's interests before the grantor's.*

*Ex 2: Because the grantor can't drive, you must pick up their prescriptions. While you are at the drugstore, you also pick up some milk and a loaf of bread for yourself. You use the grantor's money to pay for the entire purchase.*

*Ex 3: You have been assigned authority under a POA to manage your mother's affairs. She will be coming to live with you and you must renovate your home to accommodate her. She cannot get up and down the stairs so you must install a bathroom on the main floor of your house. While you are having this work done, you decide to also update the master bath on the second floor. Mom's money pays to have all of this work done.*

*Ex 4: You have been assigned authority under a POA to manage your Uncle Bill's finances. He has held the same portfolio of low risk investment products at the same financial institution for the past 15 years. Your daughter is an investment adviser at another institution. She is paid a higher commission when she sells high risk investment products. You cash out Uncle Bill's investments at his financial institution and invest in the higher risk products with your daughter at the financial institution she works for.*

**Always remember that the money and property you are managing does not belong to you. It belongs to the grantor, even if you may inherit the money one day.**

- 2) **Keep the grantor's money separate from yours.** Mixing your money with the grantor's creates confusion and makes it difficult to keep proper records. To keep money separate, do not deposit the grantor's money into your bank account or make purchases on the grantor's behalf from your bank account.
- 3) **Maintain detailed and accurate records.** You must keep records of any transactions involving the grantor's money as part of an enduring POA. You must provide them upon request by the grantor, the monitor (if one is assigned), other attorneys (if any) and the executor or administrator of the grantor's estate. If you are suspected of using the grantor's money and property inappropriately, you may find yourself subject to an investigation by the police and legal action may be initiated. The consequences for managing the grantor's money inappropriately range from having your authority under the POA revoked to criminal prosecution. If a financial institution (including a bank, credit union, a loan or trust company) suspects you are not following the *Enduring Powers of Attorney Act*, it can decline to follow your instructions, and suspend or restrict any withdrawal or transfer of funds from the grantor's accounts.

To protect yourself, keep record of every single decision and transaction you make as attorney for property. Keep all receipts and make a list of all money that you have received and spent on behalf of the grantor. Avoid paying in cash when possible. If you pay with cash, keep receipts to reference those purchases. Paying by cheque or with a bank card will provide you with an additional record. Keep any records required by regulation.

If you are being paid, make sure that the payment arrangements are in writing and that you keep a detailed record of how much time you spend and what costs you incur while fulfilling your duties as attorney for property to justify the amount of money you are being paid.

## Section 5: The role of the monitor under an enduring POA

Under the *Enduring Powers of Attorney Act*, a grantor can appoint a monitor to oversee the conduct of any appointed attorney. The monitor can visit and communicate with the grantor, request records from the attorney and apply for a court order to terminate the authority of the attorney or the enduring power of attorney, for example, when they suspect financial abuse.

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