

FAMILY CROWN SERVICES OPERATIONAL MANUAL

ADULT PROTECTION	New	Office of the Attorney General / Family Crown Services	Policy 28
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ADULT PROTECTION

1. Introduction

Adult protection matters fall under Sections 34 to 42, inclusively, of the *Family Services Act*. Similarly to child protection matters, there are situations where the security of an adult may be in danger [see subsection 37.1(1)]. The adult may be incapable of caring properly for himself or he / she may be the victim of physical abuse, sexual abuse and/or mental cruelty. Family Crown Counsel upon recommendations from the Minister of Social Development may request the following orders from the court:

- Supervisory Order - subsection 39(a);
- Supervisory Order with or without Trusteeship - subsection 39(b);
- Protective Intervention Order - subsection 39(c);
- Consent for Treatment Order - subsection 39(d)
- Order for Hospitalization - section 40; and / or
- Warrants (Section 35).

Any of the above orders may be granted on an interim basis pending the final disposition of an application.

An adult protection order shall not exceed a duration of twelve months and may be extended for additional periods not exceeding twelve months each [see subsection 39(4)].

2. Role of Family Crown Counsel

In adult protection matters, the relationship between Family Crown Counsel and the Minister of Social Development is that of a solicitor-client relationship (see Policy 7 - Solicitor-client relationship). As such, Family Crown shall provide the following services:

- provide legal advice and opinions;
- review all pleadings, powers of attorney, medical reports & affidavits;

- review orders appointing a person as committee of an estate and/or person;
- act as liaison with the Office of the Public Trustee; and
- representation of the Minister in adult protection proceedings and appeals.

3. Legislation requirements for an adult protection application

Family Crown Counsel shall ensure that all legislative requirements are met prior to filing an adult protection application. The adult in question must meet all of the following criteria:

- (a) be 19 years of age or over;
- (b) be a handicapped person (see section 1 definition) if under the age of 65;
- (c) be neglected and/or abused (see section 34);
- (c) be mentally incompetent [see subsection 37(1.1)], and

3.1 Medical reports

Family Crown Counsel shall review medical reports prior to an adult protection application being filed to ensure that there is compliance with subsection 37.3 (1), 37.3(2) and 37.3(3). Medical reports must also include the medical practitioner's opinion that the adult in question is mentally incompetent. The definition of mentally incompetent is not found within the *Family Services Act*. Therefore Section 38 of the *Interpretation Act* applies and provides the following definition:

“mentally incompetent person” means a person (incapable mental)

- (a) in whom there is such a condition of arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury, or
- (b) who is suffering from such a disorder of the mind,
that he requires care, supervision and control for his protection or welfare or for the protection of others or for the protection of his property;

3.2 Neglected or abused

Family Crown Counsel shall review any medical reports and / or affidavits and identify evidence of neglect and / or abuse prior to filing an adult protection application. If there is absence or insufficiency of evidence, Family Crown Counsel should instruct the Minister of Social Development to identify the alleged neglect or abuse and seek evidence to support same.

However, if there is evidence that an adult is likely to become neglected or abused, an adult protection application can still be filed if it meets the criteria of Section 37.2 of the *Family Services Act*.

3.3 Protective care and time for filing

If an adult has been placed under protective care pursuant to subsection 37.1 (2), the Minister must within **five days** after putting a person under protective care; either (a) release the person from protective care; or (b) apply to the court for an order under subsection 39(1).

4. Authorization for medical, dental and surgical treatment

Although the Minister of Social Development may consent for certain minor medical, dental and surgical procedures on behalf of an adult, the courts have stated that a Consent for Treatment Order is restricted and does not include the following procedures:

- surgery which includes general anesthesia;
- chemo therapy or radiation therapy;
- amputations;
- experimental treatments; and
- do not resuscitate (DNRs) and respirator decisions (life support);
- procedures with risk to Life or Limb.

In cases where more serious medical, dental or surgical treatment are required, a Specific Treatment Order is required. Family Crown Counsel should file a Motion to vary an existing adult protection order to obtain a Specific Treatment Order. Such Motion must be supported by a medical report outlining the benefits of the treatment, the risks of the treatment and the risks associated with not providing the treatment.

5. Appointment of litigation guardian and his / her counsel

When filing an adult protection application, a Request for Appointment of a Litigation Guardian (Form 7A) should also be included. In most cases, the Minister will propose an independent person to act as litigation guardian and will file an affidavit to support the request for appointment as litigation guardian.

In accordance with the following *Rules of Court*:

- a party under disability must act through a litigation guardian (rule 7.01);
- an affidavit signed by the proposed litigation guardian must be filed with the court [subrule 7.03 (4)];
- the powers and duties of the litigation guardian are very specific and restricted (rule 7.04); and
- the litigation guardian must act through a solicitor and shall instruct that solicitor in the conduct of the proceeding [subrule 7.04 (3)].

It should be noted that anyone can be proposed as a litigation guardian to the court as long as they meet the criteria set out in Rule 7.03 (4). Occasionally friends or family members will request to be appointed as litigation guardian. The Minister may contest their appointment on the basis that they are not suitable or impartial.

Upon appointment as litigation guardian by the court, counsel must also be appointed to receive instructions from the litigation guardian and to provide representation on behalf of the adult in question.

The litigation guardian usually makes inquiries with the adult, his / her family members, friends, medical personnel etc...

The litigation guardian may sign a Consent Order if he / she finds that such order is in the best interests of the adult.

6. Disclosure obligations in adult protection matters

The Disclosure obligations of the Minister are the same as in child protection applications. Counsel for the litigation guardian should request disclosure in the usual manner (see Policy 22 – Disclosure).

7. Interested parties

Interested parties must be served with an adult protection application as well as notices of any hearings scheduled. However, interested parties do not have a right to disclosure unless they request to be added as a party to the proceedings and upon same being ordered by the court. Interested parties are persons who could be impacted by an adult protection order and generally consist of the following:

- spouse of the adult subject of the application;
- a dependent family member residing with the adult;
- a person appointed as attorney under a Power of Attorney;
- a person appointed as Committee of the adult under *Infirm Persons Act*;
- anyone having care or control of the adult; and
- the Public Trustee (if the adult is in a psychiatric facility)

8. Order for hospitalization

An adult protection application may include an order for hospitalization. Such a request must be accompanied by a medical report that recommends such hospitalization. Generally, these requests are made for adults who should be hospitalized in a psychiatric facility such as the Restigouche Hospital Centre or Centracare. Family Crown Counsel should strongly recommend that the Minister contact the proposed facility to enquire as to whether or not they are willing to accept the adult. If the facility in question refuses to admit the adult, the social worker should immediately consult with his / her Provincial Consultant. Although the court can grant the order for hospitalization without the consent of the facility, there has been increasing frustration on the part of such facilities with respect to these types of orders.

9. Powers of Attorney

9.1 Powers of Attorney in general

There are many different kinds of Powers of Attorney. Some of them can be very complex. They can be specific or general. They can be limited to certain powers or subject to certain conditions. They can also be revocable or irrevocable.

There are 3 principal types of Powers of Attorney:

- (a) Personal Care;
- (b) Financial; and
- (c) Financial and Personal Care.

There can be more than one person appointed, either as joint attorneys or common attorneys under a Power of Attorney.

Under the Enduring Powers of Attorney Act, an attorney for personal care cannot exercise his/her authority unless it has been determined by a designated appointee or by a medical doctor / nurse practitioner that the grantor lacks capacity to make such decisions (Section 9).

9.2 Role of Family Crown Counsel

Family Crown Counsel will provide a legal opinion to the Minister of Social Development to identify whether a Power of Attorney is a valid legal instrument on the face of the document. Family Crown Counsel does not provide any legal opinions as to whether or not the adult had the legal capacity to execute the Power of Attorney, or whether it was obtained in a fraudulent manner or under dubious circumstances. Family Crown Counsel shall only provide a legal opinion as to the validity of the legal instrument, what the document covers in terms of powers and conditions and when it took effect. It is to be noted that the *Enduring Powers of Attorney Act* provides that some essential criteria must be met in order for the Power of Attorney to be considered valid as a legal instrument (see Section 4)

9.3 Procedure

The Minister shall provide a copy of a Power of Attorney to Family Crown Counsel by email or by fax requesting a legal opinion concerning the said Power of Attorney. Family Crown Counsel shall not offer any legal opinion without first receiving from the Minister a signed copy of the Power of Attorney, all pertinent facts relating to the case and the reason for which a legal opinion has been requested.

Family Crown Counsel shall consult with the Assistant Deputy Attorney General, or his designate should he / she feel that he / she has insufficient expertise to provide a legal opinion.

Individuals appointed under a Power of Attorney must be served as interested parties in adult protection proceedings. Adult protection orders can impact the powers conferred upon these individuals.

The Minister of Social Development has no legislative authority to terminate a Power of Attorney. An adult protection application merely suspends an existing Power of Attorney in whole or in part for the duration of the adult protection order.

10. Related documents

Enduring Powers of Attorney Act, S.N.B. 2019, c-30
Family Services Act, S.N.B. 1980, c. F-2.2
Infirm Persons Act, S.N.B. 1973, c. I-8
Interpretation Act, S.N.B. 1973, c. I-13
New Brunswick Rules of Court
Policy 7 - Solicitor-client relationship
Policy 22 – Disclosure.