

WHAT HAPPENS IF YOU CAN NO LONGER MAKE DECISIONS?

Why you need an
enduring power
of attorney



Serving the needs of older people

DO YOU HAVE AN ENDURING POWER OF ATTORNEY (AN EPA)?

Do you feel confident that others will know how to look after you and your property if you become unable to do so yourself, such as through accident, illness or incapacity? There may come a time when you become unable to make or communicate decisions yourself.

It is crucial that someone you trust knows how you would want your life and property handled. One way to ensure this happens is to appoint someone to act on your behalf by giving them “enduring power of attorney”.

The Protection of Personal and Property Rights Act 1988 (PPPR Act) introduced the concept of an enduring power of attorney (or EPA). This is an authority given by you to someone else to look after your affairs and it remains in place should you lose your capacity to make or communicate decisions.

This pamphlet explains how an enduring power of attorney works and how to create one that will work for you.

Consider setting up an EPA along with your Will when planning ahead.

WHAT IS AN ENDURING POWER OF ATTORNEY?

There are two kinds of EPA:

- one that covers a person's property
- one that covers their personal care and welfare.

EPA for property

- You can choose when you want a power of attorney for property to take effect – now, or when you can no longer manage your affairs
- You can give the attorney full power over all your property, or limit power to, for example, looking after specific investments or property. An EPA for property can apply to as many or as few assets as you, the donor, wish. If it is to be limited, that must be specified
- You may appoint one or more persons or a trustee company, for example Public Trust, as your property attorney.

EPA for personal care and welfare

- This EPA will only come into effect if you become incapable of making or communicating your decisions
- An EPA for personal care and welfare can only be given to one individual and not to a trustee company
- The EPA can authorise the attorney to act in relation to your personal care and welfare generally, or only in relation to stated specific areas.

WHAT ARE THE RESPONSIBILITIES OF AN ATTORNEY?

Your attorney must act in your best interests at all times, and must not abuse the trust you've placed in them. They should not act dishonestly, invest your money recklessly, or do anything they don't have authority to do under the EPA. Attorneys can generally only benefit themselves if the EPA specifically says they can.

Your attorney must also involve you in decision-making as much as possible: they must consult with you when making decisions, and must try to get you to develop and exercise whatever capacity you have to make decisions for yourself.

Your attorney's specific responsibilities will depend on the type of EPA and the instructions you've included in it. If you want their authority to be limited to certain areas you should say exactly what these areas are.

You can require your attorney to consult with people named in your EPA, or to give certain kinds of information to people named in the EPA. You can also include other restrictions – for example, you might even specify certain people who you don't want to look after you.

If your attorney isn't carrying out their responsibilities properly, you or another interested person can ask the Family Court to intervene.

WHO SHOULD I APPOINT AS AN ATTORNEY?

It is crucial that you trust the person and are confident that he or she will act in your best interests. At some stage you may be absolutely reliant on that person.

If your attorney for personal care and welfare stands to benefit from your estate, they may have to make decisions that have financial implications for them personally. It is important to be aware of this when you choose your attorney.

You may choose to appoint your spouse or one or more of your children, or any other family member. You may also choose a friend or a professional adviser.

(Note: a professional adviser is entitled to charge a fee for acting as your attorney.)

By law, your attorney must be at least 20 years of age and must not be bankrupt or suffering from any legal incapacity.

You could require your attorney to consult with family members and your GP about matters concerning your personal care and welfare.

Though you don't have to, it's a good idea to consider appointing one person as attorney for your personal care and welfare and a different person or persons for your property.

The skills needed to look after personal care and wellbeing are often quite different from those needed to look after someone's financial affairs.

The person you appoint as your attorney for personal care and welfare will have to work closely with your property attorney. You will need to feel confident that those you appoint can work together.

CAN I CHANGE MY MIND ABOUT GIVING SOMEONE POWER OF ATTORNEY?

Yes. You can change, vary or revoke (cancel) your EPA at any time while you are mentally capable.

Different procedures are needed to replace, revoke or vary your EPA, so you should get legal advice as to which is most suitable for your situation.

Making a new EPA does not automatically revoke an existing one. If you want to revoke your EPA you must do so in writing to your attorney.

If you do replace, revoke or vary your EPA you should not only inform the attorney, you should also inform banks or anyone else who is entitled to operate under the EPA.

WHO DECIDES WHETHER OR NOT I AM MENTALLY CAPABLE ?

You've become "mentally incapable" if –

- in relation to property, you are no longer completely competent to manage your own property affairs
- In relation to personal care and welfare, you can no longer make or understand decisions, or foresee their consequences; or you can no longer communicate them to other people.

You should be aware that under law every person is presumed to be mentally competent until the contrary is shown.

It is not your attorney who decides when you are no longer mentally capable. The question of whether you're still mentally capable must be decided by a health practitioner who is qualified to carry out this assessment. Without a certificate from a health practitioner, your attorney can't make any significant decisions for you under an EPA for personal care and welfare.

If you specify in your EPA for property that it only takes effect upon your becoming mentally incapable, then a certificate from a health practitioner is required before your property attorney can make any decisions for you.

When you make your EPA, you can specify the particular type of health practitioner you want to make the assessment of your mental capacity. For example, you might want to specify a GP or a geriatrician – a doctor specialising in the care of older people. Availability of specialist doctors may vary – your GP or local Age Concern may be able to advise you.

Whoever does the assessment, it must be a health practitioner whose scope of practice includes assessing people's mental capacity.

If necessary, the Family Court can be asked to decide whether someone is mentally incapable, after looking at all the evidence.

HOW DO I GO ABOUT SETTING UP AN ENDURING POWER OF ATTORNEY?

To set up an EPA you will need legal advice; this could be from a lawyer, a legal executive or an authorised officer of a trustee company such as the Public Trust.

When you make an EPA you must use the standard forms that are included in the Protection and Property Rights regulations.

Legal advisers will have these forms. They are also available on the Office for Senior Citizens website **www.osc.govt.nz**.

Your legal adviser will explain what information should be included and the decisions you must make.

Your legal adviser will also explain the optional provisions you can choose to include, such as –

- requiring your attorney to consult with people you name in the EPA
- requiring your attorney to provide information to people you name in the EPA
- appointing a successor (replacement) attorney if your attorney becomes unable to act.

You'll need to have your signature witnessed by your lawyer, or a qualified legal executive, or an authorised person from a trustee company. They must provide a certificate that states that they have explained the effect of the EPA to you, that they are independent of your attorney, and that they have no reason to think you may already have lost mental capacity. The signature of your attorney must be witnessed by a person other than you or your witness.

If you and your spouse or partner wish to set up EPAs appointing each other as attorneys, your legal adviser will explain how the witnessing can be done.

You and your attorney should each have a signed copy of your EPA. Your attorney will need to produce their copy when dealing with banks or other institutions about your affairs.

You should keep your signed copy in a safe place. It's also a good idea for you to make further copies and give them to others who need to know you've made an EPA and what your wishes are.

HOW CAN I PREPARE BEFORE I GO TO SEE MY LEGAL ADVISER AND APPOINT AN ATTORNEY?

1. Decide what things you want your attorney to do on your behalf and what you will not want them to do.
2. Decide when you want your EPA for property to come into effect – now or when you can no longer manage your affairs.
3. List all your main assets. Also make a note of any money owed to you. As well as your assets you should list all your debts.
4. Consider who should have a copy of the EPA.
5. Decide what steps you want taken to monitor and support your attorney in their role. For example:
 - appointing a second person to oversee your financial records or to receive copies of all statements and transactions
 - requiring your accounts to be audited once a year and for you (or a nominated person) to receive copies
 - appointing another trusted person to meet regularly with your attorney to advise and support them in their role.

(Note: that your attorney can also ask for direction from the Family Court.)

ASK YOURSELF THESE QUESTIONS:

1. Are you certain that the person you are appointing as attorney will always act in your best interests?
2. Will you appoint one attorney for property, or two, or more? Or will you appoint a trustee company?
3. Do you want to give your attorney authority to take care of everything to do with your personal care and welfare, or only some things?
4. Do you want to give your attorney authority to take care of everything to do with your property, or only some things?
5. Do you want your property attorney to take over things now, or later when you are no longer able to manage your affairs?
6. Who do you want to decide if you are no longer mentally capable? You can specify a particular type of health practitioner, provided they are qualified to make this assessment.
7. How do you want your attorney to be monitored and supported in their role?
8. If you have an EPA already, have you checked to see that it still meets your needs?
9. Have you read the notes at the back of the EPA forms?

WHERE CAN I GO FOR MORE INFORMATION?

For further information contact your local Age Concern or Age Concern New Zealand. See the back cover for contact details. Age Concerns are also listed in your local telephone directory.

For free legal advice contact your nearest Community Law Centre.

A booklet providing more information on EPA is available from Age Concern or Wellington Community Law Centre. Alternatively you can download a pdf from www.communitylaw.org.nz. The booklet gives detailed information on what happens when you don't have an EPA in place.

ORDER FORM

To: Age Concern New Zealand,
P O Box 10-688, WELLINGTON 6143
or FAX 04 801 9336 or
EMAIL: national.office@ageconcern.org.nz

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