

# PLANNING YOUR FUTURE

and the role of enduring powers of attorney



Wellington  
Community Law Centre



*Serving the needs of older people*

This booklet provides information on how a person may arrange to have his or her affairs managed when mental capacity is lost, by having enduring powers of attorney for personal care and welfare, and property. It also describes what happens when someone who does not have enduring power of attorney, loses mental capacity. It is aimed at the general public, has a question and answer format and is useful for those planning for the future.

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**Disclaimer** While every effort has been made to ensure that the information in this booklet is correct at the time of printing, no responsibility is taken for errors or omissions. The contents of the booklet do not constitute legal advice. If anyone wishes to obtain legal advice, he or she should consult a lawyer.

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# INTRODUCTION

Planning ahead is important should you ever become unable to make decisions yourself, such as through illness or incapacity. It can be crucial that someone you trust knows how you would want your life and property handled.

One way to ensure this is to appoint a person to act on your behalf by giving them “*enduring power(s) of attorney*”. This booklet tells you what to consider, how to go about it and answers common questions.

In this booklet you will find information about:

- your rights and entitlements under the Protection of Personal and Property Rights Act 1988 (PPPR Act)
- how the PPPR Act can assist you to manage your affairs
- the difference between an ordinary power of attorney and an enduring power of attorney
- what can happen if there is no enduring power of attorney in place
- things to ask yourself if you already have or are thinking of granting an enduring power of attorney
- where to go for more information

Granting an enduring power of attorney is extremely important. It is a legal requirement that you get independent advice from your own lawyer or another legal professional.

# I. DEFINITIONS AND TERMS

**Attorney:** The person appointed by you, to act on your behalf.

**Bankrupt:** A person who, having failed to pay debts, is deemed by the Family Court to have lost the power to own property and enter into transactions.

**Court order:** A binding direction from the Family Court.

**Donor:** The person giving power of attorney.

**Enduring power of attorney:** A power of attorney that continues to be valid after the person giving the power becomes mentally incapable.

**EPA:** Enduring power of attorney

**Estate:** The assets you have. The property you own or are entitled to.

**Jointly and/or Severally:** Jointly – a situation where people must act together. Severally – people can act separately or independently of each other.

**Mentally incapable:** The inability to wholly manage one's property affairs or wholly or partly understand the nature and foresee the consequences of decisions, or the inability to communicate these decisions relating to personal care and welfare, as defined in Section 94 of the PPPR Act.

**Negligence:** Breach of a duty of care which causes loss or damage to someone else.

**Ordinary power of attorney:** A power of attorney which ceases to have effect if the person who has granted the power becomes mentally incapable.

**Personal order:** An order made under sections 10, 11 or 12 of the PPPR Act, to protect, preserve or enforce a person's personal and property rights, where the person is not able to do so herself or himself.

**Power of attorney:** An authority given by one person to another to act for him or her in either general or specific circumstances. An ordinary power of attorney ceases to have effect upon the person giving the power becoming mentally incapable.

**PPPR Act as amended 2007:** The Protection of Personal and Property Rights Act 1988.

**Property:** Something that may be owned.

**Property manager:** A person appointed by the Family Court under the PPPR Act to look after the property rights of a person not able to manage his or her own affairs.

**Relevant health practitioner:** A registered health practitioner, whose scope of practice includes the assessment of a person's mental capacity.

**Statutory duty:** A duty or liability imposed by a statute.

**Trustee company:** A company authorised by law to administer the estate of deceased persons and other trust estates for individuals. New Zealand has five trustee companies: Guardian Trust; Perpetual Trust; Public Trust; Trustee Executors; and Covenant Trustee Company. The first four of these will prepare enduring powers of attorney.

**Welfare guardian:** A person appointed by the Family Court under the PPPR Act to look after the welfare of a person who is unable to make decisions for his or her own care and welfare.

## 2. PROTECTING YOUR PERSONAL AND PROPERTY RIGHTS

The PPPR Act was enacted to provide greater protection for vulnerable members of society. The underlying principle is that where possible, people who through age or infirmity are no longer fully able to manage their own affairs, should be encouraged to play as great a part in society as possible and to manage their own affairs so far as possible. The PPPR Act provides for ways of assisting people to do this.

The PPPR Act was amended in 2007 and came into force on 27 September 2008. The amendments extended the scope of the provisions relating to enduring powers of attorney. The amendments were aimed at providing more protection for those who grant enduring powers of attorney to others, that is, the donors of such powers. The most important change is the requirement that donors of enduring powers of attorney must receive independent legal advice about the implications of granting the power.

### What is a power of attorney?

A power of attorney is an authority given by you to a person or trustee company to look after your affairs. A power of attorney can be general, for example, to look after all your money or property; or specific, for example, to manage your bank account while you are overseas.

There are two types of power of attorney: an *ordinary* power of attorney, and an *enduring* power of attorney.

An *ordinary* power of attorney is valid unless the person who gives it dies, becomes bankrupt, or becomes mentally incapable. If you lose your mental capacity, for example because of debilitating disease or serious accident, the power of attorney is no longer valid, and the attorney cannot exercise it. This is because the person appointed by you to look after your affairs, your attorney, cannot have powers greater than yours.

An *enduring* power of attorney, on the other hand, continues to be valid even if the person who granted it becomes mentally incapable.

For example, if you give an ordinary power of attorney to someone who was to manage your affairs while you were overseas, but then had a memory loss or accident which impaired your legal ability, the person with ordinary power of attorney could no longer act on your behalf. If however you gave them enduring power of attorney, they could continue to manage your affairs.

An enduring power of attorney has the advantage of enabling you to appoint someone to make decisions about your future that will have effect if you later lose your capacity to make such decisions.



# 3. ENDURING POWER OF ATTORNEY

## What is an enduring power of attorney?

There are two kinds of enduring powers of attorney:

1. one that covers a person's *property*, and
2. one that covers a person's *personal care and welfare*.

With the first kind – *property* – you choose when the power can be used: either before you become incapacitated or afterwards. You may also appoint more than one attorney for property. For example, you can appoint two or more attorneys, jointly or severally. If you are going overseas you may want one person to look after your house, and another to look after your investments. You may want to give full power to an attorney or to limit that power in certain ways. You can specify the limits of such powers.

With the second kind – *personal care and welfare* – the power of attorney can be exercised after you become incapacitated. You can only have one attorney for your personal care and well-being.

We recommend that you consider appointing one person as attorney for your personal care and welfare and a different person or persons for your property.

## Who should I appoint as an enduring attorney?

A great deal of care must be taken in choosing who you appoint as your attorney. This person may be making decisions for you at a time when you cannot. It is extremely important that you feel sure the person who you choose knows you (and your partner) and that you are confident they would make decisions you would be happy about. They must also be prepared to take on the responsibility, so you must talk about it with the person you have in mind. Will your attorney have the skills to manage your affairs as well as their own? They must be able, for example, to keep proper records and full accounts.

It is crucial that you trust the person to whom you are giving the power, your attorney, and are confident that he or she will act in your best interests. This is because at some stage you may have absolute reliance on that person.

For your property attorney you may choose a member of your family, a friend, business partner or a trustee corporation. It is possible for you to have more than one attorney to act together (jointly) or independently (severally). If the attorneys are appointed severally, they should have different responsibilities.

You can also appoint different property attorneys for different purposes. For instance, you might appoint your son to be attorney for your stocks and shares, and your daughter to be attorney for your bank account.

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. The same might be true of the property attorney. It is important to be aware of this when you choose your attorney.

**Note:** *You cannot choose a trustee corporation to be your attorney for personal care and welfare.*

## Should I have different people to be my enduring attorneys for property, and for personal care and welfare?

Though you do not have to, it is a good idea to appoint 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 well-being are often quite different from those needed to look after someone's financial affairs.

You may also like to think about appointing joint property attorneys as this may afford you more protection. For example, two signatures would be needed for the transfer or release of funds. Both attorneys would need to work together. However, if one of the joint attorneys died you would need to appoint another attorney, because the surviving attorney could not act alone.

You cannot give authority to a trustee company to be your attorney for personal care and welfare. If a trustee company, for example Public Trust, is your attorney for property, you would need to appoint an individual as your attorney for personal care and welfare.

The person you appoint as your personal care and welfare attorney is given no power to manage or commit any funds, so will often have to work closely with your property attorney. Both attorneys are required to consult each other regularly to ensure that no breakdown in communication between them could harm your interests. You need to feel confident that those you appoint can work together.

Another matter to consider when granting an enduring power of attorney for personal care and welfare is whether to provide for more than one person as attorney. This can be done providing that the appointment of the second named person doesn't take effect until the appointment of the first person has ceased. In this way you could provide for unexpected circumstances resulting in your being left with no attorney.

## What should go in an enduring power of attorney covering property?

The person or trustee company you appoint as your enduring power of attorney should know what you own, where everything is kept and what your exact wishes are.

Before you appoint anyone, you should list all your main assets. Things like your house, car, bank accounts, stocks, shares or other investments, life insurance policies, furniture and jewellery. Also make a note of any money owed to you. As well as your assets you should also list your debts or other liabilities.

It is helpful to be able to tell your property attorney where you keep all your important documents: title deeds, birth or marriage certificates, share certificates and insurance policies. Try to keep all these important things together if possible.

You should also decide what things you might want your attorney to do on your behalf. These can be as limited or as wide as you choose. For instance, you can consent to your attorney executing a will for you or you might instruct your attorney to give gifts in circumstances where you would have done so if you had been able. For example, birthday gifts for your grandchildren, or to pay the costs of their tertiary education.

You can state whether you want all or part of a property enduring power of attorney to take effect straight away, or when you have become mentally incapable.

If you decide that the enduring power of attorney will take effect only after you have become mentally incapable, the attorney must not act in relation to your property until a relevant health practitioner or the Family Court has determined that you are mentally incapable.

***Note:** An enduring power of attorney for personal care and welfare only takes effect when you have become mentally incapable to make decisions about your welfare.*

If there are certain people you would not want looking after you or performing certain tasks, you can also record this.

## Are there any requirements for the appointment of the enduring power of attorney to be legal?

- Your enduring power of attorney must be in the form prescribed in the PPPR Act. Your lawyer will have these forms.
- Before you sign an enduring power of attorney, the effect of granting an enduring power of attorney must be explained to you by a lawyer, a qualified legal executive, or an authorised person from a trustee company. The lawyer or legal executive must attach a certificate to the enduring power of attorney stating that they have done so, as well as witnessing your signature. They must also certify that they have no reason to think you may already have lost mental capacity.
- Your attorney's signature must be witnessed by anyone other than you or your witness.
- Your attorney must be at least 20 years old, not be bankrupt, and not be suffering from any legal incapacity.

## What are the powers of an attorney?

It is up to you to decide how much power an enduring attorney can have. You can impose some conditions or restrictions on what they can and cannot do.

For example, you might give them a general power (over all your property), or a specific one, for example, over your car.

## What precautions should you take?

Trust is all important, but unfortunately some attorneys abuse that trust, for example, by writing cheques or withdrawing money for their own benefit. Financial abuse happens, even with members of your own family.

It is wise to take as many precautions as possible. Even if you have no concerns about abuse, it is a good idea to arrange for regular reporting back and discussions with your attorney.

You can also specify when the enduring power of attorney is set up that a third party, such as your lawyer or your accountant, or another trusted person, be involved in these discussions as an extra check. Having a third person involved can also be helpful to your attorney.

## What responsibilities does a property attorney have?

An attorney must consult you, the donor, as far as practicable when acting on your behalf. A property attorney has a specific relationship of trust with the person who appointed them, which cannot be abused. This means that a property attorney has an obligation not to use money for their own benefit, invest it unwisely, or act in a way not authorised by the power of attorney itself.

If you become mentally incapable, your property attorney must use your property in your best interests.

A property attorney must keep records of each financial transaction he or she enters into while you are mentally incapable. An attorney who fails to do this commits an offence and is liable to a fine.

## **What responsibilities does a personal care and welfare attorney have?**

If you become mentally incapable, your personal care and welfare attorney must promote and protect your welfare and best interests, while seeking at all times to encourage you to exercise your own capacity. Your attorney must consult you as far as practicable when acting on your behalf. The attorney must also encourage you to act on your own behalf and try to help you integrate into the community as far as possible.

When making a decision about your personal care and welfare, your attorney must consider the financial implications of that decision.

## **Who do I need to see if I wish to appoint an enduring power of attorney?**

You will need to see a lawyer or, in the case of an enduring power of attorney for property, an authorised officer of a trustee company. This is because the PPPR Act now requires a lawyer, a qualified legal executive or an authorised officer of a trustee company to explain the implications of granting an enduring power of attorney to an intending donor.

Any of these people will:

- be familiar with the format
- make sure your wishes comply with the law and will be enforceable
- be able to explain all the provisions to you
- be able to tell you of any possible disadvantages



- have the document witnessed appropriately
- ensure that your wishes, rather than those of your attorney, will be taken into account

**Remember:** *Never be afraid to discuss likely costs with your legal advisor.*

### **My friend has a degenerative disease – sometimes she is lucid, at other times she is confused. Can she still give enduring power of attorney?**

As long as the person giving power of attorney (in this case the friend) can understand the nature and effect of the action they are taking, they can give power of attorney to another. They do not have to be capable of managing their property and affairs on a regular basis. However, the witness to a signature must have no reason to suspect that the donor is mentally incapable at the time of signing.

## **What authority does an enduring power of attorney for personal care and welfare give to my attorney?**

The power of attorney could be general, or only in relation to certain areas. If you want your attorney to have authority only over certain areas you must specify what these are.

For example, you may give an enduring power of attorney for personal care and welfare only in respect of nursing home care, or you may give it for all medical care.

Your personal care and welfare attorney cannot:

- make decisions relating to marriage or divorce
- make decisions relating to adoption of children
- refuse consent to standard or life-saving medical treatment
- give consent to medical experimentation

## **When does a personal care and welfare enduring power of attorney come into effect?**

An enduring power of attorney for care and welfare only comes into effect when you are “mentally incapable”. Section 94 of the PPPR Act states that someone is mentally incapable in relation to personal care and welfare if he or she lacks the capacity:

- to make a decision relating to his or her personal care and welfare, or
- to understand the nature of decisions relating to his or her personal care and welfare, or

- to foresee the consequences of decisions relating to his or her personal care and welfare or of the failure to make such decisions, or
- to communicate decisions relating to his or her personal care and welfare

You should be aware that every person is presumed to be mentally capable until the contrary is shown. It is not your attorney who decides if you are no longer mentally capable.

The Family Court or a relevant health practitioner can decide whether someone is mentally incapable, after looking carefully at all the issues.

## **What happens after I sign an enduring power of attorney?**

It is necessary to sign only one copy of an enduring power of attorney. That original should be kept safe, either by your lawyer or in a safe deposit box. Sometimes it may be desirable for more than one enduring power of attorney to be signed. It is prudent to keep the number of original signed copies to a minimum.

## **Should I give a copy to the bank?**

It is only necessary to provide an enduring power of attorney for property to the bank when an attorney is required to operate the bank account.

## **If I am mentally incapable, can the Family Court monitor the performance of my attorney?**

Yes, the PPPR Act gives the Family Court quite wide powers to monitor the performance of the attorney, and, if necessary, to vary the terms of the enduring power of attorney. Examples of ways the Family Court might monitor the attorney's performance are by:

- examining accounts and financial records
- authorising or reviewing payment

However, the Family Court does not monitor an attorney's performance automatically. It would have to be notified of concerns by you or some other person.

The Family Court may vary the terms of an enduring power of attorney by:

- modifying the scope of the enduring power of attorney
- authorising gifts beyond those authorised by the enduring power of attorney
- interpreting some conditions or restrictions in an enduring power of attorney

## **Can my attorney ask for directions from the Family Court?**

Yes. For instance, if the attorney is finding it difficult to carry out some of the instructions, and you lack the ability to give further instructions, the attorney can apply to the Family Court for directions.

## Can I change my mind about giving someone power of attorney?

Yes, you can vary, suspend or revoke (cancel) your enduring power of attorney at any time while you have mental capacity.

If you grant a new enduring power of attorney, it is extremely important that you revoke the existing one. An enduring power of attorney is quite different from a will — it is not necessarily the latest enduring power of attorney that counts. The Family Court may have to decide which document is valid if there is a dispute and this can be costly.

Once the document is signed, you can revoke it at any time by giving notice in writing to your attorney. You should also notify the bank or any other agency likely to be affected that you have revoked the power of attorney given. As this is a serious step you should see a lawyer.

If you have been but are no longer mentally incapable, you may also suspend your attorney's authority to act under the enduring power of attorney, by giving him or her written notice. A suspension, unlike a revocation, does not actually cancel the enduring power of attorney.

Different procedures are needed for suspension, variation and revocation and you should get legal advice as to which is most suitable for your situation.

## Are there any other times when the enduring power of attorney might cease to have effect?

An enduring power of attorney also ceases to have effect when:

- the attorney gives notice of disclaimer (that is, they state in a written form that they do not want to act any more)
- the attorney goes bankrupt
- the attorney dies
- the attorney becomes subject to a personal or property order themselves, or becomes a committed patient under the Mental Health Act 1992
- one of the attorneys dies who has been appointed jointly and not severally
- you die. Your enduring power of attorney ceases on your death and the instructions in your will apply
- the Family Court revokes the appointment under section 105 of the PPPR Act

## **Why would the Family Court revoke authority of someone I have appointed?**

The Family Court would only revoke authority if it was satisfied that:

- the attorney was not acting in your best interests
- the attorney was likely not to act in your best interests
- the appointment was obtained by undue influence or fraud

## **Who would look after my interests if this happened?**

The Family Court may appoint a welfare guardian and perhaps a property manager to manage your affairs if an appropriate application is made.

## **What happens if my two enduring attorneys conflict?**

If there is a conflict between the attorneys in the carrying out of their respective powers or duties, either attorney can apply to the Family Court asking it for direction. However, the property attorney must generally give the personal care and welfare attorney any financial support required to carry out their duties in relation to your personal care and welfare.

## 4. WHERE AN ENDURING POWER OF ATTORNEY DOES NOT EXIST

### What happens if I have no enduring power of attorney and I lose my mental capacity?

If you have not made provision for an enduring power of attorney, the PPPR Act gives the Family Court the power to appoint someone to be your welfare guardian and/or property manager. If your circumstances at the time are such that you have no close family members to undertake this task, this person may know nothing about you, yet will be making decisions for you at a time when you cannot make them for yourself. It is therefore preferable and important that you decide who you would like to be your attorney while you are still capable of doing so.

### How does the Family Court make decisions?

If you have become incapable of managing your own affairs, you can apply on your own behalf, or someone can apply for you, to be placed under a personal and/or property order. This application can only be made where it is absolutely necessary.



## 5. PERSONAL ORDERS

Where people have not granted enduring powers of attorney, and lack the capacity to manage their own affairs, the Family Court has the power to place them under a personal order. The Family Court would not do this automatically – someone would have to make an application.

Note, however, that everyone is presumed to have the capacity to make decisions for themselves about their personal care, and to be able to express those decisions, unless proved otherwise. A personal order under the PPPR Act cannot be invoked simply because a person makes decisions which may not seem reasonable to other people.

The Family Court may not make a personal order unless you normally live in New Zealand and are at least 20 years old. You must either:

- lack, partly or fully, the capacity to understand the nature of decisions about your own personal care and welfare, and the capacity to foresee the consequences of such decisions, or
- have these capacities – but be fully lacking in the capacity to communicate decisions about your personal care and welfare

These conditions would usually be established by a medical report considered by the Family Court.

## What kind of order can the Family Court make?

The Family Court will decide whether the person in question is mentally incapable, and whether or not an order should be made.

There are eleven types of personal orders which may be made. They deal in the main with specific matters including relatively low-value property of a person in need of a Family Court order.

## Who can apply for an order?

The people who can apply for a personal order are:

- you yourself
- a relative (a spouse, i.e. a person who has a relationship in the nature of marriage, parents and grandparents, children or grandchildren, brothers, sisters, aunts, uncles, nieces and nephews)
- an attorney
- a social worker from the Department of Child, Youth and Family Services
- a medical practitioner
- the principal manager of a place that provides hospital care, rest home care, or residential disability care, in which the person is a resident or patient
- a representative from any non-profit group that provides services and facilities for people over whom the Family Court has jurisdiction to make personal orders
- the manager of the person's property
- any other person, with leave of the Family Court

## Does the application need to be done through a lawyer?

No. You can obtain an application form from the Family Court, fill it in yourself, and then file it at the Family Court. There is no filing fee.

*Note: you are strongly advised to consult a lawyer. Each year there are a number of applications which are turned down because of incomplete information.*

Because of the legal nature and complexities of applying for orders under the PPPR Act, it may be in your best interests to ask a lawyer to act for you in making the application. It is always helpful to the lawyer if you have, or the person making the application has, a good grasp of the issues involved and possible remedies.

## How long does a personal order last?

The most common personal order is for the appointment of a welfare guardian. These orders are for no more than three years and are then reviewed. Other personal orders last for as long as specified by the Family Court before being reviewed.

## **If someone applies for an order on my behalf, who will represent my interests?**

The Family Court will appoint a lawyer to represent you if necessary, at public expense, who will also carry out appropriate investigations into your circumstances, and report to the Family Court.

Applications are usually decided without a hearing. Only rarely is a hearing required. If there is a hearing, matters are sometimes resolved at a pre-hearing conference when all the parties can discuss the issues and their concerns.

## **If I am considered mentally incapable, will I be able to attend the hearing?**

Yes, the PPPR Act requires that you be present at the hearing unless:

- the Family Court is satisfied that you wholly lack the capacity to understand the proceedings, or that attendance may cause you serious mental, emotional or physical harm, or
- you make such a disturbance throughout the hearing that the Family Court considers it is not possible to continue in your presence

## 6. PROPERTY ORDERS

The Family Court can also make orders about the administration of property. There are two kinds of orders about property:

- The Family Court may make an order to appoint a *property manager* for a person who lacks the competence to manage their own affairs. Property managers can be appointed for property of any value. As far as possible the Family Court will try and find out the wishes of the person concerned when appointing a property manager. A property manager may be paid for services.
- If the property is not large (no single item being worth more than \$2,000 or the income or benefit being less than \$20,000 a year) the Family Court may make a *personal order for property* instead of a full property order. A personal order to administer property can be granted to anyone the Family Court trusts to handle the property. A personal order has preference over a property order.

If you are over 18 years of age and your assets do not exceed \$100,000, you or someone on your behalf can ask a trustee company to take your affairs in hand by obtaining certificates from two doctors (one being a psychiatrist). The trustee company may manage your affairs, but must notify the Family Court. You can withdraw your affairs from the trustee company on seven days notice.

## When would the Family Court become involved?

The Family Court will become involved when someone makes an application. It will decide whether it has jurisdiction and make an order if it is satisfied that the person in need of an order owns property, and

- considers New Zealand their permanent home, and
- wholly or partly lacks the competence to manage his or her property affairs

or

- owns property in New Zealand, and
- lives or ordinarily lives outside New Zealand, and
- wholly or partly lacks the competence to manage his or her own property affairs

Everyone is presumed to be competent to manage his or her own property affairs, unless it is proved otherwise. A property order under the PPPR Act cannot be granted simply because a person makes decisions about their property which may not seem reasonable to others.

## Who can apply for a property order?

Any of the following can apply for a property order:

- you yourself
- a relative (a spouse, i.e. a person who has a relationship in the nature of marriage, parents and grandparents, children or grandchildren, brothers, sisters, aunts, uncles, nieces and nephews)
- an attorney
- a social worker from the Department of Child, Youth and Family Services
- a medical practitioner
- the principal manager of a place that provides hospital care, rest home care, or residential disability care, in which the person is a resident or patient
- a representative from any non-profit group that provides services and facilities for people over whom the Family Court has jurisdiction to make personal orders
- any welfare guardian appointed for the person under the PPPR Act
- any other person, with leave of the Family Court

The Family Court can also grant temporary orders for up to three months in urgent cases. When an application for the appointment of a property manager is made, a person has to be nominated for the position.

## What do property managers do?

The manager's powers include the right to sell property, carry out repairs, let property or carry on a business. When the Family Court appoints a property manager, it specifies which powers in the PPPR Act the manager may exercise.

Property managers must promote and protect the interests of the person whose property they manage and encourage that person to develop and exercise as much competence as they can to manage their own affairs. They must also consult that person and take advice from other interested people.

Property managers are only personally liable for their actions when they enter into contracts or arrangements without saying that they are acting for someone else; or if they act in bad faith without reasonable care; or if they act outside the powers granted by the Family Court.

The sorts of duties a property manager may take on could include:

- investing money on your behalf
- ensuring any property you own is kept in good physical repair
- giving money to charities you may have formerly given to
- advancing money to your dependants or close relatives for maintenance or education purposes



## **Are there any restrictions on what a property manager can do?**

A number of powers require Court approval, such as:

- making gifts over \$5,000 in any one year
- the purchase or sale of property for more than \$120,000
- leasing property for a term of more than ten years
- improving or developing a property at a cost of more than \$120,000

## **Does a property manager have a duty to consult?**

Managers have a statutory duty to consult with other people such as:

- you (the person involved)
- any welfare guardian
- immediate family or close personal friends
- service providers
- any other professional adviser who may be working with you or in your interests

## What happens if there are problems?

If the manager fails to consult, the Family Court could review the manager's decisions, but someone would need to make an application to the Family Court.

If the manager fails to act in the interests of the person concerned, the Family Court may:

- vary or decline the order
- discharge or decline to discharge the order
- extend the order
- make another order
- review the competence of the person who is the subject of the property order
- appoint a new manager

## Review of property orders

The Family Court has the power to review an order at any time and must review it after three years. The order lapses after three years if not renewed. In exceptional circumstances, the Family Court may extend the time for review up to five years.

## Financial reports

A property manager is required to file in the Family Court an annual statement of management of your financial affairs, which will be audited by Public Trust.

# 7. WELFARE GUARDIANS

## What is a welfare guardian?

If a person has not made provision for their personal care and welfare and is totally unable to communicate decisions or understand decisions, then the Family Court can appoint a welfare guardian for that person.

## What does a welfare guardian do?

Usually a welfare guardian will be able to make a wide range of decisions, on a long-term basis, on behalf of the person concerned. A welfare guardian will have all the powers that are reasonably required to promote and protect the welfare and best interests of the person. However, a welfare guardian should at all times seek to encourage that person to develop and exercise any capacity they may have.

As well as promoting the person's best interests, the welfare guardian should:

- encourage self-reliance
- help the person to live in the community as normally as possible
- consult with the person, if at all practical, and also with other interested people, such as a property manager or hospital caregiver

## Are there any limits on a welfare guardian's powers?

Yes, a welfare guardian does not have the power to:

- make any decisions relating to the person entering or dissolving a marriage
- make a decision relating to the adoption of the person's child
- refuse consent to medical treatment to save the person's life or prevent serious danger to their health
- consent to electro convulsive (ECT) treatment
- consent to brain surgery or brain treatment
- consent to a person being part of any medical experiment

## Who will the Family Court appoint as a welfare guardian?

In selecting and appointing a welfare guardian the Family Court must take account of:

- the wishes and needs of the person concerned
- the ability of the welfare guardian to perform in a satisfactory manner and in the best interests of the client
- their relationship and the likelihood of any possible conflict of interest

In addition, a welfare guardian must be:

- an adult (can be a relative or spouse)
- an individual (not a company or agency, such as a trustee company)

In very exceptional circumstances the Family Court may appoint two welfare guardians.

## Are there any safeguards?

Yes, the safeguards against abuse of power are as follows:

- Welfare guardians cannot make any important decisions regarding care without direction from the Family Court.
- Welfare guardians are not paid for their services, so cannot act out of financial motives. Their expenses, however, can be met.
- They can be personally liable for negligence or misconduct if they fail to disclose that they are acting as a welfare guardian.
- The Family Court may specify the areas of life over which authority is given.
- The order must be reviewed within three years and can be reviewed earlier on application.
- Decisions by welfare guardians can be challenged and reviewed by the Family Court.
- A new welfare guardian can be appointed in place of an unsatisfactory guardian in an application for review.

## Does a welfare guardian get paid?

Welfare guardians can be paid reasonable expenses. If you do not have enough money to pay these, a court order would authorise these to be paid from public funds.

## 8. SUMMARY OF YOUR RIGHTS

If someone applies to the Family Court for an order under the PPPR Act, you have the following rights:

- Legal options should only be used if all other means of care and support are exhausted.
- You should be consulted and encouraged to use whatever remaining capacity you have in making decisions.
- You are entitled to and will have legal representation whether or not you have the means to pay for it.
- The Family Court must choose the least restrictive alternative with regard to your cultural, religious and family values.
- Each and every order should be reviewed regularly, usually every three years.
- Your property manager or welfare guardian must act in your best interests. Their actions can be examined by the Family Court.

# ASK YOURSELF THESE QUESTIONS

Safeguards and things to consider when thinking about your enduring power of attorney -

## When appointing an enduring power of attorney:

- 1. Do you have absolute trust that the person you are appointing as attorney will always act in your best interests?**
- 2. Have you consulted your lawyer about your decision to appoint an enduring power of attorney?**

Sometimes the person you are granting power of attorney to will offer to take you to their own solicitor to arrange it. However, it is now a requirement of the PPPR Act that you receive independent legal advice. It is in your best interests to see your own lawyer.

- 3. How will your attorney decide when you are no longer able to manage things yourself, and it is time for them to step in and take charge?**

If your attorney suspects you no longer have your mental capacity, they must arrange for you to be examined by a relevant health practitioner. You can choose to specify in your enduring power of attorney who will make the assessment. For example, you may want a medical specialist in older persons' health (geriatrician) to confirm that you are no longer mentally capable. Whatever you decide, get this written into the enduring power of attorney.

**4. Think about some of the following ways of protecting your best interests and helping your attorney make the best decisions for you, by:**

- appointing one attorney to take charge of your personal care and welfare, and a different attorney to take care of your property and financial affairs if appropriate
- appointing more than one attorney to take care of your property and financial affairs. It might be better than leaving control over your affairs in the hands of one person alone.
- requiring your attorney(s) to make regular reports to a third person about the way they are managing your affairs. You may want your attorney to provide a written report to this person every 6 months. This helps to keep your attorney accountable. Whatever you decide, get this written into the enduring power of attorney.

## **When granting an enduring power of attorney for your personal care and welfare...**

**5. 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?**

If the answer is “only some things”, make sure they are written into the enduring power of attorney.



## When granting an enduring power of attorney to look after your property...

**6. Do you want your attorney(s) to take over things now, or later, when you can no longer look after things?**

Enduring power of attorney for care and welfare takes effect only when you become mentally incapable. However, an enduring power of attorney for property is different. It can take effect either immediately or when you become mentally incapable. You may want the attorney to manage some things now, while you manage the rest until a later time. Whatever you decide, get this stated in the enduring power of attorney.

**7. Will you appoint one attorney, or two, or even more? Or will you appoint a trustee company?**

Your interests might be better protected by appointing one or more attorneys to take care of things.

**8. Do you want to give your property attorney authority to take charge of all your money and property, or only some things?**

If the answer is “only some things”, make sure they are written into the enduring power of attorney.

## You can change your mind...

**9. Can I cancel the enduring power of attorney if I change my mind about who I want to be my attorney?**

Yes. You can cancel an enduring power of attorney at any time, for any reason, as long as you have not become mentally incapable.



For further information and advice contact your nearest community law centre or your local Age Concern.

The most up to date version of this information is available at [www.communitylaw.org.nz](http://www.communitylaw.org.nz) and [www.ageconcern.org.nz](http://www.ageconcern.org.nz)

The Wellington Community Law Centre provides free legal advice, education and information. It aims to satisfy the unfulfilled legal needs of the community, to demystify the law, and empower people to solve their own legal problems.

The Wellington Community Law Centre produces a range of publications about law-related matters.

Contact: Wellington Community Law Centre,  
PO Box 24-005,  
Wellington 6142.

Tel (04) 499 2928.

Fax (04) 472 2320.

Email: [info@wclc.org.nz](mailto:info@wclc.org.nz)

or visit the website at  
[www.communitylaw.org.nz](http://www.communitylaw.org.nz)

Age Concern is committed to serving the needs of older people, koroua and kuia. Through a national office and a nationwide federation of 34 members, branches and associates, Age Concern provides services, information and advocacy to older people in response to local needs. Age Concern is active and vocal on issues affecting older people, taking every opportunity to work towards the vision of an inclusive society where older people are respected, valued, supported and empowered.

To contact your local Age Concern see the local telephone directory.

Contact: Age Concern New Zealand,  
PO Box 10-688,  
Wellington 6143.

Tel (04) 801 9338.

Email: [national.office@ageconcern.org.nz](mailto:national.office@ageconcern.org.nz)

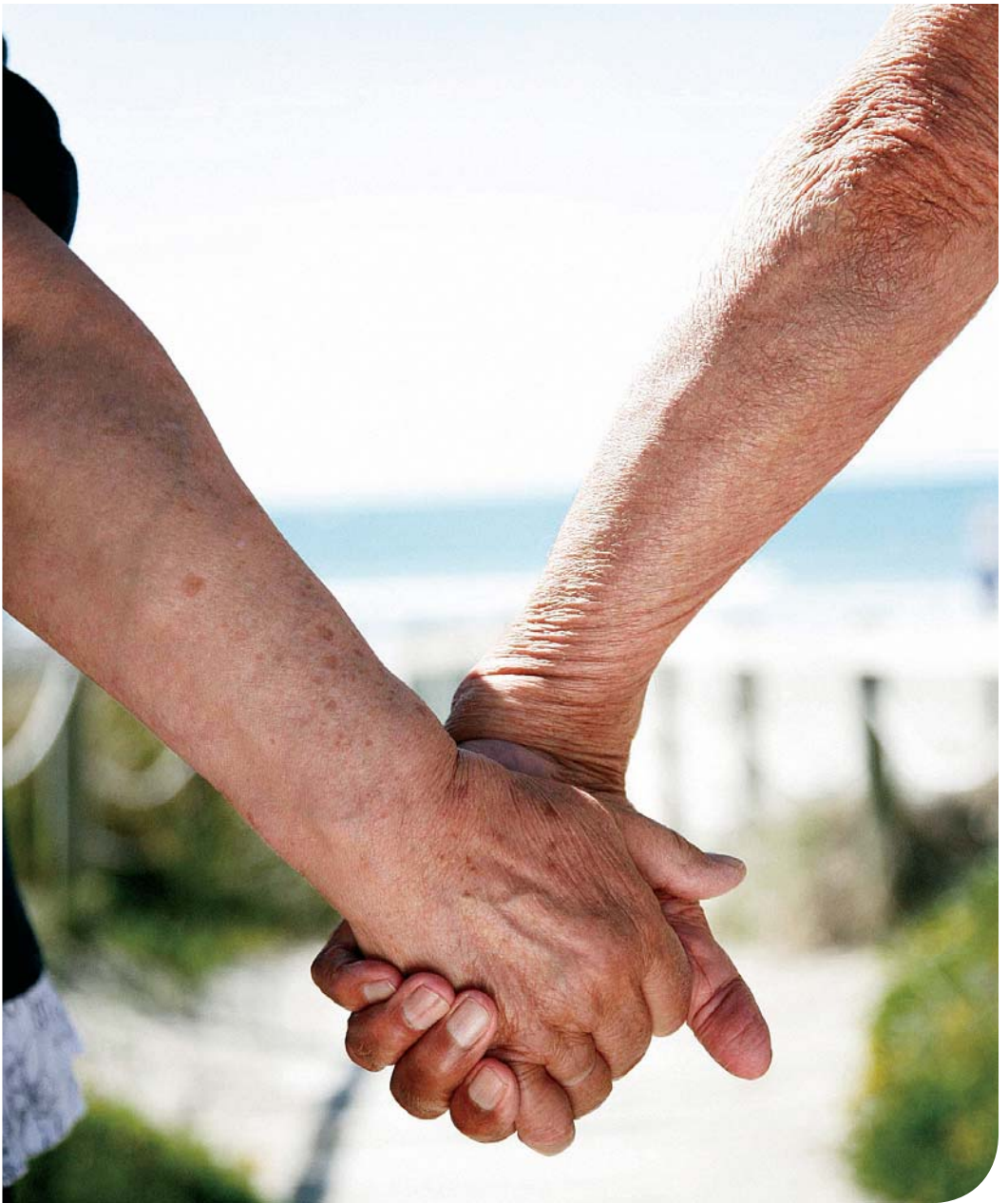
or visit the website at

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*Serving the needs of older people*



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