

## **ENDURING POWER OF ATTORNEY**

An enduring power of attorney is a legal document which sets out who can take care of your personal or financial matters if you can't. If you lose the capacity to handle your own affairs, you'll need someone to do it on your behalf so this needs to be arranged well in advance. Even if you've been married for many years, your spouse/partner will not be able to step in automatically to sort any accounts, policies or possessions if they are in your own name. They would need to go to court to be given that power. This could take months and at a high cost.

### **Two types of EPOA**

**Property** – You may have more than one attorney for this EPOA. An attorney who deals with your property covers your money and assets and can come into effect before you lose your mental capacity. The EPOA must state whether the power of attorney will have immediate effect or if it will come into effect only if you become mentally incapable. Your EPOA can write your cheques, look after your accounts and sell your home, depending on the power given or excluded in the document.

**Personal care and welfare** – You may have only one attorney for this EPOA. It covers where you live, care and health. Your EPOA has no control over money so must consult with your EPOA for property. It's important to select your EPOA's who are able to communicate and work together. An EPOA for personal care and welfare cannot act unless a relevant health practitioner has certified, or the Family Court has determined, that you are mentally incapable. You will be considered mentally incapable when you lack the capacity to make or understand decisions in relation to your personal health and welfare.

You may want to limit EPOA's authority in matters such as going into rest-home care. But you need to ensure the attorney has enough flexibility to deal with situations that you might not envisage. If the authority is too prescriptive, their ability to deal with changing circumstances could be undermined.

### **Revoking an EPOA**

You can vary, suspend or revoke an enduring power of attorney while you're still mentally capable. There are different procedures surrounding each of these actions. Legal advice should be sought, especially in regard to revocation.

The [Protection of Personal and Property Rights Act 1988](#) sets out requirements for enduring powers of attorney.

### **Reduce Risk**

There are measures you can take to protect yourself and reduce the risk of problems arising.

**Appoint two attorneys.** Appointments can be made "joint but not several" meaning neither attorney can act without the knowledge and approval of the other. The problem with requiring joint authority is that if one attorney is out of contact or incapacitated, the other can't act alone. The enduring power of attorney will cease to have effect if one of the attorneys dies and the court revokes the appointment, or if one attorney becomes bankrupt or mentally ill. There will also be a problem if the joint attorneys can't work together. Careful choice of joint attorneys is crucial.

**Appoint a professional or a trustee company.** An institution will be independent and will provide a check on an individual attorney. There will be ongoing professional costs for the work done.

**Restrict an attorney's powers.** Instead of giving an attorney full powers, you can limit of what they can do. For example, you can choose to give your attorney power to access your accounts but not sell your house. But don't go overboard with this. Having an attorney hamstrung with countless restrictions while you're unable to look after yourself could be as bad as having no attorney at all.

**Consulting parties.** You can also name parties with whom the attorney must consult before making decisions. The final decision still lies with the attorney, but the requirement of consultation can provide reassurance that the right decision will be made.

If significant sums of money are involved, two attorneys or an institution should be appointed.

### **Appointing an attorney**

You can choose practically anyone as your attorney, though to get enduring powers they must be 20 years old or over when taking on the role, a New Zealand resident, not bankrupt and not be suffering from any legal incapacity.

People often choose their partner as attorney, especially for personal care and welfare. If you are single, choose a trusted relative, friend, solicitor or accountant who is healthy and likely to outlive you, or (for property) a trustee corporation. Professionals will charge for their services, typically on an hourly basis for work done.

Consider whether the attorney has the skills, judgment and time to handle your affairs. Be aware that family members may find it difficult to act impartially, or may be influenced by other relatives.

Once you've appointed an attorney, avoid later misunderstandings by making sure that close friends and family members know.

### **An attorney**

If you are appointed as an attorney, you have certain key obligations you must meet.

**Property:** You must use the donor's property to promote and protect their best interests, and encourage them to develop the competence to manage their own property affairs. You must keep records of each financial transaction entered into under the enduring power of attorney while they're mentally incapable.

**Personal care and welfare:** You must promote and protect the welfare and best interests of the donor. You need to encourage them to understand decisions relating to their care and welfare, and encourage them to act on their behalf wherever possible. You must also help them integrate into the community – i.e. by contacting organisations who provide support and recreational activities.

### **Consultation**

You must, as far as is practicable, consult both the donor and any person that has been specified in the enduring power of attorney. An attorney for property should always consult with the donor unless there is a medical reason preventing their understanding.

If separate attorneys are appointed for property and care and welfare, both attorneys must consult regularly to ensure the donor's interests are not prejudiced through any breakdown in communication between them. The property attorney must give the personal care and welfare attorney any financial support required to carry out their duty. The care and welfare attorney must consider the financial implications of any decision in respect of the donor's property.

## Provide information on exercise of powers

You must provide information when requested if the person making the request is a lawyer appointed by the Family Court or is specified in the enduring power of attorney.

### Attorney's power to benefit

While a donor is “mentally incapable” an attorney can only act to benefit the donor, unless it is provided for or authorised by the Family Court. When creating the EPOA, a donor can specify provisions for when an attorney can benefit themselves or others. They may, for example, wish to authorise the attorney to assist a child with a particular problem.

The attorney is able to recover out-of-pocket expenses reasonably incurred and professional fees. Receipts or other reasonable evidence must be provided.

### Family Court

The Family Court has broad powers to monitor the performance of an attorney, vary the terms of the arrangement and if necessary revoke the authority.

The Family Court can review any decision made by an attorney while the donor is mentally incapable. It can review a decision by taking such actions as examining account and transaction records.

- The Family Court can revoke an appointment of an attorney if it is satisfied:
- an attorney is not acting in the best interests of the donor
- an attorney is failing to comply with certain obligations
- the donor of an enduring power of attorney was induced by undue influence or fraud to create the power.

The Court will not automatically monitor the performance of an attorney; it must receive an application for review. An application can come from a range of people including a relative, medical practitioner or anyone the Court gives leave to do so.

### Witnessing the document

The witnessing requirement for enduring powers of attorney was strengthened by the amendment of the Act in 2008. Your signature must now be witnessed by one of the following:

- a lawyer
- an authorised officer of a trustee corporation
- a Registered Legal Executive with at least 12 months' experience and employed by a lawyer

A ‘certificate of witness’ to your signature must be attached to the form. The certificate confirms that certain matters have been explained to you before you signed, that the witness is independent of the attorney, and that the witness has no reason to suspect you are mentally incapable.

### Fees

If you use a trustee company to prepare an enduring power of attorney, charges start from around \$250 to \$300 depending on the company. If you use a lawyer, fees will usually be based on an hourly rate or a task-based rate.

Before you sign-up, ask what the fees are likely to be. Lawyers must provide you with information in advance about their charges. Some [community law centres](#) may prepare enduring powers for a small charge. Check with your nearest centre. **The Public Trust will offer all RSA card holders \$50 off per Will and EPOA.** Some legal professionals offer a discount with the Super Gold Card.

More information, advice and EPOA resources can be found on the SuperSeniors website at [superseniors.msd.govt.nz](http://superseniors.msd.govt.nz) or at your local Citizens Advice Bureau, Public Library, Community Law Centre, Age Concern or by contacting your Legal Professional.