

ENDURING POWER OF ATTORNEY: WHAT? WHY? HOW?

What happens if you can no longer make decisions? Why you need an enduring power of attorney.

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He Manaakitanga Kaumātua
Aotearoa



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? There may come a time through an accident, serious illness or incapacity, when you become unable to make or communicate decisions yourself.

Many people assume that if they lose the ability to make decisions for themselves, their partner or a close relative will legally be able to make decisions for them. In fact, the law doesn't work like that.

The law, specifically the Protection of Personal and Property Rights Act 1988 (PPPR Act) allows for you to plan ahead by making what's called an enduring power of attorney – or "EPA" – where you give someone you trust the power to make decisions for you if you become unable to make them yourself.

An EPA does not replace any people you've chosen as executor or beneficiary in your Will. Your EPA is separate from your Will. On your death the EPA has no further authority and your Will takes effect instead.

This brochure explains how an enduring power of attorney (EPA) works and how to create one that will work for you.

WHAT IS AN ENDURING POWER OF ATTORNEY?

An enduring power of attorney is a legal document that allow you to plan for the future if you are not able to manage your affairs.

You can choose one or both kinds of EPA:

- One that covers your personal care and welfare
- One that covers your property

EPA FOR PERSONAL CARE & WELFARE

You can appoint a person (called your "attorney") to make decisions about issues like where you'll live, who'll look after you and what medical treatment you might need. This kind of EPA can only come into effect if you become incapable of making or communicating your decisions.

An EPA for personal care and welfare can be given to one individual. Another person can be named as a "successor attorney" if the first attorney becomes unable to act.

The EPA can authorise the attorney to act in relation to your personal care and welfare generally, or only in relation to stated aspects.

“An enduring power of attorney is a legal document that allow you to plan for the future...”



EPA FOR PROPERTY

You can appoint a person (called your “attorney”) to make decisions about your money and property. You can give them a general power to deal with all these issues, or you can limit them to dealing with, for example, a particular bank account.

In your EPA you can say whether the attorney can start using their powers and making decisions straightaway, or only if and when you lose “mental capacity”

You may appoint one or more people or a trustee company as your property attorney.

“You can appoint a person to make decisions about your money and property.”

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. The law sees your enduring power of attorney as being in a relationship of special trust with you (called a “fiduciary” relationship). They have to act with absolute openness and fairness towards you, exercise reasonable care, and avoid any conflict of interest with you. Your attorney must always promote and protect your welfare and best interests. They can’t use money for their own benefit (unless your EPA allows this), invest it unwisely, or act in a way that you haven’t authorised in the EPA.

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(s) and are confident that they will act in your best interests. At some stage you may be absolutely reliant on that person(s).

If your attorney for personal care and welfare or property 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. 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 can require your attorney to consult with family members and your GP about matters concerning your personal care and welfare.

The skills needed to look after personal care and wellbeing are often quite different from those needed to look after someone's financial affairs. Consider appointing one person as attorney for your personal care and welfare and a different person or persons for your property

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. However, either of them can go to the Family Court for directions if they cannot resolve a disagreement about your needs.

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, residential care facility manager or anyone else who may need to be involved with your EPA.

“It is crucial that you trust the person and are confident that they will act in your best interests.”

WHEN DOES MY EPA COME INTO EFFECT?

Your EPA will come into effect when it is decided you have lost 'mental capacity' (apart from if you have chosen for your property EPA to take effect when you signed it).

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

You've become "mentally incapable" if:

- 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.
- In relation to property, you are no longer completely competent to manage your own money or property

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.

“The question of whether you're still mentally capable must be decided by a health practitioner...”



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.

The health practitioner must have a scope of practice that includes assessing people's mental capacity and the certificate must include reasons for their opinion.

If necessary, the Family Court can be asked to decide whether someone is mentally incapable, and it will make a decision after looking at all the relevant information.

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.

When you make an EPA you must use the standard forms set out in the PPPR Act, otherwise they will not be valid.

Legal advisers will have these forms. You can look at these forms and read the guidance notes on the Ministry of Justice website: www.justice.govt.nz

or on the MSD Super Seniors website: www.superseniors.msd.govt.nz

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

These forms also provide the options that 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, 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 attorney(s) you appoint need(s) to sign the form and their signature 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 and appropriate medical certificate 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.

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

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

- 1) Get the forms to read and discuss them with your family / whanau and other people. Jot down notes about your ideas and questions
- 2) Decide what things you want your attorney(s) to do on your behalf and what you will not want them to do, so this can be included in your EPA
- 3) Ask people you would like to be attorney(s)
- 4) Decide when you want your EPA for property to come into effect – now or when you can no longer manage your affairs.
- 5) List all your main assets and debts owed by you. Also make a note of any money owed to you.
- 6) Consider who should have a copy of your EPA documents.
- 7) There are costs involved, so plan to discuss these with your legal advisor, Family Court or the professional you are dealing with.



- 8) Decide what steps you want taken to monitor and support your attorney in their role.
For example:
 - Require any decision making about where you will live or about your health/ medical treatment to be discussed with named people
 - Appoint a second person to oversee your financial records or to receive copies of all your bank statements and transactions
 - Require your accounts to be audited or reviewed once a year and for you (or a nominated person) to receive copies. This can be costly and would be paid by you.
 - Appoint another trusted person to meet regularly with your attorney to advise and support them in their role.
 - Ensure copies of your EPA are given to those people monitoring and supporting your attorney(s).

“Your attorney must always promote and protect your welfare and best interests.”

ASK YOURSELF THESE QUESTIONS:

1. Am I certain that the person I am appointing as attorney will always act in my best interests?
2. Will I appoint one attorney for property, or two, or more? Or will I appoint a trustee company?
3. Do I want to give my attorney authority to take care of everything to do with my personal care and welfare, or only some things?
4. Do I want to give my attorney authority to take care of everything to do with my property, or only some things?
5. Do I want my property attorney to take over things now, or later when I am no longer able to manage my affairs?
6. Who do I want to decide if I am no longer mentally capable? I can specify a particular type of health practitioner, provided they are qualified to make this assessment.
7. Do I want my attorney to be monitored and supported in their role by consulting with others?
8. If I have an EPA already, have I checked to see that it still meets my needs, especially if my circumstances have changed (such as the loss of my spouse or having a new partner)?
9. Have I read the guidance notes in the EPA forms?

WHERE CAN I GO FOR MORE INFORMATION?

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

You can access the Community Law Manual free online. For more information and to find your nearest Community Law Centre go to:
www.communitylaw.org.nz



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This brochure is intended to inform the public about the need for an enduring power of attorney. It contains information, but is not a substitute for independent legal advice on the subject.

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