



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

POWERS OF ATTORNEY

A power of attorney is a document appointing someone to make decisions on your behalf or sign documents for you. You need to think carefully about who you give this power to. There are various types of power of attorney. The most common type now is the enduring power of attorney (EPA) which is flexible and will allow the person you have named to continue acting even if you are no longer able to make decisions for yourself.

An EPA is an important document. You need good advice before you sign your EPA. But it is also important that you do not put off making an EPA – you do not know when you might need one.

Most people, if they think about EPAs at all, usually assume that these are for older people. In fact, anyone over the age of 18 may sign an EPA, unless there is a serious intellectual impairment. At any time in the future, an unexpected accident or illness might mean you are unable – possibly for some months or even permanently – to make decisions for yourself. Rather than having a court step in to decide who is to take charge, wouldn't it be much better if you have said in advance who is to speak for you in this situation.

WHAT IS AN EPA?

An EPA is a document in which you name a person (called your attorney) who is to have power to act on your behalf and make decisions for you. In some cases, two or more people may be appointed. You are known as the *donor*, the person who is giving the power of attorney. The person who you appoint to act on your behalf is the *attorney*. An attorney does not need to be a lawyer but should be someone that you trust to do the right thing for you. You can name two or more attorneys to manage your property but you need to say if they must all agree on all decisions (act *jointly*) or if any of them can act alone (*severally*) or decisions can be made by a majority of the attorneys.

POWERS OF ATTORNEY

There are two types of EPAs: those for Property and those for personal care and welfare. Property means everything that you own, including bank accounts, investments and so on. A personal care and welfare attorney is concerned with questions such as where you are to live and are you being properly cared for.

WHY DO YOU NEED AN EPA?

Life can be uncertain at times. Anyone at any age can have an accident or be hospitalised with a serious illness. Someone needs to make sure the mortgage and other bills are paid. Someone needs to ensure your children and other loved ones are being looked after if they were dependent on you. Someone should check that you are being properly cared for.

If you become incapacitated and have not signed an EPA, then the alternative is to get an order from the Family Court. The judge will not necessarily know who you rely on and who you trust to look after things for you. The judge will be reliant on the information provided to the court and will not know who among your family and friends is most able to be trusted.

WHAT ARE THE ALTERNATIVES TO AN EPA?

If you are unable to make decisions for yourself, and you have not signed an EPA, then it may be necessary to apply to the Family Court for an order. The list of people who are allowed to apply to the court includes a relative, a social worker, a medical doctor or the manager

GENERAL POWERS OF ATTORNEY

Before EPAs were introduced to New Zealand in 1988, it was quite common for people to sign a general power of attorney. The big draw-back is that, by law, the general power of attorney has no legal effect if ever the person who gave the general power of attorney loses mental capacity (i.e. is no longer able to make decisions). These general powers of attorney are useful for periods of temporary absence overseas or to allow someone to carry out a business transaction for you. They do not usually provide a long-term solution.

You can choose how wide your attorney's powers should be. For instance, it could

be a general power to look after all your money or property, or it could be more specific – perhaps appointing someone to manage your bank account and to let out your house while you are overseas.

You can choose more than one attorney. If you do, you need to say whether they must act together (jointly), separately (severally) or jointly and severally.

If you want someone to be able to act for you when you can no longer manage your finances, then you need to arrange an enduring power of attorney while you are still capable. A general power of attorney cannot be converted into an enduring power of attorney once you are no longer capable.

POWERS OF ATTORNEY

of the place where you are being cared for. The court can appoint a manager to look after your property. The court can also appoint a welfare guardian for your personal care and welfare. Getting these appointments made takes some time. The court is first required to appoint an independent lawyer to look into matters and report to the court. The cost of the independent lawyer's report may need to be paid from your money. This adds to the cost of getting the Family Court to appoint someone.

Unlike an EPA attorney, a property manager appointed by the court is obliged to report to the court every year providing full statements of account. Also property managers and welfare guardians usually have to go back to the court every three years to seek reappointment. Again there is a cost for all of this.

In some cases it may also be helpful for you and your spouse or partner to have a joint bank account. If one of you is no longer able to deal with financial matters the other one may be able to continue managing the account. However there can be draw-backs. For example if you put all of your money into a joint account and then you later die, the other account holder will usually take over all of the money as their own.

WHO CAN SIGN AN EPA?

You can sign an EPA if you are over the age of 18 and are competent to make decisions for yourself. If you do not have the necessary mental competence, then the EPA will not be valid. In the case of elderly people or others who may not have full mental capacity, it is usually wise to get a doctor's certificate before they sign the EPA. The doctor needs to be satisfied that the donor understands what an EPA is and just how much authority is being given to the attorney by the EPA.

Because signing an EPA is an important step, there are rules about who can witness your signature as donor (see the box below: "approved witnesses").

Remember that creating an EPA gives considerable power over your property affairs or personal care and welfare. However, your property attorney's paramount consideration under the PPPR Act is to use your property to promote and protect your best interests, while your personal care and welfare attorney's paramount consideration is to promote and protect your welfare and best interests.

WHEN DOES THE EPA TAKE EFFECT?

An EPA for personal care and welfare only comes into effect if you (the donor) become mentally incapable. The personal care and welfare attorney can only make important decisions if a doctor has signed a certificate to say you are mentally incapable. This is sometimes informally called "invoking the EPA". For other personal care and welfare decisions, the attorney must have reasonable grounds for thinking you have become mentally incapable.

POWERS OF ATTORNEY

With property EPAs, you have a choice. You can decide that the property EPA is to be effective only if you are mentally incapable. In that case, the property attorney may need to ask for a medical certificate before taking action. As an alternative, you can say the EPA is to be effective as soon as you sign it. This can avoid the need for a medical certificate. It can also be useful to have an EPA attorney who is able to act if you are overseas or temporarily unavailable to deal with your finances.

WHEN DOES THE EPA CEASE TO APPLY?

At any time you may cancel your EPA provided you are still mentally competent to do so. This can be done by giving notice of cancellation in writing to the named attorney or attorneys. There is a clause in the EPA form which you can choose and this will have the effect of cancelling any earlier EPA. However it is important to understand that this cancellation only takes effect once a copy of the new EPA has been sent to the previous attorney.

You can suspend your EPA by notice in writing to the attorney at any time. Until an attorney is notified of cancellation or suspension of the appointment, the attorney can continue acting on your behalf.

The Family Court can cancel the EPA if it believes the attorney is not doing the right thing or will not do so in future. Alternatively the court could appoint a property manager or welfare guardian whose authority takes priority over the attorney named in the EPA. However the court can only do this if an application is made by a relative or some other authorised person.

Finally, any EPA ceases to have effect once you have died. After your death, authority to manage everything you own passes to the executor named in your will. If you have not made a will – or the named executor is not available to act or does not want to act as executor – then the High Court may appoint an administrator to administer your estate.

WHO SHOULD I APPOINT?

You need to think very carefully about naming the right person or people in your EPAs. You are giving them a lot of responsibility. In addition, your attorney or attorneys may be called on to make decisions when you are no longer able to do so and you will be unable to keep an eye on what your attorneys are doing.

Each attorney needs to be someone you can trust to do the right thing. You also need to think about your family dynamics. If you name two family members, both of whom you trust absolutely, but they are unable to work together, then this can be a recipe for disaster. You should talk this through carefully with your lawyer before deciding who to name in your EPA.

Most people name a family member. Often the first named attorney is your spouse or partner, with one or more of your children being named as successor attorneys. These successor attorneys step into the role if the attorney who is named first can no longer carry out that

POWERS OF ATTORNEY

role. It is possible to name a professional such as a lawyer or accountant as an attorney. They will normally want the EPA to include a clause allowing them to charge for their time in managing your finances and property.

Although there is no automatic check on how well the attorneys are exercising their powers, the attorneys do have a legal duty to consult you, as far as practicable, and anyone else specified in your EPA.

The Family Court can appoint a property manager or welfare guardian whose authority will override the attorney. The Family Court also has authority to supervise attorneys and give them directions about the steps they may take. However, someone needs to apply to the court for that to happen. You can add conditions in your EPA about who the attorneys are to report to – see boxes below “things to think about”.

WHEN AND HOW DO YOU GO ABOUT MAKING AN EPA?

This is not something you should try at home. Signing an EPA is an important decision and you need good independent advice before you do so. That is why the law says that your signature must be witnessed by one of a list of approved witnesses (see box below).

It can be helpful if you have a look at the form of EPA and read the notes attached to it. See the section below “more information”. Before you get too detailed in your thinking, it is usually wise to arrange to see your lawyer and to discuss what you have in mind. Your lawyer will be able to advise what is practical in your circumstances.

It is usually wise to talk to the people who you intend to name as your attorneys. You should check they are willing to act as attorneys and they may want to find out what is involved

APPROVED WITNESSES – WHO CAN WITNESS AN EPA

There are strict rules about who can witness your signature as donor of the EPA. The witness must be independent of the attorney or attorneys.

When you sign the EPA, your signature must be witnessed by a lawyer, a qualified legal executive or an authorised officer or employee of a trustee corporation who is independent of the attorney. That witness must give you an explanation of the effects

and implications of the EPA and advice on certain matters. The attorney’s lawyer cannot do this.

There is no restriction on who may witness the attorneys’ signatures except that the witness cannot be the donor or the witness to the donor’s signature.

These rules are designed to ensure that the donor is not signing away control under an EPA without the opportunity for independent advice from a suitably qualified person.

POWERS OF ATTORNEY

before agreeing to do so. Your lawyer can help you with completing the EPA form. A lawyer who acts for a named attorney may not be able to witness your signature. It may be necessary for you to see another lawyer or approved witness, possibly someone in the same firm.

Remember that giving someone the ability to deal with your property or welfare means giving them an important power. You should think carefully about the person you plan to give this power to – and how much power you should give them. They can act without consulting you and you are bound by decisions they make on your behalf – so choosing someone you can trust is critical. Your attorney can be called to account for misusing the power and for acting contrary to your directions, but you are still bound by any action they have taken that affects other people.

CAN I ADD CONDITIONS OR GIVE DIRECTIONS?

You are able to add a number of conditions on your EPA form. You should talk to your lawyer or approved witness about whether these will be practical and realistic. You do not want your attorney to be so hampered by restrictions that the attorney cannot get anything done.

One clause that is often included in EPAs is a direction that the attorney or attorneys must consult with various named members of your family. It is important that family are kept fully informed as this can avoid disputes later on. You can go further and require the attorney to give reports or statements of account, perhaps each year or more often if you prefer. Again you want to be careful not to create unnecessary burdens for your attorneys.

Even if you say nothing about this in your EPA, your attorney is still required to consult you, the donor of the EPA, if you are able to be consulted.

PROPERTY EPAs – THINGS TO THINK ABOUT:

- Do you want to cancel any previous EPA? You will need to notify the attorneys named in the previous EPAs.
- Do you want to name a successor attorney or attorneys (in case the first named attorney is unable to continue in that role)?
- Is the EPA to become effective immediately or only if you are mentally incapable?
- If you have named more than one attorney, are they to act jointly (i.e. both must decide) or severally (either can decide) or by majority vote?
- Should the EPA apply to all of your property or only to some of your property or to do specified things?
- Do you want to impose conditions on any of those powers?
- Who should your attorney consult with and what should they consult about?
- Who should your attorney give information to and what information should they give?

POWERS OF ATTORNEY

- Should the attorney be entitled to profit from acting as attorney e.g. should attorneys be allowed to charge for their time?
- Should your attorney be allowed to apply to the Family Court if for some reason your will is out of date and needs to be changed?
- What other terms and conditions would you like to impose?

When you appoint your attorneys, you will need to be clear about what you want from them. You should discuss it with them and, once they are appointed, you should make sure they know what property you have, where you keep relevant documents and what your wishes would be in certain circumstances. For instance, you may want them to buy birthday or Christmas gifts for family members, or offer support to dependants, or make regular donations to charity. They cannot do any of these things, or do any other thing for the benefit of others or themselves, unless their authority to do so is clearly set out in the EPA.

EPA FOR PERSONAL CARE AND WELFARE – SOME THINGS TO THINK ABOUT

- Do you want to cancel any previous EPA?
- Do you want to name a successor attorney or attorneys (in case the first named attorney is unable to continue in that role)?
- Who should your attorney consult with and what should they consult about?
- Who should your attorney give information to and what information should they give?
- What other terms and conditions would you like to impose?

An EPA for personal care and welfare only takes effect once you no longer have the intellectual ability to make decisions about your own care and welfare. You can only name one attorney to act at first and your named successor attorneys can only act one at a time in the order you have named them.

There are also a number of things attorneys for personal care and welfare *cannot* do. For example, they cannot make decisions in relation to marriage or civil union or adoption of children, refuse medical treatment intended to save your life – or treatment to prevent serious damage to your health – or consent to some types of medical treatment such as brain surgery.

IS AN EPA THE SAME AS MY WILL OR A LIVING WILL?

No. Your will only takes effect when you die. Your enduring power of attorney deals with decisions that are taken while you are alive. On your death, the EPA comes to an end and your will takes over.

An advance directive (sometimes called a “living will”) is intended to provide guidance for doctors and your family when decisions need to be taken about medical intervention

POWERS OF ATTORNEY

while you are unable to make decisions for yourself. Doctors and family are often uncertain whether or not to go to extreme measures in order to keep someone alive. An advance directive can be helpful in giving family and doctors an idea of what you would want if you were able to speak for yourself. Your attorney for personal care and welfare should also be consulted at that time. This is quite different from both your will and EPA. It is always a good idea to make sure your family, your attorneys and your doctor are aware of your views in this respect.

Your lawyer can help you with preparation of an advance directive and also with a will dealing with your property and finances. Your attorney named in your EPA for personal care and welfare may take into account what you say in your advance directive.

CAN AN EPA MADE OVERSEAS WORK IN NEW ZEALAND?

Each country has its own laws about powers of attorney. Most English speaking countries have their own specified form of EPA. So an EPA made under the laws of another country is unlikely to be recognised in New Zealand. The best advice is to make an EPA in each country where you have property of any value or where you regularly spend an amount of time.

It is also unlikely that a New Zealand EPA would be recognised in other countries. Not all countries have laws allowing EPAs to be used at all. You should check with a lawyer in the country concerned if you think you need an EPA in another country.

CAN AN INTELLECTUALLY HANDICAPPED PERSON SIGN AN EPA?

In order to sign a valid EPA, the donor must have sufficient intellectual capacity to understand the document that is being signed. It is not necessary that the donor should understand every detail of what it is the attorney may have to do. It is enough that the donor understands, in general terms, the nature of an EPA and that the EPA gives the named attorney/s authority to make decisions about property or personal care and welfare.

If there is any doubt about the intellectual capacity of the donor, then it is important to obtain a medical certificate from a suitably qualified medical doctor before the EPA is signed. Your lawyer can advise the doctor about the requirements for intellectual capacity in this situation and can prepare a draft certificate for the doctor covering the relevant points.

Where a person is severely handicapped, he or she may be unable to sign an EPA due to lack of full intellectual capacity. In that case it may be necessary to apply to the Family Court for appointment of a property manager and/or welfare guardian. The application can be made by any one of a number of people including a relative, a social worker, a medical doctor, a representative of an organisation such as IHC or the manager of the place where the person is being cared for.

POWERS OF ATTORNEY

GLOSSARY - A FEW DEFINITIONS

| | |
|---------------------------|--|
| Attorney | A person who you appoint to make decisions on your behalf. This is not necessarily a lawyer. |
| Capacity | See mental capacity. |
| Donor | The person who <i>gives</i> the EPA i.e. who gives authority to the named attorney/s to act on the donor's behalf. |
| EPA | The usual abbreviation for Enduring Power of Attorney. |
| Incapacity | Lack of mental capacity – see mental capacity below. |
| Invoke | Where an EPA is to take effect only if the donor no longer has mental capacity then the formal step of obtaining a doctor's certificate may be necessary. This is sometimes informally referred to as "invoking" the EPA. |
| Legal Executive | Legal executives work under the supervision of a lawyer. Although not qualified as lawyers, legal executives have to go through a course of training and pass several exams. They are allowed to witness the signature of the donor of an EPA and are able to explain the effect of the EPA and how it will work. |
| Mental Capacity | The state of mind and level of understanding necessary in order for someone to be able to sign legal documents such as EPAs, wills and contracts etc. They are not legally valid unless the person who signed had the necessary level of mental capacity. |
| Personal care and welfare | Decisions about personal care and welfare affect your personal well-being, not property or financial matters. There are some things that do not come within the authority of a personal care and welfare attorney (see the box above "EPA for personal care and welfare – some things to think about"). |
| Power of Attorney | A document which authorises the named attorney to speak for and act on behalf of the person who gave the power of attorney. There are a number of different types of power of attorney. Most common now is the enduring power of attorney. There are also forms of powers of attorney signed by trustees who wish to delegate their role while overseas or physically disabled. (A power of attorney to delegate or hand over the duties of a trustee cannot be an EPA.) |
| PPPR Act | The Protection of Personal and Property Rights Act 1988. This is the law which covers EPAs. It also covers the appointment of property managers and welfare guardians by the Family Court. |

POWERS OF ATTORNEY

| | |
|---------------------|---|
| Property | Everything that you own. This includes money, investments, business, furniture, household and personal items, motor vehicles and so on. |
| Property Manager | A person appointed by the Family Court to manage the property of someone who is no longer able to do so themselves. If there is no attorney acting under an EPA for property – or the court has decided the named attorney is not appropriate – then a property manager is appointed. |
| Revoke | To cancel so that the document no longer has effect. |
| Trustee Corporation | People employed by trustee corporations are allowed to witness the donor's signature on an EPA. Effectively there are now only three such organisations doing this work: Public Trust, Perpetual Guardian and Trustees Executors Limited. |
| Welfare Guardian | A person appointed by the Family Court to manage the personal care and welfare of someone who is no longer able to make such decisions. If there is no attorney acting under an EPA for personal care and welfare – or the court has decided the named attorney is not appropriate – then a welfare guardian can be appointed by the court. |