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LAW SOCIETY

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POWERS OF ATTORNEY

What do you do if you want someone to help look after your affairs? What if you become unable to look after yourself or make decisions about your own affairs? Who can make decisions about your welfare and who can deal with your property, operate your bank accounts, pay your bills? Who would you want taking care of you and your affairs if you were no longer able to?

A power of attorney gives someone (the attorney) the authority to act legally on your behalf to the extent specified in the power of attorney. There are two main types of powers of attorney – a general power of attorney and an enduring power of attorney. This guide describes what is involved in each of these. It also outlines what can be done if a person needs care but is not capable of granting a power of attorney, and it mentions “living wills” and “advance directives”.

WHAT IS A GENERAL POWER OF ATTORNEY?

With a general power of attorney, you appoint someone to help look after your affairs. The person could be a family member, friend, lawyer, other adviser or a trustee company. It does not prevent you continuing to look after your own affairs, but simply allows the person you appoint to do so as well.

You can choose how wide the powers you grant 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 letting 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.

A general power of attorney remains valid only while you still have legal capacity – it

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ceases to be valid as soon as you no longer have the mental or physical capacity to instruct the attorney. If, for instance, you have an accident that leaves you with brain damage, the person could no longer act for you under a general power of attorney.

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

A general power of attorney also ceases immediately the person who granted it dies. In that event, the power to deal with property, bank accounts, etc, passes to the executor named in the will or if there is no will, the person appointed to administer the estate.

To grant a general power of attorney, you need to complete a form (available from lawyers and elsewhere) stating the extent of the powers that you (as donor) are granting. You need to sign the form and have your signature witnessed by another person. You can grant the power for a limited time or leave it open-ended. You can revoke, amend or extend the power at any time. This should be done in writing with the document properly signed and witnessed. Also, people who have been relying on its authority (the attorney, banks, etc) need to be informed as they are entitled to continue acting on it until they have been advised otherwise. Signing a new power of attorney does not automatically revoke a previous one unless that is specifically stated.

Remember that giving someone the ability to deal with your property is to give them an important power, so you should think carefully about the person to whom you plan to give this power, and how much power to 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 3rd parties. You should seek legal advice about the effect of granting a general power of attorney.

WHAT IS AN ENDURING POWER OF ATTORNEY (EPA)?

Unlike a general power of attorney, an enduring power of attorney allows the attorney to act for you if you become mentally incapable. However, you must arrange an EPA before you become mentally incapable; otherwise the power will be invalid. If you are already incapacitated, you are deemed not capable of granting a valid power of attorney. You should consider allowing the power to take effect immediately. This means your attorney can act whilst you are mentally capable, if you want or need them to.

For a definition of “mentally incapable”, see section 94 of the Protection of Personal and Property Rights Act 1988 (the PPPR Act) as amended by the Protection of Personal and Property Rights Amendment Act 2007. If you are already incapacitated, those who want to care for you and make legal decisions for you would need to apply for court orders

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under the PPPR Act (see “What if a person is already mentally incapable?” below). This takes longer and is considerably more expensive than setting up an EPA, and the person appointed might be someone you would not have chosen.

There are two types of EPA. One gives the attorney the right to manage your financial affairs and deal with your property. The other gives the attorney the right to make legal decisions about your personal care and welfare. It is recommended that you arrange both. These can be given to the same person or to different people, but even if you give them both to the same person, you need to grant each power specifically and separately, though this can be done in the same document. In both cases you can authorise the attorney to act in respect of all of your affairs or only some of them, in which case you must specify which ones.

You can also set conditions and restrictions about how your property should be dealt with or what you would like to happen to you. It is you as donor and not the prospective attorney who has the right to decide just what the powers should encompass. If you want steps to be taken to determine that you are no longer able to manage your own affairs, write these into the terms on which the power of attorney is granted.

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.

You should seek legal advice about the implications of this and you should make sure that the people you choose as attorneys are ones you can trust to act in your best interests as, at some stage, you may be relying on them absolutely. Choose your own lawyer to talk to. Except where you are appointing your spouse or civil union partner as your attorney, the lawyer advising you cannot also be your prospective attorney’s lawyer.

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 fulfil this role.

A PROPERTY EPA

An EPA for property gives the attorney the power to act on your behalf with respect to property you own. Property includes not only land and houses but also businesses, bank accounts, shares and all other possessions and debts – that is, everything you own or owe.

You can give your attorney a general authority to act on your behalf or you can limit it to specific circumstances or specific property. You do not have to give your attorney unlimited power – you can choose which decisions you want them to make and set the limits by specifying conditions and restrictions.

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You can choose whether you want the EPA in respect of property to take effect *only if* you become mentally incapable, or whether it is to have immediate effect and continue to operate if you become mentally incapable. If you choose an EPA that comes into effect only if you are mentally incapable, your attorney cannot act under it unless a relevant health practitioner certifies or the Family Court determines that you are mentally incapable. In assessing whether you are mentally incapable, the health practitioner will need to have regard to the presumption of competence in section 93B of the PPPR Act.

An attorney may have to make decisions about whether to sell your home or get a mortgage to pay for your care in a hospital or rest home, about how to manage any business you own, how to invest your money, when to buy or sell shares for you, and so on. This is a big commitment, and a highly responsible and powerful role. Therefore, you might wish to choose more than one attorney to exercise an EPA for your property – the law allows you to do this.

If you decide to appoint attorneys to act jointly (and not separately) to manage your property, then they must act together and anything requiring a signature will require the signatures of all the attorneys. Advantages of this are that the attorneys can act as a check on one another and share the weight of what can be a very responsible role.

You can appoint attorneys to act jointly or separately. This means they can act together or one of them can act independently of the others.

You might also want to appoint a substitute attorney (also known as a successor attorney) in case your original attorney's appointment ends. If you do not, and the original attorney dies or loses capacity themselves, the EPA ceases to apply and an application may need to be made to the court to appoint a property manager or welfare guardian.

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 specified in the EPA.

If you are married to or in a civil union or a de facto relationship with your property attorney, and live together and share your incomes, your attorney will be able to benefit others and themselves in dealing with property that you jointly own unless you specify otherwise in the EPA. This will not apply to property that you and your attorney own as tenants in common (that is, in which you both have separate shares).

A PERSONAL CARE AND WELFARE EPA

An EPA for your personal care and welfare enables your attorney to make legal decisions

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about your personal care in the event of your mental incapacity. For instance, your attorney can decide if you need to go into care, what home or hospital you will go to, what sort of medical treatment you should have, and so on.

You can authorise your attorney to act on your behalf either generally or only in relation to specific matters. However, even if you give a general authority, the law restricts some of the decisions that your attorney can make. For instance, they cannot make decisions in relation to marriage or civil union or adoption of children, refuse medical treatment intended to save your life or prevent serious damage to your health, or consent to certain medical treatment (some brain surgery, medical experiments or electroconvulsive treatment).

You can appoint only one person to act as your attorney in relation to personal care and welfare at any one time, but you can nominate a substitute or successor attorney to act if the first person is no longer able to.

You cannot appoint a trustee corporation as your attorney for personal care and welfare. The appointment operates only when you become mentally incapable – that is, when you no longer have the ability to make or understand a decision about your personal care and welfare or to communicate your wishes in this regard.

Your attorney will not be able to act on a *significant matter relating to your personal care and welfare* unless a relevant health practitioner has certified, or the Family Court determines, that you are mentally incapable. You can choose whether a general medical practitioner or a psychiatrist determines your mental capacity.

A *significant matter* is one that has, or would be likely to have, a significant effect on your health, well-being or enjoyment of life, such as a permanent change in your residence, entering residential care or undergoing a major medical procedure. Your attorney cannot act on any other matter relating to your personal care and welfare unless the attorney has reasonable grounds to believe you are mentally incapable. Your mental capacity must be determined when the decision about your personal care and welfare matter is being made, and in relation to the matter concerned.

WHO SHOULD SET UP AN EPA – AND WHEN?

Everyone 18 or older – whether young or old – should establish an EPA for both their property and their welfare.

And, as you need to do it while you are still mentally capable, you should do it now. People tend to think only the elderly are likely to need someone to manage their affairs but anyone can become mentally incapable at any age. An accident may leave you with brain damage, a stroke can leave you mentally and physically disabled, conditions such as Alzheimer's disease or senile dementia can strike people at relatively young ages. So, just as we should all have a current will, it is advisable for all of us to set up an EPA – "just in case".

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The personal care and welfare EPA cannot take effect until you are mentally incapable and you can also stipulate that the property EPA not take effect until you are mentally incapable. However, if you do restrict your property EPA to take effect only when you are mentally incapable, your attorney may not be able to act. Mental incapacity can fluctuate from hour to hour or day to day. It may be difficult for your attorney to manage your property affairs if there is any doubt about your capacity at the very time they need to take action to guard your assets. Do discuss this carefully with your lawyer.

A good time to arrange the EPAs is when you are making your will, especially as an attorney may have to make decisions affecting property dealt with in your will. Like a will, an EPA can be revoked, replaced or varied by you at any time before you become mentally incapable. This should be done in writing and be properly signed and witnessed, and people who have been relying on the EPA authority need to be notified.

As different procedures are involved depending on how you want to change your EPA, you should seek legal advice. After you have become mentally incapable, only the court can change the terms of an EPA. If you are certified by a relevant health practitioner as mentally incapable because of a health condition likely to continue for a specified period or indefinitely, no further certificates will be required during that time.

WHO SHOULD YOU APPOINT?

You can appoint any individual as an attorney provided he or she is over 20 years of age, is not a bankrupt and is not mentally incapable. An attorney could be - but does not have to be - a lawyer. You can appoint a friend, a member of your family or other trusted adviser. A trustee corporation can be appointed attorney in respect of property but not for personal care and welfare.

A lawyer or trustee corporation is likely to expect remuneration for their services. As there are serious responsibilities involved that can take a lot of time and work, you may also wish to provide remuneration for anyone else that you appoint as an attorney. Unless you specifically provide otherwise, your attorney can be paid out-of-pocket expenses (but not lost wages or remuneration) and an attorney who has accepted appointment or done work in a professional capacity (for example, a lawyer) can be paid professional fees and expenses.

The powers granted to deal with your property and your care can be very wide. They include, for instance, a property attorney's power to make a will for you with court approval if you lack capacity (though you can limit or negate this power). Therefore, you need to be able to trust the people to whom you give these powers.

It is a big commitment, so you should talk it over with the people you propose to appoint. The serious nature of the duties and powers involved mean you should think carefully about who you appoint. It is preferable that they don't have any interest that might conflict with their duties to you when you are mentally incapable. For instance, if they are likely

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to benefit from your will, this could affect how they deal with your property or the sort of care they choose for you. Also, they need to have the skills to manage your affairs well and to keep proper records of financial transactions under an EPA for property.

If you appoint different attorneys for property and for welfare, remember that they will need to be able to work together. The attorney for property has to give the personal care and welfare attorney the financial support required to carry out that attorney's duties in relation to your personal care and welfare, subject to the EPA and any order of the court. The personal care and welfare attorney, in turn, is required to consider the financial implications of decisions relating to your personal care and welfare. Both attorneys are also required to consult each other regularly to ensure your interests are not prejudiced by any breakdown in communications between them.

HOW DO YOU ARRANGE AN EPA?

Your lawyer will have forms that can be prepared quickly at a reasonable price. Your lawyer will also be able to advise you about the legal implications of what you propose and what is required to make sure that your wishes will be enforceable.

It is possible to draw up an EPA without going to a lawyer. For instance, there are standard forms for both types of EPA set out in the Protection of Personal and Property Rights (Enduring Powers of Attorney Forms) Regulations 2008. However, you and anyone nominated as attorney must each sign the form. In addition, your signature must be witnessed by a lawyer, a qualified legal executive or an officer or employee of a trustee corporation who has explained the effects and implications of the EPA and advised you of certain other matters. Also, someone other than you or your witness must witness your attorney's signature.

A lawyer or legal executive will generally charge a fee for providing the advice, witnessing the EPA and completing the certificate. As you will be signing over some very important legal powers, it is advisable to speak to your own lawyer so you can be sure that you and whomever you are appointing as attorneys clearly understand what is involved.

Your attorneys will need access to the original EPA documents as evidence of authority to act on your behalf once it takes effect. You should also keep a copy for your own records and give a copy to others who may need to know your wishes. The signed EPAs will need to be produced to those being asked to accept their authority (banks, etc).

WHO CHECKS ON THE ATTORNEYS?

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. You can also require your attorneys to provide, on request, to people you name, specified information about their actions under the EPA while you are

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mentally incapable. This enables the named people to monitor your attorneys' actions.

The Family Court can also monitor the performance of your attorneys and can vary the EPA terms, but it will do so only if an application is made to the court. It can be asked to review decisions attorneys make. Attorneys themselves can ask the court for directions if they are having difficulty carrying out any of your instructions or deciding what to do (for example, if they receive conflicting advice).

The court can give directions about matters relating to the exercise of the EPA, can require an attorney to produce accounts, records and information, and can modify the scope of the EPA. It can even revoke an attorney's appointment if it feels the attorney is not acting in your best interests or is failing or proposes not to comply with the consultation or information-providing obligations placed upon them.

However, someone needs to apply to the court for that to happen so you may wish to instruct your attorneys to report regularly to your lawyer or to someone else who could apply to the court if they felt the powers were not being exercised properly. You would need to get your lawyer's agreement to do this. Remember that there would be a cost involved.

HOW LONG DOES AN EPA HAVE EFFECT?

An EPA ceases to have effect when:

- the donor, while still mentally capable, revokes the power by notice in writing to the attorney;
- the attorney gives notice in writing to either the donor (if still mentally capable) or the court (if the donor is no longer mentally capable) that she or he no longer wishes to act as attorney;
- the donor dies;
- the attorney (or a joint attorney) dies, becomes a bankrupt, becomes mentally incapable or otherwise incapable of acting as attorney; or
- the court revokes the power because the attorney is not acting in the donor's best interests, or the attorney exerted undue influence or acted fraudulently to obtain the EPA, or is not suitable to be the donor's attorney.

If you have been mentally incapable but have recovered capacity, you are entitled to suspend your attorney's authority to act by giving written notice to the attorney. The suspension does not revoke the EPA and your attorney will be able to act again if a relevant health practitioner certifies, or the court determines, that you are again mentally incapable.

WHAT IF A PERSON IS ALREADY MENTALLY INCAPABLE?

When someone is already mentally incapable and so unable to authorise someone else to act on their behalf, a relative, social worker, medical practitioner or certain other classes of people (as listed in the PPPR Act) can apply to a Family Court for orders appointing people to act as a manager of the person's property and as a personal welfare guardian.

The same person could be appointed to take care of both property and personal welfare but it is also possible to have separate appointees. The appointee must be prepared to act in the best interests of the person for whom the application is being made. The Act places some limits on the sort of decisions a welfare guardian can make, especially in relation to medical treatment and decisions about marriage or civil union or adoption of children.

While a welfare guardian cannot get paid, they are entitled to have reasonable expenses paid out of the property of the person for whom they are acting. A property manager is also entitled to expenses and can be paid, but only if the court authorises that. The lack of remuneration can make it difficult to find people willing to take on these responsibilities so it is much better to have EPAs in place.

Property managers have a duty to consult others interested in the welfare of the person for whom the order was made and they must submit annual statements to the court. There are some restrictions on what a property manager can do – for instance they need the court's permission to buy or sell a property worth more than \$120,000. In cases where a full property manager or welfare guardian is not warranted but some assistance may be required, the court can make various personal orders. If you are caring for someone who may need particular help, ask the Family Court or a lawyer about what orders are available.

WHAT HAPPENS ON DEATH?

A power of attorney (general or enduring) ceases to have effect immediately the donor dies. The person holding the power can no longer act. For instance, they would not be able to sign a cheque to pay the funeral expenses. The powers transfer to whoever is named executor in the will or appointed as administrator of the donor's estate. Similarly, any authority granted by court order for the care and welfare of a mentally incapable person or management of their property expires immediately the person dies.

LIVING WILLS AND ADVANCE DIRECTIVES

A **living will** or **advance directive** is a written or oral instruction made while you are in good health and of sound mind. It gives directions as to what you would want to happen should you suffer an illness or accident that leaves you incompetent to make or communicate

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decisions about your health care. A living will or advance directive is not an alternative to enduring powers of attorney, which give people the legal power to act for you in whatever way they think fit while you are alive but incapacitated.

The living will or advance directive may not be legally effective but may give your family and the medical profession an indication of your wishes (it may be described as “a statement of wishes regarding health treatment”). If it covers the particular circumstances that have arisen and expresses your true wishes, it would be lawful to rely on the directive and possibly unlawful to ignore it. The Code of Health & Disability Services Consumers’ Rights (Rights 7(5) and 7(7)) refers to advance directives.

If you are drawing up a living will, advance directive or statement of wishes, it is advisable to discuss it with your lawyer and doctor. An attorney acting under an EPA for personal care and welfare may, after consultation with you and any other people you have nominated in the EPA, act on an advance directive to the extent that it does not require the attorney to do anything the PPPR Act prevents a personal care and welfare attorney from doing.

DO THE RIGHT THING – SEE YOUR LAWYER FIRST

Lawyers deal with many personal, family, business and property matters and transactions. No one else has the training and experience to advise you on matters relating to the law. If your lawyer can’t help you with a particular matter, he or she will refer you to another specialist. Seeing a lawyer before a problem gets too big can save you anxiety and money.

Lawyers must follow certain standards of professional behaviour as set out in their rules of conduct and client care. When you instruct a lawyer, he or she must provide you with certain information, as outlined in our guide *Seeing a lawyer – what can you expect?*

This includes informing you up front about the basis on which fees will be charged, and how and when they are to be paid. The fee, which must be fair and reasonable, will take into account the time taken and the lawyer’s skill, specialised knowledge and experience. It may also depend on the importance, urgency and complexity of the matter. There could also be other costs to pay, such as court fees.

Lawyers must have a practising certificate issued by the New Zealand Law Society. You can call the Law Society on (04) 472 7837 or email registry@lawsociety.org.nz to see if the person you plan to consult holds a current practising certificate. You can also check this on the register accessible through the website www.lawsociety.org.nz.

If you have a concern about a lawyer, you can talk to the Lawyers Complaints Service, phone 0800 261 801.

If you don’t have a lawyer:

- Ask friends or relatives to recommend one;
- Look in the Yellow Pages under “lawyers” or “barristers and solicitors”;

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- Inquire at a Citizens Advice Bureau or Community Law Centre;

Check these websites:

- www.lawsociety.org.nz/home/for_the_public/find_a_lawyer;
- www.familylaw.org.nz;
- www.propertylawyers.org.nz.

To the best of the New Zealand Law Society's knowledge, all information in this guide is true and accurate as at the date below. However, the Law Society assumes no liability for any losses suffered by any person relying directly or indirectly on information in this pamphlet. It is recommended that readers consult a lawyer before acting on this information.

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