

Standard explanation of effects and implications of enduring power of attorney in relation to personal care and welfare

Protection of Personal and Property Rights Act 1988

About this document:

This document is intended for a witness to an enduring power of attorney (**EPA**) in relation to **personal care and welfare** to use with a person who is considering creating such an EPA. It has 3 parts, entitled as follows:

- Standard explanation of effects and implications of EPA
- Instructions for **authorised witness**
- Glossary of terms.

The witness should refer first to the second part, entitled "Instructions for authorised witness". See the third part, entitled "Glossary of terms", for the meanings of words and expressions in **bold italics** in this document.

Standard explanation of effects and implications of EPA

What does it mean to have an EPA?

Your EPA authorises the person you name as your **attorney** to make decisions on your behalf about your personal care and welfare if you become **mentally incapable**.

Your attorney can make decisions only on the personal care and welfare matters you specify in the EPA. In making decisions, your attorney has to follow any conditions and restrictions set out in your EPA and the **Act**.

Unlike an ordinary power of attorney, an EPA comes into force only if you lose mental capacity. Your attorney's decisions apply as if you had made them and had full capacity to make them.

When does your EPA take effect?

Your EPA takes effect only if you become mentally incapable.

Your attorney can make decisions on a **significant matter** relating to your personal care and welfare only if a **relevant health practitioner** has issued a **medical certificate** stating that you are mentally incapable or if the **court** has decided that you are mentally incapable.

If you are certified as mentally incapable because of a health condition that is likely to continue for some time (or indefinitely), additional decisions on significant matters can be made without getting another certificate during the certified time.

Your attorney can make decisions about any matter related to your personal care and welfare that is not a significant matter (for example, common medical treatment) if they have reasonable grounds to believe that you are mentally incapable.

Your mental capacity must be assessed:

- at the time your attorney proposes to make or makes a decision on a matter; and
- in relation to the matter concerned.

Anyone can rely on decisions or actions made by your attorney if they are dealing with your attorney in good faith and do not know that the EPA has been **terminated**, the

attorney's appointment has **ended**, or the attorney's authority to act has been **suspended**. Your attorney can give people who are dealing with them a certificate stating that they have not received any notice that the EPA is terminated, their appointment is ended, or their authority to act is suspended.

What are your attorney's responsibilities?

When acting under the EPA, the overriding consideration of your attorney is to promote and protect your welfare and best interests.

Your attorney must encourage you to develop your own competence to act on your own behalf as much as you possibly can, and to be part of the community. They must consider the financial effects of any decision about your personal care and welfare.

Your attorney must follow any court orders under the Act that relate to your EPA and any personal order or property order under the Act, even if there is a conflict between the order and your EPA.

Is there anything your attorney cannot do?

Yes. There are some things that the law says can only be done personally (for example, making an oath or a declaration). No one can do those things on your behalf. Your attorney is also restricted by any conditions and restrictions that you specify in your EPA. Even if there are no conditions or restrictions in your EPA, there are certain things that your attorney cannot do. Your attorney cannot:

- make a decision entering you into a marriage or civil union, or dissolving your marriage or civil union
- make a decision about the adoption of any of your children
- refuse consent to you having medical treatment that might save your life or prevent serious damage to your health
- consent to you having electro-convulsive treatment, or any surgery or treatment on your brain that's meant to change your behaviour
- consent to you being part of a medical experiment, unless it is to save your life or prevent serious damage to your health.

Your attorney also cannot act for their own benefit or for the benefit of anyone else other than you.

Who does your attorney need to consult?

When acting under the EPA your attorney must, as far as is practicable, seek advice from you and from anyone you have named in your EPA to be **consulted** (either on all matters, or on the specific matters you have stated in your EPA).

If you have appointed someone else to be your property attorney, your attorneys must regularly consult each other to ensure that your interests are not disadvantaged by any breakdown in communication between them. Your property attorney should provide your personal care and welfare attorney with any financial support (out of your property) needed for your personal care and welfare.

Your attorney must also consult any other attorney you have appointed under any other EPA that continues in effect, except a **successor attorney** whose appointment has not yet taken effect.

Your attorney may follow any advice received in consultation, provided that they act in good faith and with reasonable care. Your attorney has the option to apply to the court

for **directions** if the attorney receives conflicting advice from consultation.

What happens to any advance directives you have given?

Your attorney may follow any **advance directive** you have given. They must do so in good faith and with reasonable care. Before doing so, they must first consult you and anyone you have specified in your EPA that you want to be consulted.

Your attorney cannot follow an advance directive that asks them to do something that they are prohibited from doing (see "Is there anything your attorney cannot do?"). You may wish to seek further advice about the effect of an advance directive.

Your attorney has the option to apply to the court for directions about any advance directive.

Your attorney's actions can be supervised

You can name a person or people in your EPA to oversee your attorney's actions and state what information about the exercise of your attorney's powers is to be given to them. Your attorney must promptly give this information to them when they ask for it.

Your attorney's actions can be challenged

Some people have the automatic right to apply to the court to review any decision your attorney makes while acting under your EPA.

These people include:

- you
- any **relative** of yours
- medical practitioners
- the manager of any hospital, rest home, or residential care facility you are receiving care in
- a person from a government-funded abuse and neglect prevention service
- a social worker.

Any other person can apply to the court to review your attorney's decisions, but they need the permission (leave) of the court to do so.

An application for review of your attorney's decisions can be made at any time, including after the EPA has ceased to have effect. If an application for review is made, you will need a lawyer to represent you. The court will appoint a lawyer to act for you if you do not already have one.

The court can make any order it thinks fit.

What other powers does the court have in respect of the EPA?

Your attorney has the option to apply to the court at any time for directions about how they should use their powers.

The court can also decide whether your EPA is valid and whether you are mentally incapable.

If you have become mentally incapable, the court can also:

- decide the meaning or effect of your EPA, if it is unclear

- decide if your EPA has ceased to have effect
- give directions on any matter relating to your personal care and welfare
- alter the scope of the personal care and welfare matters or powers in your EPA
- order your attorney to provide any information they hold as your attorney
- give consent on your behalf (for example, to medical treatment, provided it is not treatment of the kind referred to in the section entitled "*Is there anything your attorney cannot do?*")
- decide if the EPA was obtained by fraud or **undue influence**
- decide if your attorney is suitable to be your attorney
- **revoke** your attorney's appointment, especially if they are not complying with their obligations to act in your best interests, consult, or provide information. If the court decides that your EPA was obtained by fraud or undue influence or that your attorney is not suitable, it must revoke your attorney's appointment.

How can you suspend your attorney's authority to act?

If you were mentally incapable but recover your mental capacity, you can suspend your attorney's authority to act by giving written notice to your attorney.

Once your attorney's appointment is suspended, the attorney may not act again until you are certified or declared mentally incapable again (see "*When does your EPA take effect?*").

Suspending your attorney's authority to act does not revoke your EPA.

How long may an attorney act under an EPA?

Once your EPA has come into effect, your attorney may continue to act until your attorney receives notice that the EPA is terminated, their appointment is ended, or their authority to act is suspended.

Anything your attorney does in accordance with the EPA and in good faith before receiving such a notice still has effect.

If your EPA appoints a successor attorney, they will become your new attorney for all purposes if your attorney's appointment ends, whether your EPA has already taken effect or not. The successor attorney has the same authority to act as your attorney had. If you have appointed a second successor attorney, they will become your attorney only after the appointments of 2 of your previous attorneys have ended.

Validity of your EPA

Even if your EPA is invalid because of a failure to meet any of the requirements of the Act relating to its creation, anything done by your attorney in good faith with no knowledge of the failure is valid.

Implications of your EPA

Your EPA gives your attorney control over your life and living circumstances if you become mentally incapable, subject only to conditions and restrictions you have set, the requirements to consult, and the powers of the court to review your attorney's actions. That is why you need to trust the person you choose as your attorney to act in your best interests.

Instructions for authorised witness

This form will help you explain the effects and implications of an EPA in relation to personal care and welfare to a **donor** before witnessing the donor's signature. You may give the explanation required by section 94A(6) of the Act by giving this form to the donor and following the instructions below. This explanation should be read in conjunction with the glossary below.

You must be one of the persons mentioned below to be authorised to witness an EPA. You may also need to be independent of the attorney and each successor attorney appointed by the EPA (see the definition of authorised witness in the glossary of terms). The persons who may witness an EPA are:

- a lawyer
- an officer or employee of a **trustee corporation** authorised by the corporation for the purpose
- a legal executive who is a member of and holds a current registration certificate issued by The New Zealand Institute of Legal Executives Incorporated, has at least 12 months' experience as a legal executive, and who is employed by and under the direct supervision of a lawyer.

Take the donor through these notes and tailor your explanation to their individual needs and circumstances. You will also need to explain the effect of any aspect of the EPA that is not covered by the standard explanation.

Ask the donor whether they already have an EPA (a previous EPA). If they do, ask them if they want to cancel it under section B of the form. If they do, ensure that the attorney (and any successor attorney) named in the previous EPA is notified that it is revoked. Until they receive a notice of revocation, an attorney under a previous EPA may continue to act (see section 103C of the Act). However, even after the donor is mentally incapable, notice of revocation can be given by providing the attorney under the previous EPA with a copy of the new EPA in which section B specifies the previous EPA is revoked (see section 95A(2) of the Act).

You must certify that, before the donor signed the EPA, you:

- explained the effects of the EPA using these notes; and
- advised the donor of the matters referred to in the notes to the EPA form; and
- advised the donor of their right to suspend or revoke the EPA; and
- have no reason to suspect the donor may be mentally incapable.

You must also certify that you believe on reasonable grounds that the donor understands the nature of the instrument, understands the potential risks and consequences of the instrument, and is not acting under undue pressure or duress.

A copy of this standard explanation should be given to the donor along with a copy of the signed EPA.

Note: If you have any reason to suspect that the donor may be mentally incapable, you should not witness the donor's EPA. You should refer the donor to a relevant health practitioner for an assessment of whether he or she is mentally capable of setting up an EPA.

Glossary of terms

Act	The Protection of Personal and Property Rights Act 1988. Part 9 of the Act sets out the law on EPAs.
Advance directive	<p>A written or oral directive:</p> <ul style="list-style-type: none"> • by which a person makes a choice about a possible future health care procedure; and • that is intended to be effective only when he or she is not competent. <p>See the Code of Health and Disability Services Consumers' Rights set out in the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996.</p>
Attorney	A person appointed by the donor to act for the donor on some or all of the donor's personal care and welfare matters if the donor becomes mentally incapable. This includes a successor attorney whose appointment has taken effect (unless the context makes it clear that this is not intended).
Authorised witness	<p>A person who witnesses a donor's signature to an EPA. The signature must be witnessed by one of the following:</p> <ul style="list-style-type: none"> • a lawyer • a legal executive who is a member of, and holds a current annual registration certificate issued by, The New Zealand Institute of Legal Executives Incorporated, has 12 or more months' experience as a legal executive, and is employed by and supervised by a lawyer • an authorised officer or employee of a trustee corporation. <p>If the attorney is a lawyer appointed in his or her capacity as a lawyer, the witness may belong to the same firm as the attorney.</p> <p>In any other case, the witness must be independent of the attorney and any successor attorney named in the EPA.</p> <p>The requirement that the witness must be independent of the attorney is modified where 2 people appoint each other as attorney in order to allow:</p> <ul style="list-style-type: none"> • the witnesses to belong to the same legal firm or the same trustee corporation • the same person to witness both donors' signatures if the witness is satisfied and certifies that doing so does not constitute more than a negligible risk of conflict of interest.

Consult	To ask for advice and give that advice proper consideration before making a decision in the donor's best interests. This includes making sure the person being asked for advice has all the information they need to base their advice on.
Court	The Family Court.
Directions	Instructions to your attorney.
Donor	The person setting up the EPA giving the appointed attorney(s) authority to act for them.
Ends	<p>An attorney's appointment under the EPA ends when any of the following events occurs:</p> <ul style="list-style-type: none"> • the donor (while mentally capable) revokes the attorney's appointment by written notice to the attorney • the attorney gives written notice to the donor (or to the Family Court if the donor is mentally incapable) that the attorney disclaims the right to act under the EPA • the attorney dies or becomes bankrupt • the attorney becomes subject to compulsory treatment or special patient status under the Mental Health (Compulsory Assessment and Treatment) Act 1992 • the Family Court makes a personal or property order under the Act in respect of the attorney • the attorney becomes unable to act (for example, because of serious illness) • the Family Court makes an order revoking the attorney's appointment.
EPA	An enduring power of attorney in relation to personal care and welfare made under Part 9 of the Act (unless the context makes it clear that another kind of enduring power of attorney is intended).
Medical certificate	A certificate given by a relevant health practitioner on whether the donor is mentally incapable. The certificate must contain the information required by regulations under the Act.
Mentally incapable	<p>Under the Act, you are mentally incapable if, in relation to your personal care and welfare, you lack the capacity to:</p> <ul style="list-style-type: none"> • make a decision; or • understand the nature of decisions; or • see the likely result of decisions or of any failure to make decisions; or • communicate decisions.

	Everyone is presumed to have the capacity to do these things until the contrary is shown, and is not to be presumed to lack capacity just because the person makes imprudent decisions or is subject to compulsory treatment or has special patient status under the Mental Health (Compulsory Assessment and Treatment) Act 1992.
Personal care and welfare	Your health, well-being, and enjoyment of life, including matters such as where you live and medical treatment you receive.
Relative	A relative of yours includes your spouse, civil union partner, or de facto partner and your or their: <ul style="list-style-type: none"> • parent or grandparent • child or grandchild • brother or sister, whether of full-blood or half-blood • aunt or uncle • nephew or niece.
Relevant health practitioner	A health practitioner in New Zealand who is authorised to make assessments of mental capacity (for example, a New Zealand general medical practitioner (GP)). In relation to a medical certificate given overseas, a registered medical practitioner in the country where the certificate is issued who is authorised to make assessments of mental capacity.
Revoke	To cancel (end the validity of) an EPA or an attorney's appointment: <ul style="list-style-type: none"> • by sending a written notice to the attorney stating that the EPA or the appointment is revoked • by an order of the court.
Significant matter	In relation to the donor's personal care and welfare, a matter having a major effect on the donor's health, well-being, or enjoyment of life (for example, a permanent change to where they live, entering residential care, or undergoing a major medical procedure such as an operation).
Successor attorney	A person appointed by the donor to be their attorney if a previous attorney's appointment ends.
Suspend	The donor of an EPA who was, but is no longer, mentally incapable may suspend the attorney's authority to act by giving written notice to the attorney. The EPA is not revoked by the suspension but the attorney cannot act again unless and until a relevant health practitioner has certified, or the court has determined, that the donor is (again) mentally incapable.

Terminated	<p>An EPA is terminated by any of the following events:</p> <ul style="list-style-type: none"> • the donor (while mentally capable) revokes the EPA by written notice to the attorney • the donor dies • the attorney’s appointment ends, and there is no successor attorney who can act.
Trustee Corporation	<p>The Māori Trustee, Public Trust, and every trustee company within the meaning of the Trustee Companies Act 1967.</p>
Undue influence	<p>When one person takes advantage of their power over another person to the disadvantage of the other person.</p>