

Enduring Powers of Attorney

What are they?

Enduring powers of attorney (EPA) may be used to cover situations in which a person does not have the ability to manage his or her own affairs.

A personal care and welfare EPA ("PCW EPA") appoints a person to make decisions relating to your day to day care such as accommodation, healthcare and general well being. It comes into effect only if you become mentally incapable. You can only appoint one person at a time to act for you.

A property EPA appoints one or more person/s to administer your financial and property affairs. It can come into force either only if you become mentally incompetent (on a medical practitioner's certification) or, if you prefer, it can come into force immediately so it is available to be acted upon should you wish your attorney to handle a business matter for you.

How are they different from an ordinary power of attorney?

Ordinary powers of attorney are automatically revoked if you become mentally incompetent.

Why have one?

The unforeseen: Sudden illness, accidents and longer-term degenerative illnesses can leave the attorney appointed under a standard power of attorney unable to act because of the lack of mental capacity on the part of the person who granted the power of attorney.

Lifestyle: Rapid changes in lifestyle, means of doing business and ease of travel coupled with an enhanced life expectancy in the western world, have meant that the ordinary power of attorney often does not operate effectively.

The Courts: If you lose your mental capacity without an EPA in place, orders appointing a manager and welfare guardian can be obtained through the Family Court. This can be a very stressful, lengthy and costly process.

When should I have one?

Right now, so that if anything should happen to you which may impair your own mental powers someone can act on your behalf to ensure that you and your assets are properly cared for.

Signing EPAs

The signature of a person granting an EPA ("donor") must be witnessed by a lawyer, an authorised officer of a trustee corporation or a legal executive working in a law firm.

The witness must complete a certificate confirming certain matters have been explained to the donor before signing, including that the witness is independent and has no reason to suspect that the donor is mentally incapable.

The Protection of Personal and Property Rights Act 1988 ("Act") is the legislation governing EPAs.

Anyone accepting appointment as an attorney under an EPA, whether a friend, family member or professional, needs to fully understand their obligations.

How do they work?

The law presumes that a person does have mental capacity unless a medical practitioner certifies otherwise.

Medical Practitioner's Certificate

With a PCW EPA, a certificate by a medical practitioner as to a donor's lack of mental capacity must be obtained before an attorney can act for the donor. The medical practitioner must certify that the donor lacks capacity to:

- Make decisions; or
- Understand the nature of those decisions; or
- Foresee the consequences of those decisions; or
- Lacks the capacity to communicate the decisions.

For a Property EPA the donor is incapable if the donor is not wholly competent to manage his own affairs.

How an Attorney is to Act

The attorney must act in the best interests of the donor and is required to consult with the donor and any person the donor has specified in the EPA. The attorney is also required to encourage the donor to be involved with decision making within their level of competence.

Consultation with Attorneys

If separate attorneys have been appointed under a property EPA and personal care and welfare EPA, the two attorneys must consult regularly to ensure the donor's interests are not affected by any breakdown of communication between the two attorneys. The property EPA must use the donor's property to provide financial support if required by the personal care and welfare attorney.

We urge clients to treat the appointment of an EPA attorney as something that is important and not to be entered into without full understanding. If you have any questions, please contact your main contact person at Brookfields.

Alison Gilbert
Partner
Tel: +64 9 379 9350
DDI: +64 9 979 2253w
Email: gilbert@brookfields.nz

Paula Keuning
Senior Solicitor
Tel: +64 9 379 9350
DDI: +64 9 979 2183
Email: keuning@brookfields.nz

Polina Kozlova
Solicitor
Tel: +64 9 379 9350
DDI: +64 9 979 2223
Email: kozlova@brookfields.nz

DISCLAIMER

This information is intended to be general in nature. You are strongly recommended to seek your own legal advice in relation to the matters dealt with here.