

## Form 3

### Enduring power of attorney (EPA) in relation to personal care and welfare

#### *Notes to enduring power of attorney*

Please read these notes **before** completing the form.

In these notes, attorney includes a successor attorney whose appointment has come into effect. (See the glossary of terms at the end of these notes for the meaning of this term and other terms set out in ***bold italics***.)

#### Setting up your EPA

1. Your ***EPA*** in relation to ***personal care and welfare*** authorises the ***attorney*** that you, the ***donor***, have appointed to make decisions on your behalf about your personal care and welfare if you become ***mentally incapable***. You can appoint only one personal care and welfare attorney, but you can appoint a ***successor attorney*** to be your attorney if the previous attorney's appointment ***ends***. You can appoint more than one successor attorney.
2. Your attorney can be anyone you trust to understand and respect your wishes and feelings and who is able to make decisions about your personal care and welfare, provided they are aged 20 or older, not bankrupt, and not mentally incapable themselves. Usually, this is a friend, family member, or work colleague. Preferably, your attorney should live in the same area as you so that they can attend personally to your care and welfare.
3. Your EPA should be filled in, signed, and witnessed in the presence of your lawyer or another ***authorised witness***, who must explain the effects and implications of the EPA and answer any questions you may have. The signature of the attorney (and each successor attorney) you appoint needs to be witnessed by someone other than you or your witness. The witness must be an adult and should not be a relative of the attorney or the attorney's spouse or partner or live at the same address as the attorney.
4. Your EPA will not be valid until signed by all parties. This includes you and your attorney.

#### Options in your EPA

5. There are various options that you can have in your EPA. For example, you can appoint successor attorneys, cancel (***revoke***) previous EPAs, determine the extent of your attorneys' authority to act, and say who they must ***consult***. See sections B to H of the EPA form for these options.

## **You and your attorney need to understand what an attorney's role is**

6. An attorney's authority under the EPA is governed by both the EPA and the Protection of Personal and Property Rights Act 1988 (the **Act**). These notes are a summary of the main requirements of the Act. Attorneys and successor attorneys should ask a lawyer for legal advice on their role if they are unclear about how to act.

## **When an attorney can act**

7. Your attorney can act under the EPA only if you become mentally incapable.
8. Your attorney can act or make a decision on any **significant matter** relating to your personal care and welfare only if a **medical certificate** states, or the Family Court decides, that you are mentally incapable in relation to that matter.
9. Your attorney can act and make decisions without a medical certificate on any matter relating to your personal care and welfare that is not a significant matter if the attorney has reasonable grounds to believe you are mentally incapable.
10. 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.
11. However, if a medical certificate states that you are mentally incapable because of a health condition that is likely to continue for a specified period or indefinitely, no further medical certificates are required for any matters that arise during the certified period.
12. Your attorney cannot act after they receive notice that the EPA is **terminated**, their appointment is ended, or their authority to act is **suspended** (see note 20).

## **What an attorney must do**

13. Your attorney's overriding concern is the promotion and protection of your welfare and best interests. This includes:
  - encouraging you to make and communicate your own decisions about your personal care and welfare and to understand and see how decisions about your personal care and welfare will affect you.
  - encouraging you to act on your own behalf where possible and remain part of your community.
  - seeking your advice when making decisions, and consulting anyone else named in your EPA for that purpose and any attorney acting under any other EPA you have given (other than a successor attorney whose appointment has not come into effect).

- taking into account the financial implications of any decision about your personal care and welfare.
14. If you have appointed someone else to be your attorney for your property, 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.
15. Your attorney may follow any advice received through consultation or in an **advance directive** you have given if your attorney does so in good faith and with reasonable care, unless the attorney is asked to do something listed in note 17.
16. If you have named someone in section G of your EPA to be given information, your attorney must promptly give them that information when asked for it.

### **What an attorney cannot do**

17. Your attorney cannot:
- make a decision about you marrying or entering into a civil union;
  - make a decision about your marriage or civil union being dissolved;
  - make a decision about any of your children being adopted;
  - refuse consent to any standard medical treatment or procedure intended to save your life or prevent serious damage to your health;
  - consent to you receiving electro-convulsive treatment (ECT);
  - consent to any brain surgery or treatment designed to change your behaviour; or
  - consent to your taking part in any medical experiment except for the purpose of saving your life or preventing serious damage to your health.

## **Cancelling or suspending an EPA**

18. While you are mentally capable, you can cancel (revoke) your EPA or an attorney's appointment at any time by giving written notice to your attorney (you should also give notice to any successor attorneys).
19. If you choose to revoke any previous EPA in relation to personal care and welfare, but do not give notice of revocation to the previous attorney, your attorney under this EPA or your lawyer can give your previous attorney that notice by providing them with a copy of this EPA before or after you become mentally incapable.
20. If you become mentally incapable but recover your mental capacity, you can suspend your attorney's authority to act by giving them written notice. The EPA is only put on hold by the suspension, which means your attorney cannot act under it again unless a medical certificate states, or the Family Court declares, that you are mentally incapable again.
21. If you are mentally incapable and your attorney's authority is questioned, the attorney can certify on a ***prescribed form*** (available on the Ministry of Justice website) that they have not received any notice that the EPA is terminated, their appointment is ended, or their authority to act is suspended. This means they can continue to act as your attorney.

## **Involving the Family Court**

22. The Family Court can be asked to review your attorney's actions under the EPA if you or someone else has concerns about them. An application to the court is required for this purpose. The court must appoint a lawyer to represent your interests.
23. Your attorney may apply to the Family Court for directions if they are not sure about the most suitable action to take in your best interests (for example, where consultation has resulted in conflicting advice or questions about whether to follow an advance directive).
24. For matters involving the Family Court, an application to the Family Court is required. The application form can be found at the Ministry of Justice website.

## ***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:** a written or oral directive:

- by which a person makes a choice about a possible future health care procedure; and
- that is intended to be effective only when the person is not competent.

See the Code of Health and Disability Consumers' Rights set out in the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996.

**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:** a person who witnesses the donor's signature to an EPA. The signature must be witnessed by one of the following:

- 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.

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.

In any other case, the witness must be independent of the attorney and any successor attorney named in the EPA.

The requirement that the witness must be independent of the attorney is modified where two people appoint each other as attorney in order to allow:

- 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.

**Donor:** the person setting up the EPA giving the appointed attorney(s) authority to act for them.

**Ends:** an attorney's appointment under the EPA ends when any of the following events occurs:

- 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:** under the Act, donors are mentally incapable if, in relation to their personal care and welfare, they lack the capacity to:

- 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, is subject to compulsory treatment, or has special patient status under the Mental Health (Compulsory Assessment and Treatment) Act 1992.

**Personal care and welfare:** the donor's health, well-being, and enjoyment of life, including matters such as where the donor lives and medical treatment they may need.

**Prescribed form:** a form set out in the Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008.

**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:

- by sending a written notice to the attorney stating that the EPA or the appointment is revoked; or
- by an order of the Family Court.

**Significant matter:** 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:** an EPA is terminated by any of the following events:

- 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:** the Māori Trustee, Public Trust, and every trustee company within the meaning of the Trustee Companies Act 1967.