

Form 1

Enduring power of attorney (EPA) in relation to property

Notes to enduring power of attorney

Please read these notes **before** completing the your EPA.

In these notes, attorney includes each attorney (if you have appointed more than one) and a successor attorney whose appointment has come into effect. (See the glossary of terms at the end of these notes for the meaning of attorney and other terms set out in ***bold italics***.)

Setting up your EPA

1. Your ***EPA*** in relation to ***property*** authorises the ***attorney*** that you, the ***donor***, have appointed to make decisions on your behalf about your property affairs, particularly when you cannot do so for yourself because you have become ***mentally incapable***. Your attorney can act for you while you are mentally capable if you authorise them to do so. You can appoint more than one attorney. You can also 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 manage your property, provided they are aged 20 or older, not bankrupt, and not mentally incapable themselves. This can be a friend or family member, a work colleague, or a professional person, for example, a lawyer or an accountant. An attorney for property can also be a ***trustee corporation***.
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 each attorney (and 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, if you appoint more than one attorney, you can say whether they must act together (jointly) or can act separately (severally). You can also 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 M 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. You can choose that your EPA comes into effect only if you become mentally incapable. If you do, your attorney can act under the EPA only if a **medical certificate** states, or the Family Court decides, that you are mentally incapable.
8. If you choose that your EPA comes into effect while you are mentally capable, your attorney can act under it as soon as it is signed and witnessed and can continue to act if you become mentally incapable.
9. 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 19).

What an attorney must do

10. Your attorney must use your property to promote and protect your best interests. Wherever possible, your attorney must encourage you to maintain or develop your own competence to manage your property affairs.
11. When acting on your behalf, your attorney must, as far as practicable, consult you and the persons you have asked to be consulted in section I of the EPA form before making decisions. Your attorney must also consult any other attorney under any other EPA you have given (other than a successor attorney whose appointment has not come into effect). Your attorney is entitled to follow advice received from consultation if they act in good faith and with reasonable care. Your attorney can also apply to the Family Court for directions on how to act (for example, if they receive conflicting advice from consultation).
12. If you have appointed someone else to be your attorney for your **personal care and welfare**, 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.
13. If you have named someone in section J of your EPA to be given information, your attorney must promptly give them that information when asked for it.

How your property can be used

14. Your attorney must not **act to the benefit** of any person other than you unless you have explicitly stated in your EPA that your attorney can do so. However, unless you have explicitly stated in your EPA that they cannot do so, your attorney can, out of your property:
 - recover reasonable **out-of-pocket expenses**;
 - recover reasonable professional fees and expenses (if your attorney has accepted appointment or done work related to your property in a professional capacity);
 - deal with any property that you and your attorney jointly own if you and your attorney are married or in a civil union or de facto relationship, are living together, and are sharing your incomes;
 - make a loan, advance, or other investment of your property that a trustee could make under the Trustee Act 1956.
-

If you have authorised your attorney to make celebratory gifts or donations, your attorney must consider whether you can afford to make them, having regard to your overall financial circumstances and commitments.

Attorneys must keep records

15. Your attorney must keep records of each financial transaction they enter into on your behalf while you are mentally incapable. Failure to do so is an offence for which they can be prosecuted and fined. If an application is made to the Family Court under the Act about you or your EPA, your attorney must supply these records on request to the lawyer (if any) appointed by the court to represent your interests.
16. If you have named someone in section J of your EPA to be given information that includes records of financial transactions, your attorney must promptly give them that information when asked for it.

Cancelling or suspending an EPA

17. 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).
18. If you choose to revoke your previous EPAs in relation to property, but do not give notice of revocation to the previous attorneys, 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.
19. 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.
20. 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

21. 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.
 22. 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).
 23. Unless you have expressly stated in your EPA that your attorney cannot do so, your attorney may apply to the Family Court for authorisation to sign a will for you (in a form approved by the court) if you are not **capable of making a will**.
 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.

Act to the benefit: in relation to a person other than the donor, give that person a profit or advantage (for example, by allowing them to live in or use the donor's house without paying rent, or by using the donor's money to pay for goods or services for them).

Attorney: a person or persons appointed by the donor to act on behalf of the donor on some or all of the donor's property affairs. 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 a 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.

If the attorney is a trustee corporation, the witness may be an officer or employee of that corporation.

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.

Capable of making a will: the law requires that anyone making a will must have testamentary capacity; that is, they must understand the nature and effect of what they are doing, who might have a claim to their estate, what they are disposing of, and how they are disposing of it.

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 property 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 in relation to property if they are not wholly competent to manage their own property affairs. Everyone is presumed to be competent to manage their property affairs until the contrary is shown, and is not to be presumed to lack competence 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.

Out-of-pocket expenses: things that your attorney needs to pay for from their own resources in order to carry out their role, such as postage and stationery costs, bank fees, travel costs, telephone bills, and legal fees. These expenses do not include lost wages or payment for your attorney's time.

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.

Property: anything the donor owns, leases, hires, or holds on hire purchase. Property includes any land or buildings, money, investments, goods, shares, stock, machinery, businesses, household effects, or items such as vehicles, boats, aircraft, and caravans, and any interest in any of those things or right in respect of them.

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.

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;
- if the EPA appoints one attorney, the attorney's appointment ends, and there is no successor attorney who can act;
- if the EPA appoints more than one attorney to act jointly, the appointment of any of the attorneys ends, and there is no successor attorney who can act;
- if the EPA appoints more than one attorney to act severally, or jointly and severally, the last remaining 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.
