

## Enduring power of attorney

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Sometimes decisions need to be made about your property (assets) or your personal care and welfare, and you are not in a position to make them. This can happen in planned circumstances and at other times without warning. It therefore makes sense to decide now whom you want to make those decisions on your behalf, and what type of decisions they should make for you.

Deciding now, by way of an “enduring power of attorney”, avoids future problems and possibly costs. It is important to note that an enduring power of attorney is different to an ordinary power of attorney you may give a sharebroker, for example, to help manage your share portfolio.

With an ordinary power of attorney, you appoint someone to help you to look after your affairs as an alternative to yourself. It does not prevent you from looking after your own affairs, but simply allows the person whom you appoint to do so as well.

An ordinary power of attorney remains valid only while you still have the mental capacity to act yourself. It ceases to be valid as soon as you no longer have the mental or physical capacity to instruct the appointed person. For example, if you have an accident and you suffer brain damage, the person whom you appointed cannot act for you under an ordinary 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. An ordinary power of attorney cannot be converted into an enduring power of attorney and may be replaced by one only while you are still mentally capable.

### What’s an enduring power of attorney?

An enduring power of attorney is a legal document whereby you appoint someone as your attorney (your “manager”) to make decisions on your behalf, when you are no longer able to do so.

Under the Protection of Personal and Property Rights Act 1988 there are two types of enduring powers of attorney:

- Property - to manage your financial position i.e. to look after all your assets or to look after specific investments or property. You can decide when you

- ★ **Everybody over age 18 should have an enduring power of attorney.**
- ★ **Under an enduring power of attorney you appoint someone to make decisions for you if you are not in a position to, e.g. you suffer a stroke.**
- ★ **You should appoint separate people to manage your assets or your personal well being.**

#### The Protection of Personal and Property Rights Amendments Act 2007

If you are considering setting up an enduring power of attorney or have set up one, you need to know that the law dealing with enduring powers of attorney changed on 26 September 2008. The Protection of Personal and Property Rights Amendments Act 2007 ensures that there is more communication between you and the person you nominate as your manager and makes it mandatory that everything related to enduring power of attorney is explained to you by an expert in this area.

If you have an enduring power of attorney there is no need to change anything but it will be a good idea to have a look at the notes on the prescribed forms (see [www.legislation.govt.nz](http://www.legislation.govt.nz)), to ascertain whether you have any concerns that you may want to review.

#### The legal stuff

*This article is general investment information and is not personalised financial advice. If you wish to receive personalised financial advice, you need to contact an appropriately experienced authorised financial adviser.*

want your enduring power of attorney to take effect, whether you want your manager to act while you are mentally capable and to continue to act if you become mentally incapable, or only if you become mentally incapable.

- Personal care and welfare - to manage your personal position i.e. to look after your personal care and welfare. The enduring power of attorney can authorise your manager to act in relation to your personal care and welfare generally, or only in relation to specific areas. The enduring power of attorney will only come into effect if you become mentally incapable.

The two types of enduring powers of attorney can be given to the same person or to different people. If you give both the enduring powers of attorney to the same person, you will need to grant each power specifically and separately, though this can be done in the same document.

If the enduring power of attorney takes effect when you become mentally incapable, then your manager will not act on your behalf unless a relevant health practitioner has certified, or the Family Court has determined, that you are mentally incapable.

Once the enduring power of attorney is signed, you can cancel the appointment at any time by giving notice in writing, in the prescribed form to your manager.

If you have signed the enduring power of attorney and then become mentally incapable and subsequently recover capacity, you are entitled to suspend your manager's power to act under the enduring power of attorney by giving your manager written notice in the prescribed form. The notice does not cancel the enduring power of attorney and your manager will be able to act under it if you are again certified by a relevant health practitioner (or the Family Court decides you are) as being mentally incapable.

### Who should have an enduring power of attorney?

Everyone over age 18 should consider having an enduring power of attorney.

### How do I set up an enduring power of attorney?

When you decide to set up an enduring power of attorney you must use the forms prescribed by law. You can get copies of these forms from:

- your lawyer;
- your local Age Concern branch;
- a Community Law Centre or Citizens Advice Bureau;
- the Family Court website ([www.justice.govt.nz/family](http://www.justice.govt.nz/family)); and
- the New Zealand Legislation website ([www.legislation.govt.nz](http://www.legislation.govt.nz)).

The notes to the prescribed forms will give you an idea as to the issues that you need to

think about when you decide to set up an enduring power of attorney for your property, or for your personal care and welfare, or for both.

★ You need to get expert advice to help you to set up your enduring power of attorney.

### Do you need expert advice?

Yes. The law clearly states:

- you need to have your signature witnessed by your lawyer or a qualified legal executive, or an authorised person from a trustee company;
- the witness to your signature must explain to you the effects and implications of the enduring power of attorney to you and must also advise you on the matters referred to in the notes to the prescribed forms, your right to suspend or revoke the enduring power of attorney, the appointment of a manager and how the dealings of your manager are to be monitored;
- the witness must provide a certificate that they have explained the effects of the enduring power of attorney to you;
- the signature of your manager must be witnessed by a person other than you, or your witness; and
- if you decide with another person to make mutual appointees, then both of you can seek advice and use independent witnesses from the same law firm or trustee company.

### Who can be an attorney?

Different people can be appointed to the different roles.

- Enduring power of attorney in relation to property.

You can appoint up to two individuals as your managers. If you appoint two, you can specify that they must act jointly (they must make decisions and act together), or that they may act severally (each can act independently). However, you must note that if your managers have joint authority and the appointment of one of them ceases, then no one will have the authority to act on your behalf;

You can also choose to appoint a trustee corporation as your manager. A trustee corporation is the Maori Trustee, the Public Trust and any trustee company under the Trustee Companies Act 1967; to look after your financial affairs, such as filing tax returns, supervising investments and so on.

- Enduring power of attorney in relation to personal care and welfare.

You can appoint only an individual to look after your personal care. You cannot appoint a trustee corporation.

An individual who is appointed as your manager must be at least 20 years old, not

a bankrupt and not subject to a personal order or property order, under the Protection of Personal and Property Rights Act 1988.

★ You should also have a will.

As the personal care role includes approval of accommodation arrangements, buying clothing or personal items and medical decisions, you should appoint someone you trust implicitly, such as friend or relative.

★ An enduring power of attorney doesn't affect your will.

### Why bother with an enduring power of attorney?

If you have an accident or suffer from a stroke/heart attack, or mental or physical illness, someone may need to make decisions for you while you can't.

If you do not have an enduring power of attorney, your family may have to make an application to the Family Court for the appointment of a manager under the Protection of Personal Property and Rights Act 1988. The Court's decisions may not be what you had in mind.

But more importantly, Court proceedings cost money and take time. You can avoid that risk by appointing a family member or a close friend under an enduring power of attorney. This will protect you against unforeseen events.

### Can I retain control?

An enduring power of attorney appoints another person to act as your manager to make decisions on your behalf, but you can still retain as much control as you want. For example, you can:

- say when it starts - for example, immediately, some time in the future or following an emergency;
- decide whether the manager looks after all or just some of your assets and limit the type of decisions that can be made;
- appoint a friend to work with your manager; and
- retain a right to cancel and a right to suspend the appointment of your manager.

### Does an enduring power of attorney affect my will?

No. An enduring power of attorney doesn't affect your will. An enduring power of attorney applies while you are alive, whereas a will applies after you die.

If you have set up an enduring power of attorney, then when you die, the effect of enduring power of attorney will cease. For instance your manager cannot sign a cheque

to pay your funeral expenses. The powers transfer to whoever is named as your executor in your will.

★ **An enduring power of attorney doesn't affect your Advance Directives**

The person who looks after your estate when you die may have to make decisions affecting your assets included in your enduring power of attorney. For this reason, you may want to complete your enduring power of attorney and your will at the same time, and keep them both up to date.

### Does an enduring power of attorney affect my "Advance Directive"?

No. An enduring power of attorney will not affect your advance directives. The Health & Disability Commissioner (Code of Health & Disability Services Consumers' Rights) Regulations 1996 lets you make health care decisions in advance (an "Advance Directive"). An Advance Directive is a written or an oral directive by which you make a choice about a possible future health care procedure. The Advance Directive is effective only when you are incompetent.

The Advance Directive will let you set out the circumstances or situations when you want treatment withheld or withdrawn.

This is in contrast to the enduring power of attorney for personal care and welfare which lets you appoint an attorney to make treatment decisions for you once you become incompetent. But there are however, limits on an enduring power of attorney – the attorney cannot be authorised to refuse consent to the administering of any standard medical treatment intended to save your life, or to prevent serious damage to your health, or refuse to consent to any surgery, or other treatment, designed to destroy any part of the brain or brain function for the purpose of changing your behaviour or electro convulsive therapy. So in the very circumstances when you might want a proxy decision maker, that is your attorney, to say "No", they have no legal power to act.

### Who looks after the documents?

You and your appointed manager should each have a signed copy of the enduring power of attorney. Your manager will need to produce a copy when dealing with banks or other institutions about your affairs. You should keep your documents in a safe place preferably with your will. It is also a good idea for you to make extra copies and give them to others who need to know that you have made an enduring power of attorney and what your wishes are.