

# Standard explanation of effects and implications of an enduring power of attorney in relation to property

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 **property** 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 (or people) you name as your **attorney** to make decisions on your behalf about your property affairs.

There are various options that you can have in your EPA. For example, if you appoint more than 1 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 attorney's authority to act, and say who they must consult. See sections B to M of the EPA form for these options.

Your attorney can make decisions only on the property matters you specify in the EPA. Your attorney has to follow any conditions and restrictions in your EPA and in the **Act**.

Unlike an ordinary power of attorney, an EPA stays in force if you become **mentally incapable** and your attorney's decisions apply as if you made them.

### When does your EPA take effect?

You can choose whether your EPA comes into effect while you are still mentally capable or only if you become mentally incapable.

If you choose to have your EPA take effect while you are still mentally capable, it will remain in effect if you later become mentally incapable.

If you choose to have your EPA take effect only if you become mentally incapable, your attorney can act 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.

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?**

If you are mentally incapable, the overriding consideration of your attorney is to use your property to promote and protect your best interests.

Your attorney must encourage you to develop your own competence to act on your own behalf as much as you possibly can.

If you have a separate EPA for your **personal care and welfare**, your attorney must provide your personal care and welfare attorney with any financial support (from your property) that that attorney requires to carry out their duties in relation to your personal care and welfare (subject to any conditions in your EPA or any direction of the court).

Your attorney must keep records of each financial transaction the attorney enters into under your EPA while you are mentally incapable. If any application under the Act is made to the court concerning you or your EPA, your attorney must supply those records to the lawyer appointed by the court to represent your interests.

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 these things on your behalf.

Your attorney is also restricted by any conditions and restrictions that you specify in your EPA.

To avoid a conflict of interest between your attorney's duties under the EPA and their own interests, or the interests of someone close to them, an attorney cannot take any action to benefit themselves or other people while you are mentally incapable, unless:

- your EPA specifies that the action can be taken; or
- the court authorises the action.

However, unless your EPA specifically states otherwise, your attorney can:

- deal with property they own jointly with you (if your attorney is your spouse or civil union or de facto partner and you share your incomes)
- reimburse, out of your property, their own **out-of-pocket expenses** that have been reasonably incurred
- receive from your property reasonable professional fees and expenses, if your attorney was appointed as a professional person (for example, a lawyer or an accountant) or did professional work to give effect to your attorney's decisions
- make loans, advances, and investments of your property that a trustee could make in relation to trust property.

### **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 named in your EPA as someone who must 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 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.

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.

### **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 the attorney 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 about:
  - the management and disposal of your property and affairs
  - the providing of accounts and producing of records by your attorney
  - your attorney's remuneration and expenses
  - any other matter on which directions are sought
- modify the scope of your EPA by including or excluding a part of your property or any powers
- require your attorney to provide any information they hold as your attorney
- give any consent or authorisation on your behalf
- authorise your attorney to act to the benefit of your attorney or persons other than you, but subject to any conditions or restrictions in your EPA
- authorise your attorney to make any loan or advance of your property, subject to any conditions or restrictions in your EPA
- decide if the EPA was obtained by fraud or **undue influence**
- decide if your attorney is suitable to be your attorney
- unless your EPA states otherwise, authorise your attorney to execute a will for you (in a form approved by the court)
- **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 power 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, it remains in place 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 and transactions**

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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. Any transaction entered into by your attorney is also valid if the other party entered it in good faith with no knowledge of the failure.

### **Implications of your EPA**

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Your EPA gives your attorney complete control over the property matters stated in it, 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. If you are unsatisfied with the actions of your attorney acting under an EPA, and you are mentally capable, you may revoke their appointment. However, you will be unable to do so if you become mentally incapable. That is why you need to trust the person (or people) 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 property 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 of terms.

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 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 in 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 the donor's 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.
Attorney	A person or persons appointed by you to act on your behalf on some or all of your 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	<p>A person who witnesses the donor’s signature to an EPA. The witness must be one of the following:</p> <ul style="list-style-type: none"> <li>• a lawyer</li> <li>• 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</li> <li>• an authorised officer or employee of a trustee corporation.</li> </ul> <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>If the attorney is a trustee corporation, the witness may be an officer or employee of that corporation.</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"> <li>• the witnesses to belong to the same legal firm or the same trustee corporation</li> <li>• 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.</li> </ul>
Consult	To ask for advice and give that advice proper consideration before making a decision. 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"> <li>• the donor (while mentally capable) revokes the attorney's appointment by written notice to the attorney</li> <li>• 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</li> <li>• the attorney dies or becomes bankrupt</li> <li>• the attorney becomes subject to compulsory treatment or special patient status under the Mental Health (Compulsory Assessment and Treatment) Act 1992</li> <li>• the Family Court makes a personal or property order under the Act in respect of the attorney</li> <li>• the attorney becomes unable to act (for example, because of serious illness)</li> <li>• the Family Court makes an order revoking the attorney's appointment.</li> </ul>
EPA	<p>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).</p>
Medical certificate	<p>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.</p>
Mentally incapable	<p>Under the Act, you are mentally incapable in relation to your property if you are not wholly competent to manage your own affairs in relation to your property.</p> <p>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.</p>
Out-of-pocket expenses	<p>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.</p>
Personal care and welfare	<p>Your health, well-being, and enjoyment of life, including matters such as where you live and medical treatment you receive.</p>
Property	<p>Anything you own, lease, hire, or hold on hire purchase. Property includes any land or buildings, money, investments, goods, shares, stock, machinery, businesses,</p>



	household effects, or items such as vehicles, boats, aircraft, and caravans, and any interest in them or right in respect of them.
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"> <li>• parent or grandparent</li> <li>• child or grandchild</li> <li>• brother or sister, whether of full-blood or half-blood</li> <li>• aunt or uncle</li> <li>• nephew or niece.</li> </ul>
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: <ul style="list-style-type: none"> <li>• sending a written notice to the attorney stating that the EPA or the appointment is revoked</li> <li>• an order of the court.</li> </ul>
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: <ul style="list-style-type: none"> <li>• the donor (while mentally capable) revokes the EPA by written notice to the attorney</li> <li>• the donor dies</li> <li>• if the EPA appoints 1 attorney, the attorney's appointment ends, and there is no successor attorney who can act</li> <li>• if the EPA appoints more than 1 attorney to act jointly, the appointment of any of the attorneys ends, and there is no successor attorney who can act</li> <li>• if the EPA appoints more than 1 attorney with several authority or with joint and several authority, the last remaining attorney's appointment ends, and there is no successor attorney who can act.</li> </ul>

Trustee Corporation	The Māori Trustee, Public Trust, and every trustee company within the meaning of the Trustee Companies Act 1967.
Undue influence	When one person takes advantage of their power over another person to the disadvantage of the other person.