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14/8/2014

## Power of Attorney

Creating an Enduring Power of Attorney ("EPA") or an ordinary power of attorney is very important. EPAs are commonly regarded as desirable for retired people and essential for those living in retirement villages, but EPAs are really important for everyone. Both the ordinary power of attorney and the EPA enables someone to look after your affairs, including your property, finances and matters concerning your health.

### **An ordinary Power of Attorney**

When you give a person (or more than one person) an ordinary power of attorney then you are providing them with a power to act on your behalf either with respect to all your affairs or a specific aspect of your affairs, such as your business or your finances. An ordinary power of attorney can be for either an indefinite period or a specific period of time. The shortcoming with an ordinary power of attorney is that once the person who provided the power loses their mental capacity, either through the aging process or through an accident, the attorney may no longer act.

### **Enduring Powers of Attorney ("EPA")**

**There are two types of EPA:**

- EPA for Personal Care and Welfare
- EPA for Property

EPAs are created under the Protection of Personal and Property Rights Act 1988 and as the name suggests they will endure even after the person loses their mental capacity. This means the attorney may still act after the donor has lost his or her mental capacity.

### **EPA for personal care and welfare**

An EPA for personal care and welfare is created to enable someone to make decisions on your behalf at the time when you cannot because of your loss of mental capacity. Usually such a power will be given to a close friend or family member who can best judge what is best for you at the right time. For example, whether it is best for you to go into a rest home and which home would best suit your needs. The attorney will also be responsible for making decisions about your health care.

## **EPA for property**

An EPA for property is created so that the attorney can make decisions about your property and finances and how they should be managed. You can decide whether you would like the power to come into immediate effect (ie as soon as the EPA document is signed) or only if your mental capacity has been lost.

## **Choosing someone to give a power of attorney to**

It is essential that choosing an attorney is done with proper consideration. The attorney must be someone you can trust and who you can rely on to only do what is best for you at all times. The attorney must be over 20, not bankrupt or subject to a personal or property order (for an enduring power of attorney). It is also essential that the person to be appointed understands exactly what it is to be an attorney.

## **Creating an EPA**

Creating an EPA must be done on the prescribed form with a certificate completed by the lawyer witnessing it which confirms that before you signed the lawyer:

- Explained the effects and the implications of the EPA;
- Advised you of your right to suspend or revoke the EPA;
- In the case of an EPA in relation to property, explained to you, your right to appoint more than one attorney and to stipulate whether, and if so, how the attorney's dealings with the property are to be monitored.

The witness must also certify that they have no reason to believe that you were (or have been) mentally incapacitated at the time of signing the EPA.

Note: the witness must be a solicitor, a legal executive or an officer or employee of a trustee company.

## Loss of mental capacity

The Protection of Personal Property Act provides that a person who makes an EPA in relation to property will be mentally incapable if he or she is not wholly competent to manage their own affairs in relation to that property.

A person who has made an EPA in relation to personal care and welfare will be mentally incapable if he or she lacks the capacity to:

- Make a decision about a matter relating to their personal care and welfare;
- Understand the nature of decisions about matters relating to their personal care and welfare;
- Foresee the consequences of decisions they make or fail to make concerning their personal care and welfare; or
- Communicate decisions about matters relating to their personal care and welfare.

**Whether or not a person is mentally incapable will be decided by the Family Court or by a qualified health provider. A person will be assumed to be mentally competent unless it is proved otherwise.**

## Revoking an EPA

An EPA will automatically be revoked when for example, the attorney dies. The Family Court can revoke an EPA if it is determined that the attorney is not acting in your best interests.

Other grounds which will revoke an EPA are for example, if the attorney is adjudicated bankrupt, or loses their mental capacity or dies.

In such circumstances a new attorney can be appointed in place of the old one.

The attorney may also choose to no longer act as an attorney. In such instances the attorney must file a notice of disclaimer.

Certain people can apply to the Family Court if they are concerned with the way in which an attorney is exercising their powers under the EPA. The Family Court may order the cancellation of the attorney's appointment. Note there are also a number of other orders the Court can make in such circumstances.

## **Appointment of a welfare guardian**

In the case where a person has already lost their mental capacity or become unable to look after their own affairs and do not have an EPA then it is possible to apply to the Family Court for the appointment of a welfare guardian. However, it is hugely expensive to be in the position where one is forced to make a Family Court application. It is much more sensible to plan ahead, by having EPAs, and then reviewing them regularly to make sure they are continuing to meet your needs.

Before creating an EPA it is important to get good legal advice. Graeme Withers and Julie Withers of Graeme Withers Law are experienced Solicitors who can assist you with preparing an EPA. Please contact Graeme on (04) 478 4889 (027) 715 5421 or Julie on (04) 478 4888 (027) 478 4888 or by email [info@witherslaw.co.nz](mailto:info@witherslaw.co.nz)

*This note is intended for general information only. It is not intended to be relied on as a substitute for legal advice which focusses on individual circumstances.*