

# Planning Your Future

And the role of enduring powers of attorney



This booklet provides information on how you may arrange to have your affairs managed if mental capacity is lost, by having an enduring power of attorney for personal care and welfare and property. It also describes what happens if you do not have an enduring power of attorney and lose mental capacity. It is aimed at the general public, has a question and answer format and is useful for planning your future.

# Acknowledgments

Community Law Wellington and Hutt Valley would like to thank Wendy Davis, Darien Mahoney and lone Gill for their invaluable assistance and time.

**Disclaimer:** While every effort has been made to ensure that the information in this booklet is correct at the time of printing, no responsibility is taken for errors or omissions. The contents of this booklet do not constitute legal advice. If you wish to obtain legal advice, you should consult a lawyer.

© The copyright in this booklet belongs to Community Law Wellington and Hutt Valley Inc. and Age Concern New Zealand. Material from this booklet may be reproduced without alteration for educations or personal use provided the source is acknowledged. For permission to use the material in this booklet for any other use, including translation, please contact Community Law Wellington and Hutt Valley.

This booklet has been produced with funding from Trillion Trust.

**First printed September 1999**

**Current edition July 2015**

**Design: Bunkhouse Graphic Design Ltd**

**ISBN: 978-0-473-14480-7 (print)**

**ISBN: 978-0-473-14494-4 (online)**



# Contents

Introduction	4
1   Protecting your personal and property rights	5
2   Enduring power of attorney (EPA)	7
3   When there is no enduring power of attorney	19
4   Family Court orders: Welfare guardianship orders, other personal orders and property orders	20
5   Ask yourself these questions	30

# Introduction

Many of us will lose our mental capacity as we age – either suddenly or slowly over time. This means we lose the ability to make important decisions about our lives.

To plan ahead, you can make an enduring power of attorney, commonly called an EPA, giving someone else the ability to make decisions on your behalf about things like healthcare, finances and property. It is crucial that someone you trust knows how you would want your life and property handled.

An enduring power of attorney gives someone else the legal right to act on your behalf. Granting an enduring power of attorney is an important decision. It is a legal requirement that you get legal advice from a lawyer who only acts on your behalf.

## In this booklet you will find information about:

- how the Protection of Personal and Property Rights Act 1988 (PPPR Act) can assist you to manage your affairs
- the difference between an ordinary power of attorney and an enduring power of attorney
- the responsibilities and powers of both personal care and welfare attorneys and property attorneys
- personal orders and property orders
- appointing a welfare guardian and property manager
- things to ask yourself if you have or are thinking of making an enduring power of attorney.

# 1. Protecting your personal and property rights



The Protection of Personal and Property Rights Act 1988 (PPPR Act) provides legal ways to assist people who through age, accident or illness are no longer fully able to manage their own affairs. The PPPR Act also stresses the importance of people managing their own affairs and making their own decisions wherever possible because there is a presumption that people have mental capacity unless the contrary is shown. The PPPR Act can help people plan ahead and prepare for future possibilities by arranging powers of attorney.

The PPPR Act was amended in 2007 and came into force on 27 September 2008. The amendments provided more protection for those who grant enduring powers of attorney to others, that is, the donors. The key changes are:

- the requirement that donors of enduring powers of attorney must receive independent legal advice about the implications of granting the power
- the donor's witness must certify (in a certificate attached to the enduring power of attorney form) that they have no reason to suspect that the donor may not have mental capacity when they are signing the document
- the donor's witness must also certify that they are independent of the attorney.

If your enduring power of attorney was created before 25 September 2008, not all of the current requirements apply. For enduring powers of attorney made before this date, the donor's signature only has to be witnessed by an independent person and there is no requirement for the donor's witness to complete and attach a certificate.

## What is a power of attorney?

A power of attorney is an authority given by you to a person or trustee company to look after your affairs. A power of attorney can be general, for example, to look after all your money or property, or specific, for example, to manage your bank account while you are overseas.

There are two types of power of attorney: an ordinary power of attorney, and an enduring power of attorney.

An ordinary power of attorney has effect until it expires (if it is for a fixed term) or is cancelled (revoked). In addition, an ordinary power of attorney is valid while the person who granted it is alive and still has mental capacity. If you lose your mental capacity, for example because of debilitating disease or serious accident, the power of attorney is no longer in effect and the attorney (the person appointed by you to act on your behalf) cannot exercise it. This is because the person appointed by you to look after your affairs, your attorney, cannot have powers greater than yours.

An enduring power of attorney, on the other hand, can have effect if the person who granted it stops being able to make decisions for themselves, or to communicate those decisions. An enduring power of attorney usually comes into force when the person who granted it has lost the mental capacity to manage their own affairs.

Giving someone an enduring power of attorney is a way of making sure that someone you trust will make decisions on your behalf if you become unable to make those decisions alone - for example, due to a serious head injury, disease or mental illness.



## 2. Enduring power of attorney

### What is an enduring power of attorney?

There are two kinds of enduring powers of attorney:

1. one that covers your *personal care and welfare* (for example, covers living arrangements and medical care)
2. one that covers your *property* (for example, covers real estate and financial affairs).

An enduring power of attorney for *personal care and welfare* is activated after you lose mental capacity. You can have only one attorney for your personal care and welfare.

An enduring power of attorney for *property* is activated if you lose mental capacity but can also be used while you have mental capacity. You choose when the power can be used: either before you become incapacitated or after you lose mental capacity. You may also appoint more than one attorney for property. For example, if you are going overseas you may want one person to look after your house, and another to look after your investments. You may want to give full power to an attorney or to limit that power in certain ways. You can specify the limits of such powers.

We recommend that you consider appointing one person as attorney for your personal care and welfare and a different person (or different people) for your property.

## Who should I appoint as my enduring power of attorney?

A great deal of care must be taken in choosing who you appoint as your attorney. This person may be making decisions for you at a time when you cannot. It is extremely important that you feel sure the person who you choose knows you (and your partner) and that you are confident they would make decisions you would be happy about. They must also be prepared to take on the responsibility, so you must talk about it with the person you have in mind. Your attorney should have the skills to manage your affairs as well as their own and, for example, be able to keep proper records and full accounts.

It is crucial that you trust the person to whom you are giving the power (your attorney) and are confident that he or she will act in your best interests. This is because at some stage you may have absolute reliance on that person.

For your personal care and welfare attorney you may want to choose a member of your family or a friend. If there are certain people you would not want looking after you or performing certain tasks, you can also record this in your enduring power of attorney. For your property attorney you may want to choose your business partner or a trustee corporation.

It is possible for you to have more than one property attorney to act together (jointly) or independently (severally). If the attorneys are appointed severally, they should have different responsibilities. For instance, you might appoint your son to be attorney for your stocks and shares, and your daughter to be attorney for your bank account.

If your attorney for personal care and welfare is a beneficiary under your will, the decisions they make as your attorney may have financial implications for them personally. The same might be true of the property attorney. It is important to be aware of this when you choose your attorney.

**Note:** You cannot choose a trustee corporation to be your attorney for personal care and welfare.

## Should I have different people to be my attorneys for personal care and welfare and for property?

Though you do not have to, it is a good idea to appoint one person as attorney for your personal care and welfare and a different person or persons for your property. The skills needed to look after personal care and wellbeing are often quite different from those needed to look after someone's financial affairs.

You may also like to think about appointing joint property attorneys as this may afford you more protection than one person handling your affairs alone. For example, two signatures would be needed for the transfer or release of funds. Both attorneys would need to work together. However, if one of the joint attorneys dies, is made bankrupt, or loses mental capacity, you would generally need to appoint a successor attorney because the surviving attorney cannot act alone. While you have mental capacity it is important to review your enduring power of attorney with your lawyer, for example, to ensure that you have named a backup or substitute attorney.

You need to appoint an individual as your attorney for personal care and welfare. This means you cannot give authority to a trustee company, for example Public Trust, to be your attorney for personal care and welfare. You should also appoint a successor attorney who will take over if the first attorney dies or loses mental capacity themselves. This means that if the first attorney becomes unable to act, your enduring power of attorney continues to have effect.

The person you appoint as your personal care and welfare attorney is given no power to manage or commit any funds, so will often have to work closely with your property attorney(s). Attorneys are required to consult each other regularly to ensure that no breakdown in communication between them could harm your interests. You need to feel confident that those you appoint can work together.

## What should be in an enduring power of attorney covering property?

The person or trustee company you appoint as your enduring power of attorney should know what you own, what you owe, where everything is kept and what your exact wishes are.

Before you appoint anyone, you should list all your main assets. Things like your house, car, bank accounts, stocks, shares or other investments, life insurance policies, furniture and jewellery. Also make a note of any money owed to you. As well as your assets you should also list your debts or other liabilities.

It is helpful to be able to tell your property attorney where you keep all your important documents: title deeds, birth or marriage certificates, share certificates and insurance policies. Try to keep all these important things together if possible.

You should also decide what things you might want your attorney to do on your behalf. These can be as limited or as wide as you choose. For instance, you can consent to your attorney executing a will for you or you might instruct your attorney to give gifts in circumstances where you would have done so if you had been able. For example, birthday gifts for your grandchildren, or to pay the costs of their tertiary education.

You can state whether you want all or part of a property enduring power of attorney to take effect straight away, or only when you have lost mental capacity.

If you decide that the enduring power of attorney will take effect only after you have lost mental capacity, the attorney must not act in relation to your property until a registered health practitioner or the Family Court has determined that you have lost mental capacity.

An enduring power of attorney for personal care and welfare is different - it only takes effect when you have lost the mental capacity to make decisions about your welfare or the ability to communicate those decisions.

## What are the legal requirements for the appointment of my attorney?

- your attorney must be at least 20 years old, have mental capacity and not be bankrupt
- your enduring power of attorney must be in the form prescribed in the PPPR Act. Your lawyer will have these forms
- before you sign an enduring power of attorney, the effect of granting an enduring power of attorney must be explained to you by a lawyer, a qualified legal executive (with at least one year's experience who is employed by and under the direct supervision of a lawyer), or an authorised person from a trustee company
- the lawyer or legal executive must attach a certificate to the enduring power of attorney stating that they have explained it to you and must witness your signature as well. They must also certify that they have no reason to think you may already have lost mental capacity
- You and your attorney must sign the enduring power of attorney
- Your attorney's signature must be witnessed by anyone other than you or your witness.

## What powers does my property attorney have?

It is up to you to decide how much power a property attorney will have. You can impose some conditions or restrictions on what they can and cannot do.

You can grant your property attorney a general power to act in all matters relating to your property, or a specific power to act only in relation to some matters relating to your property for example, over your car.

It is wise to take precautions as financial abuse is possible. Even if you have no concerns about abuse, it is a good idea to arrange for regular reporting back and discussions with your attorney.

You can also specify when the enduring power of attorney is set up that a third party, such as your lawyer or your accountant, or another trusted person, be involved in these discussions as an extra check. Having a third person involved can also be helpful to your attorney.

## What responsibilities does my property attorney have?

An attorney must consult you, the donor, as far as practicable when acting on your behalf. A property attorney has a specific relationship of trust with the person who appointed them. This means that a property attorney has an obligation not to use money for their own benefit, invest it unwisely, or act in a way not authorised by the power of attorney itself.

If you lose mental capacity, your property attorney must use your property in your best interests.

A property attorney must keep records of each financial transaction he or she enters into while you do not have mental capacity. An attorney who fails to do this commits an offence and is liable to a fine.

What authority does my personal care and welfare attorney have?

Your enduring power of attorney could be general, or only in relation to certain areas. If you want your attorney to have authority only over certain areas you must specify what these are.

For example, you may give an enduring power of attorney for personal care and welfare only in respect of nursing home care, or you may give it for all medical care.

Your personal care and welfare attorney:

- cannot make decisions relating to marriage or divorce
- cannot make decisions relating to adoption of children
- cannot refuse consent to standard or life-saving medical treatment
- cannot give consent to medical experimentation.

## What responsibilities does my personal care and welfare attorney have?

If you lose mental capacity, your personal care and welfare attorney must promote and protect your welfare and best interests, while seeking at all times to encourage you to exercise your own capacity. Your attorney must consult you as far as practicable when acting on your behalf. The attorney must also encourage you to act on your own behalf and try to help you integrate into your community as far as possible.

When making a decision about your personal care and welfare, your attorney must consider the financial implications of that decision.

## Who do I need to see if I wish to create an enduring power of attorney?

You will need to see a lawyer or an authorised officer of a trustee company. This is because the PPPR Act requires a lawyer, a qualified legal executive or an authorised officer of a trustee company to explain the implications of granting an enduring power of attorney to an intending donor.

Any of these people will:

- be familiar with the format
- make sure your wishes comply with the law and will be enforceable
- be able to explain all the provisions to you
- be able to tell you of any possible disadvantages
- have the document witnessed appropriately
- ensure that your wishes, rather than those of your attorney, will be taken into account.

**Remember: You should discuss likely costs with your legal advisor before they do any work on your behalf.**

My friend has a degenerative disease – sometimes she is lucid, at other times she is confused. Can she still give enduring power of attorney?

As long as the person giving power of attorney (in this case the friend) can understand the nature and effect of the action they are taking, they can give power of attorney to another. They do not have to be capable of managing their property and affairs on a regular basis. However, the witness to a signature must have no reason to suspect that the donor does not have mental capacity at the time of signing.

## When does a personal care and welfare enduring power of attorney come into effect?

Your enduring power of attorney for care and welfare comes into effect only when you lose mental capacity. Section 94 of the PPPR Act states that someone is “mentally incapable” in relation to personal care and welfare if he or she lacks the mental capacity:

- to make a decision relating to his or her personal care and welfare, or
- to understand the nature of decisions relating to his or her personal care and welfare, or
- to foresee the consequences of decisions relating to his or her personal care and welfare or of the failure to make such decisions, or
- to communicate decisions relating to his or her personal care and welfare.

You should be aware that every person is presumed to have “mentally capable” until the contrary is shown. It is not your attorney who decides if you are no longer mentally capable.

The Family Court or a registered health practitioner can decide whether someone has mental capacity after looking carefully at all the issues.

## When does a property enduring power of attorney come into effect?

Your enduring power of attorney for property may come into effect either when you lose mental capacity or before then depending on the conditions in your enduring power of attorney. Section 94 of the PPPR Act states that someone is “mentally incapable” in relation to property if he or she is not completely competent to manage their own property affairs.

## Where should I keep my enduring power of attorney?

The original enduring power of attorney should be kept safe, either by your lawyer or in a safety deposit box. It is necessary to sign only one copy of an enduring power of attorney. Sometimes it may be desirable for more than one enduring power of attorney to be signed. It is prudent to keep the number of original signed copies to a minimum.

## Should I give a copy to the bank?

It is only necessary to provide an enduring power of attorney for property to the bank when an attorney is required to operate the bank account.

## If I do not have mental capacity, can the Family Court review the performance of my attorney?

Yes. The Family Court can review an attorney’s performance if you or some other person applies to the Court. The PPPR Act gives the Family Court wide powers to review the performance of your attorney and to vary the terms of the enduring power of attorney. The Family Court does not review an attorney’s performance automatically.

Among other things, you or some other person can ask the Family Court specifically to:

- decide whether you have lost mental capacity
- decide whether an enduring power of attorney is legally valid and what its specific effect is

- review any decision that an attorney has made
- give directions to an attorney to do certain things
- cancel an attorney's appointment. This may involve deciding whether you were unfairly induced or pressured to sign the EPA, or whether an attorney is suitable for the role.

## Can my attorney ask for directions from the Family Court?

Yes. For instance, if the attorney is finding it difficult to carry out some of the instructions, and you lack the ability to give further instructions, the attorney can apply to the Family Court for directions.

## Can I change my mind about making someone my attorney?

Yes, you can vary, suspend or revoke (cancel) your enduring power of attorney at any time while you have mental capacity.

Changes to an enduring power of attorney should be made in writing, in a document that is signed and witnessed in accordance with current legal requirements. However, the changes do not need to be witnessed by the same person as on the first occasion.

Different procedures apply for changing, cancelling and replacing an enduring power of attorney, and you should get legal advice as to which is most suitable for your situation.

If you grant a new enduring power of attorney, it is extremely important that you revoke the existing one. An enduring power of attorney is quite different from a will — it is not necessarily the latest enduring power of attorney that counts. The Family Court may have to decide which document will take effect if there is a dispute and this can be costly.

Once the document is signed, you can revoke it at any time by giving notice in writing to your attorney. You should also notify the bank or any other agency likely to be affected that you have revoked the power of attorney given. As this is a serious step you should see a lawyer beforehand.

If you had lost mental capacity but have since regained it, you may also suspend your attorney's authority to act under the enduring power of attorney, by giving him or her written notice. A suspension, unlike a revocation, does not actually cancel the enduring power of attorney.

Different procedures are needed for suspension, variation and revocation and you should get legal advice as to which is most suitable for your situation.

## How can an enduring power of attorney cease to have effect?

An enduring power of attorney ceases to have effect when:

- you revoke (cancel) the enduring power of attorney
- you die (your enduring power of attorney ceases on your death and the instructions in your will apply)
- the attorney states in writing that they do not want to act any more (called a notice of disclaimer)
- the attorney goes bankrupt
- the attorney dies
- the attorney becomes subject to a personal or property order themselves, or becomes a compulsory patient under the Mental Health Act 1992
- one of the attorneys dies who has been appointed jointly (both attorneys have to act together) and not severally (either attorney can act)
- the Family Court revokes the appointment of the attorney under section 105 of the PPPR Act.

## When will the Family Court revoke authority of the attorney I have appointed?

The Family Court will revoke authority if it is satisfied that:

- the attorney was not acting, or was likely not to act, in your best interests
- or the appointment was obtained by undue influence or fraud.

## Who would look after my interests if this happened?

The Family Court may appoint a welfare guardian and perhaps a property manager to manage your affairs if an appropriate application is made.

## What happens if there is a conflict between my personal care and welfare attorney and my property attorney?

If there is a conflict in carrying out their respective powers or duties, either attorney can apply to the Family Court to ask for direction.

However, the property attorney must generally give the personal care and welfare attorney any financial support required to carry out their duties in relation to your personal care and welfare.



# 3. When there is no enduring power of attorney

What happens if I have no enduring power of attorney and I lose my mental capacity?

It is preferable and important that you decide who you would like to be your attorney while you are still capable of doing so. If you have not made an enduring power of attorney, the PPPR Act allows someone to apply to the Family Court to be appointed as your welfare guardian and/or property manager. If your circumstances at the time are such that you have no close family members to make an application to the Family Court, the person who applies and is appointed may know nothing about you, yet will be making decisions for you at a time when you cannot make them for yourself.



# 4. Family court: welfare guardianship orders, personal orders and property orders

The Family Court has extensive powers to make court orders about personal care and welfare and property matters if you lose your mental capacity. This is more likely to happen if you do not have an enduring power of attorney.

Everyone is presumed to have the capacity to make decisions for themselves about their personal care, and to be able to express those decisions, unless proved otherwise. A personal order under the PPPR Act cannot be made simply because a person makes decisions which may not seem reasonable to other people.

The Family Court may not make a personal order unless you normally live in New Zealand and are at least 20 years old. You must either:

- lack, partly or fully, the mental capacity to understand the nature of decisions about your own personal care and welfare, and the mental capacity to foresee the consequences of such decisions, or
- have these capacities, but fully lack the capacity to communicate decisions about your personal care and welfare.

These matters would usually be established by a medical report considered by the Family Court.

## What kind of orders can the Family Court make?

The Family Court can make “personal orders”, which relate to someone’s personal care and welfare. A personal order can be made to deal with a specific issue (such as where someone will live or who will look after them), or it can appoint a welfare guardian to have a general power to look after someone’s personal care and welfare.

The Family Court can also make “property orders”, which involve appointing a property manager for the person’s property or part of it.

## What is a welfare guardian?

A welfare guardian is a person appointed by the Family Court to look after your welfare if you are completely unable to communicate or understand decisions about your personal care and welfare.

## What does a welfare guardian do?

Usually a welfare guardian will be able to make a wide range of decisions, on a long-term basis, on your behalf. A welfare guardian will have all the powers that are reasonably required to promote and protect your welfare and best interests, for example, to decide medical matters or where you live. A welfare guardian should at all times seek to encourage that person to develop and exercise any capacity they may have.

As well as promoting your best interests, the welfare guardian should:

- encourage self-reliance
- help you to live in your community as normally as possible
- consult with you, if practical
- consult with other interested people, such as your property manager or hospital caregiver.

## Are there any limits on a welfare guardian's powers?

Yes, a welfare guardian:

- cannot make any decisions relating to you entering or dissolving a marriage
- cannot make decisions about the adoption of any of your children
- cannot refuse consent to medical treatment to save your life or prevent serious danger to your health
- cannot consent to electro convulsive (ECT) treatment
- cannot consent to brain surgery or brain treatment for the purpose of changing your behaviour
- cannot consent to you being part of any medical experiment unless it is intended to save your life or prevent damage to your health.

## Who will the Family Court appoint as a welfare guardian?

The Family Court can only appoint one person as a welfare guardian.

The person must be an individual (not a company or agency, such as a trustee company) and must be at least 20 years old. In very exceptional circumstances the Family Court may appoint two welfare guardians.

The Family Court will not appoint someone to be your welfare guardian unless it is satisfied that they:

- are capable of performing the role in a satisfactory manner
- will act in your best interests
- is unlikely to have a conflict of interest with you
- consents to being appointed.

Before appointing a guardian, the Family Court will, as far as is practical, find out who you want to be appointed as your welfare guardian.

## Are there any safeguards?

Yes, the safeguards against abuse of power by the welfare guardian are as follows:

- welfare guardians are not paid for their services, so there is no financial motive to be appointed. Their reasonable expenses, however, can be met
- welfare guardians can be personally liable if they act in bad faith or without reasonable care. They will also be personally responsible for contracts or other arrangements they enter into (for example, a mortgage) if they fail to disclose that they are acting as a welfare guardian
- the Family Court can limit what the welfare guardian can do
- an application can be made at any time to the Family Court to review the decisions of a welfare guardian
- the Family Court can appoint a new welfare guardian in place of an unsatisfactory welfare guardian
- the order appointing a welfare guardian must be reviewed within three years and can be reviewed earlier on application.

## Does a welfare guardian get paid?

Welfare guardians do not get paid for the tasks they do but can be paid reasonable expenses. If you do not have enough money to pay these, the Family Court may authorise these to be paid from public funds.

## Who can apply for a personal order?

The people who can apply for a personal order are:

- you
- a relative (a spouse, civil union partner, de facto partner, parent or grandparent, child or grandchild, brother, sister, aunt, uncle, niece or nephew)
- a relative of your spouse, civil union partner or de facto partner
- anyone to whom you have given a power of attorney
- a medical practitioner
- a social worker
- the principal manager of a place that provides hospital care, rest home care, or residential disability care, in which you are a resident or patient
- a representative from any non-profit group that provides services and facilities for people who have lost their mental capacity
- any property manager appointed for you under the PPPR Act
- any other person, with permission from the Family Court.

## Do applications for personal orders need to be done through a lawyer?

No. You can get application forms from the Family Court, fill them in yourself, and file them at the Family Court. There is no filing fee.

Because of the legal nature and complexities of applying for orders under the PPPR Act, it may be in your best interests to ask a lawyer to act for you in making the application.

## If someone applies for a personal order relating to me, who will represent my interests?

The Family Court will appoint a lawyer (called “counsel for subject person”) to represent you if necessary, generally paid for by the government. The lawyer will carry out appropriate investigations into your circumstances and report to the Family Court.

Applications can be decided without a court hearing. Matters are also sometimes resolved at a pre-hearing conference where all the parties can discuss the issues and their concerns.

## If I have lost mental capacity, will I be able to attend the hearing?

The PPPR Act says that you are to be present at the hearing, but you will be excused from attending if:

- the Family Court is satisfied that you wholly lack the mental capacity to understand the proceedings, or that attendance may cause you serious mental, emotional or physical harm
- you make such a disturbance throughout the hearing that the Family Court considers it is not possible to continue in your presence.

## When will the Family Court make a property order about my property?

The Family Court will make an order if you own property and live in New Zealand or own property in New Zealand but do not live there and wholly or partly lack the mental capacity to manage your own property affairs.

Everyone is presumed to be competent to manage their own property affairs, unless it is proved otherwise. A property order under the PPPR Act cannot be granted simply because you make decisions about your property which may not seem reasonable to others.

## If I lose mental capacity, how are decisions made about my property?

The Family Court can make orders about the management and administration of your property. There are two kinds of property orders:

- an order appointing a *property manager* for you
- an order for *property administration*.

The Family Court can appoint a property manager for property of any value. As far as possible, the Family Court will try and find out your wishes when appointing a property manager. A property manager may be paid from your assets for their services.

If the property is not large (no single item being worth more than \$5,000 or the income or benefit being less than \$20,000 a year), the Family Court can appoint a property administrator.

A trustee company can also make decisions about your property if you or someone on your behalf apply to it. If you are 18 years old or over and believe you have become partly or completely unable to manage your own affairs, you, your relatives or other people in some cases, may apply directly to a trustee corporation to manage your property, instead of applying to the Family Court for a property order. Someone can apply on your behalf if your assets are less than \$100,000. Any application must be in writing and include certificates from two doctors (one must be independent of you and your family). You can withdraw your affairs from the trustee company on giving seven days' written notice.

## Who can apply for a property order?

Any of the following people can apply for a property order to be made:

- you
- a relative (a spouse, civil union partner, de facto partner, parent or grandparent, child or grandchild, brother, sister, aunt, uncle, niece or nephew)
- anyone to whom you have given a power of attorney
- a medical practitioner
- a social worker
- a trustee corporation
- the principal manager of a place that provides hospital care, rest home care, or residential disability care, in which you are a resident or patient
- a representative from any non-profit group that provides services and facilities for people who have lost their mental capacity
- any welfare guardian appointed for you under the PPPR Act
- any other person, with permission from the Family Court.

In urgent cases, the Family Court can grant temporary orders for up to three months.

## What do property managers do?

The manager's powers include the right to buy, sell, let and maintain property, carry on a business, or pay debts. When the Family Court appoints a property manager, it specifies which powers in the PPPR Act the manager may exercise.

The sorts of duties a property manager may take on could include:

- investing money on your behalf
- ensuring any property you own is kept in good physical repair
- giving money to charities you may have formerly given to
- advancing money to your dependants or close relatives for maintenance or education purposes.

Property managers must promote and protect the interests of the person whose property they manage and encourage that person to develop and exercise as much competence as they can to manage their own affairs.

They must also consult that person and take advice from other interested people.

In some situations property managers may be personally liable for their actions, for example, if they enter into contracts or arrangements without saying that they are acting for you, if they act in bad faith without reasonable care, or if they act outside the powers granted by the Family Court.

## Are there any restrictions on what a property manager can do?

A property manager only has the specific powers given to them by the Family Court. A number of powers require Family Court approval, such as:

- making gifts over \$5,000 in total in any one year
- buying or selling property for more than \$120,000
- leasing property for a term of more than ten years

- improving or developing a property at a cost of more than \$120,000
- managing your business.

## Does a property manager have a duty to consult?

Property managers have a statutory duty (a duty or liability imposed by legislation) to consult with other people such as:

- you
- any welfare guardian
- family members
- service providers
- any other professional adviser who may be working with you or in your interests.

## What happens if there are problems with my property manager?

If there are problems, you or someone else can apply to the Family Court to review any decision made by your property manager. Your property manager must act in your best interest. If they fail to do so, the Family Court may vary existing orders or make new orders, including appointing a new property manager.

## Financial reports

A property manager is required to file an annual statement of management of your financial affairs in the Family Court, which will be audited by Public Trust.



# Ask yourself these questions

Things to consider when appointing an enduring power of attorney:

- 1. Do you have absolute trust that the person you are appointing as attorney will always act in your best interests?**
- 2. Have you consulted your own lawyer about your decision to make an enduring power of attorney?**

Sometimes the person you are granting power of attorney to will offer to take you to their lawyer to arrange it. However, it is now a requirement of the PPPR Act that you receive independent legal advice. It is in your best interests to see your own lawyer.

- 3. How will your attorney decide when you are no longer able to manage things yourself, and it is time for them to manage your affairs?**

If your attorney suspects you no longer have mental capacity, they must arrange for you to be examined by a relevant health practitioner who will make this assessment.

- 4. How can you help your attorney to make the best decisions for you?**

You could appoint one attorney to take charge of your personal care and welfare, and a different attorney (or attorneys) to take care of your property and financial affairs.

You could appoint more than one attorney to take care of your property and financial affairs. It might be better than leaving control over your affairs in the hands of one person alone.

You could require your attorney(s) to consult with and/or make regular reports to a third person about the way they are managing your affairs. You may want your attorney to provide a written report to this person every six months. This would help to keep your attorney accountable. Whatever you decide, get this written into your enduring power of attorney.

**5. Do you want to give your personal care and welfare attorney authority to take care of everything to do with your personal care and welfare, or only some things?**

If the answer is “only some things”, make sure they are written into the enduring power of attorney.

**6. Who will you appoint as a substitute in case your personal care and welfare attorney can no longer act for you?**

An enduring power of attorney can cease to have effect if the attorney dies, goes bankrupt or loses mental capacity, so it is important to name a backup or substitute attorney.

**7. Do you want your property attorney(s) to begin managing your property now or only if you lose mental capacity?**

Your enduring power of attorney for property takes effect either immediately or when you lose mental capacity. You may want your property attorney to manage some things now, while you manage the rest until you lose mental capacity. Whatever you decide, get this written into your enduring power of attorney.

**8. Do you want to give your property attorney authority to take charge of all your money and property, or only some things?**

If the answer is “only some things”, make sure this is written into your enduring power of attorney.

**9. Will you appoint one property attorney, or two, or even more?  
Or will you appoint a trustee company?**

Your interests might be better protected by appointing one or more attorneys to take care of things. There will be different reasons for appointing one or more property attorneys and this is something you should discuss with your lawyer.

**10. If I change my mind, can I change my attorney?**

Yes. Changes to an enduring power of attorney should be made in writing, and in accordance with current legal requirements. Different procedures apply for changing, cancelling and replacing an enduring power of attorney, and you should get legal advice as to which is most suitable for your situation. If you grant a new enduring power of attorney, it is extremely important that you revoke the existing one to avoid confusion about which is valid.

## Notes



For further information and advice contact your nearest community law centre or your local Age Concern.

This information is also available at [www.communitylaw.org.nz](http://www.communitylaw.org.nz) and [www.ageconcern.org.nz](http://www.ageconcern.org.nz)

# Contact:

## Community Law Wellington and Hutt Valley

**PO Box 24-005**

**Wellington 6142**

**Phone: (04) 499 2928**

**Email: [info@wclc.org.nz](mailto:info@wclc.org.nz)**

**or visit the website at [www.communitylaw.org.nz](http://www.communitylaw.org.nz)**

Community Law Wellington and Hutt Valley provides free legal help to the community and empowers people to resolve their legal problems.

## Age Concern New Zealand

**PO Box 10-688**

**Wellington 6143**

**Phone: (04) 801 9338**

**Email: [national.office@ageconcern.org.nz](mailto:national.office@ageconcern.org.nz)**

**or visit the website at [www.ageconcern.org.nz](http://www.ageconcern.org.nz)**

Age Concern is a charitable organisation dedicated solely to people over 65.

We promote dignity, wellbeing, equity and respect and provide expert information and support services in response to older people's needs.



© 2015 Age Concern New Zealand

