

Enduring Powers of Attorney

What are they?

Enduring powers of attorney (EPA) may be used to cover situations in which a person does not have the ability to manage his or her own affairs.

A personal care and welfare EPA appoints a person to make decisions relating to your day to day care such as accommodation, healthcare and general well being. It comes into effect only if you become mentally incompetent.

A property EPA appoints one or more person/s to administer your financial and property affairs. It can come into force either if you become mentally incompetent (on a medical practitioner's certification) or, if you prefer, it can come into force immediately so it is available to be acted upon should you wish your attorney to handle a business matter for you.

How are they different from an ordinary power of attorney?

Ordinary powers of attorney are automatically revoked if you become mentally incompetent.

Why have one?

The unforeseen: Sudden illness, accidents and longer term degenerative illnesses can leave the holder of an ordinary power of attorney unable to act through lack of mental capacity on the part of the person who gave the power of attorney.

Lifestyle: Rapid changes in lifestyle, means of doing business and ease of travel coupled with an enhanced life expectancy in the western world, have meant that the ordinary power of attorney often does not operate effectively.

The Courts: If you lose your mental capacity without an EPA in place, orders appointing a manager and welfare guardian can be obtained through the Family Court. This can be a very stressful, lengthy and costly process.

When should I have one?

Right now, so that if anything should happen to you which may impair your own mental powers someone can act on your behalf to ensure that you and your assets are properly cared for.

Signing EPAs

The signature of a person granting an EPA must be witnessed by a lawyer, an authorised officer of a trustee corporation or a legal executive working in a law firm.

The witness must complete a certificate confirming certain matters have been explained to the donor before signing, including that the witness is independent and has no reason to suspect that the donor is mentally incapable.

The Protection of Personal and Property Rights Act 1988 ("Act") requires that detailed legal advice is given to the donor when appointing an EPA attorney and the witness must also certify that he/she is independent of the attorney. It is



likely that where partners appoint each other as attorney both will need to consult separate legal advisers to satisfy the requirements of the Act.

Anyone accepting appointment as an EPA attorney, whether a friend, family member or professional, will need to fully understand their obligations.

How do they work?

The law presumes that a person does have mental capacity unless a medical practitioner certifies otherwise. This means that unless the contrary is shown, a person is presumed to have the capacity to make and understand the nature of decisions, foresee the consequences of their decisions and be able to tell others about these decisions. A person will not be presumed to lack capacity because they are displaying imprudent behaviour or the person is currently receiving treatment under the Mental Health Act.

Definition of "Mentally Incapable"

A medical practitioner must certify that the donor lacks the capacity to:

- make decisions; or
- understand the nature of those decisions; or
- foresee the consequences of those decisions; or
- lacks the capacity to communicate the decisions.

Medical Practitioner's Certificate

A certification by a medical practitioner as to a donor's lack of mental capacity must be obtained before an attorney can act for the donor.

A donor may nominate in the EPA a medical practitioner who is to provide this certificate.

How an Attorney is to Act

The attorney must act in the best interests of the donor and is required to consult with the donor and any person the donor has specified in the EPA. The attorney is also required to encourage the donor to be involved with decision making within their level of competence.

Consultation with Attorneys

If separate attorneys have been appointed under a property EPA and personal care and welfare EPA, the two attorneys must consult regularly to ensure the donor's interests are not affected by any breakdown of communication between the two attorneys. The property EPA must use the donor's property to provide financial support if required by the personal care and welfare attorney.

We urge clients to treat the appointment of an EPA attorney as something which is important and not to be entered into without full understanding. If you have any questions, please contact your main contact person at Brookfields or:

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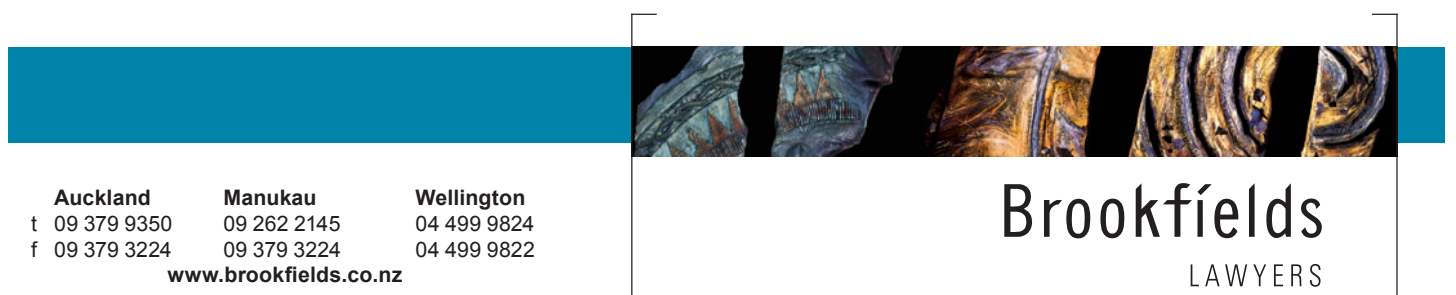
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