

## ENDURING POWER OF ATTORNEY

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### Powers of Attorney prior to 1988

Under the Protection of Personal and Property Rights Act 1988 (the "Act"), it became possible to create Enduring Powers of Attorney. Prior to this Act, a Power of Attorney ceased to have effect if the Donor became mentally incapable. This meant that at one of the times when the Power of Attorney was most needed, it was automatically revoked. Every Power of Attorney executed before 1 October 1988, even if it purports to be enduring, will be subject to revocation in the event of the Donor becoming mentally incapable.

### Enduring Powers of Attorney

There are two types of Enduring Power of Attorney:

- (a) In relation to Property; and
- (b) In relation to Personal Care and Welfare.

You can choose to execute one Power of Attorney covering both areas or execute two separate ones. We recommend that you execute two separate Enduring Powers of Attorney to avoid any confusion of instructions.

The Enduring Power of Attorney in relation to Property authorizes the attorney to act in relation to all or a specified part of your affairs relating to your property and you can give the Enduring Power of Attorney subject to any conditions or restrictions you wish. Property dealt with under this type of Enduring Power of Attorney includes not only land but all other property, for example, money, business interests and personal assets.

The Enduring Power of Attorney in relation to Personal Care and Welfare authorizes the attorney to act in relation to your personal care and welfare, again either generally or in relation to specific matters and subject to any conditions or restrictions you may wish. Sometimes this Power of Attorney may overlap with the Enduring Power of Attorney in relation to Property (refer "What can your Attorney do?" below) and for this reason we recommend that a common person be appointed in relation to both Personal Care and Welfare and Property.

### What can your Attorney do?

An Enduring Power of Attorney in relation to Property empowers the attorney to do anything which you can lawfully do. The attorney is your agent and can for example, assist in handling complex financial transactions or take care of your affairs while you are

overseas. However, an Enduring Power of Attorney will not enable your Attorney to act in your capacity as an executor or trustee. If this is required, it will be necessary to execute a non-enduring power of attorney that specifically permits the Attorney to act in your capacity as executor and/or trustee.

An Enduring Power of Attorney in relation to Personal Care and Welfare authorizes the attorney to act in relation to your personal care and welfare to the extent you specify and any action taken by your attorney will have the same effect as if you had taken it with full capacity.

Your Personal Care and Welfare attorney may not do certain things, including:

- (a) making any decision relating to your entering into or dissolving a marriage;
- (b) making any decision relating to adopting any child;
- (c) refusing consent to any standard medical treatment intended to save your life or prevent serious damage to your health;
- (d) consenting to electro-convulsive treatment for you;
- (e) consenting to any surgery or treatment on you designed to destroy part of your brain to change your behaviour; or
- (f) consenting to any medical experimentation on you unless it is to save your life or prevent serious damage to your health.

There are two other major restrictions on the powers of your attorney. The Family Court may make orders on application from certain interested parties if it believes that a person is unable to look after their affairs without assistance. The orders may be personal or in relation to property and they prevail over the powers and duties of your attorney. However, we believe a Court would be reluctant to make orders in circumstances where valid Powers of Attorney had been executed and there were not unusual circumstances.

There are also restrictions on your attorney acting for his or her own benefit or for the benefit of other persons. The attorney can only do so if and to the extent that you might be expected to do so to provide for their needs or to make reasonable gifts, for example, on birthdays or to charities. You may wish to restrict this provision even further yourself or make specific requests.

There is some doubt as to whether an attorney for personal care and welfare can deal with your property, for example, by making gifts on your behalf. To remove any doubt, we recommend that one of your attorneys in relation to property also act in relation to your personal care and welfare.

## When does an Enduring Power of Attorney comes into effect?

An Enduring Power of Attorney in relation to Property comes into effect upon execution and continues to have effect even if the donor becomes mentally incapable. However, you can specify that the Enduring Power of Attorney will only come into effect if you become mentally incapable, should you prefer. In relation to these Enduring Powers of Attorney, "mentally incapable" means that the Donor is not wholly competent to manage his or her own affairs in relation to his or her property.

An Enduring Power of Attorney in relation to Personal Care and Welfare only takes effect when a person becomes mentally incapable. For the purposes of personal care and welfare, mental incapacity means:

- (a) Lacking the capacity, wholly or partly, to understand the nature and foresee the consequences of decisions relating to the donor's own personal care and welfare; or
- (b) Wholly lacking the capacity to communicate decisions relating to the donor's own personal care and welfare.

It appears that only the Family Court can determine whether or not a person who has made an Enduring Power of Attorney is mentally incapable and therefore rule that the Enduring Power of Attorney in relation to Personal Care and Welfare has come into effect.

## Execution

Any person who uses a form complying with the ones set out in the Act may create an Enduring Power of Attorney. The Enduring Power of Attorney must be signed by both the Donor and the Attorney and both signatures must be witnessed by a third party. The Donor must be able to understand the nature and effect of signing an Enduring Power of Attorney, even if he or she is mentally incapable at the time of signing in the full legal sense of being able to manage his or her property and personal affairs.

## Who can be Attorneys?

Any person who is at least 20 years old, and who is not bankrupt or subject to an order under the Act (because that person is unable to look after his or her affairs without assistance) can be appointed as an Attorney.

In the case of an Enduring Power of Attorney in relation to Property, it is also possible to appoint a Trustee Corporation to act as Attorney.

## How many Attorneys are Permitted?

More than one Attorney can be appointed in relation to Property, but if you do decide to appoint more than one, it is recommended that you specify how the Attorneys are to act, for example whether they are to act together at all times ("jointly"), or whether they can act either together or separately ("jointly or severally").

You can only appoint one Attorney in relation to Personal Care and Welfare. There are many similarities in the Act between welfare guardians (who are appointed by the Family Court) and Personal Care and Welfare Attorneys. A policy decision appears to have been made at the time of drafting the Act that only one welfare guardian should be able to be appointed, in order to encourage a relationship to be developed on a one-to-one basis with the aim of encouraging the incapacitated person to manage his or her own affairs. It is probable that the same rationale underlies the ability to appoint only one Personal Care and Welfare Attorney.

It is possible to appoint a successor to your nominated Attorney in the event that the nominated Attorney is unable to act, however it is not possible to delegate the power of appointment to your nominated Attorney.

## Revocation of Enduring Powers of Attorney

An Enduring Power of Attorney ceases to have effect when:

- (a) The Donor revokes it while mentally capable;
- (b) The Donor dies;
- (c) The Attorney refuses to act, dies, becomes bankrupt or becomes incapable of acting; or
- (d) The Court revokes the appointment of the Attorney.

If you appoint two or more Attorneys in relation to property to act jointly but not separately, and one dies or becomes bankrupt or incapable of acting, the whole Enduring Power of Attorney will cease to have effect.

*For further information or assistance, please contact John Jon on (09) 970 8829 or email [john@queencitylaw.co.nz](mailto:john@queencitylaw.co.nz)*