

ENDURING POWERS OF ATTORNEY

Traditionally, if a donor lost their mental capacity or ability to administer their affairs, the attorney's ability to "stand in the donor's shoes" and perform the delegated acts also came to an end. The enduring aspect of the Enduring Power of Attorney ("EPA") provides that the donee's ability to act for the donor "endures" despite the donor's subsequent incapacity and may relate to property, to personal care and welfare, or to both.

Enduring Powers of Attorney ("EPA's") are set out in Part IX of the PPPR Act. There are two types of attorney – property and personal care and welfare, prescribed by sections 97 and 98 respectively. In both cases the powers can be as broad or as specific as the donor wishes. This is in keeping with the principle of the PPPR Act and allows the donor to tailor the power to suit their specific circumstances. Having said this, most older clients will accept their solicitor's advice, and will generally be given documents which provide the donee with a general authority to act which, in the case of property matters, takes effect immediately.

When advising the older client it is important:

To ensure that your instructions are taken from the older person without other family members or caregivers present. The choice as to who will act for the older person in the situation where they lack mental capacity must be one freely given and appropriate.

That they clearly understand that the enduring power of attorney document gives the attorney very wide powers and particular care must be taken in the selection of an attorney, who must be competent, not a bankrupt and over 20 years of age.

That they understand that the powers conferred may be general or specific.

That they are aware that the power can be revoked at any time, provided they have the requisite mental capacity. There is no legally prescribed document, but it is wise to document any subsequent revocation and the reasons why

That the duties of an attorney include:

- to act within the terms of the document
- to act in the best interests of the donor
- to consult with any other attorney appointed.
- to comply with the minimum standards prescribed in sections 97 and 98.
- if the Family Court reviews the EPA, to adhere to any direction or order of the Court
- generally, not to act in his or her own interests to the detriment of the donor's estate.
- to apply to the Court when areas of doubt arise

Capacity Considerations.

Capacity given under enduring powers of attorney is not defined by the Act. In *Re "Tony"* [1990] 5 NZFLR 609 the Court held that it is sufficient if a donor is capable of understanding the nature and effect of the power, ie the broad essentials of an enduring power of attorney. It is not necessary that the donor will be able to perform the acts authorised by the power, as the capacity goes to an understanding of delegation, not the management which is being delegated.

The competency tests for the commencement of authority under an enduring power of attorney are the same as those which give jurisdiction to the Court to make personal and property orders.

Conversely, Section 94 sets out when the donor of an enduring power of attorney is mentally incapable. It provides:

Section 94(1)(a)

"For the purposes of this part of the Act, the donor of an enduring power of attorney is mentally incapable -

(a) In relation to property, if the donor is not wholly competent to manage his or her own affairs in relation to his or her property; or

(b) In relation to personal care and welfare, if the donor:

(i) lacks, wholly or partly, the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare; or

(ii) has the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare, but wholly lacks the capacity to communicate decisions in respect of such matters."

Essentially, the reality is, medical input will be required, both in respect of the execution and the appropriate time for commencement. (Refer comments – Proposed legislative changes below).

The property enduring power of attorney can take effect immediately it is signed and will not be revoked by the donor's subsequent mental incapacity or, like a personal enduring power of attorney, come into effect only on the donor becoming mentally incapable. (For further discussion of the competency tests see Philippa Cunningham's paper at point 4.)

Family Court's Supervisory Jurisdiction.

The Family Court retains the right to supervise the activity of attorneys and their appointments may be revoked if they do not act in the best interests of the donor. However, in reality, this involves the vigilance of family, friends and other carers or social workers, doctors or lawyers.

Section 101 confers the right for an attorney to seek directions from the Court relating to the exercise of the attorney's powers. This section may be particularly helpful where there are conflicting interests within a family and a major transaction (ie: sale of the family home) or a significant step in relation to personal care and welfare (ie. moving the older person into rest home care) is contemplated.

Section 103 provides for the review of an attorney's decisions and again may be particularly helpful in inter family conflicts such as those set out above. This section however, is primarily invoked "after the event" and may not be particularly helpful to stop a proposed action, such as the sale of a house, where injunction proceedings may be required. In addition, one must apply for leave unless you are the donor and wish to challenge the actions of your own attorney