

## ENDURING POWER OF ATTORNEY IN RELATION TO PERSONAL CARE AND WELFARE

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**There are two types of Enduring Powers of Attorney. One is for property and the other is for Personal Care and Welfare. The following Notes relate to an Enduring Power of Attorney in Relation to Personal Care and Welfare and are an Extract from the Notes contained within the Protection of Personal and Property Rights Act 1988.**

The effect of the Enduring Power of Attorney is to authorise the person(s) you (**the Donor**) have named as your Attorney(s) to act on your behalf in relation to your personal care and welfare if you become mentally incapable.

**Mentally incapable** is defined in Section 94(2) of the Protection of Personal and Property Rights Act 1988 (the **Act**). That section provides that a donor of an Enduring Power of Attorney is mentally incapable in relation to personal care and welfare if the donor:

- (a) lacks the capacity:
  - (i) to make a decision about a matter relating to his or her personal care and welfare; or
  - (ii) to understand the nature of decisions about matters relating to his or her personal care and welfare; or
  - (iii) to foresee the consequences of decisions about matters relating to his or her personal care and welfare or of any failure to make such decisions; or
- (b) lacks the capacity to communicate decisions about matters relating to his or her personal care and welfare.

An assessment of mental capacity must take into account the presumption of competence in Section 93B of the Act. Every person is presumed, until the contrary is shown, to have the capacity:

- to understand the nature of decisions about matters relating to his or her personal care and welfare; and
- to foresee the consequences of decisions about matters relating to his or her personal care and welfare or of any failure to make such decisions; and
- to communicate decisions about such matters.

A person must not be presumed to lack mental capacity just because the person makes or intends to make a decision about his or her personal care and welfare that a person exercising prudence would not make in the same circumstances.

Also, a person must not be presumed to lack mental capacity just because he or she is subject to compulsory treatment or has special patient status under the Mental Health (Compulsory Assessment and Treatment) Act 1992.

Your Attorney will be able to act under the Enduring Power of Attorney only if you become mentally incapable.

Under Section 98 of the Act:

An attorney must not act in respect of a **significant matter relating to the donor's personal care and welfare unless:**

- at the time a decision relating to the matter is being, or is proposed to be, made, and in relation to that matter, a relevant health practitioner has certified, or the Family Court has determined, that the donor is mentally incapable; or
- a relevant health practitioner has previously certified that the donor is mentally incapable because of a health condition that is likely to continue indefinitely; or
- a relevant health practitioner has previously certified that the donor is mentally incapable because of a health condition that is likely to continue for a specified time, and the decision about the matter is being made within the specified time.
- an Attorney must not act in respect of any other matter relating to the donor's personal care and welfare unless the Attorney believes on reasonable grounds that the donor is mentally incapable.

A **significant matter relating to the donor's personal care and welfare** is defined in Section 98(6) of the Act to mean a matter that has, or is likely to have, a significant effect on the health, wellbeing, or enjoyment of life of the donor (for example, a permanent change in the donor's residence, entering residential care, or undergoing a major medical procedure).

A **relevant health practitioner** is a person:

- who is, or is deemed to be, registered with a registration authority appointed by or under the Health Practitioners Competence Assurance Act 2003 as a practitioner of a particular health profession; and
- whose scope of practice enables him or her to assess a person's mental capacity; and
- who is competent to undertake an assessment of that kind.

In the case of a certificate of mental incapacity issued outside New Zealand, a relevant health practitioner is a person registered as a medical practitioner by the competent authority of the country concerned and whose scope of practice includes the assessment of a person's mental capacity.

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A donor may specify in an Enduring Power of Attorney that an assessment of his or her mental capacity be undertaken by a health practitioner with a specified scope of practice (for example, a medical practitioner registered with a general scope of practice, or a nurse whose registered scope of practice is nurse practitioner). Provided health practitioners who have that scope of practice are able to assess a person's mental capacity, then only a health practitioner with the scope of practice specified by the donor and who is competent to do so may assess the donor's mental capacity and complete the certificate.

The following notes refer to the numbered paragraphs in the form.

## 1. **Appointment of Attorney**

You can appoint only one Attorney to act in relation to your personal care and welfare if you become mentally incapable.

You must appoint an individual as your Attorney who is at least 20 years of age, not bankrupt, and not subject to a personal order or a property order under the Act.

You may not appoint a trustee corporation to be your Attorney. A trustee corporation is the Maori Trustee, Public Trust and any trustee company within the meaning of the Trustee Companies Act 1967.

## 2. **Personal care and welfare matters subject to Enduring Power of Attorney**

You can authorise your Attorney to act on your behalf in relation to all of your personal care and welfare matters, or only some of your personal care and welfare matters. If you want your Attorney to act only in relation to some of your personal care and welfare matters, you must specify what those matters are.

Your Attorney will not, under Section 98(4) of the Act, be able to act on certain matters. These are:

- to make any decision relating to the entering into marriage or civil union by you, or to the dissolution of your marriage or civil union; or
- to make any decision relating to the adoption of any child of yours; or
- to refuse consent to the administering to you of any standard medical treatment or procedure intended to save your life or to prevent serious damage to your health; or
- to consent to the administering to you of electro-convulsive treatment; or
- to consent to the performance on you of any surgery or other treatment designed to destroy any part of the brain or any brain function for the purpose of changing your behaviour; or

- to consent to you taking part in any medical experiment other than one to be conducted for the purpose of saving your life or of preventing serious damage to your health.

Under Section 98A of the Act, your Attorney's paramount consideration is the promotion and protection of your welfare and best interests, while seeking at all times to encourage you to exercise your own capacity and act on your own behalf to the greatest extent possible.

## **OPTIONAL PROVISIONS**

### **3. Conditions and restrictions on Attorney's power**

If you want to place conditions or restrictions on your Attorney's authority, you must specify what those conditions or restrictions are.

### **4. Appointment of Successor Attorney**

You can appoint another individual to be your successor Attorney in the event that your original Attorney's appointment ceases. Section 106(1)(c) to (f) of the Act sets out the circumstances when an Attorney's appointment ceases, as follows:

- the Attorney gives notice of disclaimer in accordance with Section 104 of the Act. Disclaimer means that the Attorney refuses to accept or continue the responsibility as your Attorney; or
- the Attorney dies, or is adjudged bankrupt, or becomes a patient within the meaning of the Mental Health (Compulsory Assessment and Treatment) Act 1992 detained in a hospital under that Act, or becomes subject to a personal order or a property order under the Act, or otherwise becomes incapable of acting; or
- a Family Court revokes the appointment of the Attorney pursuant to Section 105 of the Act.

### **5. Attorney to consult with others**

When acting on your behalf under the Enduring Power of Attorney, your Attorney must, as far as is practicable, consult with you.

You may specify one or more persons with whom your Attorney must, as far as is practicable, also consult when making decisions under the Enduring Power of Attorney.

In respect of each of these persons, you must state the personal care and welfare matters on which your Attorney is required to consult with them.

You may wish your Attorney to consult with these persons on all matters, or only in respect of certain kinds of matters or particular matters.

If you appoint a separate Attorney in relation to your personal care and welfare, your Attorneys must consult each other regularly to ensure that your interests are not prejudiced through any breakdown in communication between them. An Attorney's duty to consult is set out in Section 99A of the Act.

## 6. **Attorney to provide information on exercise of powers**

You can specify one or more persons who are to be provided with information relating to the exercise of the Attorney's powers under the Enduring Power of Attorney on request. In respect of each person, you must specify the kind of information to be provided to that person. Under Section 99B of the Act, your Attorney is required to promptly comply with a request made by any of those persons for information relating to the exercise of the Attorney's powers if the information requested is of the kind that you have specified is to be provided to that person.

## 7. **Assessment of mental capacity**

You can specify that any assessment of your mental capacity be undertaken by a health practitioner with a specified scope of practice. The scope of practice must include the assessment of mental capacity. Note that if you were to become mentally incapable while overseas, special provisions apply to assessment of capacity.

## **OTHER MATTERS**

### **Signing this document**

Before signing this document, you must receive an explanation of the effects and implications of it and other matters from the person who witnesses your signature, and that person must also give a certificate as to certain matters. The witness must be a lawyer, an authorised officer of a trustee corporation or a qualified legal executive who is independent of the Attorney. However, if the Attorney is appointed in his or her capacity as a lawyer, another lawyer or qualified legal executive in the lawyer's firm can witness your signature. Likewise, if the Attorney is a trustee corporation, an authorised officer of the corporation can witness your signature.

A qualified legal executive must be a member of, and hold a current annual registration certificate issued by, the New Zealand Institute of Legal Executives Inc, have at least 12 months experience as a legal executive, and be employed by, and under the direct supervision of, a lawyer.

Your Attorney's signature to this document must be witnessed by a person who is not the same person who witnessed your signature to the Enduring Power of Attorney. You cannot act as witness to the Attorney's signature.

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If you appoint a successor Attorney, he or she must also sign the document, and the signature must also be witnessed by a person who is not the witness to your signature. You cannot act as witness to the successor Attorney's signature.

## **Your right to revoke**

Once this document is signed, you can revoke it at any time by giving notice in writing to the Attorney and to any successor Attorney.

## **Your right to suspend**

If you become mentally incapable and subsequently recover capacity, you are entitled to suspend your Attorney's power to act under the Enduring Power of Attorney by giving the Attorney written notice. The suspension does not revoke the Enduring Power of Attorney, and your Attorney will be able to act under it again if you are again certified as (or the Family Court decides you are) mentally incapable. Forms that may be used to give notice of revocation or notice of suspension are set out in the Protection of Personal and Property Rights (Enduring Powers of Attorney Forms) Regulations 2008.

## **Telling people that you have appointed an Attorney**

You should send a copy of this document to people or organisations that the Attorney may have dealings with under the Enduring Power of Attorney (for example, your doctor or any person providing care services to you).