

## ENDURING POWER OF ATTORNEY IN RELATION TO PROPERTY

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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 Property 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 property affairs.

You can authorise your Attorney to act on your behalf while you are mentally capable, and to continue to act if you become mentally incapable. Alternatively, you can authorise your Attorney to act on your behalf only if you become mentally incapable.

**Mentally incapable** is defined in Section 94(1) 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 property if the donor is not wholly competent to manage his or her own affairs in relation to his or her property.

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 be competent to manage his or her own affairs in relation to his or her property. A person must not be presumed to lack that competence just because:

- the person manages, or intends to manage, his or her own affairs in relation to his or her property in a way that a person exercising ordinary prudence would not do in the same circumstances; or
- the person is subject to compulsory treatment or has special patient status under the Mental Health (Compulsory Assessment and Treatment) Act 1992.

In these notes, the term **Attorney** refers, if you have appointed more than one Attorney, to all Attorneys.

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

### 1. **Appointment of Attorney**

You can appoint one or more Attorneys.

You can appoint an individual or a trustee corporation as an Attorney.

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An individual appointed as an Attorney must be at least 20 years of age, not bankrupt, and not subject to a personal order or a property order under the Act.

A trustee corporation is the Maori Trustee, the Public Trust, and any trustee company within the meaning of the Trustee Companies Act 1967.

## 2. **Property affairs subject to Enduring Power of Attorney**

You can authorise your Attorney to act on your behalf in relation to all of your property affairs, or only some of your property affairs. If you want your Attorney to act only in relation to some of your property affairs, you must specify what those affairs are.

## 3. **Extent of Attorney's Authority**

You can authorise your Attorney to act generally on your behalf in relation to your property affairs, or to act on your behalf in certain ways only.

Under Section 97A(2) of the Act, your Attorney's paramount consideration when you are mentally incapable is to use your property in the promotion and protection of your best interests, while seeking at all times to encourage you to develop your own competence to manage your own affairs in relation to your property.

## 4. **When Enduring Power of Attorney takes effect**

You can authorise your Attorney to act immediately, while you are mentally capable, and to continue to act if you become mentally incapable. Alternatively, you can authorise your Attorney to act under the Enduring Power of Attorney only if you become mentally incapable. Under this option your Attorney must not act in relation to your property unless a relevant health practitioner has certified, or the Family Court has determined, that you are mentally incapable.

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.

## OPTIONAL PROVISIONS

### 5. **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.

### 6. **Attorneys may have joint or several authority**

If you have appointed more than one Attorney, you can specify that your Attorneys must act jointly (they must make decisions and act together), or that they may act severally (each can act independently). Note that if your Attorneys have joint authority and the appointment of one of them ceases, none will have authority to act.

### 7. **Appointment of Successor Attorney**

You can appoint another individual or individuals or a trustee corporation to be your 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
- if you have appointed Attorneys with joint authority, one of them 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.

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## 8. **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 matters related to your property affairs 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 property, 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.

## 9. **Execution of Will on behalf of donor**

The Family Court can authorise your property Attorney to execute a Will for and on your behalf if you do not have the capacity to make a Will, unless you say otherwise in your Enduring Power of Attorney. If an application is made to the Court for this authority, the Court decides provisionally on the form of the Will and hears from all interested parties before it makes a decision to authorise your Attorney to execute it.

## 10. **Attorney's power to benefit self and others**

You should consider very carefully whether you want to give your Attorney(s) the right, when you are mentally incapable, to act to their own benefit or to the benefit of other persons. Acting to the benefit means that your Attorney may use, or authorise someone else to use, your property or make loans or gifts from it. If you do not expressly state otherwise in your Enduring Power of Attorney, your Attorney will be able to do any of the following things set out in Section 107(1) of the Act:

- if you and the Attorney are married or are in a civil union or de facto relationship with each other and you live together and share your incomes, act in respect of real property (land and buildings) or personal property you own jointly and not as tenants in common;
- make payments for out-of-pocket expenses (but not for lost wages or remuneration) reasonably incurred by an Attorney if the Attorney produces receipts or other evidence;
- pay professional fees and expenses reasonably incurred by an Attorney who has accepted the appointment in a professional capacity (for

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example, a lawyer) or has done work in a professional capacity to give effect to decisions taken under the Enduring Power of Attorney.

- make a loan or advance or other investment of your property of the kind that a trustee could make of trust funds under Section 13A of the Trustee Act 1956.

## 11. 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 that that person can request.

## 12. 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 bank or lawyer).