



# Protecting the vulnerable – EPAs reframed

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Enduring powers of attorney (EPAs) can be a double-edged sword. Lawyers recommend them for risk management. Ironically, such protection leaves donors open to abuse from unscrupulous or inept attorneys, both in the personal welfare and property context. The Protection of Personal and Property Rights Amendment Bill (the Bill) is due for its second reading in early September 2007. The Bill is an extensive reframing of the duties required of attorneys and restrictions placed on them. It strengthens the protection of vulnerable donors and affirms donors' rights.

## Presumption of competence

The Bill provides an expansive presumption of competence, beyond that in section 5 of the *Protection of Personal and Property Rights Act 1988* (the Act). Its aim is to maximise donor autonomy.

There is now a presumption of competence in relation to management of property as well as the expansion of the personal care and welfare capacity qualification. In the care and welfare context, capacity relates to decisions and omissions by donors.

Presumed competence encompasses both a donor's understanding of the nature of decisions and foreseeing consequences, and omissions to make decisions about personal care and welfare. Even if a donor's decision or omission is not one that would commonly be agreed with by a person exercising "ordinary prudence", there will be no presumption of lack of capacity. Donors subject to compulsory treatment/special patient status under the *Mental Health (Compulsory Assessment and Treatment) Act 1992* are not presumed to be lacking in competence.

The presumption of competence threads its way through Part IX of the Bill (section 97A). The paramount consideration of property attorneys is the use of the donor's property in the promotion and protection of the donor's best interests while seeking to encourage the donor to develop competence to manage their own property affairs, regardless of whether the donor is mentally capable or incapable.

## Mental incapacity redefined

Whether a donor is mentally incapable can determine when an EPA is activated (section 97 provides that donors can authorise the EPA to have effect while mentally capable and to continue to have effect if the donor becomes mentally incapable). What is mental incapacity and how is it determined?

The Bill changes the donor's threshold capacity for personal and welfare matters. Previously, under the Act, the donor needed to "lack 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". Now, the donor needs to *lack the capacity* to make a decision as to his or her personal care and welfare, or to foresee the consequences of such a decision *or failure to make such decisions*.

In relation to communicating decisions, the Bill ensures that donors have to *wholly lack capacity to communicate* – recognition of the particular circumstances often relating to stroke victims, who are mentally capable, but impaired in communication due to the stroke.

A medical practitioner or the court will decide if mental capacity is lacking (section 98). The donor can specify a particular health practitioner in the EPA, and can require that the assessment of their mental capacity be undertaken by a health practitioner with a scope of practice that specifically includes the assessment of a person's mental capacity (section 99C). The costs of this assessment are recoverable as a debt from the donor's property.

## When is an assessment of incapacity made?

The attorney cannot act unless they believe on reasonable grounds that the donor is mentally incapable. A donor's mental capacity is determined at the time a decision is proposed to be made regarding personal care and welfare, and in relation to the personal care and welfare matter concerned.



Mandatory determination of donor mental capacity by a health practitioner or the court is necessary for *significant matters* relating to the donor's personal care and welfare. A significant matter has a sizeable impact on the donor's health, well-being, or enjoyment of life (eg permanent change in the donor's residence, entering residential care, or undergoing a major medical procedure). The attorney cannot act unless a health practitioner or the court has certified that the donor is mentally incapable (section 97).

A certificate of the donor's mental incapacity becomes essential, and must be in the prescribed form, or if the certificate is issued outside of New Zealand, in a form acceptable to the competent authority of the State concerned (section 99C).

## Safeguarding donors' rights

This tightening of when EPAs are activated (particularly regarding significant matters), and who determines incapacity, is a considerable safeguard, and respects a donor's autonomy and presumed competence. Certificates of mental incapacity by those qualified to do so prevent attorneys undertaking major decisions that alter the donor's life without expert guidance.

The duration of attorney powers is also specified (sections 98 and 98A). If the donor is certified as mentally incapable because of a health condition that is likely to continue indefinitely, no further certificates are required. If the donor is certified as mentally incapable for a defined period, no other certificates are necessary in relation to any further personal care and welfare matters arising during the specified time.

An attorney's paramount consideration is to promote and protect the welfare and best interests of the donor while seeking to encourage the donor to develop and exercise their capacity to understand the nature, and foresee the consequences of, personal care and welfare decisions, and to communicate such decisions. The attorney is under an obligation to encourage the donor to act on their own behalf, and to facilitate the integration of the donor into the community, to the greatest extent possible.

## Independent legal advice

Similar to obligations for certifying section 21 agreements under the *Property (Relationships) Act 1976*, EPAs now require an independent witness to the signature of donor and attorney, along with independent legal advice for the creation of a valid EPA. All EPAs made after the commencement of the amendment to the Act will not have effect unless they comply with the requirements of sections 94A and 95. An EPA which does not match the new



prescribed form has effect only if no prescribed provision is substantially omitted and the differences are immaterial.

This part of the Bill is an attempt to ensure donors are fully and independently advised of the scope and significance of the powers they are transferring to the attorney by signing the EPA. It is a fully informed consent process.

#### **Bearing witness**

The donor's signature must be witnessed by either a lawyer, an officer or employee of a trustee corporation, or a legal executive independent of the attorney. The witness is obliged to explain the effects and implications of the EPA to the donor, and specifically advise the donor of:

- the notes to the prescribed form EPA;
- the donor's rights to suspend or revoke the EPA; and
- in property EPA situations, the donor's right to appoint more than one attorney, and to stipulate whether/how the attorney's dealings are to be monitored.

The witness is required to certify on the prescribed form that independent legal advice has been given as required by the Act, that the witness had no reason to suspect the donor was mentally incapable, and that the witness is independent of the attorney. The attorney's signature must be witnessed by someone other than the donor or the donor's witness.

There are some exceptions. Where the attorney is a trustee corporation, an officer or employee of that corporation may witness the donor's signature. Also, if the attorney is a lawyer, another lawyer in the attorney's firm can witness the donor's signature.

#### **A duty to consult**

Rather than being solely in charge of decision making (as is often the current practice), attorneys now have a duty to consult with the donor and any other attorney (section 99A). This is an extensive obligation. If there are separate attorneys for welfare and property matters, mandatory regular consultation is now required. This is significant, as attorneys are now obliged to give due consideration to the financial implications of the personal care and welfare decisions on the donor's property.

After consultation, the personal welfare attorney may have regard to any advance directive given by the donor, except to the extent the directive would require the attorney to act contrary to the limitations placed by sections 98(4) and 18. The attorney, when following an advanced directive given by the donor,

is not liable for the consequences, unless the act or omission was in bad faith or without reasonable care. The attorney may apply to the Court for directions under section 101 on advance directives/advice, and is not liable if they act in accordance with those directions.

The attorney must provide information on the exercise of their power to those specified in the EPA as a person to be provided with that kind of information (section 99B). Additionally, a court-appointed lawyer for the subject person can request records of financial transactions that the attorney must keep.

#### **Regulating attorney powers**

The Bill strengthens the court's ability to regulate and review attorney's powers and to revoke the EPA itself. The list of persons who can apply to review the attorney's decisions is greatly expanded, maximising the opportunity for donors to be protected.

The attorney's power to act is suspended when the donor is no longer mentally incapable by giving written notice to the attorney (section 100A). The suspension doesn't revoke the EPA, and the attorney may not act again under the EPA unless the donor is again certified mentally incapable. The donor has the freedom to revoke the power of attorney while mentally capable.

The court can authorise the attorney to make any loan or advance of the donor's property subject to conditions the court thinks are appropriate or that are contained in the EPA itself. The property attorney may be authorised by the Court to execute a will for the donor if he or she is lacking in testamentary capacity and there is no provision to the contrary in the EPA.

Section 103 provides the Court with the power to review the attorney's decisions (both while the EPA is in force or after it is revoked), revoke the EPA, or make any order it sees fit on application by the donor or any person with the leave of the Court.

Until the notice is received by the attorney, all acts and things within the scope of the EPA done in good faith will have effect (section 103C). Reliance on a certificate of non-revocation/suspension of EPA in the prescribed form is accepted if the person is dealing with the attorney in good faith and does not have actual knowledge of an event revoking the attorney. A false certificate knowingly provided is an offence liable to summary conviction and a fine not exceeding \$5,000.

If a donor is mentally incapable, the attorney must file with notice a report stating he or she considers it in the donor's best interest that a welfare guardian or property manager be appointed or that it is not necessary.

#### **Abuse of attorney powers**

Abuse of attorney powers is a live issue for donors. Dishonest or incompetent attorneys use the EPA to benefit themselves. Alarming, this has become more prevalent. The Bill proposes changes tangibly to protect vulnerable donors, and these can be triggered by a proposed broad list of persons able to apply to the Court to review the decision of the attorney or revoke the attorney's appointment (section 103). This is particularly an issue for property attorney decisions.

Under the Bill, the attorney, while the donor is mentally incapable, must not act to the benefit of the attorney or a person other than the donor, or act to recover any expenses from the donor's property unless, and to the extent that, the donor has specified the power in the EPA or the Court authorises it.

In addition, pursuant to section 105, the Court can revoke the appointment if it is satisfied the attorney is not acting, or proposes not to act, in the best interest of the donor, or has failed, or is failing, to comply with the attorney's obligations under the duty to consult and provide information on the exercise of powers or the keeping of records.

#### **Effect of amendments on existing EPAs**

Existing EPAs need not comply with the new prescribed form, certification, and independent legal advice requirements, nor will the restrictions on attorney's powers to benefit self apply.