

Understanding Powers of Attorney

“What the heck is a Power of Attorney?”

We get this question a lot. Our clients, friends and family members have put this *exact* question to us many times over the years. And, it’s a great question. What the heck *is* a Power of Attorney? The very name sounds intimidating and “legal” (not usually a positive adjective, let’s be honest). What is an attorney? What power is involved? These are all fair questions.

Let’s start with a definition

In general terms, a Power of Attorney is an authority that you give to another person to act on your behalf (whether that’s signing a document for you, or liaising with your bank, for example). The person you give the authority to is called your “Attorney” and they will have a legal right to act on your behalf. *When* and *how* they are able to act on your behalf depends on the “Power” that you give to them. In order to set up this authority and explain the limits and boundaries of the authority, we create a document called a “Power of Attorney”.

Stay with us, there’s a bit more to it

To really answer the question of “what the heck is a Power of Attorney”, it is important to explain that, under New Zealand law, there are two types of Powers of Attorney: *General* Powers of Attorney and *Enduring* Powers of Attorney. To make it more complicated, there are, in turn two kinds of *Enduring* Powers of Attorney - one relating to property affairs and one relating to personal care and welfare affairs. You’ll see from the diagram below how they differ from each other.

What’s all this about mental capacity?

You’ll see from the diagram above that the main difference between a General Power of Attorney and an Enduring Power of Attorney comes down to the Attorney’s role if you become mentally incapable. An Attorney under a General Power of Attorney does not have any power to act on your behalf if you become mentally incapable. An Attorney appointed under an Enduring Power of Attorney does have the power to act on your behalf if you become mentally incapable.

You may be wondering what the vague (and somewhat scary) sounding concept of “mentally incapable” looks like in real life. Generally, it will come down to your ability to make, communicate and understand decisions about your property and personal welfare. In practice, the Court or a trained health practitioner will make this assessment at the time it becomes relevant, taking into account the circumstances and the relevant law.

Do I need a power of attorney? Which kind should I have?

Yes. You should create Enduring Powers of Attorney in relation to Property and Personal Care and Welfare.

Powers Of Attorney

General Power of Attorney

You can appoint someone to act on your behalf for your financial and legal affairs. Importantly, a General Power of Attorney can only apply while you are mentally capable. It *does not endure* if you lose mental capacity - it becomes immediately invalid. A General Power of Attorney will also become invalid if you die, if you cancel it, or if it expires.

Powers: You can choose what powers your attorney has, and for how long they have them. However, a General Power of Attorney cannot cover health care or personal care matters.

You may say that your Attorney has the power to look after all of your affairs, or you can limit the power to certain tasks (for example, your term investment or your rental property). The power can be for a certain amount of time (for example the length of a holiday), or an indefinite amount of time.

Enduring Power of Attorney

You can appoint someone to act on your behalf and this power *endures* if you become mentally incapable. You must make an Enduring Power of Attorney when you are mentally capable or the power will be invalid. There are two types of Enduring Powers of Attorney:

- **Property**

Your attorney has power to act on your behalf in relation to your property, including your house, business, bank accounts, shares, possessions and debts.

You can decide when the Power of Attorney relating to Property comes into effect. The two options are:

- While you're mentally capable (continuing when you're mentally incapable);

or

- *Only* when you become mentally incapable.

- **Personal Care and Welfare**

Your attorney has power to act on your behalf in relation to your personal care and welfare, including, for example, decisions relating to your medical care.

You don't have a choice about when the Power of Attorney relating to Personal Care and Welfare comes into effect. It *only* comes into effect when you're mentally incapable.

Ideally, you would make these today.

General Powers of Attorney are nice to have and can be convenient on a temporary basis. But it is the Enduring kind that are really essential.

Why? Well, Enduring Powers of Attorney are a very good thing for you and your family.

- **For you:** Enduring Powers of Attorney will give you comfort that your interests will be protected by someone you trust if you do become incapable of making decisions for yourself. For example, you can take comfort from the fact that, if you suffer a sudden brain injury or if you are diagnosed with a serious illness, the little decisions (for example, paying the power bill) to the big decisions (for example, selling the family house to pay for medical costs) will be taken care of for you.
- **For your family:** Many clients feel comforted by the fact that Enduring Powers of Attorney will ease the burden on their family during tragic circumstances. There is no doubt that it will be a hard time for you and your family if you fall ill or become incapable of making your own decisions. By having Enduring Powers of Attorney in place, you can minimise the stress and uncertainty felt by your family in this time. Without Enduring Powers of Attorney, your family will be required to apply to the Court and get an order authorising them to act on your behalf. This can be a costly and time consuming process and can add to the stress and burden of the circumstances. It can also result in delays in making important decisions that affect your health, wellbeing and property interests.

We are often asked by younger clients if it is truly necessary to put these Enduring Powers of Attorney in place. Our answer, again, is yes. It is necessary. Although it may seem unlikely that you will need these documents as a young person, life can be unpredictable and, unfortunately, none of us can rule out the possibility of accidents occurring.

If you're over 18 and mentally capable, you should create Enduring Powers of Attorney in relation to Property and Personal Care and Welfare.

Point taken. How do I make enduring powers of attorney? What do I need to know?

Because of the important powers that are being given in these documents, the law imposes really strict requirements about creating and signing an Enduring Power of Attorney, so you should see your lawyer to create them. Your lawyer will ask you about your circumstances and explain the consequences and effects of various components of the Enduring Powers of Attorney, which can be complicated. Some important concepts that you will discuss with your lawyer include the following:

- **How do I choose an Attorney?** Choosing your Attorney is pretty much the most important decision in this process. Legally, you are able to appoint anyone who is over 20 years old, mentally capable and isn't bankrupt. In our view, the most important thing is that you appoint someone who you trust, as they will have the power to make a broad range of decisions on your behalf. We should also mention that your Attorney is ideally someone who is responsible and up to handling the important job of acting on your behalf.
- **What does my Attorney do?** Even though you've likely chosen someone you trust, perhaps you're wondering how your Attorney will actually make decisions for you when you can't. The good news is that the law creates certain safeguards for this situation. Any Attorney has a legal duty to act in your best interests at all times, and to involve you in decisions as much as possible. If someone you know is concerned about how the Attorney is exercising their powers, they can apply to the Family Court for a review of the

Attorney's decisions. In order to reduce the likelihood of problems arising, however, there are lots of options available to you when you create your Enduring Powers of Attorney, such as;

- For Property matters, appointing two Attorneys, as they must agree on all decisions;
- Appointing a person who your Attorney must provide specific information to about their decisions;
- Appointing a person that your Attorney must consult with on all decisions;
- Restricting your Attorney's powers if you have specific concerns about the exercise of their power; and
- Appointing a professional Attorney such as a lawyer or other company who will be an independent party.

It might be a good idea to discuss these options with your lawyer if you would like more information. Your lawyer can also explain the scope of powers under each Enduring Power of Attorney as there are some restrictions already built into the powers. For example, for Personal Care and Welfare matters, an Attorney is not allowed to make decisions that relate to entering into a marriage or civil union, or the adoption of children.

- **How long will my Enduring Powers of Attorney last?** They will last until you die. However, you are able to cancel Enduring Powers of Attorney at any time if you would like to appoint a new Attorney or make any other changes (provided you are still mentally capable). Your Enduring Powers of Attorney are also cancelled if your Attorney decides that he or she no longer wants the job.

Give us a call.

We put together this guide as a very general overview to Powers of Attorney. However, there are innumerable factors that may become relevant or crop up in any given situation that weren't covered here. We can't talk about them all in one guide, so, for the very best guidance and support, we recommend you give us a call so we can work together to make sure you're looked after, taking into account all of your specific circumstances.

Have a question about Powers of Attorney? Inspired to get them in order? Or perhaps you just fancy a chat about how this applies to your situation? If so, we would love to help. You can give us a call or send us an email for more information.

Phone: +64 9 486 6827 | Email: info@kevinmcdonald.co.nz | Website: kevinmcdonald.co.nz

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