



## Introduction

Here at Te Hopai we want to ensure that we follow the wishes of the residents to whom we provide care. It is important once a person has lost capacity that they have someone available who can make their decisions and wishes known.

It is no longer sufficient to be someone's next of kin; a formal arrangement needs to be organised. This takes the form of an enduring power of attorney or welfare guardian. The definition of these positions is described in this information sheet.

Te Hopai strongly urges relatives to organise this before a person loses capacity, so we can ensure that their wishes are met. However, if this time has passed, it is still important that the resident has a voice and so it is in their best interest to consider going to the court to have a welfare guardian appointed.

## Definitions

A power of attorney is an authority for a person to act on another person's behalf. There are two types of power of attorney:

*Ordinary power of attorney* – this is the authority given by one person (a donor) to one or more others to act on that person's behalf. This can relate to all matters or a specific issue which is defined in the document. The power of attorney is valid until it expires and an ordinary power of attorney is only valid while the donor has the mental capacity to make decisions.

*Enduring power of attorney* – an enduring power of attorney can have effect if the donor is not able to make decisions for themselves or to communicate those decisions. An enduring power of attorney only comes into effect when a donor has become mentally incapable of managing their affairs. Enduring power of attorney (*EPOA*) come in two forms – one for *personal care and welfare* and one for *property*.

There can be only one person appointed to make decisions about care and welfare but more than one person can be responsible for making decisions about property.

It is very important that trusted people are appointed as *EPOAs*. There are some restrictions about who can hold *EPOA*; they must be over 20 years old, must not be bankrupt and must be able to make informed decisions.

The same person can be appointed as *EPOA* for property and care and welfare, or the donor may choose different people.

If there is conflict between *EPOAs* then they may go to the Family Court to ask for direction.

If there is no *EPOA* appointed before the donor loses capacity then the Family Court has the power to make orders for that person. The court is able to decide about issues that relate to a person's health and welfare and belongings and also appoint welfare guardians and property managers.

A *welfare guardian* is appointed by the family court to look after the affairs of a person who has lost the capacity to make or communicate decisions. Only one person may be appointed as a

welfare guardian. The court will try to determine, if possible, who the person wants to be appointed. A *welfare guardian* can only deal with the issues specified by the court and must always protect the person's best interests and is expected to consult with other interested parties such as caregivers, doctors and the person/s managing the person's property.

A *welfare guardian* cannot refuse consent to standard or life-saving treatment, medical experimentation, brain surgery that will affect the person's behaviour or consent to the person receiving electro-convulsive treatment.

A *welfare guardian* can be liable if they act without reasonable care. A review is carried out after a maximum of three years and can be reviewed earlier on application. For individual matters, the court may decide to make more limited specific orders such as the living arrangements of the person.

Applications for setting up an *EPOA* must be created using a specific form and the donor and attorney/s must sign the form. There must also be two independent witnesses present to the signatures who must be a lawyer, a qualified legal executive or an authorised representative of a trustee corporation. Before the donor signs the document they will be advised of the implications of the *EPOA* and the witness must certify that the donor is not mentally incapable when they sign the document. Thus the donor must have capacity to make decisions to appoint an *EPOA*.

Once the donor has been assessed as being mentally incapable, which is defined as being incapable of making decisions, being unable to understand decisions, being unable to foresee the consequences of decisions or the consequences of the failure to make decisions or if they are unable to communicate decisions, then the *EPOA* can be invoked.

The decision about a person's mental capacity must be made by a relevant health practitioner who is qualified to assess mental capacity or by the Family Court.

While the donor is still capable they may end an *EPOA*, replace the attorney or change the conditions of the document. This needs to be done in writing and signed and witnessed in the same way as the original document.

Once the donor dies the *EPOA* also ends. If the attorney also loses mental capacity or the Family Court revokes the *EPOA* then it ceases to have effect. Attorneys may lose the right to make decisions for the donor if the court determines that they are not acting in a person's best interests or if they are failing to meet their obligations.

Attorneys can be supervised and a number of people can apply to the court to review their performance. They include the relatives of the donor, an attorney of the donor, a medical practitioner, a manager of hospital or rest home care and social workers.

An *EPOA* can be general or it can relate only to certain matters; this is stated in the document. Even with no restrictions placed on the attorney for personal care, they cannot decide if the person gets married or divorced, adopts children, receives ECT, has brain surgery designed to alter a person's behaviour, refuse standard or life-saving medical treatment for the donor or consent to the person taking part in medical experimentation.

This is a brief summary about enduring power of attorney and welfare guardians and all the information regarding the matter is not included in this document. The issues can be complex, so it is advisable to obtain legal advice before deciding what to do. If the person has already lost capacity to make decisions then the matter about property and health and welfare decisions needs to be made by the Family Court.