



By Elly-Marie Connolly
 elly-marie@collinsmay.co.nz
 DD: 576 1411

Lloyd Collins
 lloyd@collinsmay.co.nz
 DD: 576 1403

Eugene Collins
 eugene@collinsmay.co.nz
 DD: 576 1407

Amy Haste
 amy@collinsmay.co.nz
 DD: 576 1412

Michael Moohan
 michael@collinsmay.co.nz
 DD: 576 1417

Hannah Nimot
 hannah@collinsmay.co.nz
 DD: 576 1409

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ENDURING POWERS OF ATTORNEY - ATTORNEY'S OBLIGATIONS

There may come a time in your life when a close friend or family member asks if you will be their Enduring Power of Attorney. In these situations we are always tempted to say "yes! whatever you need", without having regard to the consequences. In this situation however this is not the best course of action. Accepting the position of a Enduring Power of Attorney comes with certain obligations and responsibilities that you need to be sure you are comfortable with, before you accept the position.

So what is an Enduring Power of Attorney?

Created by the Protection of Personal & Property Rights Act 1988 ("the Act") an Enduring Power of Attorney is when you select a person, or more than one person, to have the authority to act on your behalf in relation to either all of your affairs or just specific issues.

The two types of Enduring Power of Attorney are:

- Enduring Power of Attorney for Personal Care and Welfare. This is usually a family member or close friend who is able to make decisions about your care. This power only comes into effect when you lose your mental capacity; and
- Enduring Power of Attorney for Property. This is when you choose someone to make decisions about how your property should be managed. This can come into effect immediately or only once you lose mental capacity.

So if you are chosen to be one of the above what are your obligations?

- Acting in the best interest of the Donor. The paramount consideration when doing this is to ensure all your actions are in the promotion and protection of the Donor's best interest. If the Donor is mentally incapable Section 97A (2) of the Act provides you also need to seek at all times to encourage the Donor to develop their own competence in managing their affairs.
- Consultation. When making decisions, you must consult as far as practical with the following:
 - The Donee;
 - Any other person specified in the Enduring Power of Attorney; and
 - If there are separate Property and Personal Care Attorneys with the other Attorney as per Section 99A of the Act;
- Financial Support. A Property Attorney has the requirement to provide financial support to the Attorney for Personal Care and Welfare. This is why it is so important that if these Attorneys are different people they consult with each other. An example would be if the Donor needed an urgent

expense covered, the Attorney for Property would be required to provide this funding. In this situation the Property Attorney would be required to put the Donor's personal care and welfare above the Donor's financial interest. The same is required of the Welfare Attorney in that they need to consider the financial implications of any decisions they make regarding the Donor's personal care and welfare.

- Information. If the Enduring Power of Attorney specifies certain people are entitled to information relating to the exercise of the Attorney's powers, they are able to request this information at anytime under the Act. If this happens you are required to promptly comply, provided that the information they have requested is of the type the Donor has allowed in the Enduring Power of Attorney.

Further Property Attorneys are also required to keep appropriate records of financial transactions. If you fail to do this as an Attorney you could be liable for a fine up to \$1,000.00 for each financial transaction missed.

- Ceasing to Act. It is important to know when you have the right to act as an Attorney and when you do not. The first thing to check is whether your Enduring Power of Attorney comes into effect immediately or only once the Donor is no longer mentally capable. If it only comes into effect once the Donor is mentally incapable, both the Property Enduring Power of Attorney and the Personal Care and Welfare Enduring Power of Attorney has specific obligations to prove that the Donor is in fact mentally incapable. You can also no longer act if the Donor revokes your Enduring Power of Attorney, once the Donor dies or if you become incapable of acting for example, if you become bankrupt.

As you can see there is a lot more to this role than on the face of it would seem. This is why it is so important you think carefully before taking on this role and if you have any queries seek the appropriate legal advice.

If you have any queries in relation to this newsletter or Powers of Attorney in general please do not hesitate to contact the Collins & May Law team.

20 MINUTE FREE

WANT to review your Family Trust structure? THEN call us and take advantage of our 20 Minute Free interview