



BEGINNER'S  
GUIDE

# Power of Attorney



# Franklin Law

Protecting what is important to you

# What is a Power of Attorney?

A Power of Attorney gives someone (the Attorney) the legal right to act on your behalf in your absence. The power can relate to one or more aspects of your life, for example:

- **your finances**
- **property**
- **health care**

## **THERE ARE TWO TYPES OF POWER OF ATTORNEY:**

### **General Power of Attorney**

With a general power of attorney, you appoint a person (or more than one person) with the authority to act on your behalf in relation to your affairs. You can choose how wide the powers you grant are, for example you could grant a general power to look after all your affairs including money and property, or the power may be more specific in that it only covers money in a specific bank account and letting out your house while you are overseas.

A general power of attorney remains valid only while you (the grantor of the attorney) still have legal capacity. Should you become ill or have an accident depriving you of mental or physical capacity, the general power of attorney lapses.

### **Enduring Power of Attorney**

Unlike a general power of attorney, an enduring power of attorney continues to remain in force if you become mentally incapable. You must however arrange the enduring power of attorney before you become mentally incapable otherwise the power will be invalid.

## **THERE ARE TWO TYPES OF ENDURING POWER OF ATTORNEY:**

**Enduring Power of Attorney for personal care and welfare:** This allows your attorney to make decisions about your personal care in the event of your mental incapacity. This enduring power of attorney has the following characteristics:

- You can only appoint one person to act as your attorney at any one time
- It only comes into effect when you are mentally incapable. This requires a relevant health practitioner to certify or the Family Court to determine that you are mentally incapable
- It covers decisions regarding care, for example what hospital or home you will attend or what medical treatment you should have
- Your attorney cannot make decisions to refuse life saving treatment or that would prevent serious damage to your health
- Your attorney cannot consent to certain medical treatments

**Enduring Power of Attorney for property:** This gives your attorney the power to act on your behalf with respect to property you own. Property includes not only land but also businesses, bank accounts, shares and all other possessions – that is, everything you own. There are significant differences from an enduring power of attorney for personal care and welfare which are:

- You can have more than one attorney and you can stipulate that the two attorneys must act together
- You can choose whether the attorney has unlimited power or you can choose to set limits by specifying conditions and restrictions
- You can decide that the enduring power of attorney has immediate effect or only takes effect if you become mentally incapable

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## When should I set up an Enduring Power of Attorney?

Everyone 18 or older should establish an enduring power of attorney for both their property and their welfare. This needs to be established while you are still mentally capable.

People tend to think that only the elderly are likely to need someone to manage their affairs but anyone can become mentally incapable. An accident or illness could leave you with brain damage or mentally disabled at any age.

A good time to arrange the enduring power of attorney is when you are making your Will.

“ This was one of those things we have been meaning to do for years. ”



# Who should I appoint as my Attorney?

You can appoint any individual as an attorney provided they are over 20 years of age, not bankrupt and not mentally incapable.

The powers granted to the attorney can be very wide, therefore it is crucial you appoint an attorney you trust. It is also a big commitment on the attorney so you will need to discuss it with them first.

A trustee corporation can be appointed an attorney in respect of property but not for personal care and welfare.

The skills needed to look after your personal care and well being are often quite different from those needed to look after someone's financial affairs. It may be a good idea to consider appointing a different attorney for each. When deciding on whether to appoint two different attorneys, you need to feel confident that those you appoint can work together.

You are also able to appoint a subsequent attorney for an enduring power of attorney. This person becomes the attorney when your first choice of attorney is either unwilling or unable to perform as your attorney.

# What checks are there on my Attorney?

Enduring powers of attorney have to meet specific legal requirements to be valid. Your lawyer can ensure these requirements are met.

Although there are no automatic checks on how well attorneys are exercising their powers, your attorney has a legal duty to act in your best interests at all times and not abuse the trust you have placed in them. They should not act dishonestly, invest your money recklessly or do anything that they do not have the authority for. You have the option to include in your enduring power of attorney the requirement that your attorneys provide, on request to people you name, specified information about their actions as your attorney while you are mentally incapable. This enables monitoring of your attorney's actions.

Your attorney also has a legal duty to involve you as much as practicable when making decisions.

The Family Court can also monitor the performance of your attorneys and can vary the terms of your enduring power of attorney. However the Court will only do so if you or another person intervenes by making an application to the Court. Attorneys themselves can ask the Court for directions if they are having difficulty carrying out any of your instructions or deciding what to do (for example, if they receive conflicting advice).

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# How long does an Enduring Power of Attorney last?

An enduring power of attorney ceases to have effect when:

- You, while still mentally capable, revoke the power by notice in writing to your attorney
- The Court (if you are no longer mentally capable) revokes the power of attorney
- In the event of the death of the person granting the enduring power of attorney
- The attorney becomes mentally incapable or becomes a bankrupt
- The Court revokes the power for any reason

If you have been mentally incapable but have recovered capacity, you are entitled to suspend your attorney's authority by giving written notice to the attorney. This is different from revoking the enduring power of attorney as your attorney will be able to act again should the Court determine or a relevant health practitioner certify that you are again mentally incapable.



“ The whole process was much easier than we thought it would be... ”

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# What happens if I do not have an Enduring Power of Attorney?

Should you become mentally incapable and you do not have an enduring power of attorney, your family would have to apply to the Family Court for the appointment of a Property Manager and a Welfare Guardian.

Both Court Orders have a similar effect to the two forms of enduring power of attorney. However there will be considerable expense involved with the application; the need to renew the Orders on a regular basis; and the reporting to the Court with annual financial accounts. There will also be time delays while waiting for the Court when applying for the Orders.

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# What is an Advance Directive?

An Advance Directive (sometimes referred to as a living will) is a statement made while you are in good health and of sound mind. It states your wishes and gives direction regarding health issues should you suffer an illness or accident that leaves you incompetent to make or communicate decisions about your health care.

This Advance Directive is not an alternative to enduring powers of attorney and is not legally binding. It will however assist your attorney in making decisions on your behalf.

With an Advance Directive your attorney, family and friends will know what medical treatment you wish should you become seriously ill. This will mean that your loved ones will not need to guess about what you wish but know that you have previously considered the issue and therefore know what you would want.



For more information on appointing a Power of Attorney - please contact Kelly Jones  
Director, Property Team.

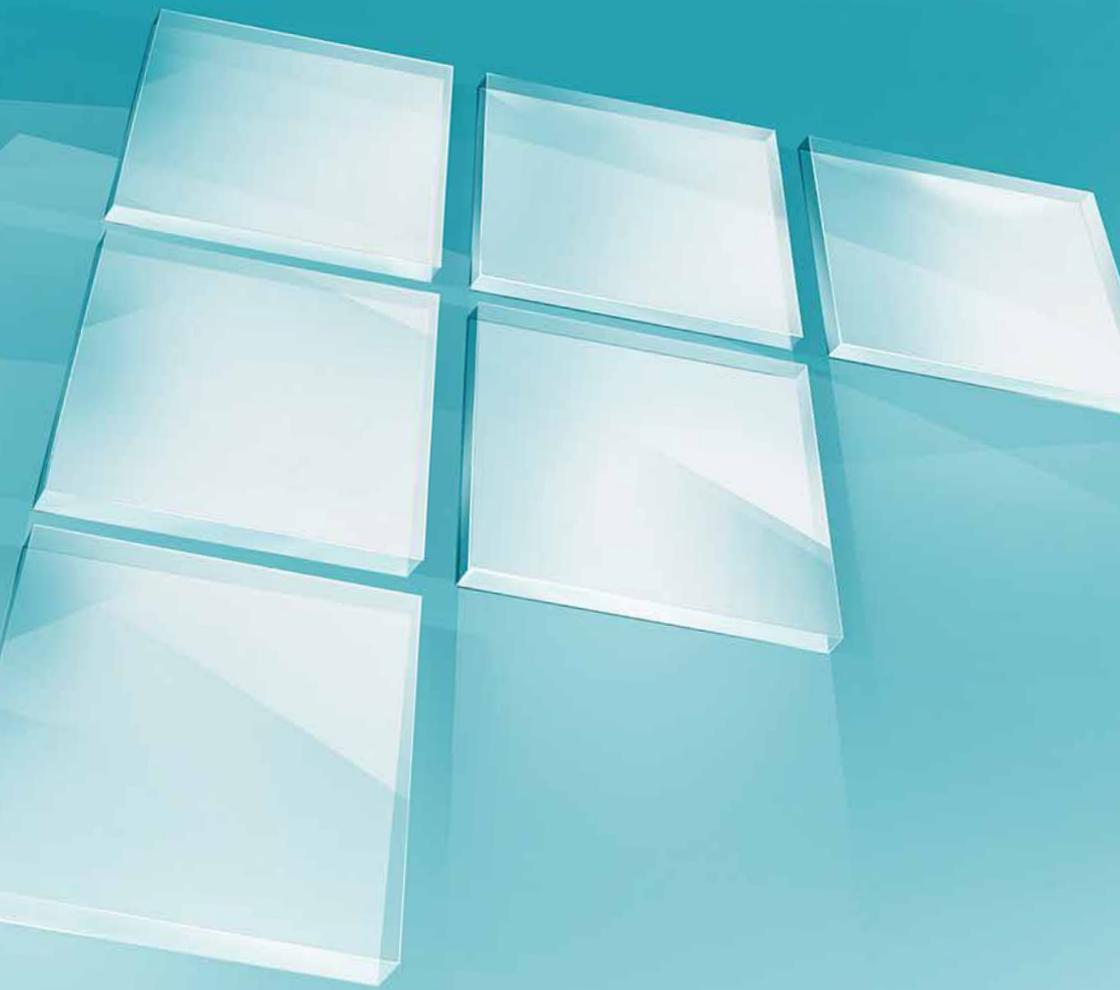
# What Franklin Law can do for you?

- Advice on who you should appoint as your attorney
- Preparation and advice on the correct power of attorney to meet your needs
- Ensuring your enduring power of attorney meets all legal requirements
- Safe keeping of your enduring power of attorney
- Acting as your attorney should you so wish
- Assistance to family members, should advice be required about the attorney acting on your behalf
- Monitoring of your attorney, should that be required

We are experienced professionals who can help, guide and advise you through the process.



“ We see this as a small investment for a large amount of peace of mind ”



# Franklin Law

Protecting what is important to you

Level 2, 1 Wesley St, Pukekohe. **PHONE** 0800 842 972  
**EMAIL** [info@franklinlaw.co.nz](mailto:info@franklinlaw.co.nz) **WEBSITE** [www.franklinlaw.co.nz](http://www.franklinlaw.co.nz)