

time to step back?



In each issue of *Family Care*, we ask Public Trust's **Janet Strong** to answer your questions about legal and planning issues.

Dear Janet,

My husband and I are in our 50s and support our 30 year old son, who suffered a traumatic brain injury when he was 21. He was a pedestrian and run over by a drunk driver. This was obviously gut-wrenching for our family. Today Michael lives a fairly independent life, with our support.

We would value your advice about legal planning for Michael, which may be of use to other parents who are getting on and want to ensure the necessary legal paperwork and financial planning is in place.

It's also important for Michael to have up to date paperwork, as he will need the help of others throughout his life. These may seem like little issues, but worrying about them causes extra stress. Your advice will be most appreciated. **Kerry and Rob, Auckland**

Our questions...

What will happen to Michael's Powers of Attorney when we can no longer support him? Should someone else take over this responsibility, or are we still young enough to not worry about this? There are no obvious others to act for our son in this role.

Once a Power of Attorney is in place, does it have an expiry date, or does it have to be renewed from time to time? We know we need to properly review all the paperwork.

Recently we moved to Auckland from a rural area. Does moving affect the Powers of Attorney for everyone in our family? Do we need to update these documents following our shift?

Dear Kerry & Rob,

Having the right plans in place to protect your son's future is important. You've touched on a few topics that will help to ensure Michael's best interests are taken care of now and in the long-term.

Enduring Powers of Attorney

Assuming these are already in place, at some stage you'll need to consider what happens when you're no longer able to support your son with decision-making.

Appointing a new Attorney to act in your son's best interests will depend on his mental capacity.

You've mentioned that he leads a fairly independent life, so if he meets capacity thresholds (your family doctor can help with an assessment if necessary), he can appoint new Enduring Powers of Attorney at any time.

In a general sense he needs to have an understanding of what he owns, what he owes, what income he is entitled to, and what appointing an Attorney to act for him means. He also needs to understand the nature of decisions which may need to be made by the Attorney, foresee the consequences

of decisions, and be able to communicate his wishes.

Your son doesn't have to be able to manage his finances for himself when the documents are put in place.

If mental capacity thresholds are not reached, the Protection of Personal and Property Rights Act 1988 is the legislation outlining other options and safeguards.

Property + personal care and welfare

Assuming your son reaches the capacity thresholds, he can appoint you to act on his behalf while you are willing and able to undertake this role. Or, he could name a professional organisation to act either immediately, or as his 'Successive' Attorney, to manage his financial and property interests. These could include taking care of household maintenance, paying bills, or collecting benefits. Public Trust offers a service called Personal Assist to do this.

Your son would also need to appoint an individual to make decisions about his personal care and welfare should he ever be unable to do this for himself. If he meets the mental capacity thresholds to appoint Enduring Powers of Attorney, perhaps you could

discuss together who the next best person would be after you.

Powers of Attorney and Enduring Powers of Attorney don't have an expiry date.

They set out clear guidelines about when an Attorney can act, and the Attorney must be capable of acting in the best interests of the person who has appointed them (known as the Donor).

Legislation

If your son's mental capacity means he is unable to complete new Enduring Powers of Attorney independently, any existing authorities should be reviewed.

It isn't possible for you to simply update the legal authorities on Michael's behalf.

The Protection of Personal and Property Rights Act 1988 is the legislation which provides safeguards for his best interests. Approaches are often made to the Family Court by parents, family and sometimes medical practitioners and social workers, asking the Court to appoint Managers, make Personal Orders, or appoint a Welfare Guardian to protect a person's best interests.

Moving home

It doesn't matter where the Donor and/or Attorney reside, but key people or organisations should be informed of any move if the Enduring Powers of Attorney have been activated.

Things can become more complex if the Donor has income and assets outside of New Zealand, or if they move permanently to another country where rules and laws are not the same as New Zealand's.

Your estate planning

Your situation raises interesting issues all parents supporting disabled children should consider.

Estate planning requires looking at an individual's family and financial circumstances in detail, then considering a range of solutions.

Often these discussions are about finding a solution to provide future security and practical management for those who need extra help, balancing the needs of everyone in the family.

Most parents in your situation recognise that leaving significant inheritances directly to someone who requires ongoing help to manage

their assets isn't ideal.

Alternatives include 'limited interests' being provided via a Will or estate, which would mean setting aside part or all of your estate to benefit your son instead of leaving assets to him outright, and having these assets professionally managed for him.

You could also think about providing for your son's future through a family trust, an inheritance trust, or a combination of these.

Circumstances differ, so no single solution suits everyone.

It's best to get the right advice now.

More information

If you'd like to know more about Enduring Powers of Attorney, services to help manage your affairs or those of a loved one who requires ongoing support, or about estate planning, you're welcome to call Public Trust on 0800 371 471, or visit www.publictrust.co.nz

Janet

This column is not a substitute for professional advice in any particular circumstances; no liability will be accepted by Public Trust for any loss arising from any person relying on the information it contains.

What's the difference between Powers of Attorney and Enduring Powers of Attorney?

A general Power of Attorney (POA) is a legal document which allows you to appoint someone to look after your affairs.

It doesn't prevent you from continuing to look after things yourself. It just allows the person you appoint to act as your Attorney to also have authority to deal with the matters which you specify. The document can deal broadly with all assets and money, or just specific assets, and may be of limited authority (managing the rental of your house while you are overseas, for example).

A general POA remains valid only while you still have legal capacity. It ceases to be valid as soon as you no longer have the mental or physical capacity to instruct the Attorney.

There are two types of Enduring Power of Attorney (EPAs) – one for your finances/property, and one for personal care and welfare.

Unlike the general POA, these documents are designed to endure, and allow an Attorney to act when you no longer have legal capacity.

A number of options are

considered when these documents are put in place.

Discussions would include when the Property document is to be effective (immediately, or only if later incapacity occurs), whether all financial matters are to be dealt with by an Attorney, whether an Attorney has restricted or full authority, whether Successive Attorneys are to be named, who needs to be consulted, and who can make future assessments of capacity.

It is recommended that while a person is well, they put both EPAs in place, then review and update them as personal circumstances change, or every two to three years.