

10 October 2023

██████████

By email: fyi-request-24109-e813d03d@requests.fyi.org.nz

To Whom It May Concern,

1. We refer to your request under the Official Information Act 1982 for the following information:

“What process has to be taken by public trust to verify mental capacity of donors signing EPOAs via public trust in-order for that EPOA to be valid/processed/completed.

Can some one (a donor) sign an EPOA if not mentally capable, eg which can't read fully or write fully? Which is a brain injured person which can't under documentation?

What type of document would such person mentioned above be entitled to if not an EPOA?

What process/measures does public trust have to take in-order to complete signing of an EPOA of a donor with a brain injury which has obvious signs of brain damage”.

2. Trustees are required to consider capacity when setting up an enduring power of attorney (EPA). The starting point is that the donor is presumed to have capacity.¹ The fact that a donor chooses to make decisions that someone exercising ordinary prudence would not, is not enough to establish incompetence.²
3. It is not necessary for the donor to be fully capable of managing their affairs. It is sufficient that the donor understands the nature and effect of the EPA, namely that:
 - a. he or she is giving power of attorney to a third party, and
 - b. the EPA may either come into force immediately, or when the donor becomes incapable.

¹ Protection of Personal and Property Rights Act 1988, s 93B(1).

² Protection of Personal and Property Rights Act 1988, s 93B(2).

4. Except in cases of urgency, Public Trust's usual practice is to obtain a medical certificate when the trustee has doubt about a donor's capacity.
5. The donor must sign the EPA in the presence of an authorised trustee. The trustee must explain the implications of the EPA to the donor, and then certify that the explanation has been provided and that there is no reason to doubt the donor's capacity.
6. The Protection of Personal and Property Rights Act 1988 contains the requirements for appointment of property managers and welfare guardians by the Court, where a person has lost the capacity to manage their own affairs and does not have enduring powers of attorney in place.
7. Please find **attached** documents summarising Public Trust's requirements in relation to capacity, as well as signing and witnessing EPAs. To provide you with a more targeted response, we have redacted information that is not relevant to your request.
8. It is Public Trust's policy to proactively release responses to official information requests where possible. We will consider publishing our response to your request at www.publictrust.co.nz, with your personal information removed.

Yours sincerely,



Kelly Reuben

Corporate Solicitor

Enclosures: EPA Capacity
 EPA Signatures Witnessing

Capacity

Introduction

Capacity is the **level** of mental competence required before a **valid legal** document can be signed:

A customer who...	must...
sets up an enduring power of attorney (EPA)	appreciate that: <ul style="list-style-type: none"> • they are giving power of attorney for property and/or personal care and welfare to a third party • the power of attorney may come into force immediately or in the event that they become incapable in the future.
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]



They do not need to be fully capable of managing their property matters at the time of the appointment, but they do need to have sufficient capacity to appreciate the consequences of doing so.

The Trustee's and Multi-Channel Adviser's role is to check if there is uncertainty, or if someone may claim the customer didn't have capacity at a later date.

A trustee may seek advice from Retail Legal if there is any reason to suggest that the customer giving instructions is not of sound mind or lacks capacity. Prompt action is required to establish capacity (or lack of it) in each case. A careful record needs to be made of the enquiries and circumstances.

If possible, the situation should at least be discussed with a medical practitioner before any documents are signed. The trustee needs to record the medical practitioner's advice immediately.

Click below for information on:

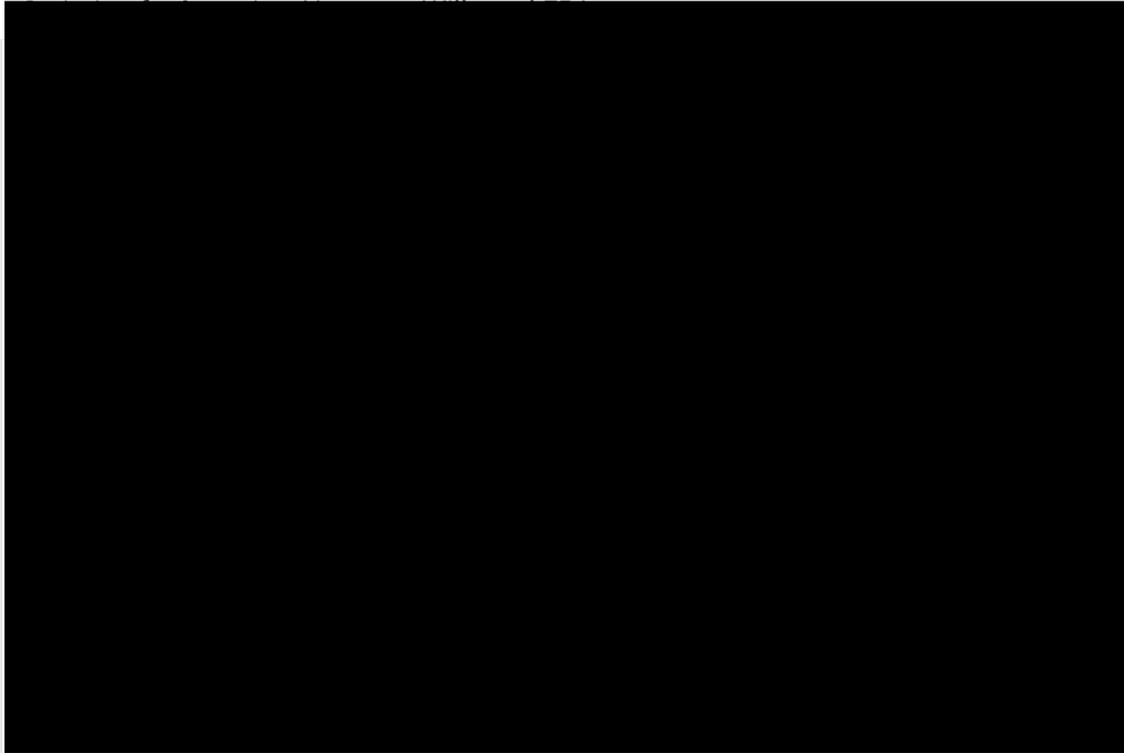
What to look for

A trustee looks for signs that alert them that the customer's capacity may be impaired, including:

- restricted vocabulary
- short attention span
- difficulty understanding the questions
- inappropriate answers
- problems with memory.

These signs are checked by asking questions throughout the interview, e.g. today's date, who the customer wants to appoint as their attorney, etc. The trustee determines whether to obtain a medical certificate from the answers the customer gives, and the way the customer interacts with them during the meeting.

Only a medical practitioner whose scope of practice includes the assessment of mental capacity can determine if someone has lost capacity.



Urgent cases

Where there is doubt regarding a customer's capacity, the trustee must also determine if there is urgency. Sometimes a customer may be about to undergo surgery or there is a risk they may die or become too ill to sign documents before a medical certificate is obtained.

In these situations, the trustee checks with a Retail Legal Solicitor to see whether the documents can be signed without a medical certificate. The customer's general practitioner (GP) may be consulted for a verbal indication of the customer's capacity (with confirmation in writing). This must be recorded in the Interview Notes in PT Online.

There are risks to Public Trust in accepting instructions for any business if there is doubt regarding the customer's mental capacity. However, if the person's health is likely to deteriorate in the near future, there may also be risks in delaying. A delay while the doctor's certificate is received may mean the customer has been denied the opportunity to sign the document they want. In these situations, the trustee seeks input from their manager or Legal Services.

Obtaining a medical certificate

When there is concern about a customer's capacity but there is no urgency, the trustee asks the customer to obtain a medical certificate from their **health practitioner**.

Instances where a medical certificate is likely to be required:

- If the customer is requesting something radical
- Where a new Will or EPA is created which is markedly different from the last one
- Where the customer is over the age of 80

A standard letter containing instructions of what is required is sent to the medical practitioner when Public Trust arranges the medical certificate/report. The letter also:



APPROVED

- includes a standard certificate for them to complete and send back to Public Trust.

Following is a list of the standard letters that you can send to the medical practitioner:

NavOne Template Code	Name
[REDACTED]	[REDACTED]
EPA LTR 12	Ltr to doctor with certificate re capacity - EPA

Public Trust must receive a report on the customer's capacity from the medical practitioner before:

- any instructions are taken
- any documents are completed
- an EPA is activated at the request of a third party.

The medical certificate or report outlines the customer's capacity and provides information, such as whether they are able to understand the:

- implications of signing an EPA

What we do when a customer refuses to complete a medical certificate

A customer is within their rights to refuse to obtain a medical certificate when we have requested. Obviously there are many benefits to obtaining the medical certificate, but if they are not convinced and you have concerns around their capacity you should still take the instructions. The courts have made it clear that in cases where capacity is in doubt we should still be preparing the document(s). In these cases though it is really important that we have good notes, so if issues are raised later we can show that we met our duty – both for us and for the client. The Interview Notes should include any relevant information the trustee has, but at a minimum need to:

- Explain why you have concerns and what your concerns are
- Confirm that you explained the advantages in getting a medical certificate and that the client declined to do so
- Cover off any potential undue influence issues – this is particularly important in these situations.

Feedback?

Rate This Page

Was this page Helpful?

- It's great
- It's ok
- It's hard to follow
- It's wrong

Feedback Comments

Suggested Amendments Upload your suggested amendments

Choose File No file chosen

Submit

[Home](#) »

GUIDELINE

EPA signatures and signing

Introduction

An Enduring Power of Attorney (EPA) is not valid until:

- it is explained to the Donor
- the witness certificate is completed by an **authorised person**
- the EPA is signed by the Donor
- the EPA is signed by all of the Attorneys (note: the Donor is responsible for getting attorneys to sign the EPA)

The Protection of Personal and Property Rights Act 1988 **Section 94A**, requires that:

1. the signature of the donor is witnessed by a person who is independent of the attorney and who is one of the following:
 - a. a lawyer
 - b. an officer or employee of a trustee corporation authorised by the corporation for the purposes of this subsection
 - c. a legal executive who meets the requirements of subsection (9)

Only authorised Public Trust staff can provide advice and witness the donor's signature.

Handy Tip

Signing an EPA is easy:

1. the trustee who advises the donor must witness the **donor's** signature.
2. **only** authorised trustees may witness a donor's signature.
3. the donor's witness is not able to witness the attorney's signature or sign on behalf of Public Trust
4. anyone who signs on behalf of Public Trust is **unable** to act as a witness
5. anyone over 18 with mental capacity can witness the attorney's signature. **If** the attorney doesn't come with the donor to the same signing appointment, the donor can **hold on to the original** EPA and organise the attorney signing him/herself.

Instructions for authorised witness

This form will help you explain the effects and implications of an EPA in relation to property to a **donor** before witnessing the donor's signature. You may give the explanation required by section 94A(6) of the Act by giving this form to the donor and following the instructions below. This explanation should be read in conjunction with the glossary of terms.

You must be one of the persons mentioned below to be authorised to witness an EPA. You may also need to be independent of the attorney and each successor attorney appointed by the EPA (see the definition of authorised witness in the glossary of terms). The persons who may witness an EPA are:

- a lawyer
- an officer or employee of a **trustee corporation** authorised by the corporation for the purpose
- a legal executive who is a member of and holds a current registration certificate issued by The New Zealand Institute of Legal Executives Incorporated, has at least 12 months' experience as a legal executive, and is employed by and under the direct supervision of a lawyer.

Take the donor through these notes and tailor your explanation to their individual needs and circumstances. You will also need to explain the effect of any aspect of the EPA that is not covered in the standard explanation.

Ask the donor whether they already have an EPA (a previous EPA). If they do, ask them if they want to cancel it under section B of the form. If they do, ensure that the attorney (and any successor attorney) named in the previous EPA is notified that it is revoked. Until they receive a notice of revocation, an attorney under a previous EPA may continue to act (see section 103C of the Act). However, even after the donor is mentally incapable, notice of revocation can be given by providing the attorney under the previous EPA with a copy of the new EPA in which section B specifies the previous EPA is revoked (see section 95A(2) of the Act).

You must certify that, before the donor signed the EPA, you:

- explained the effects of the EPA using these notes; and
- advised the donor of the matters referred to in the notes to the EPA form; and
- advised the donor of the donor's right to suspend or revoke the EPA; and
- have no reason to suspect the donor may be mentally incapable.

You must also certify that you believe on reasonable grounds that the donor understands the nature of the instrument, understands the potential risks and consequences of the instrument, and is not acting under undue pressure or duress.

A copy of this standard explanation should be given to the donor along with a copy of the signed EPA.

Note: *If you have any reason to suspect that the donor may be mentally incapable, you should not witness the donor's EPA. You should refer the donor to a relevant health practitioner for an assessment of whether he or she is mentally capable of setting up an EPA.*