

Financial Capacity: Enduring Powers of Attorney for Property and Property Orders

On occasion a health practitioner may be asked to assess a patient's "financial capacity" – that is their cognitive capacity to make decisions about their property and financial matters. There are many situations where such an assessment may be necessary, for example, where a patient is entering into a legal transaction such as a contract, or is wanting to issue legal proceedings, or is considering selling and purchasing property, and concerns arise as to their capacity to do so.

More commonly however, health practitioners are asked to assess a patient's financial capacity to activate an Enduring Power of Attorney (EPA) for Property, or to support an application to the Court for a property order, such as to appoint a property manager under the Protection of Personal and Property Rights Act (PPRA). This factsheet focuses on the legal tests to be applied in these two scenarios, and some of the relevant inquiries to be made when assessing a patient's financial capacity.

The relevant legal tests

As with any capacity assessment:

- A person is presumed competent to manage their own financial affairs unless proven otherwise.
- Capacity is task- and time-specific, i.e. it should be assessed in relation to the specific decision being contemplated, at the time the decision is to be made.

Financial capacity is also situation-specific. A patient's financial capacity can vary depending on the complexity of a decision and how they went about making particular financial decisions in the past.

For example, more complex financial decisions may have been made with the assistance of a professional advisor, such as an accountant. This is especially relevant if the decision being contemplated at the time of the capacity assessment is one that cannot be delegated.



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Activating an EPA for Property

An EPA for Personal Care and Welfare comes into effect if the person who has made the EPA (the “donor”) becomes “mentally incapable”. On the other hand, an EPA for Property may come into effect while the donor is still mentally capable, if the donor so chooses.

Alternatively, as with an EPA for Personal Care and Welfare, the donor can elect for the EPA for Property to come into effect only if they become mentally incapable.

While the activation of both Personal Care and Welfare and Property EPAs requires an assessment of whether a person is “mentally incapable”, the legal test for such an assessment differs depending on the type of EPA being activated:

- To activate an EPA for Property the health practitioner is required to assess whether, in his or her clinical opinion, the donor is “**not wholly competent** to manage his or her own affairs in relation to his or her property.”
- For an EPA for Personal Care and Welfare, the test is whether the donor “lacks the capacity” to make a decision about a matter relating to their personal care and welfare, or to understand the nature or foresee the consequences of decisions, or to communicate those decisions to others. (For more information see NZMII’s factsheet **Enduring Power of Attorneys and Welfare Guardians**).

Property orders under the PPPRA

Where a person has already lost capacity to appoint someone to manage their financial affairs under an EPA for Property, an application may be made to the court for a property order. There are two types of property orders; the first is an order for the administration of property, the second is an order appointing a property manager. Before either order can be made, the patient’s financial capacity will need to be assessed by a health practitioner.

The legal test in these circumstances is whether, in the health practitioner’s clinical opinion, the person who is the subject of the application “lacks **wholly or partly** the competence to manage his or her own affairs in relation to his or her property”.

(This is a lower threshold than the legal test for the court-appointment of a welfare guardian for example, which requires that the person “wholly” lack the capacity to make or to communicate decisions relating to the personal care and welfare of that person).

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Relevant inquiries to assess financial capacity

When assessing a patient's financial capacity, specific inquiries will need to be made to understand the financial decision that is being called into question. Depending on what that decision is, relevant questions may include:

- Does the patient understand the nature and extent of their assets? Income? Outgoings? Debts and financial obligations?
- Does the patient understand the risks and consequences of the financial decision being made? For example, where a patient is entering into an agreement to sell their home, do they understand how much their property is being sold for, who the purchasers are and how creditworthy they are, how the funds from the sale of the property are to be applied (etc.)
- Can the patient undertake basic financial tasks such as using an EFTPOS card, or accessing online banking, or reading a bank statement?
- If the financial decision is more complex, is a professional advisor such as an accountant involved to assist the patient with making that financial decision? Can the decision-making be delegated by the patient to a professional advisor?

Who is best-placed to assess a patient's financial capacity?

GP's are often well-suited to assess a patient's financial capacity given they tend to have a longer-term view of the patient and their family dynamics, as well as their circumstances and particular needs.

Ultimately however, the practitioner who is conducting the assessment must consider whether it is within their scope to do so. If a practitioner does *not* consider the assessment to be within their scope, the appropriate course may be for the patient to be assessed by a specialist with expertise in the area, such as a psychiatrist. This is a clinical assessment for the practitioner to make.

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