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Information Sheet – Enduring Power of Attorney

What is an enduring power of attorney?

An enduring power of attorney is a legal document which you can use to appoint a person to make decisions about your property and financial affairs if you lose capacity. The person who makes an enduring power of attorney is known as 'the principal'. The person who you appoint to make decisions for you is known as 'the attorney'.

Why make an enduring power of attorney?

By making an enduring power of attorney, you are choosing who you want to manage your affairs if you lose the capacity to do this for yourself. While people are living longer, there is unfortunately an increasing incidence of dementia and related conditions in elderly people. If you do not have an enduring power of attorney and you lose mental capacity, there may be no one with legal authority to manage your affairs. This may mean that the Guardianship Tribunal or the Supreme Court will need to appoint a financial manager for you.

What is the difference between a 'general' power of attorney and an 'enduring' power of attorney?

A general power of attorney ceases to have effect after you lose the capacity to make financial decisions. An enduring power of attorney will continue even after you lose capacity (e.g. if you develop dementia, have a stroke or sustain a brain injury in a car accident). A general power of attorney is usually made for certain specific purposes or for certain timeframes – for example, a person going overseas may appoint an attorney to look after his or her affairs while he is away.

Can the attorney make any decisions apart from financial ones under an enduring power of attorney?

The attorney can make decisions about your property and financial affairs. This means that they can operate your bank accounts, pay your bills, and sell or buy property (such as your house or shares) on your behalf. There are a few legal tasks that can't be done by an attorney – for example, an attorney can't make a Will for the principal. An enduring power of attorney also cannot be used to make medical or lifestyle decisions for you. However, you can appoint an enduring guardian to make these decisions. It is common for people to appoint an enduring guardian at the same time as making an enduring power of attorney. The two documents complement each other to some extent.

What level of capacity does someone need to make a valid enduring power of attorney?

To make a valid enduring power of attorney, the person making it must have capacity when they sign the document. At that time, the person must be capable of understanding the nature and effect of the enduring power of attorney. If it is not clear if a person has the required capacity to make an enduring power of attorney, it may be necessary for the person's capacity to be assessed by a professional (such as a neuropsychologist or geriatrician) before the enduring power of attorney is made.

Who should you appoint as your attorney?

An attorney can have significant power over your financial affairs. You should choose an attorney whom you trust and who will manage your finances in a responsible way. If your financial affairs are complicated, you should appoint an attorney who has the skills to deal with complex financial arrangements. You may wish to appoint a family member or a close friend as your attorney. You can also appoint the NSW Trustee and Guardian or a trustee company, in which case fees will apply.

How many attorneys can you appoint?

You can appoint more than one attorney. When appointing more than one attorney, you should choose people who can cooperate with each other and who you trust to work together in your best interests.

You can appoint your attorneys to act:

- jointly and severally (this means that the attorneys can make decisions together or separately),
- severally (this means that any one of the attorneys can make decisions independently of the other attorneys),
- jointly (the attorneys must agree on all decisions).

What if one of your attorneys dies or cannot continue for some reason?

Your power of attorney may be affected if one of your attorneys dies or cannot continue in their role. This depends on how you appointed the attorneys. If you appointed them to act jointly and one of them is no longer willing or able to carry out their duties, then this will automatically end the enduring power of attorney unless you provide otherwise.

However, if you appointed your attorneys to act jointly and severally or severally then the enduring power of attorney will continue, even when one of them can no longer act. The remaining attorneys can keep making decisions for you.

You can also appoint substitute or alternative attorneys in the event that the originally appointed attorney(s) have died or are unable or unwilling to fulfil the appointment.

What powers can you give an attorney under an enduring power of attorney?

You can give your attorney the power to make decisions about your finances or property which you could do yourself. These broad powers include selling, buying or leasing property (such as your house), making investments, accessing cash (including bank accounts) and buying or selling shares. The attorney can also generally deal on your behalf with government bodies such as Centrelink and Medicare, insurance companies and superannuation funds. You can control the power you give to the attorney by placing limits or conditions in the enduring power of attorney. For example, you can give the attorney limited authority to do specific tasks, such as paying regular bills but not selling property.

What are the duties and responsibilities of an attorney?

An attorney holds an important position of trust. The attorney is legally responsible to you and must:

- always act only in your best interests;
- avoid doing anything as an attorney which would mean that their interests conflict with your interests;
- act in accordance with your instructions while you have capacity to instruct and follow any directions you make in the enduring power of attorney;
- act according to any limits or conditions placed on their authority;
- not give gifts or give themselves or others a benefit unless you specifically authorise this;
- keep their finances and money separate from yours;
- keep accurate and proper records of their dealings with your finances or property.

If your attorney abuses their position of trust, legal action can be taken to protect your interests.

When does an enduring power of attorney start?

You can choose when you would like your enduring power of attorney to start. You may want the enduring power of attorney to start immediately after you appoint the attorney or at some future date. When you make an enduring power of attorney, you should make it clear when you want it to start. If you do not make this clear, then the enduring power of attorney will start when the attorney accepts the appointment by signing the enduring power of attorney.

When does an enduring power of attorney end?

An enduring power of attorney ends:

- when you revoke it (so long as you have capacity at that time);
- on your death;
- when you have only appointed one attorney and that attorney dies or can no longer act as your attorney;
- when you have appointed two or more attorneys to act jointly and one of them dies or can no longer act as your attorney (unless you provide otherwise which is usually done so that the surviving attorney can continue to act).

Who can witness an enduring power of attorney?

An enduring power of attorney needs to include a witness's certificate completed and signed by a solicitor.

Do I need to register the enduring power of attorney?

If your attorney needs to use the enduring power of attorney to deal with any real estate you own in NSW then the enduring power of attorney must be registered with Land and Property Information (formerly the Land Titles Office). Even if there is no requirement to register the enduring power of attorney, you may choose to do so because that means the enduring power of attorney:

- will be on record as a public document;
- may be more easily accepted as evidence that your attorney has authority to deal with your property or financial affairs.

How do I revoke my enduring power of attorney?

You can revoke your enduring power of attorney at any time so long as you have capacity to understand what you are doing when you revoke it. If you do not tell the attorney about the revocation, the attorney can keep dealing with your finances and property.

Further Advice

If you have any queries or wish to seek advice in relation to an Enduring Power of Attorney, please feel free to contact us by phone of 9181 5764 or by email to tom@bealelawyers.com.au