

ESTATE PLANNING ATTORNEYS & GUARDIANS

INFORMATION FOR ENDURING ATTORNEYS AND ENDURING GUARDIANS

Taking on the role of attorney or guardian for a family member or friend is an important and trusted position, so naturally it comes with specific responsibilities and considerations.

ENDURING POWER OF ATTORNEY [FINANCIAL]

An Enduring Power of Attorney [Financial] is a legal document that allows you to be appointed as a person's attorney to attend to their legal and financial affairs, after they lose legal capacity and usually beforehand too.

While the law differs in each state and territory, an Enduring Power of Attorney [Financial] can become effective immediately or when the person who has appointed you loses capacity or upon the occurrence of some other specified event.

ENDURING GUARDIANSHIP [OR ENDURING MEDICAL POWER OF ATTORNEY]

Again the law differs in each state and territory, but generally an Enduring Power of Guardianship comes into force when the person appointing you loses their mental capacity. This may be due to illness, accident or other events that result in their inability to make decisions or communicate. As the Enduring Guardian of that person, you become responsible for making day-to-day decisions about their care, lifestyle, medical and dental treatment.

'JOINTLY' AND/OR 'JOINTLY AND SEVERALLY'

If a number of attorneys/guardians have been appointed, 'jointly' means that they must all act together and agree about the decisions being made. 'Jointly and severally' means that the attorneys/guardians can act together, or they can make decisions individually (eg. if an attorney/guardian is overseas on holiday, the other attorney/guardian is still able to make decisions).

If more than one attorney/guardian has been appointed (either 'jointly' or 'jointly and severally') and they cannot agree on an issue, an application to the relevant Guardianship Board or Tribunal may need to be made.

HOW IS LEGAL CAPACITY ASSESSED?

A medical report from a medical practitioner may be required to confirm whether or not that person is capable of managing or conducting their own affairs.

YOUR RESPONSIBILITIES

As an attorney (financial), you are required to act in the best interests of the person who has appointed you and generally ensure that:

- their assets and interests are protected and preserved;
- their assets are invested prudently;
- full and accurate records are kept in case of audit;
- you do not abuse or benefit (unless expressly allowed) from your role as attorney.

As an enduring guardian (health/medical), although you have the responsibility to protect that person's interests, there is no obligation for you to provide daily care.

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YOUR RESPONSIBILITIES

The types of decisions you can make on behalf of that person differs in each state and territory, but generally include:

- the choice of treating doctor;
- the treatment/surgery/medication required (with some exceptions) and whether consent should be given or refused;
- whether they go to the doctor or the dentist and what treatment they receive;
- the provision of consent to live in a retirement village, hostel or nursing home;
- authorising leisure activities such as a holiday (including who they go with and where they go);
- authorising participation in a particular day programme;
- the people with whom they associate as well those who visit.

If you are appointed as an enduring guardian, it's important to be aware of the law which in some jurisdictions includes:

- any decisions you make should be as close as possible to the decision that the person would make if they could.
- any wishes expressed by the person must be considered
- decisions made should be the least restrictive option for the person with reduced or no capacity.

Again the law differs in each state and territory, but generally as an enduring guardian, you need to:

- consider any professional advice that has been provided;
- preserve the relationships that the person appointing you values;
- request further information from service providers to ensure that the services that are required are being provided;
- make appropriate health care decisions and ensure that the person has appropriate medical attention;
- communicate with those responsible for the management of that person's money and consult with them about any decisions that need to be made. In other words, the enduring guardian and enduring attorney have a duty to work co-operatively.

If agreement cannot be reached an application may need to be made to the Guardianship Board. If, as an enduring guardian, you are found to be exploitive, abusive or neglectful in any way in your role, you may be found guilty of a criminal offence.



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REVOKING AN APPOINTMENT

While the person appointing you has legal capacity, they can revoke the enduring power of attorney or enduring guardianship at any time. Once legal capacity has been lost, however, they are unable to revoke the appointments and in some jurisdictions you are unable to resign without Court approval.

DO THESE DOCUMENTS NEED TO BE REGISTERED?

No. In most circumstances, neither document needs to be registered. However, if real estate is to be sold or purchased, the enduring power of attorney [financial] must be registered at the state or territory's Lands Titles Office.

Once registered (registration fees are incurred), the original Enduring Power of Attorney [Financial] remains at the Lands Titles Office to allow the attorney to act in relation to the real estate and a certified copy is kept by the attorney to use for other matters (such as collecting pensions, operating bank accounts, reviewing investments etc).

HOW LONG DO THESE APPOINTMENTS LAST?

The law differs in each state and territory, but generally both appointments last until the person appointing you dies, unless:

- they decide to revoke it, whilst they are of sound mind;
- an expiry date specified in the documents has been reached;
- you die, resign or are removed because you are no longer willing or able to act on their behalf.

Acceptance of these roles is not a decision that should be made lightly. These roles carry with them serious responsibilities; the person appointing you trusts that you will make decisions that are in their best interests (as you are obliged to do by law).

WHAT PROVISIONS DO YOU HAVE IN PLACE FOR THE MANAGEMENT OF YOUR AFFAIRS?

What would happen if you ever lost your legal capacity? You should consider appointing an enduring attorney(s) and or guardian(s) to attend to your financial, medical and lifestyle decisions. Before you appoint them in these roles, you should also consider the ability of your attorneys and guardians to work together.

MORE INFORMATION

If you want to know more about Estate Planning – without any up-front commitment or cost – talk to Brad Roberts, one of our Directors at **The Peak Partnership** on 07 3360 9888.

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