



ESTATE PLANNING POWER OF ATTORNEY

WHY YOU SHOULD HAVE AN ENDURING POWER OF ATTORNEY

Most of us may have an up-to-date Will, but how many of us have thought about who will manage our affairs if we become incapacitated? A Power of Attorney is a legal document that allows you (as the 'principal') to appoint a person (the attorney) to make decisions about your property or financial affairs.

AN ENDURING POWER OF ATTORNEY DIFFERS FROM A GENERAL POWER OF ATTORNEY

It depends on the jurisdiction but generally a 'General Power of Attorney' ceases to have effect after you lose the mental capacity to make financial decisions. An 'Enduring Power of Attorney' will continue to have effect even if for any reason you lose your mental capacity to manage your own affairs.

WHY MAKE AN ENDURING POWER OF ATTORNEY?

By making an Enduring Power of Attorney, you are choosing who you want to manage your financial affairs, even if you lose mental capacity.

If you lose mental capacity, without an Enduring Power of Attorney in place, there may be no one with the legal authority to manage your financial affairs. Your family or advisors would then need to apply to the relevant State or Territory authority to have someone appointed.

WHO CAN MAKE AN ENDURING POWER OF ATTORNEY?

An adult can make an Enduring Power of Attorney if they are capable of understanding the nature and effect of the Power of Attorney and the range of decisions which their attorney is authorised to make.

A person who has a cognitive disability may still have capacity to make an Enduring Power of Attorney. It would depend on their level of understanding about the Power of Attorney.

If there is any doubt about whether a person has the capacity to make an Enduring Power of Attorney, an appropriately qualified medical practitioner should assess the person's understanding beforehand.

WHO SHOULD YOU APPOINT AS YOUR ATTORNEY?

An attorney can have an enormous power over your affairs. You should choose an attorney whom you trust and who will manage your finances in a responsible manner. If your financial affairs are complex, you should appoint an attorney who is capable of managing complex affairs and is available and willing to do so.

You may wish to appoint a family member or a close friend as your attorney. You can also appoint a trustee company, such as The Peak Partnership.

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 and work together in your best interests.

You can appoint your attorneys to act:

- jointly (the attorneys must agree on all decisions)
- severally (the attorneys can act separately) or
- jointly and severally.

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If your attorneys are able to act separately, the Enduring Power of Attorney will continue even when one of the attorneys can no longer act. However, if you appoint your attorneys to act jointly, the death or incapacity of one of the attorneys may automatically end the Enduring Power of Attorney (depending on the jurisdiction and the document itself).

If your first choice is unable or unwilling to act, you should also consider appointing a substitute attorney. For example, if you appoint your partner as your attorney and you are subsequently both involved in an accident, your partner may be unable to act for you due to their own incapacity. If you have not appointed a substitute, then you will have no authorised attorney.

COMMENCING AN ENDURING POWER OF ATTORNEY

There are different requirements in each jurisdiction, but generally you can choose when you would like your Enduring Power of Attorney to commence. You may want it to start immediately after you appoint the attorney or at some future date. You may wish it to start only when your attorney thinks you need help with managing your financial affairs. Alternatively, you may wish it to start only when a doctor provides evidence that you are unable to manage your affairs.

You indicate on the Power of Attorney when it is to commence. If you do not indicate a commencement time, it will come into effect when the attorney accepts the appointment.

AUTHORITY UNDER AN ENDURING POWER OF ATTORNEY

You can give your attorney the power to make any decision about your finances or property which you could make yourself. These broad and general powers include paying bills, selling a property, making investments, accessing cash and buying or selling shares.

You can control the powers you give to the attorney by placing limits or conditions in the Enduring Power of Attorney. For example, you can give the attorney authority to pay bills but not to sell property. If you wish to include limits or conditions in your Enduring Power of Attorney you should seek expert advice about the best way to do this.

If you are a member, and therefore trustee (or director of a corporate trustee), of a self-managed superannuation fund, your attorney can be appointed as a trustee of the fund in your place in the event of your incapacity (depending on the governing rules of the fund). As a result, your fund can remain a complying superannuation fund and retain the significant taxation benefits available to a complying fund.

In most jurisdictions, an Enduring Power of Attorney cannot be used to make medical or lifestyle decisions. If you want to appoint someone to make medical or lifestyle decisions on your behalf, each State and Territory has a procedure for making such an appointment.



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DUTIES AND RESPONSIBILITIES OF AN ATTORNEY

Your attorney has a responsibility to always act only in your best interests. The attorney must:

- avoid doing anything that would cause their interests to conflict with your interests;
- obey your instructions while you are mentally capable and 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 using your finances unless specifically authorised;
- 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.

REGISTERING AN ENDURING POWER OF ATTORNEY

If your attorney wants to use the Enduring Power of Attorney to deal with any real estate, the Enduring Power of Attorney may need to be registered with the Land Titles Office. A fee is normally charged for registering an Enduring Power of Attorney.

Even if there is no requirement to register the Enduring Power of Attorney, you may be able to do so voluntarily. By registering it, the Enduring Power of Attorney:

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

After registration, your original document of the Enduring Power of Attorney will be returned to you with a registration number stamped on it. Your attorney should use this number when signing any documents on your behalf.

REVOKING YOUR ENDURING POWER OF ATTORNEY

You can revoke your Enduring Power of Attorney at any time, provided you have mental capacity to understand what you are doing at the time you revoke it.

It depends on the jurisdiction, but generally the power of attorney can be revoked by notifying the attorney either verbally or in writing that it has been revoked.

It is clearer for everyone if it is revoked in writing, especially if it is registered at the Land Titles Office. If you do not notify the attorney about the revocation, the attorney can keep dealing with your finances and property.

After revocation, you should destroy the original and any copies of the Enduring Power of Attorney.

WHEN DOES AN ENDURING POWER OF ATTORNEY END?

An enduring power of attorney ends:

- when you revoke it
- upon your death
- when your attorney dies or is unable or unwilling to act as your attorney, or
- (depending on the jurisdiction and document) if you have multiple attorneys appointed jointly, when one of them dies or is unable or unwilling to act as your attorney.

The Enduring Power of Attorney may also end for more complex legal reasons, such as bankruptcy. You should seek legal advice about these matters.

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