

What is an Enduring Power of Attorney (Medical Treatment)?

An Enduring Power of Attorney (Medical Treatment) is a very important legal document which enables a person (**the donor**) to appoint another person (**the agent**) to make medical treatment decisions on their behalf, in the event they are unable to make those decisions (due to incapacity).

Part of our estate planning service includes the making of an Enduring Power of Attorney (Medical Treatment), as this is the only way a person can control who will make decisions on his/her behalf when they are unable.

If a valid Enduring Power of Attorney (Medical Treatment) is not made:

- responsibility for the donor's medical treatment will fall to the donor's next of kin. This may not be the most appropriate/desirable person to make these decisions, i.e. where there is more than one child the person responsible will be the eldest child; and/or
- donor's family/person concerned will need to apply to the Guardianship List of the Victorian Civil and Administrative Tribunal (**VCAT**) to be appointed as the donor's 'agent'. In some circumstances, particularly if there is a dispute or conflict between the donor's family/persons concerned, VCAT may appoint an independent person or the Office of the Public Advocate to act as the donor's 'agent'.

Who can you appoint as a medical agent?

You can appoint any person to act as your agent provided he/she is over 18 years of age and is capable of acting.

The agent should be trustworthy and be prepared to respect and carry out your medical treatment wishes.

The *Medical Treatment Act 1988* (Vic) only allows you to appoint one person to act at any one time, i.e. you cannot have 'joint' agents acting on your behalf.

You may also appoint a person to act as an alternative agent, if the first named agent is unable to act. The alternate agent can only act if the first named agent:

- dies;
- cannot be contacted; or
- becomes incapacitated themselves.

Commencement

The Enduring Power of Attorney (Medical Treatment) only takes effect if, and when, you become incapable, as certified by a medical practitioner, i.e. when you are unable to make decisions for yourself due to accident or illness.

A person lacks capacity to give consent to medical/dental treatment if:

- he/she incapable of understanding the general nature and effect of the proposed procedure or treatment; or
- he/she incapable of indicating whether or not he/she consents to the carrying out of the proposed procedure or treatment.

Medical treatment decisions

The *Medical Treatment Act 1988* (Vic) sets out the types of medical treatment decisions an agent can make. For example, 'medical treatment' includes:

- an operation;
- a medical or surgical procedure;
- an examination;
- any preventative, or rehabilitative care; and
- dental treatment.

An agent can also make decisions in respect to 'health care'. Health care encompasses therapies such as physiotherapy, mobility exercises, and alternative therapies.



An agent cannot agree to the following medical procedures:

- those likely to lead to infertility;
- termination of a pregnancy; or
- removal of tissue for transplant.

If any of these procedures may be required, the agent must apply to VCAT for a decision.

An agent can only refuse medical treatment if:

- the treatment would cause the donor unreasonable distress, or
- the agent reasonably believes that the donor would consider the treatment unwarranted.

The agent cannot refuse medical treatment to alleviate pain or suffering when a donor is dying (palliative care).

Ultimately, a doctor or health service professional cannot be compelled to provide the medical treatment as directed by the agent if to do so is futile or unduly burdensome on the donor.

To help the agent understand the donor's views about possible medical procedures (e.g. the use of a life support system), we recommend that the donor either (or both):

- discuss these wishes with the agent; and
- write these wishes down in a statement of wishes document.

We can provide the donor with a 'Statement of Medical Wishes' to complete, which asks the donor to set out their wishes as to the various medical treatment decisions/procedures or circumstances. We recommend that a copy of this completed list be provided to the agent and the donor's family/next of kin.

Responsibilities of the agent

The law requires that the agent make decisions that would be in the best interests of the donor and consider:

- the donor's wishes, so far as they can be ascertained so that wherever possible, the agent will make the same decision that the donor would have made;
- the wishes of donor's family members;
- the consequences to the donor if the treatment is not carried out;
- whether there are alternative treatment options;
- the nature and degree of risks associated with the treatment; and
- whether the treatment is to promote and maintain the health and wellbeing of the patient.

We recommend that an agent maintain accurate records of all medical decisions made and the reasons why they chose to make those decisions. The records should contain copies of all correspondences, notes of conversations with doctors and health service professionals as well as the donor. These records may be useful if a dispute arises with a doctor or health service professional, or if someone challenges that the decisions made by the agent were other than in the donor's best interests.

When does the Enduring Power of Attorney (Medical Treatment) end?

The Enduring Power of Attorney (Medical Treatment) will end on any of the following circumstances:

- the death of the donor;
- the death of the agent and alternate agent, if applicable;
- the donor revokes the Enduring Power of Attorney (Medical Treatment) (whilst the donor is competent to do so); or
- the donor signs a later Enduring Power of Attorney (Medical Treatment), which revokes all previous Enduring Powers of Attorney (Medical Treatment).

The agent may resign if they no longer wish to accept the appointment. If the donor is still competent, the donor can make a new Enduring Power of Attorney (Medical Treatment).



If the agent wishes to resign whilst the donor is incapable or if the agent does not wish to continue to act as the donor's agent, the agent must apply to the Victorian Civil and Administrative Tribunal for their resignation to be approved.

If the donor revokes the Enduring Power of Attorney (Medical Treatment), we recommend that the donor notifies the previous agent either by telling them that their power has been withdrawn or by providing them with a completed Revocation of Enduring Power of Attorney form.

The law is complex and the types of decisions an agent may be required to make are varied, often highly emotional and done so under pressure.

For advice and assistance, we recommend you contact our Estate Group on (03) 8600 8885.

