

## What is an Enduring Power of Attorney?

An Enduring Power of Attorney is a document which enables a person (**the Principal**) to appoint another person (**the Attorney**) to do certain things on behalf of the Principal.

The Principal may make an Enduring Power of Attorney for personal and/or financial matters.

'**Enduring**' means the power continues (endures) even when the Principal is unable to make these types of decisions for themselves due to accident or illness resulting in incapacity, either temporary or permanent.

If a valid Enduring Power of Attorney is not made, the Principal'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 Principal's financial administrator and/or guardian for healthcare and lifestyle decisions. In some circumstances, particularly if there is a dispute or conflict between the Principal's family/persons concerned, VCAT may appoint an independent person or trustee company to act.

## Decisions

A Principal may give an Attorney power to make decisions about:

- personal matters; and/or
- financial matters, including any legal matter that relates to the financial or property affairs of the Principal.

## Personal matters

Personal matter means any matter relating to the Principal's personal or lifestyle affairs.

These matters are generally described as the powers that a parent may exercise in respect of a child.

The following are examples of **personal matters**:

- where and with whom the Principal lives;
- persons with whom the Principal associates;
- whether the Principal works and, if so, the kind and place of work and employer;
- whether the Principal undertakes education or training, the kind of education or training and the place where it takes place;
- daily living issues such as diet and dress; and
- health care matters, including matters provided for in Part 4A of the *Guardianship and Administration Act 1986*.

## Financial matters

The following are examples of **financial matters** that can be done by an Attorney for a Principal:

- dealing with bank accounts;
- paying any debts of the Principal, including any fees and expenses to which an Attorney is legally entitled;
- paying expenses for the Principal (and in some circumstances, any dependants of the Principal), for maintenance and accommodation, including purchasing a property or paying an aged care accommodation bond or expenses;
- receiving and recovering money/debts/loans;
- carrying on any trade or business;
- performing any contracts;
- making investments;
- continuing investments, including exercising shareholder rights or options;
- undertaking any real estate transaction;
- discharging any mortgage;
- paying rates, taxes and insurance premiums or other outgoings;
- insuring the Principal or the Principal's property; and
- using the Principal's property as security (eg for a loan or guarantee) for a transaction beneficial to the Principal.



## Legal matters

Legal matters means:

- use of legal services for the Principal's benefit; or
- bringing or defending a legal proceeding on behalf of the Principal, including settling an anticipated or issued legal proceeding.

The following are examples of **legal matters**:

- the use of legal services to obtain information about the Principal's legal rights; or
- the use of legal services to undertake a transaction.

## Decisions an Attorney cannot make for the Principal

An Attorney cannot:

- make or revoke a Will;
- make or revoke an Enduring Power of Attorney;
- vote on the Principal's behalf in an election;
- consent to the entering into or dissolution of a marriage of the Principal or of a sexual relationship of the Principal;
  - make or give effect to a decision:
    - about the care and wellbeing of any child of the Principal; or
    - about the adoption of a child under 18 years of age of the Principal;
- enter into, or agree to enter into, a surrogacy arrangement on the Principal's behalf; or
- consent to the making or discharge of a substitute parentage order on the Principal's behalf;
- manage the estate of the Principal on the death of the Principal; or
- consent to an unlawful act.

## Conditions and instructions in an Enduring Power of Attorney

A Principal may place conditions on the Attorney or give instructions about the exercise of the Attorney's power.

**Note:** an Attorney cannot delegate a power under the Enduring Power of Attorney.

## Who may be an Attorney?

An individual is eligible to be appointed as an Attorney if they are:

- over 18 years of age and capable of acting;
- not insolvent or under administration;
- to be an Attorney for financial matters:
  - have not been convicted or found guilty of an offence involving dishonesty; or
  - if the individual has been convicted or found guilty of an offence involving dishonesty, has disclosed the conviction or finding of guilt to the Principal and the disclosure of the conviction or finding of guilt has been recorded in the Enduring Power of Attorney; and
  - not a care worker, a health provider or an accommodation provider for the Principal.

**Note:** 'care worker' does not mean someone receiving a carer's pension or similar benefit.

A trustee company is eligible to be appointed as an Attorney for financial matters.

The Public Advocate is eligible to be appointed as an Attorney for personal matters.

Ultimately, the Attorney should be someone who the Principal trusts to manage their affairs, and look after their best interests.

## Multiple Attorneys

A Principal may appoint more than one person as their Attorney.

For example, the Principal may appoint one person to act for legal and financial matters and another person to act for personal matters.



If more than one Attorney is appointed, the Principal may appoint those Attorneys to act:

- jointly; or
- severally; or
- jointly and severally; or
- by majority.

**Note:** If the Principal does not specify how the Attorneys are appointed, the Attorneys are to act jointly.

Unless otherwise provided, if Attorneys are appointed to act:

- **jointly**, the Attorneys must make decisions unanimously and if a document is required to be signed, by all signing the document; or
- **severally**, the Attorneys are authorised to act as **one alone** and signing the document as one alone; or
- **jointly and severally**, the Attorneys are authorised to act:
  - by all agreeing and all signing the document; or
  - as one alone or by more than one agreeing and signing the document,
- **by majority**, the Attorneys are authorised to act if a majority of the Attorneys agree and by the majority who agree, signing the document.

An Attorney for financial matters must implement a decision of an Attorney for personal matters unless it would result in a serious depletion of the Principal's financial resources. In this case, the Attorney for financial matters must apply to VCAT for an order to determine the matter.

## Alternative Attorneys

A Principal may appoint an alternative Attorney.

An alternative Attorney is authorised to act:

- in the circumstances specified; or
- if no circumstances are specified:
  - if the Attorney for whom the alternative Attorney is appointed:
    - dies; or
    - loses the capacity to make decisions; or
    - is otherwise not willing or able to act; or
    - if the appointment of the Attorney for whom the alternative Attorney is appointed is revoked.

An alternative Attorney must act in the same manner as the Attorney appointed to act, unless the Enduring Power of Attorney otherwise provides.

## Commencement

An Attorney's powers may commence:

- immediately, when the Attorney accepts the appointment; or
- when the Principal ceases to have decision making capacity; or
- any other time, circumstance or occasion specified in the Enduring Power of Attorney.

If a specification is not made, the power is exercisable immediately.

**Note:** Even if the Attorney is authorised to act immediately, the Principal may also continue to make their own decisions, while they are able to do so.

## Signing the Enduring Power of Attorney

For the Principal, the Enduring Power of Attorney must be signed before two (2) witnesses, one (1) of which must be either authorised to witness Affidavits or a medical practitioner. Both witnesses must not be:

- a relative of the Principal;
- a relative of an Attorney; or
- a care worker or an accommodation provider for the Principal.



For the Attorney / Alternative Attorney, the Statement of Acceptance must be witnessed by a person over 18 years of age.

## Changing or revoking the Enduring Power of Attorney

A Principal may change or revoke the Enduring Power of Attorney at any time, so long as the Principal has capacity.

The Enduring Power of Attorney will otherwise be revoked so far as it relates to an Attorney, if the Attorney:

- becomes insolvent or under administration;
- becomes a care worker, a health provider or an accommodation provider for the Principal; or
- for financial matters, is convicted or found guilty of an offence involving dishonesty.

## Ending the Enduring Power of Attorney

There are several circumstances that will bring an Enduring Power of Attorney to an end:

- the **Principal dies**;
- the **Attorney dies**. The Enduring Power of Attorney is revoked so far as it gives power to that Attorney;
- the **Attorney becomes incapable**. The Attorney's power is revoked if he/she becomes incapable and does not have decision making capacity for the matters to which the Enduring Power of Attorney applies; or
- the Principal makes a **later Enduring Power of Attorney**, so far as the later is inconsistent or unless the Principal specifies in the later Enduring Power of Attorney that the former is not to be revoked.

**Note:** Unless otherwise specified in the Enduring Power of Attorney, the resignation, incapacity or death of one of multiple Attorneys or alternate Attorneys does not affect the ability to exercise that power of any remaining Attorneys.

## For the Attorney

### IMPORTANT NOTICE

An Attorney takes on serious responsibilities for a Principal. If an Attorney fails to observe their responsibilities, they could be removed or even convicted of an offence and required to pay compensation.

### Duties of an Attorney

- must act honestly, diligently and in good faith;
- must exercise reasonable skill and care;
- must not use the position for profit, unless permitted under section 70 of the Act;
- must avoid acting where there is or may be a conflict of interest unless the power so authorises;
- must not disclose confidential information gained as the Attorney under the power unless authorised by the power or by law; and
- must keep accurate records and accounts of all dealings and transactions made for financial matters and all material dealings and transactions made for personal matters.

### Gifts

- Subject to any condition or restriction stated in the Enduring Power of Attorney, an Attorney for financial matters may make a gift of the Principal's property only if:
  - the gift is reasonable having regard to all the circumstances and, in particular, the Principal's financial circumstances; and
  - the gift is:
    - to a relative or a close friend of the Principal and is of a seasonal nature or for a special event (e.g. a birth or a marriage); or
    - a type of donation that the Principal made when the Principal had decision making capacity for the matter or that the Principal might reasonably be expected to make.



A gift may be made even though the gift is made to:

- the Attorney; or
- a relative or close friend of the Attorney; or
- an organisation with whom the Attorney has a connection.

If the total value of the gift is over \$100, an Attorney must keep a written record of any gift that is made to:

- the Attorney;
- a relative or close friend of the Attorney; or
- an organisation with which the Attorney has a connection.

## Remuneration of Attorney

An Attorney is not entitled to any remuneration unless it is specifically authorised by the Enduring Power of Attorney or by law.

## Can an Attorney be held liable?

The Supreme Court or VCAT may order an Attorney to compensate the Principal for a loss caused by the Attorney contravening any provision of the Act even if:

- the Principal has died, in which case compensation is payable to the estate of the Principal; and
- the Enduring Power of Attorney is invalid or has been revoked or, at the time of the contravention, was invalid or had been revoked.

## Protecting the Attorney

If an attorney is in doubt regarding a transaction or decision that he or she needs or wishes to make on behalf of a Principal or if two or more attorneys cannot agree as to whether a transaction or a decision should be made, an attorney can apply to VCAT for direction as to whether the transaction or decision ought to proceed.

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

The role of an attorney is very important and comes with a great deal of responsibility.

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

