ENDURING POWERS OF ATTORNEY

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ENDURING POWERS OF ATTORNEY

There are two branches of Powers of Attorney. The old style Power of Attorney is either general in nature or it allows very specific limited powers to an attorney. In either situation upon the incapacity of the person who made the Power of Attorney, then the Power of Attorney becomes ineffective.

The majority of Powers of Attorney that are made today are the Enduring types (or EPAs). This means that if a person becomes incapable of making decisions the Powers of Attorney continues to be effective and valid.

Choosing an Attorney

An attorney is someone appointed by you to make decisions at your express direction or when you are incapacitated. The types of decisions they can make and actions they can take are limited by the powers granted to them.

The person who makes the Power of Attorney is called “the Donor” or “the principal”.

How many Attorneys can you choose?

It is possible to nominate one or more attorneys and they can act either jointly, separately or in a majority. Jointly means all must act together and agree on all decisions made.

You can also nominate one individual to be your initial attorney, but in the event that that person is unable to act you can then nominate a substitute attorney or attorneys.

Types of Enduring Power of Attorney

There are 2 different Enduring Powers of Attorney.

- Financial and Personal Enduring Power of Attorney (p.4)
- Medical Treatment Enduring Power of Attorney (p.5)
Importance of choosing the right Attorney

While your attorney (or attorneys) should only make decisions at your express direction while you have capacity, it is still possible that they might make inappropriate decisions without your knowledge.

One notable disaster involving a Financial Enduring Power of Attorney occurred more than ten years ago in Victoria. A 30-year old man had become a paraplegic as a result of a work related incident. He received $300,000 compensation and placed that money in an account with the Commonwealth Bank. After completing rehabilitation he returned to live with his mother. This event occurred prior to internet banking and as it was difficult for the gentleman to attend the bank himself he made an Enduring Power Attorney in favour of his mother and authorised her to withdraw funds as he needed from time to time. Tragically, the mother had an addiction to poker machines and started to withdraw very large sums on a weekly basis, which were entirely gambled away. After 12 months, his mother had exhausted the compensation benefit of $300,000 and it was only then that the disaster was discovered. The mother was charged with theft and the matter had a large amount of coverage in the media. While the mother was ultimately sent to jail, the bank had no obligation to repay the money to the son, as he had given a complete authority to his mother to make transactions on his behalf. For all the bank might have known, the money was given by the mother back to the son and he was making decisions in relation to the money.

You need to be aware that:

- The choice of an attorney is extremely important and you should not allocate this task to anyone unless you are completely confident that they will act honestly and sensibly.
- The activities of an attorney are not audited or supervised.
- While there are legal options to recover money from attorneys, if they act inappropriately, there may not be any funds left to recover. As the example above demonstrates, the mother had no funds left after 12 months to repay her son.
- While you have capacity you may revoke the Enduring Power of Attorney at any time.
• If you have lost capacity, then any other person may on your behalf apply to VCAT to have the Enduring Power of Attorney revoked. VCAT will need to be satisfied that it is in your best interest to have the Enduring Power of Attorney revoked. Mere suspicions that the attorney might do the wrong thing are rarely going to be adequate evidence for VCAT.

• The choice of two or more people to act jointly or in a majority can be highly effective in reducing the risk of dishonesty or an inappropriate decision.

**Are there some actions that an Attorney cannot take?**

There are some matters that an attorney cannot do and these include:

• Make a new Will for the donor or principal

• Have access to the Will unless they can demonstrate that there is a good reason. For example, the attorney may be planning to sell the residential property to pay for nursing home accommodation fees. It would be reasonable for an attorney to look at the Will to ascertain whether there was a specific gift in the Will in respect of the house. An attorney is not entitled to take possession of the Will.

• Delegation of tasks to an attorney in respect of positions held which are personal. For example, a director of a company cannot delegate to their attorney to make decisions in respect of the company through a normal Enduring Power of Attorney. It is possible for the company to appoint an alternate director and that is the preferred option.

• If a person is acting as a trustee of a trust or superannuation fund, then their attorney will not necessarily have the ability to make decisions for the donor in their capacity as trustee. In that situation, very specific attention should be given to the Trust Deed to ascertain the suitable options.

**Record Keeping**

It is strongly recommended attorneys keep detailed records of all decisions and activities undertaken in the capacity as an attorney. A separate diary is an excellent option. Attorneys should be in the position to provide an explanation of all transactions completed.
Financial and Personal Enduring Power of Attorney

This document allows the attorney to sign on behalf of the donor or principal any document which has a financial connection. This could involve:

- Transactions with bank accounts
- Payment of accounts
- Dealings with investments and shares
- Buying and selling property
- Payment for accommodation needs, including a hospital or nursing home
- Selling existing assets and the purchase of other assets

The personal side of the EPA can allow an attorney to make decisions about:

- Where you live, whether permanently or temporarily
- Whether you attend church
- Whether you give gifts to family and friends
- Who you live with
- Whether or not you should be permitted to work including with who and the type of work
- Consent to any health care that is in your best interest (this is in contrast to a Medical Treatment Enduring Power of Attorney which allows for the consent and refusal of health care)
- Restricting visitors to such an extent as may be necessary in your best interest and to prohibit visits by any person if your attorney reasonably believes that visits by that person would have an adverse effect on you

For some people, the choice of residence if they lose capacity is a very important matter. In these situations, the appointment of an Enduring Power of Attorney—Personal might be a very sensible option.
As an example of what can be allowed, it might be the habit of a parent to put $100 in a Christmas card for each of their adult children. If the parent lost capacity to make decisions, the attorney is permitted to send a Christmas card on behalf of the donor which encloses a further $100. While it is not a decision that is in the best financial interests of the principal it is allowable. When making a Financial and Personal Enduring Power of Attorney it is possible to add additional comments which could limit those types of gifts, but it is very difficult to predict those types of transactions when the Enduring Power of Attorney may not come into use until many years in the future.

Medical Treatment Enduring Power of Attorney

Every adult has the right to consent to medical treatment or refuse medical treatment. If you are unable to make these decisions due to being unconscious or lacking capacity, then your Doctor is able to obtain consent from your next of kin for that medical treatment. Relevant legislation refers to a “responsible person” and the first of the following persons qualifies in this role:

- A person appointed by the patient under a Medical Treatment Enduring Power of Attorney (“medical agent”)
- A person appointed by VCAT to make decisions in relation to the proposed procedure or treatment
- A person appointed under a Guardianship Order with power to make decisions in relation to the proposed procedure or treatment
- A person appointed by the patient, before they became incapable, as an Enduring Guardian
- A person appointed in writing by the patient to make decisions in relation to medical research procedures that included the proposed procedure
- The patient’s spouse or domestic partner
- The patient’s primary carer
- The patient’s nearest relative

For most people, if they have not made a specific choice of a person to make medical decisions for them, then their spouse or nearest relative becomes the person able to consent to medical treatment. This may or may not, be the best choice.
However, it is possible to make a Medical Treatment Enduring Power of Attorney appointing a person who is able to make medical decisions for you. **Only if a Medical Treatment Enduring Power of Attorney is made can your medical agent make the decision to refuse or withdraw medical treatment.**

Your medical agent is given the responsibility of advising the Doctor of the decision that you would probably make if you were able to give appropriate directions to the Doctor yourself.

Your medical agent cannot refuse palliative care, which is the provision of pain relief and sustenance. However, where you are only able to be fed by way of an intravenous tube, that is considered to be medical treatment and your agent can refuse that treatment, if they believe that would be your wish.

### Organ Donation

Your next of kin will make the ultimate decision for you about organ donation. You can be registered for organ donation, but your family can override that decision. This might be a surprise to some, but it is recognition that your living family members have to live with the outcome.

So if you want to be an organ donor, please tell your family and let them know your reasons. You might find that after a conversation with you that they wish to become organ donors too.

Sometimes the decision to be made by your medical agent is harrowing and extremely emotional. Consequently, when making a Medical Treatment Enduring Power of Attorney it is important that you discuss what your likely wishes would be with your medical agent in advance. This can be difficult when you are fit and well and have no medical problems so it is easier and useful to discuss hypothetical scenarios. Once you have made a Medical Treatment Enduring Power of Attorney it would be reasonable to have ongoing discussions with your medical agent from time to time, particularly if any illnesses develop.

### Prescribed forms and procedure for signing documents

Each of the Financial, Personal and Medical Enduring Powers of Attorney has prescribed forms which must be used. Significantly, there are restrictions about
the witnessing of these documents. One important obligation is that at least one of the witnesses must be a person who is eligible to witness affidavits and both witnesses must certify that you have decision making capacity in relation to the document.

It is therefore essential to discuss these important documents with a lawyer and have the lawyer prepare them so you can be assured they are valid.

Further information

If you require further information or assistance about Enduring Powers of Attorney or your will contact Russell Robertson, Accredited Wills and Estates Specialist at O’Farrell Robertson McMahon or any of our Wills and Estates team.

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Things to consider

- Do you have a valid and up-to-date Will?
- Do you have a Financial and Personal Enduring Power of Attorney?
- Is your attorney aware of their obligations?
- Are you confident your attorney will act responsibly?
- Do you want a joint, majority or individual attorney?
- Do you have a Medical Treatment Enduring Power of Attorney?
- Have you discussed your medical treatment wishes with your family?
- Have you registered as an organ donor?
- Have you discussed with your family your wishes to donate your organs?
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