

Enduring Powers of Attorney



A power of attorney is a right that allows a person or a company to act on behalf of another person or company. The person or company who is appointed to act is called an “attorney”. The person appointing the attorney is commonly called “the donor”. Powers of attorney are often given by travellers so that someone can sign documents on their behalf in their absence.

An attorney does not have to be a lawyer or have legal qualifications.

Until the enactment of the Protection of Personal and Property Rights Act 1988, attorneys lost their authority if the donor became mentally incapable. The Act provided that, if your power of attorney is drafted in accordance with the Act, it will be “enduring”, which means it will remain effective even if the donor loses mental capacity. Accordingly, enduring powers of attorney can facilitate the management of the affairs of the elderly.

There are two types of enduring powers of attorney:

- (a) enduring powers of attorney in relation to personal care and welfare; and
- (b) enduring powers of attorney in relation to property

Personal care and welfare powers of attorney

Personal care and welfare powers of attorney grant authority over such matters as where you live and, within limits outlined below, what medical treatment you shall receive. Your attorney may not act for you on the following matters:

- (a) any decision relating to your entering into marriage, or the dissolution of your marriage;
- (b) any decision relating to the adoption of a child of yours;
- (c) the refusal of consent to any standard medical treatment intended to save your life or to prevent serious damage to your health;
- (d) consenting to electro-convulsive treatment;
- (e) consenting to any treatment designed to destroy any part of your brain for the purposes of changing your behaviour; or
- (f) consenting to your taking part in any medical experiment (except for the purpose of saving your life or of preventing serious damage to your health).

Only a single attorney may be appointed for your care and welfare and a care and welfare power of

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attorney may only come into effect if you become mentally incapable.

Property powers of attorney

A property power of attorney can authorise your attorney to act in respect of your property affairs. The word “property” in this context means everything you own—the meaning is not confined to real estate and includes your debts.

If you wish your attorney to act in respect of only some of your property matters, you can specify those matters. Unless you impose limits on the attorney’s power, your attorney will be able to assume complete authority over your property affairs and to do anything with your property that you could have done yourself.

You can appoint more than one property attorney and you can require them to act jointly. Parents often feel more secure appointing two children, or one child and their lawyer, to be their joint attorneys.

We recommend joint attorneys because each attorney will check the actions of the other attorneys and so ensure that your interests are safeguarded.

A property power of attorney can be expressed to be effective even while you are mentally capable and it will continue if you become mentally incapable, or it can be restricted so that it will have effect only if you become mentally incapable.

We recommend that property powers of attorney only take effect if you lose your mental capacity, unless you want the attorney to have authority for a specific purpose, for example, while you are overseas.

Optional provisions

There are a number of provisions you can include in your enduring powers of attorney, if you want to:

Conditions and restrictions on the attorney’s power

- (a) You may place conditions or restrictions on your attorney’s power to act. This may be in the form of a positive act that the attorney must do or in the form of something your attorney must refrain from doing.

Appointment of successive attorney

- (b) You may appoint successor attorneys to take the place of your appointed attorneys should they no longer be able to act.

Attorney to consult with others

- (c) You may require your attorneys to consult people whom you specify on certain matters before making decisions.

Attorney to provide information on exercise of powers

- (d) You may specify specific people to whom you want your attorneys to provide information on specific matters.

Assessment of mental capacity

- (e) You may specify a particular health practitioner or a specific type of health practitioner you want to make any assessment of your mental capacity.

With enduring powers of attorney in relation to property, you have all the above options plus the following options:

Joint or several authority.

- (a) If you appoint more than one property attorney, you can require them to always act jointly, which we recommend to safeguard your interests.

Signing of wills on behalf of donor

- (b) The Family Court can authorise your property attorney to make a will on your behalf if you do not have the capacity to make a will. If you do not want the Family Court to give your property attorney this authorisation you may say so in your enduring power of attorney.

Attorneys power to benefit themselves and others

- (c) You can authorise your attorney to use your property to the benefit of themselves or other persons. This may be justified if you wish your attorneys to be able to reimburse themselves or to continue a gifting program to cancel debt owed to you by your family trust.

Signing

A lawyer, legal executive or officer or employee of a trust corporation must witness the signature of the person granting the enduring power of attorney (“the donor”) and they must certify that they have advised you of the contents of the document and your right to suspend or revoke the enduring power of attorney.

Powers of attorney avoid costly court proceedings

If someone who has not signed enduring powers of attorney becomes

mentally incapable, they cannot grant powers of attorney and no one (not even their spouse) may make formal decisions about their property or their care, or sign formal documents for that person. The only way to obtain authority is to apply to the court for a property manager or guardian to be appointed.

We have dealt with a number of these applications and they typically cost at least \$1,500—a compelling justification for our recommendation that clients sign enduring powers of attorney while they may.

Whom should I appoint?

If you have a family, common appointments are:

Care and welfare: Spouse.
Substitute: one child.

Property: Spouse. Substitutes:
Two children, or a child and a lawyer jointly.

If you have no family, common appointments are:

Care and welfare: Friend.
Substitute: another friend or lawyer.

Property: Friend and lawyer jointly. Substitutes: another friend or lawyer.

General

Please remember that you can appoint anyone you trust as your attorney—an attorney does not have to have legal qualifications.

Your attorneys only have authority while you are alive. On your death, your will comes into effect and only your trustees have authority over your affairs.

If you would like further information about enduring powers of attorney, we invite you to contact us for an

appointment. We will be pleased to assist you.

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