

# POWERS OF ATTORNEY

A power of attorney gives the attorney the authority to while you are alive act legally on your behalf to the extent specified in the power of attorney.

There are two main types of powers of attorney – a **general power of attorney** and an **enduring power of attorney**.

# GENERAL POWER OF ATTORNEY

- With a general power of attorney, you appoint someone to help look after your affairs. It does not prevent you continuing to look after your own affairs but simply allows the person you appoint to do so as well.
- You can choose how wide the powers you grant should be. For instance, it could be a general power to look after all your money or property, or it could be more specific – perhaps appointing someone to manage your bank account to let out your house while you are overseas.

- you can choose more than one attorney. If you do, you need to say whether they must act together (jointly), separately (severally) or jointly and severally.
- A general power of attorney remains valid only while you still have legal capacity – it ceases to be valid as soon as you no longer have the mental or physical capacity to instruct the attorney. If, for instance, you have an accident that leaves you with brain damage, the specified person could no longer act for you under a general power of attorney.

- If you want someone to be able to act for you when you can no longer manage your own affairs, you need to arrange an enduring power of attorney while you are still capable. A general power of attorney cannot be converted into an enduring power of attorney once you are no longer capable.
- A general power of attorney also ceases immediately the person who granted it dies. When that happens, the power to deal with property, bank accounts, etc, passes to the executor named in the will or – if there is no will – the person appointed to administer the estate.

- To grant a general power of attorney, you need to complete a form stating the extent of powers that you (as donor) are granting. You need to sign the form and have your signature witnessed by another person. You can grant the power for a limited time or leave it open-ended.
- You can revoke, amend or extend the power at any time. This should be done in writing. People who have been relying on its authority need to be informed. Signing a new power of attorney does not automatically revoke a previous one.
- An important power. They can act without consulting you and you are bound by decisions they make on your behalf – so choosing someone you can trust is critical. Your attorney can be called to account for misusing the power and acting contrary to your directions, but you are still bound by any action they have taken that affects third parties.

# ENDURING POWERS OF ATTORNEY (EPA)

- An enduring power of attorney allows the attorney to act for you if you become mentally incapable. You must arrange an EPA before you become mentally incapable. You can allow the power to take effect immediately. This means your attorney can act whilst you are mentally capable, if you want or need them to. If you are already incapacitated, you are deemed not capable of granting a valid power of attorney.
- You set conditions and restrictions about how your property should be dealt with or what you would like to happen.

- Creating an EPA gives considerable power over your property affairs or personal care and welfare. However, your property attorney's paramount consideration under the PPPR Act is to use your property to promote and protect your best interests. Your personal care and welfare attorney's paramount consideration is to protect your welfare and best interests.
- You will need to see an independent lawyer. Except where your attorney is also appointing you as attorney the lawyer advising you cannot also be your prospective attorney's lawyer. Your signature must be witnessed by a lawyer or a qualified legal executive. That witness must give you an explanation of the effects and implications of the EPA and advice on certain matters.

# PROPERTY EPA

- An EPA for property gives the attorney the power to act on your behalf with respect to property you own. Property includes not only land and houses but also businesses, and accounts, shares and all other possessions and debts – that is, everything you own or owe.
- You can give your attorney a general authority to act on your behalf or you can limit it to specific circumstances or specific property.



- You can choose whether you want the EPA in respect of property to take effect **only if** you become mentally incapable, or whether it is to have immediate effect and continue to operate if you become mentally incapable. A relevant health practitioner certifies or the Family Court determines that you are mentally incapable. There is a presumption of competence in section 93B of the PPPR Act.
- If you decide to appoint attorneys to act jointly (and not separately) to manage your property, then they must act together and anything requiring a signature will require the signatures of all attorneys. advantages of this are that the attorney's can act as a check on one another and share the weight of what can be a very responsible role. You can also appoint a substitute attorney (also known as a successor attorney) in case your original attorney's appointment ends.

- When you appoint your attorneys, you will need to be clear about what you want from them. You should discuss it with them and, once they are appointed, you should make sure they know what property you have, where you keep relevant documents and what your wishes would be in certain circumstances.
- If you are married to or in a civil union or a de facto relationship with your property attorney, and live together and share your incomes, your attorney will be able to benefit others and themselves in dealing with property that you jointly own unless you specify otherwise in the EPA.

# PERSONAL CARE AND WELFARE EPA

- An EPA for your personal care and welfare enables your attorney to make legal decisions about your personal care in the event of your mental incapacity. For instance, your attorney can decide if you need to go into care, what home or hospital you will go to, what sort of medical treatment you should have, and so on.
- You can authorise your attorney to act on your behalf either generally or only in relation to specific matters. However, even if you give a general authority, the law restricts some of the decisions that your attorney can make. For example, they cannot make decisions in relation to marriage or civil union or adoption of children, refuse medical treatment intended to save your life or prevent serious damage to your health, or consent to certain medical treatment (some brain surgery, medical experiments or electroconvulsive treatment.)

- You can appoint only one person to act as your attorney in relation to personal care and welfare at any one time, but you can nominate a substitute or successor attorney.
- The appointment operates only when you become mentally incapable

# WHO SHOULD SET UP AN EPA? – AND WHEN?

- Everybody 18 or older – whether young or old – should establish an EPA for both their property and their welfare. And, as you need to do it while you are still mentally capable, you should do it now. Anyone can become mentally incapable at any age.
- If you do restrict your property EPA to take effect only when you are mentally incapable, your attorney may not be able to act. Mental incapacity can fluctuate from hour to hour or day to day. It may be difficult for your attorney to manage your property affairs if there is any doubt about your capacity at the very time they need to take action to guard your assets.

# WHO SHOULD YOU APPOINT?

- You can appoint a friend, a member of your family or other trusted adviser.
- You may wish to provide remuneration for anybody else for anybody else that you appoint as an attorney. Unless you specifically provide otherwise, your attorney can be paid out-of-pocket expenses (but not lost wages or remuneration) and an attorney who has accepted appointment or done work in a professional capacity (for example, a lawyer) can be paid professional fees and expenses. It's a big commitment, so you should talk it over with the people you propose to appoint. If you appoint different attorneys for property and for welfare, remember that they will need to be able to work together.

# HOW DO YOU ARRANGE AN EPA?

- Your lawyer will be able to prepare an EPA for you after careful consideration of your circumstances. Your lawyer will also be able to advise you about the legal implications of what you propose and what is required to make sure that your wishes will be enforceable. A lawyer or legal executive will charge a fee for preparing the EPA.

# WHO CHECKS ON THE ATTORNEYS?

- Although there is no automatic check on how well the attorneys are exercising their powers, the attorneys do have a legal duty to consult you, as far as practicable, and anyone else specified in your EPA. The Family Court can also monitor the performance if an application is made to the court.



# HOW LONG DOES AN EPA HAVE EFFECT?

An EPA ceases to have effect when:

- The donor, while still mentally capable, revokes the power by notice in writing to the attorney.
- The attorney gives notice in writing to either the donor (if still mentally capable) or the court (if the donor is no longer mentally capable) that she/he no longer wishes to act as attorney
- The donor dies
- The attorney (or one of the attorneys if their power is jointly held) dies, becomes a bankrupt, becomes mentally incapable of acting as attorney
- The court revokes the power because the attorney is not acting in the donor's best interests, or the attorney exerted undue influence or acted fraudulently to obtain the EPA or is not suitable to be the donors attorney.

# WHAT IF A PERSON IS ALREADY MENTALLY INCAPABLE?

- An application must be made to the Family Court for orders appointing people to act as a manager of the person's property and as a personal welfare guardian. It is much better to have EPAs in place.

# WHAT HAPPENS ON DEATH?

- A power of attorney (general or enduring) ceases to have effect immediately when the donor dies. The person holding the power can no longer act. For instance, they would not be able to sign a cheque to pay funeral expenses. The power transfers to whoever is named executor in the will or appointed as administrator of the donor's estate.

# LIVING WILLS AND ADVANCE DIRECTIVES

- A **living will** or **advance directive** is a written or oral instruction made while you are in good health and of sound mind. A living will or advance directive is not an alternative to enduring powers of attorney, which give people the legal power to act for you in whatever way they think fit while you are alive but incapacitated.
- The living will or advance directive may not be legally effective but may give your family and the medical profession an indication of your wishes (it may be described as “a statement of wishes regarding health treatment”). If it covers the particular circumstances that have arisen and expresses your true wishes, then it would be lawful to rely on the directive and possibly unlawful to ignore it. The Code of Health and Disability Services Consumers’ Rights (Rights 7(5) and 7(7)) refers to advance directives.