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Enduring Power of Attorney

An Enduring Power of Attorney is a legal document which enables you to appoint a person to make decisions on your behalf about your finances and assets.

The power may be one of three types:

General - this will take effect immediately;

Enduring - when the appointment continues to be effective and enforceable if you lose mental capacity;

Specific - lists a specific period of time the document is to operate.

The appointment of an attorney is prescribed by the Powers of Attorney and Agency Act 1984 which states any act of a donee in pursuance of their power of appointment is as effective as if the donor had taken the action themselves.

Why you should appoint an Attorney?

All adults should have an Enduring Power of Attorney to ensure that your affairs are administered by a person, or persons, of your choice (usually immediate family members but need not be).

You may nominate more than one attorney to make decisions for you and you may appoint them either jointly, jointly and severally or as alternatives.

If you lose mental capacity for example, due to an accident, dementia or other illness, and have not appointed an attorney, the Guardianship Board has the power to make an appointment but it may not choose who you would have wished.

For example the Public Trustee may be appointed and the process takes time.

You may wish to appoint an attorney whilst you are travelling overseas to ensure your financial affairs can be handled whilst you are away or an attorney may act in circumstances of physical incapacity to make financial transactions easier.

Considerations to be made

The power you grant to your attorney is significant. That person has the power to deal with real estate and withdraw and spend money from your bank accounts but only if it is in your best interests.

Other important matters you should also be aware of:

- You have the right to specify limitations or conditions;
- The power can be expressed to commence immediately or at some future time;
- The power can be revoked at any time whilst you retain mental capacity.

How do you appoint an Attorney?

You must be over 18 years of age and sign a document in the presence of an authorised witness such as a Justice of the Peace or solicitor. All attorneys that you appoint must also sign the document but unlike in other States, the attorney's signature need not be witnessed.

It is therefore necessary that you seek the consent of those you intend to appoint and ensure that they understand their rights and obligations.

Relevant principles to be observed by your Attorney

Your attorney must act with reasonable diligence to protect your interests or may be liable to compensate you for any financial loss occasioned.

Your attorney cannot make decisions about your medical treatment or daily care. Those decisions are made by a person appointed under an Advance Care Directive.

Important advice

The Enduring Power of Attorney document does not become effective until and unless it is signed and completed by all attorneys appointed by you.

The original document should be stored securely, such as in Andersons Solicitors' deeds safe. You should always ensure your attorneys are aware of the location of your original documents and you can provide them with photocopies for their records.

If you own real estate then the Enduring Power of Attorney will need to be registered at the Lands Titles Office (LTO) before it can be used in connection with real estate. You may wish to have the document lodged with the LTO in advance.

Cancellation of the appointment of an Attorney

To cancel the appointment of an attorney you must sign a document revoking the power and a copy of this revocation should be given to all attorneys appointed. Separation from a spouse or partner does not revoke their appointment as an attorney.

It is suggested that in the event of separation or divorce you should revoke the power of attorney and appoint another attorney. Destruction of any original or superseded appointment is also recommended.

If you become incapacitated the appointments you have made will remain in place until you die, your chosen attorney(s) die (or become incapacitated) or by an order of the Guardianship Board or the Supreme Court or revocation by a manager under the Aged and Infirm Persons' Property Act 1940.

On the date of your death, the Power of Attorney ceases and the executor named in your Will becomes responsible for your assets and finances.

Have you been appointed as an Attorney?

See page 3 for information about your responsibilities and obligations.

Information for those who are appointed as an Attorney

When does the Power commence?

The power granted to you as an attorney may commence immediately upon execution and continue notwithstanding the subsequent legal incapacity of the donor. Alternatively the power may not commence until incapacity occurs. The document you sign will detail this.

If it is expressed to commence only upon incapacity occurring, you may be required to obtain specialist medical opinion as to your donor's mental capacity in order for you to be able to exercise the power granted to you.

The period of incapacity may not be permanent. In this case the power granted to you might be enforceable only during the period of incapacity.

More than one attorney may be appointed however the document will determine whether your appointment is made jointly with another, jointly and severally with another or as alternatives.

Your responsibilities as an Attorney

You should understand that the power granted to you is significant. You must always act in the best interests of your donor. If you fail to do so you may be liable to compensate for any financial loss suffered.

You must retain accurate records of all dealings and transactions made using the power granted to you. Anyone with a proper interest may apply to the Supreme Court requiring you to file a copy of all records and accounts. These records may also be audited.

If your donor becomes mentally incapacitated and the power granted to you has not been revoked you are unable to renounce your appointment without leave of the Supreme Court.

You cannot make decisions about the donor's medical treatment and daily care. Those decisions are made by a person appointed under an Advance Care Directive.

Our recommendations

If you are called upon to act as an attorney you should seek professional legal, financial and accounting advice whenever possible especially if you believe the sale or disposition/transfer of significant assets is required.

You should generally avoid transactions that involve a conflict of interest. If you believe a decision is required that appears to also affect your own personal financial position, you should not act without authority or direction of the Supreme Court.

Cancellation of the Appointment

Your appointment as an attorney can be cancelled by your donor serving you with a Notice of Revocation. The revocation does not become effective until it has been served upon you.

If you die or become mentally incapacitated, then your appointment as an attorney also ceases.

If your donor dies then your appointment as an enduring attorney comes to an end and any executor appointed under the donor's Will becomes responsible for their assets and finances.

For more information on Enduring Power of Attorney and all things related to Wills and Estate Planning, please visit our website:
andersons.com.au/services/power-of-attorney