Obligations of attorneys under an enduring document

This information is general in nature and cannot be used as a substitute for appropriate professional legal advice about your particular circumstances.

Enduring documents

Enduring powers of attorney and **advance health directives** are enduring documents which allow an adult (called "the principal") to appoint someone they trust to make decisions for them. The appointment continues when the principal loses capacity to make decisions for themselves.

Types of decisions

An attorney under an enduring power of attorney can make decisions about personal matters (including health care) and/or financial matters, depending on the terms of their appointment. An attorney under an advance health directive can only make decisions about health matters.

Personal matters relate to decisions about the principal's care and welfare, such as where and with whom they live and support services they may need. Personal matters include legal matters that do not relate to the principal's financial or property matters.

Health matters are a personal matter and relate to decisions about the principal's health care.

Health care includes most medical treatments, procedures and services to treat both physical and mental conditions. Health care also includes treatments aimed at keeping the principal alive or delaying their death (life-sustaining treatments).

Financial matters relate to decisions about the principal's financial or property affairs, including decisions about paying expenses, making investments, selling property (including their home) or carrying on a business.

When does an attorney's enduring power begin?

An attorney must first sign the enduring document to accept their appointment before they can start to make decisions as an attorney.

An attorney for **personal matters (including health matters)** can only make decisions as an attorney when the principal no longer has capacity to make those decisions.

An attorney for **financial matters** can make decisions as an attorney on the day or in the circumstances specified in the enduring document (or if not specified, the day the enduring power is made) or when the principal no longer has capacity to make those decisions.

What is capacity?

Capacity is a legal term referring to the ability to exercise the decision-making process in relation to a matter. When an adult has capacity to make a certain decision, they are able to:

- understand the nature and effect of decisions about the matter
- freely and voluntarily make decisions about the matter, and
- and communicate those decisions in some way.

An attorney appointed for a personal (including health) matter under an enduring document has the power to make decisions for a principal when the principal has impaired capacity for making a particular decision on a matter. The power for an attorney appointed under an enduring power of attorney for a financial matter to make decisions for a principal, depends on the terms of the document.

The power may begin:

- immediately
- at a particular time or in a particular circumstance, or
- when the principal has impaired capacity for the matter.

See the *Queensland Capacity Assessment Guidelines 2020* for more information.

Duties and obligations of attorneys

An attorney has important legal duties and obligations that they must comply with.

Apply the General Principles and the Health Care Principles

An attorney must apply the general principles when exercising their powers, and if making health care decisions, also apply the health care principles.

The principles recognise that all adults (regardless of whether or not the adult has decision-making capacity) have the same human rights and fundamental freedoms as others in the community.

Under the general principles an attorney must:

- presume the principal has capacity for a matter
- support the principal to exercise their human rights
- support the principal to maintain their supportive relationships with family, friends and others
- support the principal to maintain their cultural and religious practices, values and beliefs and use their language
- respect the principal's privacy and protect their personal (including health) information
- recognise that the principal should not be deprived of their liberty unless authorised by law
- support the principal's right to participate as much as possible in decisions affecting their life
- make decisions in a way that safeguards the principal's rights, interests and opportunities
- if possible, support the principal to make and communicate their own decisions, and
- when making decisions on behalf of the principal, recognise and take into account their views, wishes and preferences.

When making **health care decisions** for the principal, the attorney must:

- apply the general principles
- respect the inherent dignity and worth, individual autonomy and independence of persons
- ensure they are offered appropriate health care, including preventative care, and
- take into account:
    - information given by the adult's health provider
    - any existing medical conditions of the adult and the prognosis of the adult
    - any alternative health care available
    - any significant risks associated with the health care
    - if the health care can be postponed because a better option may become available within a reasonable time, or the principal may regain capacity to make their own decision
    - the consequences for the principal if the health care is not carried out
    - the benefits and burdens of the proposed health care for the principal
    - the effect of the health care on the principal's dignity and autonomy.

See Factsheet: General principles and health care principles under Queensland's guardianship framework for more information.

Exercise powers according to the terms and conditions

It is very important for the attorney to read the enduring document thoroughly. It contains important information on how attorneys must exercise their powers. For example, the enduring document may state:

» If there are multiple attorneys: how those attorneys can exercise their powers e.g. jointly, severally, by a majority or any other way that the document directs.

» Terms and instructions for the attorney: the document may contain terms on how the attorney must exercise their powers or give specific instructions.

An attorney appointed for health matters, must first check if the principal has made an advance health directive. Under most circumstances, clear directions in an advance health directive must be followed. See Form 10 – Advance Health Directive Explanatory Guide for further information.

Consult with the Principal's other attorneys

If more than one attorney is appointed in the enduring document, attorneys must consult with each other regularly to ensure that the principal's interests are not impacted by a breakdown in communication by the attorneys. If the enduring document does not state how to share power, they must act jointly.

Acting honestly and with reasonable diligence

Attorneys must be careful to protect the principal's interests.

Attorneys must also act honestly and diligently and pay reasonable attention when exercising their role in making decisions so that all decisions have the best chance of being in the principal's interests.

For example

- seeking all relevant information required to make a decision
- getting professional opinions when necessary, and
- complying with the general principles and health care principles when performing a function and exercising a power for an adult with impaired capacity.

Be careful about the principal's confidential information

Attorneys will likely have access to confidential information about the principal. This may include information about the principal's health conditions and treatment and financial details. The attorney must keep such information confidential except when it must be disclosed as part of the attorney's functions and powers and as required by law.

Rules for making financial decisions

There are some specific rules that attorneys must follow when making financial decisions. It is strongly recommended that independent legal advice is sought before acting on complex financial decisions.

Gifts and donations: Attorneys can use the principal's money or other property to give gifts and donations unless there is a contrary intention in the enduring power. This can only be done if the gift or donation is a type or nature of gift that the principal would have given when they had capacity or might reasonably be expected to make.

Gifts and donations must be of a reasonable amount taking into consideration all of the circumstances, including the principal's overall finances.

Conflict transaction: A conflict transaction happens when there is a conflict between the attorney's duty to the principal and the attorney's own interests. An attorney cannot enter into a conflict transaction unless the principal has authorised the attorney to do so.

An example of a conflict transaction is if an attorney for a financial matter buy's the principal's car.

Maintaining the principal's dependants: An attorney can use the principal's money and property to provide for the needs of people that are dependent on the principal, such as the principal's children. This can only be done if it is reasonable in all the circumstances, including the principal's overall finances.

Investments: An attorney can only invest in 'authorised investments' or continue investments that existed when the attorney's powers began. An authorised investment is an investment approved by the Queensland Civil and Administrative Tribunal, or an investment that would be made by a trustee under the *Trusts Act 1973*.

Keep records: Attorneys must keep accurate records and accounts of all dealings and transactions they make as attorneys (e.g. bank account statements or receipts).

Keep property separate: Attorneys must keep their property separate from the principal's. This does not apply to property owned jointly between them already, or property acquired jointly in place of property that was already jointly owned.

More information:

For more information about enduring documents go to http://www.qld.gov.au/guardianship-planahead

Office of the Public Guardian

Find information about the role of the Public Guardian at:
www.publicguardian.qld.gov.au
Tel: **1300 653 187**

The Public Trustee of Queensland (PTQ)

Find information about the role of PTQ at:
www.pt.qld.gov.au
Email: Clienteng@pt.qld.gov.au
Tel: **1300 360 044** Monday to Friday, 8:15am–5pm

Queensland Law Society

For information about finding a solicitor for legal advice:
www.qls.com.au
Tel: **1300 367 757** Monday to Friday, 8:30am–5pm.

Justice of the Peace Branch

Information on how to locate the services of a Justice of the Peace or Commissioner for Declarations can be found at:
www.qld.gov.au/findjp
Email: jp@justice.qld.gov.au
Tel: **1300 301 147** Monday to Friday 8:30am–5pm

Community Legal Centres

Call or visit your nearest community legal centre, Seniors Legal and Support Service or specialist legal centre for people with disability or mental illness. Community legal centres can provide free legal advice for your situation. You can find local legal help at: www.communitylegalqld.org.au

Queensland Civil and Administrative Tribunal (QCAT)

Applications for guardianship and administration, as well as applications regarding capacity and attorneys can be made at QCAT. Information about making an application to QCAT is available at:
www.qcat.qld.gov.au
Tel: 1300 753 228 Monday to Friday, 8:30am–3pm.

If you need an interpreter

If you have difficulty understanding this publication and need language assistance, please call **13QGOV (137468)**, ask for an interpreter and ask them to telephone any of the agencies in this section.

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