



MackeyWales

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ENDURING POWERS OF ATTORNEY

A Power of Attorney is a legal document that allows you to appoint one or more persons (usually relatives) to make decisions on your behalf if you are not able to do so. An Enduring Power of Attorney is an integral part of any estate plan as it is just as important that you have appointed trusted persons to look after your estate in the event that you do not have capacity as it is that you ensure that your estate is dealt appropriately with on death.

TYPES OF POWERS OF ATTORNEY

There are two types:-

- General Powers of Attorney
- Enduring Powers of Attorney

GENERAL POWERS OF ATTORNEY

General Powers of Attorney are usually given to attorneys for business and financial purposes such as specific powers to deal with property, businesses or powers pursuant to a mortgage. A General Power of Attorney is revoked at law on the principal becoming incapable of making their own decisions. A General Power of Attorney can only be used for financial matters.

ENDURING POWERS OF ATTORNEY

An Enduring Power of Attorney is a document that endures past the time when a principal might lose their capacity. There are two parts to an Enduring Power of Attorney:-

- **Financial matters** – which are powers to do with money and property and include signing cheques, doing the banking, selling or renting your home and investing your money;
- **Personal/Health matters** – these powers include the power to decide where you live, who you have contact with, power to consent to most health care issues including medical and dental treatment and if you have not completed an Advance Health Directive, withdrawing or withholding of life sustaining measures.

Built on reputation

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WHEN DO YOUR ATTORNEY'S POWERS BEGIN?

You may specify that your attorney's powers begin immediately, on a nominated date or only if or when you lose capacity. Appointing an attorney does not prevent you from continuing to make your own decisions while you are capable of doing so. During this time your attorney must act on your instructions.

You may have more than one attorney and you should appoint attorneys who you trust as, once they are acting, although they must act in your best interests, their decisions will have the same legal force as if you had made them yourself.

YOUR ATTORNEY'S RESPONSIBILITIES

Your attorney must act honestly and with care and recognise your right to confidentiality, take into account your existing supportive relationships, values and culture and apply the general principles set out below.

In relation to health care your attorney must:-

- Ensure that any decision made for you contributes to your health and wellbeing
- Choose the least intrusive method of treatment (where there is a choice)
- Take into account the advice of your doctor or other health care providers.

In relation to financial matters, your attorney must:-

- Keep records and accounts of dealings and transactions;
- Keep your property separate from that of the attorney (unless it is owned jointly); and
- Not give away your property- make only reasonable gifts for birthday or Christmas presents, or donations that you would normally make yourself.

GENERAL PRINCIPLES OF AN ENDURING POWER OF ATTORNEY

General principles include:-

- Presuming that the principal has the capacity to make a particular decision until there is conclusive evidence that this is not the case;
- Recognising his/her right to participate in decisions affecting his/her life to the maximum extent for which he/she has capacity;
- Respecting the principal's human worth and dignity and equal claim to basic human rights, regardless of his/her capacity;
- Recognising the principal's role as a valued member of society and encouraging his/her self-reliance and participation in community life;
- Taking into account the importance of the principal's existing supportive relationships, values and cultural and linguistic environment; and
- Ensuring that your decisions are appropriate to the principal's characteristics and needs;
- Recognising the principal's right to confidentiality of information.

HEALTH-CARE PRINCIPLES

Any health-care decision you make for the principal must:

- Promote and maintain the principal's health and well-being;
- Be made in the way that is least restrictive of the principal's rights;
- Where possible, take account of the principal's views and wishes, along with information given by the principal's health-care provider.

Financial Decisions

Any investments you make on the principal's behalf while he/she lacks the capacity to make financial decisions must be those that a prudent investor would make when investing their own funds. This is an objective test.

For all decisions

If the principal has other attorneys, you must consult with them regularly and make your decisions as directed in the Power of Attorney document. If you are a joint attorney, for example, you and the other attorney/s must make your decisions jointly or unanimously.

SPECIFIC RESPONSIBILITIES

- **Duty to keep records.** If you have the power to make financial decisions, you must keep reasonable records of dealings and transactions made under the power. It is an offence not to do so, and the Court or Adult Guardian may require you to produce them.
- **Duty to keep property separate.** You must keep your property separate from the principal's property unless you and the principal own the property jointly.
- **Duty to present a management plan and get approval for unauthorised transactions.** If you make a financial decision, you must present a plan of management to the Court if the Court requires it.

If the principal's capacity to make decisions is impaired, you must also get approval from the Court for any transactions that have not been authorised in the document.

- **Duty to avoid transactions that involve a conflict of interest.** You must not enter into transactions that could or do bring your interests (or those of your relation, business associate or close friend) into conflict with those of the principal. For example, you must not buy the principal's car unless you pay at least its market value.
- **Duty in relation to gifts.** You must not give away the principal's property except where the principal would be likely to do so, for example as a marriage gift to a relation of the principal or a donation to his/her favourite charity (so long as the size of the gift is reasonable in the circumstances).
- **Power to maintain the principal's dependants.** You may give reasonable maintenance to the principal's dependants.

REVOCAATION

A Power of Attorney can be revoked at any time provided that the principal has not lost his or her legal capacity. An Enduring Power of Attorney is also revoked as a matter of law on the following occasions:-

1. The death of the principal;
2. The marriage of the principal to someone other than the attorney (unless otherwise specified);
3. Divorce, in so far as the power relates to a former spouse;
4. A later power of attorney (to the extent of any inconsistency);
5. The attorney becomes incapable of making their own decisions;
6. The attorney becomes bankrupt;
7. The attorney dies;
8. The attorney becomes a paid health care provider.

WHAT HAPPENS IF MY ATTORNEY DOES NOT ACT PROPERLY?

The Adult Guardian (a Government appointed office) may investigate an attorney's actions where there is a complaint of neglect, exploitation or abuse and may take measures to protect your interests. If a family member is concerned about the way your attorney is acting, they may also apply to the Guardianship and Administration Tribunal.

CONCLUSION

If you have lost your capacity and you have not appointed someone to act as your attorney, who will make those decisions for you and take care of your estate whilst you do not have capacity? It is much better that you appoint people that you trust (and who you can rely on to do a good job) to ensure that your estate is managed properly on your behalf. If you lose capacity and have not appointed attorneys under an Enduring Power of Attorney, then the process of making an application to the Guardianship and Administration Tribunal for appointment of attorneys is lengthy and the outcome uncertain.

