

Enduring Power of Attorney – Financial Matters

What is an Enduring Power of Attorney?

An Enduring Power of Attorney for financial matters allows you (the Principal) to appoint someone (the Attorney) to make financial and legal decisions on your behalf. An Enduring Power of Attorney for financial matters continues to have effect even after you are no longer capable of making financial and legal decisions for yourself.

Responsibilities of an Attorney

Your Attorney can make any financial and legal decisions you can legally make for yourself. You can however place limitations or restrictions on what your Attorney can do. For example you can restrict their ability to deal with your residential home or invest in unethical investments. However, before you include any limitations, conditions or restrictions you should speak with a solicitor to discuss any potential consequences.

Your Attorney must act in your best interests at all times; they must keep accurate records of all dealings and transactions; and avoid situations which could give rise to a conflict of interest. Your Attorney must also keep your property and money separate from their own.

Providing additional powers

In addition to setting limitations or conditions for your Attorney you can also provide your Attorney with greater powers. For example you may wish your Attorney to continue to donate to a charity on your behalf or buy birthday presents for your grandchildren; these directions can be included in the Enduring Power of Attorney document.

Other issues you should discuss with your solicitor include powers relating to spouses and conflict transactions and superannuation.



Why do you need an Enduring Power of Attorney?

This legal document gives you the control to appoint someone who you trust to manage your finances. If you lose the mental capacity to make decisions for yourself and you have not appointed someone to act on your behalf, then it is likely that someone will be appointed for you as your administrator. This person or Trustee Company will be appointed by the Victorian Civil and Administrative Tribunal (VCAT). Unfortunately, the person or Trustee Company they appoint to act on your behalf may not be someone you would have personally chosen to manage your finances.

Appointing an Attorney also provides you with a mechanism for continuity in management of your financial and legal affairs, thereby minimising any immediate financial hardship which may otherwise result if you suddenly and unexpectedly lost your ability to make decisions.

It also enables you to maintain a level of confidentiality with respect to your affairs.

Finally as mentioned above you may wish to include limits or conditions on your Attorney's powers or you may wish to give them greater power and authority to act on your behalf. Unfortunately, once you have lost mental capacity you will not have the ability to do so.

When does the appointment start?

As the Principal you can choose when the Enduring Power of Attorney commences. The following options are available to you as the Principal:

- Immediately upon you signing the document and the Attorney accepting his/her/their appointment;
- Upon incapacity. Your Attorney will only be able to act on your behalf upon you losing the mental capacity to manage your own affairs and make decisions for yourself; or
- At such other time as nominated by you in the document.

If you do not nominate when your Enduring Power of Attorney commences it is deemed to commence immediately.

Who should you appoint as your Attorney?

An Attorney must have the necessary capacity to act as your Attorney and be:

- over 18 years of age;
- not insolvent under administration; and
- not a care worker, a health provider or an accommodation provider for you (the principal).

You should consider someone whom you trust to manage your financial affairs, someone who has the necessary financial skills or business acumen to manage your personal finances and most importantly someone who will look after your best interests.

You may appoint more than one Attorney to act on your behalf. If you elect to appoint more than one then you must decide how they must exercise this power, for example:

- Jointly (they must make all decisions together);
- Jointly and Severally (they can act together or individually);
- Severally (they will act independently of each other); or
- by a Majority — a majority need to agree to make a decision (and the majority who agree sign any document).

If appointing more than one Attorney you should speak with a solicitor to discuss the implications of choosing one type of appointment over another.

You may also appoint an alternative Attorney. This means you can appoint one person to act on your behalf and if they are unable or are no longer able to act on your behalf then the alternative Attorney can step into the position of your Attorney.

In Victoria an Attorney must accept their appointment before they can act on your behalf.

Does it need to be registered?

No, unlike other states, such as NSW and Queensland, in Victoria there is no current requirement for the document to be registered.

Jack was a very proud man and did not discuss his finances with his friends; in fact when he met with his solicitor he had discussed appointing either his solicitor or accountant as his Attorney as he did not think there was anyone in his life he trusted to manage his finances. Unfortunately Jack never finalised the documents.

Miranda took her role as Jack's Attorney seriously but believed she should be financially compensated for all the time she put into the management of Jack's affairs.

Every year Miranda would pay for a vacation for herself and her partner using Jack's funds. After three years Miranda was caught misusing Jack's money and was removed as his Attorney.

If Jack had the capacity to appoint an Attorney would he have appointed Miranda?

For more information, contact Michael Clohesy, Solicitor, on 0417 342 972.



Case Study - Jack's Story

Jack was 65 years of age, single with no children when he was in a serious motor vehicle accident. Jack survived but never fully recovered as a result of suffering brain damage.

Jack never got around to finalising his Will or Enduring Power of Attorney, so when it came to managing Jack's finances an application was made by Miranda, a friend of Jack. VCAT appointed Miranda as there were no family members available.