

Powers of Attorney – myths and “mythconceptions”

Most people have heard of Powers of Attorney. Many have used them when looking after an elderly relative's affairs. So it's quite surprising that there are so many misconceptions about what they are and how they work, particularly when a Power of Attorney is probably one of the most important legal documents that a person can make during their lifetime.

To start with, a Power of Attorney is a document that allows a person (“donor”) to appoint someone of their own choosing and whom they trust to act on their behalf (“attorney”).

Misconception #1:

There is only one type of Power of Attorney.

No.

There are four main types of Power of Attorney:

- A General Power of Attorney
- An Enduring Power of Attorney (Financial)
- An Enduring Power of Attorney (Medical Treatment)
- An Appointment of Enduring Guardian

Misconception #2:

One Power of Attorney allows you to appoint an attorney to make all types of decisions on your behalf.

No.

Each type of Power of Attorney has a different purpose and application.

General Power of Attorney

A General Power of Attorney gives the attorney power to act on behalf of the donor in limited circumstances. For example:

- to sell the donor's house for a specific figure
- to act on behalf of the donor while the donor is overseas

Importantly, a General Power of Attorney comes to an immediate end when the donor becomes mentally or physically incapable of managing their affairs.

Enduring Power of Attorney (Financial)

Although the Enduring Power of Attorney (Financial) form states that the attorney is authorised to do on behalf of the donor “any thing that the donor may lawfully authorise an attorney to do”, the attorney is limited to making financial and legal decisions for the donor – such as managing the donor's banking, paying bills or signing contracts.

The attorney cannot make medical or “lifestyle” decisions such as where the donor lives.

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Powers of Attorney – myths and “mythconceptions” *cont*

Unlike the General Power of Attorney, the attorney’s authority to act on behalf of the donor does not come to an end if the donor becomes physically or mentally incapable of managing their affairs.

Enduring Power of Attorney (Medical Treatment)

An Enduring Power of Attorney (Medical Treatment) gives the agent appointed by the donor authority to make decisions about medical treatment on behalf of the donor if the donor becomes incapable of making those decisions.

Appointment of Enduring Guardian

An Appointment of Enduring Guardian gives the guardian authority to make certain health care and “lifestyle” decisions on behalf of the donor (such as where the donor lives) if the donor becomes incapable of making those decisions.

Case Study

Rob’s widowed mother suffered a stroke and urgently needed nursing home accommodation. Although Rob had been appointed as his mother’s attorney under an Enduring Power of Attorney (Financial), the nursing home correctly refused to accept that this gave him the power to decide where she should live.

In the absence of an Appointment of Enduring Guardian, Rob was forced to apply to the Victorian Civil & Administrative Tribunal (“VCAT”) to be appointed as his mother’s guardian just so that he could get her into a nursing home.

Misconception #3:

You don’t need any Powers of Attorney unless you’re about to go into a nursing home or have health problems.

No.

A person can also lose the ability to make decisions for themselves at any time as a result of an accident or sudden illness.

Case Study

Noel’s wife was only 40 when she suffered extensive brain damage as a result of a near drowning accident. Neither of them had any Powers of Attorney.

When Noel wanted to sell the family home, which was held in joint names, he had to apply to the authorities to be appointed as the Administrator of his wife’s financial affairs. The application was opposed by her family and Noel spent many thousands of dollars in legal fees before he was finally appointed to look after his wife’s financial affairs.

Once appointed, Noel then had to provide financial statements annually for audit by government authorities.

Misconception #4:

An Enduring Power of Attorney (Financial) allows the attorney (often a child) to sell Mum’s home once she’s in the nursing home and then divide the proceeds of sale between her children.

Absolutely not!

An attorney is required to act in the best interests of the donor. That includes **not** giving away the donor’s assets.

Misconception #5:

An attorney can keep acting under the Power of Attorney even after the donor dies.

No.

All Powers of Attorney cease immediately when the donor dies.

Misconception #6:

You can appoint two people jointly to make decisions about medical treatment or “lifestyle” decisions on your behalf.

No.

You can appoint only one person to make medical or “lifestyle” decisions on your behalf.

Misconception #7:

If you don’t have any Powers of Attorney in place and you become incapable of managing your affairs, the family will work things out.

That depends!!

If that happens, only VCAT can appoint someone such as a family member or, if the family can’t agree, then possibly a trustee company, to make decisions on your behalf.

That person might not be your preferred choice. They might not know your wishes either.

Also, if a family member is appointed to manage your affairs, their actions will be monitored by government authorities who can also over-ride decisions made by the family member. All of this can be very stressful, intrusive, time-consuming and costly.

For more information or to make or review your Powers of Attorney, please contact:

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