

## Enduring Powers of Attorney

*If you have ever looked after an elderly relative's affairs, you have most likely heard of Enduring Powers of Attorney. Surprisingly, there are still many misconceptions about what they are and how they work.*

An Enduring Power of Attorney is a legal document that allows a person (**Principal**) to appoint a trusted person of their choice to act on their behalf (**Attorney**) in certain circumstances.

### Main types of Enduring Powers of Attorney

There are three main types of Enduring Power of Attorney and each has a different purpose and application:

- > Enduring Power of Attorney (Financial)
- > Enduring Power of Attorney (Personal)
- > Medical Treatment Decision Maker

### Enduring Power of Attorney (Financial)

An Enduring Power of Attorney for financial matters is a legal document that allows you to appoint one or more persons to manage your financial and legal affairs such as banking, paying bills or signing contracts.

### Responsibilities of an Attorney for financial matters

Your Attorney is authorised to do on your behalf 'anything that you may lawfully authorise your Attorney to do'. You can also place limitations or restrictions on what your Attorney can do, or give them more power than that given under the law.

For example, you can restrict the Attorney's 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 lawyer to discuss any potential ramifications.

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

Your Attorney cannot make personal or medical decisions for you. Your Attorney's authority under an Enduring Power of Attorney continues even after you become mentally incapable of managing your financial and legal affairs.

### Why do you need an Enduring Power of Attorney (Financial)?

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. This person or Trustee Company will be appointed to act as your Administrator by the Victorian Civil and Administrative Tribunal (**VCAT**).

Unfortunately, the person or trustee company appointed by VCAT to act on your behalf may not be the same person you would have personally chosen to manage your affairs.

Appointing an Attorney provides you with a mechanism for the continuity in management of your financial and legal affairs. This minimises any immediate financial hardship which may otherwise result if your decision-making ability was suddenly and unexpectedly taken away from you. It also enables you to maintain a level of confidentiality with respect to your affairs.

Finally, you may wish to include limits or conditions on your Attorney's powers or give them greater power and authority to act on your behalf. Unfortunately, once you have lost mental capacity you cannot do any of this.

## Enduring Power of Attorney (Personal)

### *Previously known as Appointment of Enduring Guardian*

There are two certainties in life, death and taxes, but unfortunately we do not have a crystal ball to predict whether we will suffer dementia, Alzheimer's or simply lose the ability to look after ourselves due to illness or accident. Appointing an Attorney for personal matters can provide you with peace of mind knowing there is someone looking after your needs and welfare.

An Attorney for personal matters has the authority to make certain lifestyle decisions on behalf of the Principal where the Principal becomes incapable of making those decisions for themselves.

### What decisions can my Attorney for personal matters make?

Your Attorney can make any lifestyle decisions which you are not able to make on your own behalf, such as where you live, whether you can work and who can visit you.

Your Attorney also has certain responsibilities. They must take into account any wishes you have expressed, act in your best interests, and where possible, make the same decision that you would have made.

When appointing your Attorney for personal matters, you can restrict or limit their powers. This can be done in the deed appointing them

### Why should I give someone this power?

Consider appointing someone as your Attorney for personal matters for the following reasons:

- > **Reassurance:** to ensure there is someone you trust making decisions regarding your wellbeing. For example, deciding where you live or ensuring you are fed and clothed.
- > **Choice:** an accident or unexpected illness may render you incapable of looking after yourself. If you cannot make personal decisions, and you have not appointed someone as your Attorney for personal matters, then VCAT will appoint someone to act as your Guardian. The person VCAT appoints may not be the same person you would have appointed if you had the choice.
- > **Peace of mind:** appointing an Attorney for personal matters whilst you have the mental capacity to do so gives you the power to decide who and how you will be looked after when you are no longer capable of making lifestyle decisions for yourself. This ensures that the person making decisions on your behalf is someone you trust and who will fulfil your wishes.

### Noel's story

Noel's wife, Sarah, was only 30 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 VCAT to be appointed as the Administrator of Sarah'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 had to provide financial statements annually for audit by government authorities. This could have been prevented had Noel and Sarah consulted a solicitor regarding their estate planning and prepared Enduring Powers of Attorney.



## Medical Treatment Decision Maker

### ***Previously known as Enduring Power of Attorney (Medical)***

Provided you have decision-making capacity you can appoint a medical treatment decision maker. Their role is to make medical choices on your behalf if you are unable to do so yourself and if no relevant instructional directive exists.

The Decision Maker will be required to make decisions (in regards to medical treatment) that they reasonably believe you would have made.

They will be required to make the decision considering (in order of preference):

- > any valid and relevant values and preferences in your Advance Care Directive;
- > preferences that you have expressed, taking into account the circumstances in which they were expressed;
- > personal values inferred from your life; and
- > the likely effectiveness and consequences of medical treatment including whether there are alternatives more consistent with your preferences and values.

## What decisions can my Medical Treatment Decision maker make?

The Decision Maker can both consent to and refuse medical treatment on your behalf, including participation in medical research.

There are some restrictions placed on the decision maker. They cannot consent to medical procedures which are likely to lead to infertility or those which will remove tissue for transplant purposes. These specific procedures require the consent of VCAT.

## Advance Care Directive

An Advance Care Directive is a document that sets out your binding instructions and/or preferences and values in relation to your medical treatment in the event that you no longer have decision-making capacity.

An Advance Care Directive may contain:

- > an instructional directive with legally binding instructions about future medical treatment that you consent to or refuse; and
- > a values directive which outlines your values and preferences for future medical treatment

## What effect does an Advance Care Directive have?

If you no longer have decision-making capacity and a health practitioner proposes to administer medical treatment, the practitioner must seek to give effect to the relevant instructional directive.

Where no relevant instructional directive is included, the health practitioner must consider any values-based directive and refer any medical decisions to the person appointed as your Medical Treatment Decision Maker.



## Gabrielle's story

Gabrielle moved in with her son Tom after the death of her husband. With age, Gabrielle became frail and prone to falling. Gabrielle also had the onset of dementia. In the past 12 months Gabrielle had fallen twice, the first breaking her shoulder with severe bruising and the most recent fall breaking her hip. Each time Gabrielle was taken to hospital by her son Tom.

The hospital staff became concerned for Gabrielle's safety and Tom's ability to look after her. They made enquiries as to whether Gabrielle had appointed her son as her Attorney for personal matters.

Unfortunately for Gabrielle, she thought her next of kin would be the person to make decisions on her behalf and didn't think she needed to formalise the appointment.

The hospital made an application to VCAT to have a Guardian appointed for Gabrielle. At the VCAT hearing, submissions were heard from the hospital, Gabrielle, Tom and his siblings (who supported him as the appointed Guardian).

VCAT decided that it was in Gabrielle's best interests that the Public Advocate be appointed to manage Gabrielle's personal affairs as the family were too close to the situation to know what was in Gabrielle's best interests. That day Gabrielle was moved into a nursing home.



Gabrielle became distressed when she was moved into the nursing home. She wanted to move back in with her son where she was happy. Her Guardian however was not convinced that living with her son was in Gabrielle's best interest and insisted on her living in the nursing home. Gabrielle became depressed in the nursing home and within six months passed away after refusing to drink and eat.

The power to decide who will make lifestyle and personal decisions on your behalf is lost once you are no longer mentally capable to make those decisions for yourself, so it is important to take action and make legal declarations while you have the capacity to do so.

## Frequently asked questions

### **Does an Enduring Power of Attorney (Financial) allow an Attorney to sell the Principal's home and pay the proceeds of sale to themselves?**

An Attorney is required to act in the best interests of the Principal. That includes not giving away the Principal's assets.

If the Attorney doesn't act in the Principals best interests, then the Attorney may be removed by VCAT and asked to pay back assets to the estate. There may also be criminal sanctions.

### **Can an Attorney continue to act under the Power of Attorney after the Principal dies?**

Powers of Attorney cease immediately when the Principal dies.

### **Does an Enduring Power of Attorney (Financial) need to be registered?**

Not in Victoria, unlike other states such as New South Wales and Queensland, where there is a requirement for the document to be registered.

### **I am young and healthy. Do I need Powers of Attorney?**

A person may lose the ability to make decisions for themselves at any time. It could be as a result of an accident or sudden illness. Both young and old people can lose the ability to manage their affairs. If you want to choose who makes decisions on your behalf then the simple answer is 'yes'.

# Our Wills, Trusts & Estates team

We provide comprehensive Wills, trusts and estate planning services to professionals, executives, business owners, investors, mums and dads and retirees.

For further information, please contact a member of Wills, Trusts & Estates team below.



**Rachael Grabovic**  
*Partner & Notary Public*  
*Accredited Specialist in Wills & Estates Law*  
T +61 3 9321 7826  
E RGrabovic@rigbycooke.com.au



**Christian Teese**  
*Partner*  
T +61 3 9321 7983  
E CTeese@rigbycooke.com.au



**Thalia Livadaras**  
*Senior Associate*  
T +61 3 9321 7881  
E TLivadaras@rigbycooke.com.au



**Marcus Schivo**  
*Senior Associate*  
T +61 3 9321 7892  
E MSchivo@rigbycooke.com.au



**Ashwin Reddy**  
*Associate*  
T +61 3 9321 7868  
E AReddy@rigbycooke.com.au



**Jenna Bayindir**  
*Lawyer*  
T +61 3 9321 7891  
E JBayindir@rigbycooke.com.au

## Areas of expertise

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### RIGBY COOKE LAWYERS

Level 11, 360 Elizabeth Street  
Melbourne Victoria 3000  
T +61 3 9321 7888  
www.rigbycooke.com.au