



DO YOU HAVE AN ENDURING POWER OF ATTORNEY?

An Enduring Power of Attorney (EPA) is a legal document that allows you to nominate one or more attorneys to act on your behalf in the event that you lose capacity. The powers under an EPA continue in the event you lose the capacity to make decisions for yourself. An EPA allows you to plan for the unexpected such as an accident or physical or other illness.

What is often not known is that you can include a wide range of different directions, powers and duties within an EPA so that your affairs are managed in the way you want them to be. Properly prepared EPAs are becoming more and more important given our ageing population, the wealth of and more complicated structures used by the baby boomers, and the increase in blended families.

Put simply, living longer increases the prospect of incapacity. In 2009 it was estimated that 40% of those aged between 65 and 69 suffered from an incapacitating disability while this figure increases to 88% of those over 90. An Australian Government Department of Health Report shows that after the age of 65, your risk of being diagnosed with dementia doubles every five years, with one in four aged over 85 diagnosed. Dementia is a disease that strips even the most independent of their brain function leading to changes in behaviour and personality, loss of the ability to write, read and shower and most commonly causes memory loss.

Yet this is just one of the issues facing our society, incapacitation can happen any number of ways; an accident or sudden illness can strike even the young.

If you lose capacity and don't have an EPA, depending on your individual circumstances the problems could be far-reaching. A common myth is that your family, or next-of-kin will **automatically** take control of your medical and financial decisions. This is NOT the case. Under the *Guardianship and Administration Act 2000*, unless other family or other persons make an application, the Queensland Civil and Administration Tribunal (QCAT) may appoint Administrators from the Public Trustee for financial matters and the Adult Guardian for personal/health matters where there is no EPA in place. If no such application is made by your family members, the Public Trustee is automatically appointed to manage your financial affairs and the Adult Guardian is

appointed to make decisions on your personal and health matters.

If your next of kin don't want the Public Trustee or the Adult Guardian involved they would need to make an application to QCAT for appointment as administrator or guardian. This will cost your family money and time during an already traumatic period. Further, if you do not wish for a certain member of your family to control your personal and financial affairs, you will be unable to stop them from making such an application.

It is always better for you to draw up documents to ensure your wishes are given effect. Every person over 18 years of age should make an EPA.

The powers you give your Attorney should be carefully thought out and specific clauses should be drafted taking into consideration all aspects of your personal wealth and preferred health care. The form itself looks pretty simple, leading people to believe it is a simple matter of filling out the information, ticking some boxes and signing. But an EPA should be seen as much more than just a "tick-a-box" form to complete, this form should be drafted like a "living will" that can give effect to your wishes while you are still alive, but incapacitated and unable to inform your relatives and friends of what you wish to happen.

If your EPA is not properly drafted complications can arise where attorneys are appointed, but their powers are not specifically enough described. An attorney who acts unwittingly beyond the scope of power, (e.g. by allowing a family member to move into the principal's home rent free), can be prosecuted for illegitimate use of their powers.

It is important that the principal (the person appointing the attorney) obtains legal advice when preparing their EPA. It is equally as important that if you are appointed as attorney you seek advice to ensure you are acting within the scope of the EPA and relevant legislation.

Please contact our office if you wish to create or review your EPA.

Please see below for some of the most Frequently Asked Questions about EPAs.

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EPA Frequently Asked Questions

Why give someone an enduring power of attorney?

At some point, you may be unable to make decisions about matters that concern you. For example, you may be overseas, or you may be too ill.

If you give someone a *general* power of attorney, for instance to sign documents for you in your absence, that power will come to an immediate end if for some reason, you lose your capacity to make decisions. This could be very awkward if your attorney is in the process of conducting business affairs for you.

Giving someone *enduring* power means that he/she is able to continue to act for you if you lose capacity to act for yourself.

What types of decisions?

You may give your attorney power to make decisions about:

- personal/health matters;
- financial matters.

Examples of personal/health matters are decisions about accommodation, care, diet and dress and whether to consent to particular types of health care for you (such as an operation). An example of a financial matter is deciding how your income should be invested.

Note: You cannot give your attorney power to make decisions about:

- *special personal matters such as making your will, appointing an attorney, voting or consenting to adoption or marriage;*
- *special health matters, such as donation of body tissue, sterilisation, pregnancy termination, experimental health care or certain psychiatric health care.*

Can I limit my attorney's powers?

Yes, you can specify decisions that you do not want your attorney to make. You can also include particular instructions about what you would like your attorney to do. Your attorney must act in accordance with your instructions.

There are also limits set by legislation, such as setting out the types of investments your attorney may make on your behalf.

Can I appoint more than one attorney?

Yes. Several options are available to you. For example, you may appoint two or more attorneys to act jointly (unanimously), as a majority (e.g. two-thirds), severally (any one can sign), or successively (power is given to a particular attorney when the power given to another attorney ends).

Whom should I appoint as my attorney?

You should appoint someone you trust. Many people choose their spouse or an adult child, but you may prefer to appoint another family member or friend with expertise in the area. Your attorney must be over eighteen years of age, must not be your current paid carer or your current health-care provider (such as your nurse or your doctor), and (for financial matters) must not be bankrupt or insolvent.

Note: *'Paid carer' does not mean someone receiving a carer's pension or similar benefit, so you are free to choose someone who is receiving such a benefit for looking after you.*

Should I pay my attorney?

You do not need to pay your attorney for the power to be effective. Normally payment is not made unless a trust company is acting as attorney, however sometimes remuneration clauses are included to recompense attorneys for time they take looking after your affairs.

When does the attorney's power begin?

With personal/health matters, your attorney's power to make decisions does not begin until (if ever) you are incapable of understanding the nature and foreseeing the effects of a decision, and of communicating that decision.

With financial matters, you may nominate when your attorney's power is to begin. If you do not name a date or an occasion, it begins immediately. On the other hand, if you lose the capacity to make such decisions before the date or occasion you name, the power begins at that point.

Note: Even if you give your attorney power immediately, you continue to make decisions yourself while you are able to do so

How much control will my attorney have?

Once the power to make a decision begins, your attorney will have full control over that decision unless you have explicitly limited that power in this document.

How long does the power continue?

For personal/health matters, it continues so long as you are incapable of understanding the nature and foreseeing the effects of a decision, and of communicating that decision.

For financial matters, it continues until it is revoked.

How can I be sure that my attorney will act in my interests?

While (if ever) you are unable to oversee your attorney's decisions, the Adult Guardian (a person appointed by statute to look out for the interests of persons with a disability) and the Court have the power to protect your interests. Your attorney may be required to produce a summary of receipts and expenditure or more detailed accounts, and these may be audited. An attorney who does not adequately protect your interests can be removed or changed.

Can I change or revoke this power of attorney?

Yes, you may change or revoke it at any time, so long as you are capable of understanding what you are doing. In other words, so long as you have the capacity to *make* an enduring power of attorney, you also have the capacity to *change or revoke* it.

If you do change or revoke this power, you must inform your attorney.

Is there anything else that will end this power?

Yes, several other circumstances will bring this enduring power of attorney to an end:

- **Marriage.** If you marry, the power of attorney is revoked unless your new spouse is already your attorney. (If your new spouse is your attorney, the only power that is revoked is the power of any other attorney you may have.)
- **Divorce.** If you divorce, the power of attorney is revoked to the extent that it was given to your former spouse.

Note: Mere separation from your spouse (or defacto partner) will not revoke your power and therefore it is recommended that you prepare a new document if separation occurs and your spouse was an appointed attorney.

- **Death.** If you die, the enduring power of attorney is revoked in its entirety.
- **Inconsistent document.** The power is revoked to the extent of any inconsistency with a later document you complete, such as an Advance Health Directive or another Enduring Power of Attorney.
- **Attorney withdraws.** By giving you a signed notice or by getting the Court's leave to withdraw (if you have already lost capacity).
- **Attorney becomes paid carer/health-care provider.** If this happens, your attorney's power is revoked.
- **Attorney becomes incapable.** Your attorney's power is revoked.
- **Attorney becomes bankrupt or insolvent.** Your attorney's power is revoked.
- **Attorney dies.**