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What are Powers of Attorney and their types?

A power of attorney is a legal document where a person (known as the Principal) appoints substitute decision makers (known as their Attorney/s) who can make decisions for them.

There are four types of Powers of Attorney:

Enduring Powers of Attorney (previously known as enduring guardianship power) means the power continues (endures) even when a person cannot make decisions for themselves due to accident or illness (either temporary or permanent). They include—: Personal, Financial and Medical Treatment powers

Non-enduring Powers of Attorney (previously known as general powers of attorney) are mostly used for a specific purpose and for a fixed period of time. This power of attorney is not enduring. It is usually used for things like leaving someone in charge of the sale of your home while you are overseas so they can sign all paper work on your behalf until you return.

Supportive Attorney appointments are about promoting autonomy and dignity for a person who is able to make various decisions, provided they have support to make and act on their decisions. For example you may wish to appoint a professional on your behalf to deal with a government authority.

Eligible Attorneys:

The new Powers of Attorney Act 2014 came into effect on 1 September 2015, which sets out the roles and responsibilities of persons appointed under an enduring power of attorney. Persons must now be eligible to be appointed as attorney if:

- They are 18 years of age and over; and
- They are not insolvent under administration; and
- They are not a care worker, a health provider or an accommodation provider for the Principal.

Note: Someone who is an undischarged bankrupt is an example of a person who is 'insolvent under administration'.

Additional requirement for attorneys for financial matters

A person is eligible to be an attorney for financial matters if, in addition to the above requirements, the person has not been convicted or found guilty of an offence involving dishonesty.

If the person has been convicted or found guilty of an offence involving dishonesty, the person is only eligible if:

They have disclosed the conviction or finding of guilt to the principal; and

The disclosure of the conviction or finding of guilt has been recorded in the enduring power of attorney.

Duties of an Attorney:

An attorney must:

- Act honestly, diligently and in good faith
- Exercise reasonable skill and care
- Not use the position for profit (unless the enduring power of attorney authorises the attorney to be paid)
- Avoid acting where there is, or may be, a conflict of interest (unless the enduring power of attorney specifically authorises this)
- Not disclose confidential information (unless authorised by the enduring power of attorney or by law) and
- Must keep accurate records and amounts. An attorney must keep accurate records and accounts of all dealings and transactions made for financial matters and all material dealings and transactions made for personal matters.

When may the role start?

The Principal nominates in the appointment form when the attorney's powers may start, and could commence either:

- Immediately; or
- When the principal ceases to have decision making capacity for the matters or matter and is proven by a medical practitioner; or
- Another time, circumstance or occasion as instructed by the attorney.

Powers can commence at different times for different matters, for example:

Immediately for financial matters; and/or when the principal ceases to have decision making capacity to make decisions about personal matters.

If the commencement date has not been specified, it will begin for all matters immediately when the enduring power of attorney is made. If the power comes into effect when the principal ceases to have decision making capacity then the attorney

will need to show evidence of this by way of producing a medical certificate clearly stating so.

Enduring Power of Attorney (Financial matters)

Financial matters refers to the Principal's financial or property affairs. Financial matters also include legal matters that relate to the said affairs. Legal matters refer to the use of legal services for the principal's benefit and bringing or defending a legal proceeding or hearing in a court, tribunal or other body on behalf of the principal, including settling a claim before or after a legal proceeding or hearing starts.

Examples of financial matters are as follows:

- Making money available to the principal for the principal's personal expenditure
- Paying expenses for the principal
- Paying debts of the principal
- Receiving and recovering money payable to the principal
- Carrying on any trade or business of the principal
- Performing any contracts entered into by the principal
- Discharging any mortgage over the principal's property
- Paying rates, taxes and insurance premiums or other outgoings for the principal's property
- insuring the principal's property
- preserving or improving the principal's property
- making investments for the principal
- undertaking any real estate transaction for the principal
- withdrawing money from or depositing money into an account of the principal with a financial institution.

Enduring Power of Attorney (Personal matters)

Personal matters refers to the Principal's personal or lifestyle affairs. Personal matters also include any legal matters that relates to the principal's personal or lifestyle affairs.

Examples of personal matters are as follows:

- where and with whom the principal lives
- persons with whom the principal associates
- whether the principal works and, if so, the kind and place of work and employer
- whether the principal undertakes education or training, the kind of education or training and the place where it takes place
- daily living issues such as diet and dress
- health care matters, including whether to consent to medical treatment.

Power of Attorney (Medical Treatment)

The law sets out the role and responsibilities of people appointed under an enduring power of attorney (medical treatment). The said power of attorney only takes effect if and when the Donor (known as Principal or person who gives the power) is unable to make decisions for themselves due to an accident or illness resulting in incapacity.

The medical agent may:

- consent to medical treatment if they believe it is in the best interest of the patient to do so; and
- refuse medical treatment.
- The medical agent can only make decisions about medical and dental treatment and abide by the powers that are sent out in the Medical Treatment Act 1988 and the Guardianship and Administration Act 1986 and cannot be changed. If the medical agent has any concerns they can contact the Victorian and Administrative Tribunal (VCAT) for advice.

If the medical agent no longer wishes to accept the appointment, they should discuss this with the Donor.

What Attorneys cannot do:

An attorney under any enduring power of attorney cannot conduct the following:

- make or revoke a will for the principal
- make or revoke an enduring power of attorney for the principal
- vote on the principal's behalf in an election or a referendum
- consent to the entering into or dissolution of a marriage of the principal or a sexual relationship of the principal
- make or give effect to a decision about the care and wellbeing of any child of the principal
- make or give effect to a decision about the adoption of a child under 18 years of age of the principal
- make or give effect to a decision to enter into, or agree to enter into, a surrogacy arrangement on the principal's behalf
- consent to the making or discharge of a substitute parentage order on the principal's behalf
- manage the estate of the principal on the death of a principal
- consent to an unlawful act
- delegate their power and if an attorney is no longer able to carry out the role only an alternative attorney already appointment is able to step in

How decisions are made when there is more than one attorney appointed:

The principal will appoint the attorneys to act either:

- Jointly- where the attorneys must make decisions together (and both sign any necessary documents)
- Jointly and severally- where the attorneys can make decisions independently and one attorney can sign any document along
- By a majority- where a majority need to agree to make a decision (and the majority who agree sign any document)

If the principal does not specify, the attorneys are taken to be appointed to act jointly.

When attorneys for different matters disagree:

If and when an attorney is to act and powers of attorney for financial and personal matters take effect, if an attorney for personal matters and an attorney for financial matters disagree about a subject that each have authority to act, the decision of the attorney for personal matters prevails to the extent of any inconsistency unless ordered by VCAT. In summary, the attorney for financial matters must implement the decision of the attorney for personal matters. If the disagreement between the attorneys persist, they may also apply to VCAT to resolve the matter.

How an attorney signs documents when acting

If an attorney needs to sign any document on behalf of the principal, this must be done in a way to show that the attorney had signed for the principal. An example is:

Signed by [insert name of principal] by their attorney, [insert name of attorney], appointed by [insert name of principal] by enduring power of attorney made on [insert date of power made]

If an attorney wishes to resign/withdraw

The attorney can resign while the principal still has decision making capacity or not and if there is another attorney or alternative attorney willing to act who has power or with leave of VCAT or the Supreme Court. The “Resignation for an attorney or alternative attorney” form must be used and the attorney must take reasonable steps to inform the principal and any other attorneys.



Rigoli Lawyers is an accredited Family Law Specialist firm.

Our lawyers have experience in varied areas including commercial and company law, conveyancing and contracts, criminal law, deceased estates, family law, business law and all court and litigation matters.

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