



Making an Enduring Power of Attorney

New legislation that commenced on 1 June 1998 makes an enduring power of attorney more workable.

What is an enduring power of attorney?

An enduring power of attorney is a legal agreement giving someone else the power to make personal/health and/or financial decisions on your behalf. 'Enduring' simply means that the power continues even if you lose the capacity to make the decisions yourself.

How does it work?

- You sign a form giving power of attorney to someone of your choice.
- You specify the types of decisions that this person (your attorney) will make.
- Your attorney agrees to the appointment by signing the acceptance section of the form.
- Your attorney can then act on your behalf if necessary.
- The decisions that your attorney makes have the same legal force as if you had made them yourself.

What types of decisions would my attorney make?

You can give your attorney power to make decisions about:

- personal matters (including health care); and/or
- financial matters.

Examples of personal/health matters are:

- where you live, and with whom;
- day-to-day issues like diet and dress;
- the type of health care you will receive.

Examples of financial matters are:

- doing your banking;
- paying bills;
- deciding how your income should be invested.

Why give someone this power?

You may not always be able to make decisions when you need to. For example, you may be overseas when decisions must be made and documents signed about the sale of some property. Or you may be too ill to make choices about the medical treatment you will receive, or where you will live. Or an injury could leave you with a disability that prevents you from making decisions, or from telling other people what your decisions are.

Giving someone enduring power of attorney means that your wishes will be carried out, even if you lose the capacity to make decisions yourself. Your attorney will have the power to make decisions in your interests and to sign all the necessary documents.

What would happen if I could not make decisions myself and I did not have an attorney to act for me?

You would have no opportunity to make your wishes clear. Someone would have to step in and take responsibility.

- Financial decisions would be made by the Public Trustee.
- Health matters would be decided by your 'statutory health attorney'. This is someone close to you who would become your attorney 'by default'. The law sets down in general terms who that would be; it must be someone readily available who would be expected to take the responsibility. That person could be:
 - your spouse, where the relationship was close and continuing;
 - your carer - the person primarily responsible for caring for you at home;
 - a close friend or relation.

Just who it would be depends not only on who is closest to you, but also on your culture or religion. For example, if you belong to a culture or religion where a particular person traditionally has authority, it may be more appropriate for that person to become your statutory health attorney, even if someone else usually cares for you.

Any other personal/health matters would be decided by the Adult Guardian, who is appointed by the Government to look after the interests of people with disabilities and, in certain situations, to give health-care consent.

Whom should I choose as my attorney?

Choose someone you trust. Many people choose their spouse, but you may prefer to appoint someone with expertise in the area.

- For financial matters you could choose a family member with these professional skills. Other options are the Public Trustee or a private trustee company.

- For personal/health matters you could choose a family member who understands your personal needs. The Adult Guardian, who is appointed by the Government to look after the interests of people with disabilities, is also available.

Your attorney must be over eighteen and must not be your 'paid carer' - that is, anyone who is being paid to take care of you or to look after your medical treatment, such as your nurse or doctor. (*Note: A 'paid carer' is someone who is paid a fee or a wage to care of the person, such as a nurse, not someone receiving a carer's pension or similar benefit*).

Can I appoint more than one attorney?

Yes, under the new law you can appoint several people to act as your attorneys if you wish. You may appoint one person as your attorney for financial matters and another person as your attorney for personal/health matters. You may also appoint joint attorneys - that is, two or more - for each matter.

How does the new law affect existing powers of attorney?

Any power of attorney made before the new legislation came into effect on 1 June 1998 still has legal force (unless you have revoked it). However, it would be limited to financial matters only and would not allow you to give specific instructions or appoint more than one attorney.

If you already have an attorney under the old law, you should consider completing a new form. You may choose to re-appoint the same person or you may wish to appoint additional, or different, attorneys. You could also appoint an attorney (or attorneys) for personal/health matters, and you could be more specific about the decisions you would like your attorney/s to make.

How do I give someone enduring power of attorney?

You fill out the proper **Enduring Power of Attorney** form.

There are two types of form - the short form and the long form. You decide which type will suit you.

What is the difference

The only difference is that with the short form you *cannot* appoint one attorney (or more) for personal/health matters and a *different* attorney (or attorneys) for financial matters.

So you use the short form if:

- you wish to appoint *the same* attorney/s (for example, your spouse and/or your adult child) for both personal/health and financial matters; or

- you want your attorney/s to handle personal/health matters only, and you do not wish to appoint anyone for financial matters; or
- you want your attorney/s to handle financial matters only, and you do not wish to appoint anyone for personal/health matters (in which case health matters would be handled by the statutory health attorney or the Audit Guardian).

The long form covers all the options. You can use it to appoint any number or combination of attorneys for personal/health and/or financial matters.

Who else is involved?

You will need a witness to sign the form, and this person must be a justice of the peace, commissioner for declarations, lawyer or notary public.

The witness must state that you appear to understand what you are doing. If the witness is not sure that you understand the nature and effect of the appointment, he/she should refuse to sign the document.

And of course, for most power of attorney forms, your attorney will have to fill out the acceptance section of the form.

When does the power begin?

Personal/health matters

Decisions about personal/health matters will remain in your hands unless for some reason you lose the ability to make such decisions, and to communicate them. So your attorney's power will not begin until (if ever) you are incapable of making the decisions yourself.

The whole idea of the power of attorney is to give you maximum control over your own life. Even if there comes a time when your attorney must make *some* personal or health decisions on your behalf, there may be other things that you are still capable of deciding. Your attorney is obliged to help you make decisions yourself if at all possible.

Financial matters

With financial matters, you may want someone to act for you because you are not available to act for yourself. So you can specify on the form whether the power is to begin immediately, or on a particular date, or on a particular occasion.

If you lose the capacity to make such decisions before the date or occasion you've named, the power begins as soon as the attorney is notified of your condition. If you do not name a date or an occasion, your attorney can begin to make decisions on your behalf immediately. However, this does not prevent you from continuing to make decisions while you are able to do so.

How long does the power continue?

With personal/health matters, the power continues so long as you are incapable of deciding for yourself. To the extent that you recover your ability, your attorney's power is reduced. So if you recover fully, your attorney's power comes to an end.

But don't forget that the law requires your attorney to help you make decisions yourself to the fullest extent possible.

Exactly what powers would my attorney have?

You specify the sorts of decisions that you want your attorney to make. Within those limits, your attorney would have the power to do, on your behalf, anything that you could lawfully do yourself in relation to either personal/health or financial matters - with one important exception: your attorney *does not* have the power to make decisions about 'special' personal matters (such as voting), or 'special' health matters (such as withdrawing or withholding life-sustaining medical treatment).

Can I restrict the power?

Yes, you can limit your attorney's power by listing on the form anything that you do *not* want your attorney to make decisions about.

You can also include specific information about your wishes - but not about withdrawing or withholding life - sustaining medical treatment. Such directions can only be given in an Advance Health Directive.

Can I change my mind after I have signed the form?

Yes, you can revoke (cancel) the power at any time, so long as you are capable of understanding what you are doing. You simply fill out a special 'revocation' form. You can also change details, if you wish, by completing a new Enduring Power of Attorney form.

If you change or revoke this power, you must inform your attorney. Otherwise your attorney can legally continue to exercise the power.

What do I do with the form when it is completed?

You should leave the original in a safe place, such as with your bank, but it is wise to keep a copy to refer to.

You should give a copy to anyone else who may need to be involved, such as:

- your attorney;
- your solicitor;
- your doctor (for personal/health matters);
- your accountant;
- your stockbroker;
- a family member or friend.

If your attorney will be making decisions about buying or selling land, you should register the form with the Land Titles Office.

You may also wish to carry a card in your purse or wallet, saying that you have appointed an attorney or make an Advance Health Directive, and stating details of whom to contact for copies of these.

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 you have appointed a professional person or organisation to act as your attorney for financial matters.

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

Your attorney's responsibilities are clearly set out in the legislation. The law ensures that your interests will be paramount and your wishes will be respected.

Anyone who suspects that the power is not being exercised properly can inform the Adult Guardian or the Supreme Court. They have the power to protect your interests if you are unable to oversee your attorney's decisions. They can require your attorney to provide accounts and details about any decisions that have been made, and can remove the attorney if they are not satisfied.

If you feel that your attorney is not acting in your interests, you can revoke the power immediately by completing a revocation form.

What are my attorney's responsibilities?

A person who accepts a power of attorney has both general and specific responsibilities.

Attorneys must exercise the power given to them with honesty and care, and it is an offence not to do so.

In general, your attorney must:

- encourage self-reliance. Your attorney must only make decisions when there is conclusive evidence that you are unable to do so;
- recognise your right to confidentiality and dignity;
- take into account your existing supportive relationships, values and culture.

In relation to health care, your attorney must:

- ensure that any decision made for you contributes to your health and well-being;
- act in a way that least restricts your rights. This simply means that if there is a choice between a more or less intrusive method for achieving the same result, the least intrusive should be used;

- take into account your views and wishes as well as the advice of your doctor or other health-care provider.

An attorney's specific responsibilities include:

- the duty to keep records. Attorneys for financial matters must keep records of any dealings and/or transactions they make;
- the duty to keep property separate. Your attorney's property must be kept separate from yours unless it is jointly owned;
- the duty relating to gifts. Your attorney must not give away your property except in cases where you would have been likely to do the same thing, for example as donations to charity or wedding gifts for a relation.