

Sladen drives
Legal results

Information for attorneys under an enduring power of attorney (financial matters)

What is an enduring power of attorney (financial matters)?

You have been appointed by a person making the enduring power of attorney (financial matters), called the principal, to be his or her attorney. Serious responsibilities are imposed upon you by this appointment

An enduring power of attorney (financial matters) is a legal document which enables the principal to appoint another person to make decisions about the principal's assets and finances. This could become necessary or useful if the principal becomes ill or incapacitated or is travelling (depending on the conditions imposed). The power is "enduring" because it continues to be effective even if the principal later loses decision making capacity.

Your responsibilities

A financial attorney must act in the best interests of the principal and must do so honestly and with reasonable care. If a principal does not have decision making capacity, you must carry out the function in a manner which is least restrictive of the principal's ability to act in the circumstances, and ensure that the principal is given practicable support to participate in decision making. You must also give all practicable and appropriate

effect to carrying out a principal's wishes, encourage the principal to participate in decision making, and act in a way that promotes the wellbeing of the principal, including by recognising the dignity of the principal, having regard to their relationship, religion and cultural environment, and respecting the confidentiality of confidential information of the principal.

You should carefully check the terms of the document which appoints you as attorney. It may contain conditions or limitations in relation to the exercise of your powers. It may contain a commencement date or stipulate particular circumstances which must exist before the power commences, for example, the power may only be effective upon the principal not having decision making capacity.

The Powers of Attorney Act (the Act) imposes the various requirements upon you. The Act requires that you be at least 18 years of age. You cannot be an attorney if you are an accommodation provider, care worker or health provider for the principal. An accommodation provider, in the case of an individual, is defined under the Act as a person who is in a professional or administrative capacity directly or indirectly responsible for or involved in the provision of accommodation to the principal.

Important

This document is a guide only. It is not comprehensive legal advice.



You must keep and preserve accurate records and accounts of all dealings and transactions made under your power. The Supreme Court or the Victorian Civil & Administrative Tribunal (VCAT) can order you to produce these.

When you sign a document in your capacity as attorney you must indicate on the document that you are signing as attorney for the principal of the power. You are only authorised to make decisions about the principal's finances and assets. The power does not extend to decisions about medical treatment or lifestyle matters.

Note that the same document may have been prepared in respect of financial and personal/ lifestyle matters. You will need to check the terms of the document to see what matters you have been appointed as an attorney for the principal.

If VCAT makes an administration order in relation to the principal then you should check the terms of that order. It may revoke your power as attorney or may limit it in some way.

You must keep your property separate from the principal's property unless you and the principal own property jointly (which would be common between a husband and a wife).

You must avoid transactions that involve a conflict of interest. If a decision needs to be made in relation to the principal's interests that also affects your interests then you need to seek authority from VCAT or the Supreme Court before making a decision

The principal's will

You do not have an automatic right to obtain either the original or a copy of the principal's will. However, if you are proposing to sell a significant asset, such as the principal's home, you should be allowed to view a copy of the principal's will to check whether your proposed sale will impact upon the will.

For instance, the principal may not have decision making capacity and you may wish to sell the principal's home to pay for supported accommodation. You should check the principal's will.

If you find that the principal has gifted the property in the will to a specific beneficiary, and the sale of the home will therefore upset the terms of the will by creating an unintended outcome, you may need to apply to the Supreme Court for a court made will. You should seek legal advice in these circumstances.

Signing as attorney

When you sign a document as attorney for the principal you should sign with your usual signature. Under the signature you should write "Signed by [your full name] on behalf of [principal's full name] under an enduring power of attorney dated [date of the enduring power of attorney] which is not revoked".

Joint, joint and several or majority appointments

If two or more attorneys are appointed the document can require that they must all sign any document to exercise the power, which is a joint appointment, or it can require that any one of them can sign to exercise the power, which is a several appointment. The document may also require a majority of attorneys to exercise the power. If the appointment is not specified, it is presumed that the attorneys are to act jointly.

What if you wish to resign?

If the principal still has decision making capacity, and you wish to resign, you can give the principal a signed notice of your resignation. However, if the principal no longer has decision making capacity and there is no continuing attorney or alternative attorney then you can only resign with the consent of VCAT or the Supreme Court.

What if you lose decision making capacity?

If you become incapable of understanding the nature of the power then the power is revoked.

What if you become bankrupt or have been convicted of an offence of dishonesty?

If you have been convicted of an offence of dishonesty, you must notify the principal prior to being appointed as an attorney.

If you become bankrupt the power is revoked.



What happens upon your death?

Upon your death the power is revoked.

Revocation of your power

Provided the principal has decision making capacity the principal can revoke your power at any time, but must give you notice of the revocation. If you are not given notice and you do not know about the revocation then you are not committing an offence if you exercise the power. However, if you continue to act on behalf of the principal after receiving notice that the power has been revoked or cancelled in any other way you are committing an offence.

If anybody else believes that you are acting improperly and that you are not protecting the principal's interests you can be reported to VCAT, the Supreme Court or the Office of the Public Advocate. You could then be removed as attorney and have your power revoked. You may also have to pay compensation depending upon what you have done

Use of certified copies of the power of attorney document

We recommend that the original document appointing you as attorney remain securely in our office. If you need to exercise the power you will need to produce evidence of your authority. You can do this by using a certified copy of the document.

We can provide you with certified copies of the enduring power of attorney upon request. We suggest that you give a certified copy to any institution holding assets on behalf of the principal and any other person or institution requiring a copy.

Further advice

If you seek further advice in relation to your responsibilities we recommend that you contact the Office of the Public Advocate. You will find useful information on the website of the Office of the Public Advocate at www.publicadvocate.vic.gov.au

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