



Enduring Power of Attorney (Financial)

Planning ahead for future financial and legal decisions

What is an enduring power of attorney (financial) and how does it operate?

An enduring power of attorney (financial) is a legal document where an individual (the ‘donor’) can give another person (the ‘attorney’) the legal right to make financial and legal decisions for them. This may include managing matters such as banking, property, and paying bills.

‘Enduring’ means the power continues (endures) even when an individual is unable to make these types of decisions for themselves due to accident or illness resulting in incapacity, either temporary or permanent.

The power can be executed by completing an *Enduring Power of Attorney (Financial) form*, giving power of attorney to a person chosen by the donor. The form must be signed and witnessed.

The time at which the powers take effect can be specified on the form, as can conditions on the decisions an attorney can make.

The attorney agrees by signing the acceptance section of the form.

The attorney’s decisions have the same legal force as if the donor had made them.

Why give someone this power?

The Office of the Public Advocate (OPA) recommends that everyone

over the age of 18 years should appoint an attorney under an enduring power of attorney (financial). This is the only method by which an individual can have control over who will make decisions on their behalf if they are ever unable to do so.

An individual may lose the capacity to make decisions permanently, such as through dementia or an acquired brain injury from a car accident, or temporarily, by becoming unconscious as a result of an illness or accident.

What type of decisions can an attorney make?

An attorney appointed under an enduring power of attorney (financial) can make the same financial and legal decisions that an individual would make for themselves when competent. An enduring power of attorney (financial) cannot be used to make medical treatment or lifestyle decisions such as where a person lives.

On the form used to appoint an attorney, the donor can limit or place conditions on how they want their attorney(s) to carry out their responsibilities.

Who can appoint an attorney?

Anyone can appoint an attorney, provided they are over 18 years of age, and have the capacity to make the appointment.

What is ‘capacity’?

To have capacity is to have the ability to reason things out, that is, to:

- understand
- retain
- believe
- evaluate (i.e. process), and
- weigh relevant information.

The donor needs to be able to understand:

- the powers the donor gives to the attorney, including any limitations or conditions the donor has put on these powers
- when the attorney can exercise these powers
- that while the donor has capacity, they can revoke the power of attorney
- that the power will still operate if the donor loses the ability to make legal and financial decisions
- that once the donor has lost capacity, it is unlikely they will be able to oversee their attorney’s work and decision-making.

Usually, a donor should also know something about the nature and extent of their financial estate.

If a donor does not have capacity, but requires someone to take care of their financial and legal affairs, the Guardianship List of the Victorian Civil and Administrative Tribunal (VCAT) can appoint an

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administrator who can make financial and legal decisions for them. For further information, see OPA's fact sheet *Administration*.

Choosing an attorney

An attorney must be over 18 years of age and have the capacity to be an attorney. The donor can appoint any person or organisation as an attorney, as long as they agree to take on the role. The attorney should be someone who the donor trusts to manage their affairs, and look after their best interests.

The donor may choose to appoint more than one attorney, and can decide how those attorneys exercise their power. This may be:

- jointly, i.e. the attorneys must make decisions together
- jointly and severally, i.e. the attorneys can make decisions together or independently.

An alternative attorney can also be appointed. The alternative attorney can then act in place of the original attorney/s in the event that they are unable to carry out their role.

The attorney must accept the appointment in writing.

Responsibilities of the attorney

The attorney must:

- act in the donor's best interests
- wherever possible, make the same decision that the donor would have made
- keep accurate records of dealings and transactions made under the power
- avoid situations where there is a conflict of interest
- keep the donor's property and

money separate from their own.

When the donor dies, the enduring power of attorney ends.

Should an attorney be paid?

The donor does not need to pay the attorney, unless they have appointed a professional person or organisation as their attorney.

How is an enduring power of attorney (financial) created?

An enduring power of attorney (financial) is easy to make. It does not have to be prepared by a lawyer. However, if a person has complex financial and legal affairs, the advice of a lawyer will be helpful.

A donor must fill in a form to appoint a power of attorney, and sign it in the presence of witnesses, who must be assured that the donor knows what they are doing (has capacity). There are restrictions regarding who can be a witness. If there is any question about the donor's capacity, an independent medical assessment should be obtained.

Forms for appointing a power of attorney are available from www.publicadvocate.vic.gov.au, as well as most newsagents or legal stationers.

Alternatively, *Take Control – a kit for making powers of attorney and guardianship* is available from www.publicadvocate.vic.gov.au or by calling 1300 309 337. Bulk orders can be placed at www.legalaid.vic.gov.au or by contacting Victoria Legal Aid.

What if the donor changes their mind?

The donor can cancel (revoke) the

appointment of an attorney at any time, as long as they understand the nature and effect of revoking the power. The donor can revoke the power by telling the attorney that their power is withdrawn, or by destroying the enduring power of attorney document and any copies.

OPA recommends that the donor also completes a *Revocation of Enduring Power of Attorney* form and give a copy to the attorney. This form is available from OPA.

Safeguards

The form appointing powers of attorney does not have to be registered or sent anywhere. The donor should keep the original form in a safe place, and give the attorney a certified copy.

If an attorney is not acting in the donor's best interests, and they are no longer competent to revoke the enduring power of attorney (financial), VCAT can revoke or suspend the enduring power of attorney. Anyone who has a genuine interest in the donor's welfare can ask VCAT to consider the actions of the attorney.

VCAT operates a 24-hour emergency service and can appoint an administrator to make financial and legal decisions if the power of attorney is cancelled.

Further information

Further advice and information on powers of attorney and the role of the attorney is available from:

- OPA
- VCAT
- community legal centres
- solicitors
- Victoria Legal Aid.