



Advice for Attorneys (Financial)

Information for people appointed with enduring power of attorney (financial)

What is an enduring power of attorney (financial)?

It is a legal document in which someone (the donor) appoints you (the attorney) with the power to make financial and legal decisions on their behalf – like managing their banking, property, or paying bills. *Enduring* means the power continues (endures) when the donor is unable to make these decisions or has ‘lost capacity’.

What is capacity?

You have capacity when you have the ability to:

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

the information about the financial and legal decisions you have to make.

Becoming an attorney

If you were appointed before 1 April 2004

The legislation governing enduring powers of attorney, the *Instruments Act*, was amended on 1 April 2004. If you were appointed before that date, your power remains legally valid.

Note: the information in this fact sheet relates to the new form of appointment used on or after 1 April 2004.

If you were appointed on or after 1 April 2004

To become the donor’s attorney, you must sign a *Statement of Acceptance* form. This form is part of the donor’s enduring power of attorney (financial) form.

When do my powers begin?

Depending on the wishes of the donor, your power can begin:

1. immediately, when you accept the appointment
2. on a specified date
3. on a certain occasion (such as when the donor loses capacity).

If your power begins immediately, you should exercise your powers at the direction of the donor while they still have the capacity to manage their financial and legal affairs.

When the donor loses capacity, your responsibility is to continue to manage their legal and financial affairs in their best interests.

If your power begins on a specified date and the donor still has capacity at that time, you can only exercise the power at the direction of the donor. If the donor loses capacity before the date specified, your power will still only begin on that date. If decisions need to be made earlier, you may need to be appointed the administrator for the donor (see *Administration* fact sheet).

If your power begins on a certain occasion – such as when the donor loses capacity – you may be asked to prove that the donor has lost capacity. You can do this by providing a medical certificate or letter from the donor’s doctor, geriatrician or neuropsychologist, stating that the donor does not have capacity to manage their legal and financial affairs, and whether the loss is permanent or not.

As there are laws affecting the privacy of health information, you should get a consent form from the donor that lets you get health information about their capacity at any time from their medical practitioner. It is recommended that you get this from the donor when they make the enduring power of attorney (financial). For suggested wording of the consent form go to www.publicadvocate.vic.gov.au or contact our Advice Service on 1300 309 337.

Checklist for attorneys

The donor has placed a lot of trust in you by appointing you as their attorney. It is important that you find out information from the donor that will enable you to act in their best interests.

They should let you know the following or where you can get this information when you need it:

- bank account details
- real estate details
- shares and investment details



- safety deposit boxes
- motor vehicle details
- names of their accountant, lawyer and/or doctor
- where they keep their financial and legal records
- how to access their records if they are on a computer
- insurance details
- income
- any special entitlements eg. mobility allowance or rent assistance
- unusual expenditure items eg. donations
- any limitations, conditions or instructions the donor has specified in the enduring power of attorney (financial)
- their wishes for their financial and legal affairs, and lifestyle wishes with financial implications
- if there is more than one attorney, how the attorneys are to work together
- contact details if they have an enduring guardian or attorney (medical treatment)
- whether it is important for the attorney to know the contents of the donor's will (see next page).

This is not a complete checklist and you may need to ask the donor other questions. You should regularly update the information and ensure it is protected to maintain confidentiality.

You should contact the donor at least once a year to confirm their wishes and any changes that may affect the way you will act as their attorney.

What are my powers?

Your powers or authority are set out in the enduring power of attorney (financial) form. Donors authorise their attorney to do *anything on behalf of the donor that the donor may lawfully authorise an attorney to do*. However, the donor may state on the form of appointment some conditions, limitations and

instructions. If this happens you should know and discuss them with the donor.

Acting with another attorney

The enduring power of attorney (financial) will state if you are appointed as an attorney with another person. This can be:

- jointly (you must make decisions together), or
- jointly and severally (you can make decisions together or independently)
- alternatively (the alternative attorney can only make decisions when the first attorney is dead, absent or has lost capacity).

If more than one person has been appointed as attorney but the form does not state if it is joint and/or several, they must make decisions *jointly*.

If you are a joint attorney but you do not agree on an important decision and the donor has lost capacity, you should contact the Guardianship List of the Victorian Civil and Administrative Tribunal (VCAT) for advice.

If you are appointed 'jointly and severally', you should work together. This will help you keep track of the decisions each of you is making. If you cannot work together as attorneys, you may have to stop being an attorney. You can do this by resigning or by applying to VCAT to have the power revoked (see following section in this fact sheet titled *Can the attorney resign?*). VCAT may then appoint an independent administrator. (see *Administration* fact sheet).

If the donor has appointed an alternative attorney, it is important that you have some contact with them to let them know about the information you got from the donor, where you keep records and accounts and any issues that confront you as an attorney.

Lifestyle decisions

The enduring power of attorney (financial) only allows you to make financial and legal decisions. Lifestyle decisions – such as where a person lives and with who – can only be made by an appointed guardian or enduring guardian (See *Guardianship* and *Enduring power of guardianship* fact sheets).

Your role as the attorney (financial) is to provide advice and ensure that the donor can afford the decision made by the guardian or enduring guardian. If the cost is prohibitive, you can refuse to pay for the decision. Where a dispute cannot be resolved, you can seek advice from VCAT.

Health and medical decisions

An enduring power of attorney (financial) does not let you make health and medical decisions for the donor. These should be made by the donor's enduring power of attorney (medical treatment), enduring guardian or appointed guardian. If the donor does not have such an appointment, the 'person responsible' can consent to medical and dental treatment (See *Enduring power of attorney (medical treatment)* and *Medical/dental treatment for patients who cannot consent* fact sheets).

Personal decisions

Some powers of a donor, such as the right to vote, are personal and cannot be exercised by the attorney (financial).

If the donor has been appointed by a third party to exercise a power, that power cannot be delegated to the donor's attorney. For example, if the donor is an attorney or an executor of a will for another person, this power cannot be exercised by you as their attorney.

The donor's will

As attorney, you have no legal right to see the donor's will; however, if you know how the donor has left their estate it may help you to work out how to manage the donor's assets. For example, if the donor has left the family home to one child with a disability, this asset may have to be preserved at the expense of other assets. You should discuss with the donor whether it is important for you to know the contents of their will.

You cannot re-make the donor's will. Once a person has lost the capacity to make a will only the Supreme Court may re-make their will.

What does the law require of an attorney?

The law requires that you, the attorney:

- act in the donor's best interests
- keep accurate records and accounts of transactions and dealings
- keep your property separate from the donor's property except where you already own that property jointly
- do not exercise powers beyond those set out in the form of appointment
- do not have a conflict of interest with the interests of the donor
- when executing a document as an attorney, make a note that you are executing it under the enduring power of attorney (financial) (e.g. *'Jill Smith, by her duly appointed attorney, John Jones'*).

If you have any conflict of interest or concern, you should seek VCAT's advice.

The law expects you to exercise a reasonable standard of care when making decisions.

The law also requires that you:

- recognise the donor's right to participate in decisions as much as possible
- respect the donor's worth, dignity and human rights
- recognise the donor as a valued member of the community and encourage their self-reliance and participation in the community
- take into account the donor's supportive relationships, values, culture and language
- ensure the decisions are appropriate to the donor's characteristics, needs and wishes
- ensure confidentiality.

How do I use my enduring power of attorney (financial)?

When you are acting as the attorney, the people and organisations you are dealing with are entitled to see the form of appointment and to check that what you are doing is within your power.

Financial institutions such as banks usually keep a copy of the enduring power of attorney (financial) in their records. They can then compare the signature on cheques against the certificate of acceptance you have signed.

If the enduring power of attorney (financial) states that it does not begin until the donor has lost capacity, the party you are dealing with is entitled to proof that the donor has lost capacity (see previous section, *Becoming an attorney*).

Can someone refuse my decision as attorney?

Another person is not entitled to ignore your authority as stated by the enduring power of attorney (financial) unless they have good reason.

If a bank or institution unreasonably refuses to deal with you as attorney, you could use

the grievance procedures of that organisation or make a complaint to the Banking and Financial Services Ombudsman.

If you are still unsuccessful, VCAT has jurisdiction to declare what powers you have. It may also be in breach of the *Equal Opportunity Act 1995* or the *Disability Discrimination Act 1992* for a service provider to refuse to accept the donor's enduring power of attorney (financial).

What records and accounts must I keep?

You must keep a record of income and expenditure and an up-to-date list of assets and liabilities. You must also keep receipts, payment slips and all necessary documents for tax purposes.

Where there is concern that you are not acting in the best interests of the donor and the donor has lost capacity, VCAT may require an audit or lodgement of these accounts. The Public Advocate may require you to provide information including accounts if it is investigating any matter on behalf of the VCAT.

Reimbursement of reasonable costs

You are entitled to be reimbursed by the donor for expenses you have paid on the donor's behalf.

Can I use a copy of the enduring power of attorney (financial) instead of the original?

You can use a certified copy of the enduring power of attorney (financial) in place of the original. A certified copy can only be signed by the following:

- a justice of the peace
- a legal practitioner
- a public notary



- an officer authorised by law to administer an oath (for a complete list contact our Advice Service)
- a financial services licensee under section 761A of the *Corporations Act 2001*
- a regulated principal under section 1430 of the *Corporations Act*.

What if I make a mistake?

If you have made an honest and reasonable mistake, and acted in good faith, you will not be personally liable. If the mistake is serious, you should contact VCAT.

If you have acted dishonestly, in bad faith or unreasonably, you may be personally liable to restore to the estate of the donor the property you have lost.

How does an enduring power of attorney (financial) end?

An enduring power of attorney (financial) ends if:

- the donor revokes the power (while competent to do so)
- the donor later appoints an attorney and gives the attorney powers which are inconsistent with the powers given to you – then your powers are ended to the extent of that inconsistency
- VCAT revokes the power
- the donor dies
- attorneys are jointly appointed, and there is a death, resignation or insolvency of one of the attorneys.

Can the attorney resign?

Yes, you can resign by giving a signed notice – called a ‘disclaimer’ – to the donor while the donor is competent. For a *Disclaimer* form go to www.publicadvocate.vic.gov.au or contact our Advice Service on 1300 309 337.

If the donor has lost capacity you can only resign with VCAT’s permission.

What happens if the donor revokes the power but does not tell me?

The donor should inform you if they revoke your authority. You are not liable for any honest and reasonable decision made if you believed that you were the attorney.

What happens when the donor dies?

Your power as attorney ends on the death of the donor. The executor of the donor’s will has responsibility for the donor’s estate after that time. If the donor has not left a will, State Trustees is responsible for the person’s estate until ‘letters of administration’ are taken out by people who may inherit from the donor.

What is VCAT?

The Guardianship List of the Victorian Civil and Administrative Tribunal (VCAT) has responsibility for powers of attorney. It holds this responsibility alongside the Supreme Court. VCAT is less formal than the Court and holds hearings around Victoria.

VCAT has the power to:

- determine if the donor had capacity when they signed the document
- supervise the operation of powers of attorney
- require an audit or the lodging of accounts with it
- seek an investigation into the exercise of the enduring power of attorney (financial)
- give advice or instructions to an attorney
- vary the effect of an enduring power of attorney (financial)
- declare what the powers are (where there is a dispute about this)
- revoke or suspend the enduring power of attorney (financial)
- give permission for an attorney to resign.

Does VCAT charge a fee?

No. However, if you want to be represented by a lawyer you need to work out whether this is a cost that you should pay personally or whether it is a reasonable expense of the estate of the donor. If there is doubt, you should contact VCAT to confirm that it is a reasonable charge upon the donor’s estate.

Further information

For further information visit www.publicadvocate.vic.gov.au or contact our Advice Service.