

## **POWER OF ATTORNEY**

### **What is an Enduring Power of Attorney?**

It is a document under which a person appoints another person to act on their behalf in financial or business-type transactions. An enduring power of attorney continues to operate even if the person appointing the attorney(s) (“the donor”) becomes mentally incapacitated.

### **Once appointed, what can the Attorney do?**

This depends on the wording of the document. The power may be limited if the donor wishes, e.g. the attorney may not sell any real estate owned by the donor. Alternatively, the power may be unrestricted and the attorney is able to sign any document that the donor could have signed. The attorney cannot, however, sign or change the donor’s will and cannot vote in place of the donor.

### **Does the appointment mean that the donor can no longer sign documents?**

No. The appointment only means that an additional person or persons can sign documents for the donor. The donor may want the attorney to manage their finances if they are ill or absent overseas, but then resume control of their own affairs on their return to health or from their trip. It is only where the donor becomes mentally incapacitated that the donor’s signature will be invalid and in that event the attorney will need to sign all necessary documents.

### **What is the difference between an Enduring and a General Power of Attorney?**

A general power of attorney is valid whilst the donor is of sound mind, but becomes null and void on the incapacity of the donor. An enduring power of attorney is valid until the death of the donor or until cancelled by the donor. Most powers of attorney are prepared as general and enduring powers of attorney for the reason that most donors will want their attorney to manage their affairs if they are incapable of doing so.

### **When does the power commence?**

From the date that the donor and the attorney sign the document unless a later date or event is specified e.g. a donor may specify that the attorney can only use the power with the written permission of the donor, or with a medical certificate evidencing the donor’s incapacity.

### **Do I need to give a Power of Attorney?**

If you own any assets, then it is recommended that you put in place an enduring power of attorney so that someone is able to attend to your affairs if you are unable to do so through absence, illness or incapacity.

### **What happens if I am incapacitated and I don’t have a Power of Attorney?**

In order to administer your affairs, someone will need to apply to the South Australian Civil and Administrative Tribunal (“SACAT”) for what is called an administration order. The incapacitated person may need to attend the SACAT hearing, and family members and other interested persons will be invited to attend. Once an administration order is granted, the person appointed will need to submit a report to Public Trustee each year accounting for each transaction they have made on behalf of the incapacitated person. In addition, the order will need to be reviewed at least every three years.

If there is any family conflict or no one wishes to apply for an order, then SACAT will usually appoint Public Trustee to manage your affairs. In that event, of course, Public Trustee is entitled to charge fees for doing so.

## **Can you give me an example of when a power of attorney might be required?**

Assume that a husband and wife have all or some of their assets in separate names. If either of them became mentally incapacitated through injury or medical reasons and were unable to sign documents relating to the asset in their name, then the other spouse would not be able to deal with that asset without an administration order from SACAT.

Even where a couple holds all their assets jointly, should one become incapacitated and as a result the other has to sell the family home, the signatures of both spouses are required on the house transfer document. Again, a special order would be required before the spouse who is not incapacitated would be able to sign on behalf of their incapacitated partner.

A common scenario is for spouses to appoint each other as primary attorney, and then appoint one or more of their children as substitute attorneys. This covers the situation where, for example, a couple is involved in an accident, one dies as a result and the other is incapacitated: If they have just appointed each other, then the incapacitated one has lost their only attorney.

## **What duties does the attorney have?**

The Powers of Attorney and Agency Act 1984 prescribes certain duties for the attorney to observe.

- the recipient of an enduring power of attorney must keep and preserve accurate records and accounts of all dealings and transactions made using the power, otherwise they commit an offence and can be fined; and
- the recipient cannot renounce the power during the legal incapacity of the donor except with the leave of the Supreme Court; and
- the attorney must exercise their powers with reasonable diligence to protect the interests of the donor otherwise they are liable to compensate the donor for any loss suffered as a result of such failure; and
- the attorney is not allowed to use their powers to benefit themselves, unless the power of attorney specifically allows them to do so.

## **Can I change or cancel an appointment of an attorney?**

Yes, at any time whilst you are of sound mind.

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