

PLANNING FOR INCAPACITY

ENDURING POWERS OF ATTORNEY

and

ADVANCE HEALTH DIRECTIVES



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SAFEGUARDING YOUR INTERESTS

What is meant by a Power of Attorney?

A Power of Attorney generally means a formal appointment giving someone else the power to make decisions on your behalf.

It works like this:

1. You sign a legal document giving 'Power of Attorney' to someone of your choice;
2. You specify the types of decisions that the person you choose (your Attorney) may make;
3. Your Attorney agrees to the appointment by signing the acceptance section of the legal document;
4. Your Attorney can then act on your behalf if necessary.

The decisions that your Attorney makes for you have the same legal force as if you had made them yourself.

Why would I need a Power of Attorney?

There may come a time when, for some reason, you are unable to make decisions about things that concern you – for example, you may not be on the spot when financial decisions have to be made, or you may be too ill to make decisions about your own health care, or an accident could leave you with a disability which affects your capacity to make decisions.

If this happens, it is better to be prepared. You can feel more confident if you have chosen someone who understands your wishes and is legally bound to respect them.

Giving this power to someone you know and trust is the best way of making sure that your wishes will be followed. You specify the sorts of decisions to be made, and you choose someone you trust to carry them out.

What types of decisions would my Attorney make?

You can give your Attorney power to make decisions about:

1. Personal matters (including health care),
2. Financial matters,
3. Both.

The details are up to you. You work out exactly what areas you want your Attorney to be responsible for, and you note these on the form. The questions in the form will guide you.

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, such as a family member with the relevant skills.

If you are not able to appoint a spouse, family member or even a trusted personal advisor, the Public Guardian (for personal matters) or the Public Trustee (for financial matters) could be appointed. We refer to the role of these entities later in this paper.

Your Attorney must be over 18 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: It is all right to choose someone who is receiving a carer's pension or similar benefit for looking after you, because the law does not regard such a person as a 'paid carer'.)

What does "enduring" mean?

The law has always recognized that you can make a general Power of Attorney for financial matters. It is useful if you are not available to sign documents when financial decisions have to be made. However, this power is only valid while you are capable of managing your own affairs. If you become incapable for some reason, your Attorney's power ceases.

The Queensland Government created the **Enduring Power of Attorney**. The difference being that it **endures** and does not cease if you become incapable of managing your own affairs.

The Enduring Power of Attorney:

1. Covers both personal and financial matters;
2. Allows you to appoint more than one Attorney;
3. Allows you to specify when the power will begin and exactly what areas it will cover;
4. Gives clear guidance to your Attorney if you are unable to supervise the decisions yourself.

The law also allows you to make an Advance Health Directive, which allows you to write down your wishes about your future health care, in case the time comes when you are unable to speak for yourself.

Two other important additions are:

1. The concept of the **Statutory Health Attorney**. This is the 'default' Attorney – the person recognized by the law as having authority to make health decisions on behalf of someone else when no-one has been formally appointed to the role;
2. The position of **Public Guardian**, an independent officer who is appointed by the Government to protect the interests of people with decision-making disabilities. One of the duties of the Public Guardian is to deal with situations where Attorneys prove to be unreliable.

How does the law on Powers of Attorney help me?

In four ways:

1. It allows you to appoint someone as your Attorney and to be specific about the sorts of decisions you want your Attorney to make;
2. It enables you to give clear and unambiguous directions about your future health care;
3. It clarifies the issue of who can make health-care decisions for you if you have not appointed an Attorney;
4. It ensures that your interests are protected if your Attorney proves to be unreliable.

How do I appoint an Attorney or make an Advance Health Directive?

You sign legal documents prepared in the form required under the Powers of Attorney Act.

You may sign:

1. General Power of Attorney;
2. Enduring Power of Attorney (Short Form);
3. Enduring Power of Attorney (Long Form);
4. Advance Health Directive.

Which document should I sign?

1. A **General Power of Attorney** is normally used in commercial transactions to give someone specific authority in financial matters;
2. If you want to appoint an Attorney for other reasons, you sign an Enduring Power of Attorney, because this power does not lapse if you lose the capacity to make decisions.

With an Enduring Power of Attorney, you can cover both personal matters ('personal decisions' or 'personal matters' including health care) and financial matters. You can appoint separate Attorneys for these matters and you can provide for a "reserve" or "back-up" if, for instance, your spouse passes away or is also rendered incapable;

3. If you want to give specific written directions about your future health care, sign the Advance Health Directive. It sets out the sorts of medical issues that could arise if you were seriously ill or injured, and allows you to give clear direction about your treatment.

With this Directive, medical staff will be able to follow your wishes when making decisions about your treatment.

ENDURING POWER OF ATTORNEY

What is an Enduring Power of Attorney?

An Enduring Power of Attorney is a legal document giving someone else the power to make decisions on your behalf. It allows you to give that person the power to make personal decisions and financial decisions. 'Enduring' simply means that the power continues even if you lose the capacity to make decisions for yourself.

What is meant by 'personal decisions' and 'financial decisions'?

Examples of personal decisions are:

1. Where you live, and with whom;
2. Day-to-day issues like diet and dress;
3. The type of health care you will receive.

Examples of financial decisions are:

1. Doing your banking;
2. Paying bills;
3. Dealing with the Australian Taxation Office.

Why give someone this power?

You may not always be able to make decisions when you need to.

You may be away from home when documents need to be signed about the sale of some property, or you may be suffering an illness or injury that affects your ability to make decisions about financial matters.

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.

1. Financial decisions may have to be made by the Public Trustee;

2. Health matters would be decided by your 'Statutory Health Attorney' – someone close to you who would become your Attorney 'by default'. If no-one suitable was available, health matters would be decided by the Public Guardian.

Is an existing Power of Attorney affected?

Any Power of Attorney made before 1 June 1998 still has legal force (unless you have revoked it). However, it would be limited to **financial matters only** (that is, your current Attorney could not make decisions about your health care).

If you already have an Attorney, you should consider completing a new form, as the new document as it gives you new options. You could then appoint an Attorney (or Attorneys) for personal 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 consult Reaburn Solicitors to discuss your needs. You will receive advice about which type of Power of Attorney meets your needs and you can then decide which documents should be prepared.

What is the difference?

One document is used if you want the same Attorney for personal / health matters and financial matters and a different document needs to be prepared if you want to appoint different Attorneys for personal / health matters and financial matters.

Who else is involved?

You will need a witness to sign the form – a justice of the peace, commissioner for declarations, solicitor or notary public. The witness has very onerous responsibilities to ensure you fully understand the document before it is signed.

Your Attorney will have to fill out the acceptance section of the form.

People who do not speak or read English well enough to complete such forms on their own would need the help of a qualified, registered interpreter.

When does the power begin?

Personal matters

Clearly, decisions about personal matters will remain in your hands unless for some reason you lose the ability to make such decisions, and to communicate them. Your Attorney's power does 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 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. 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 your 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 (remember, only about financial matters).

How long does the power continue?

With personal 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 comes to an end.

With financial matters, unless you specify otherwise, the power continues until you revoke it.

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 or financial matters – with one important exception: your Attorney does not have the power to make decisions about 'special' matters, such as making a Will, or withholding / withdrawing life-sustaining measures.

Don't forget that the law requires your Attorney to help you make decisions yourself to the fullest extent possible.

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 instructions. However, if you want to give detailed instructions about health care decisions, it is better to use an Advance Health Directive.

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

Yes, you can revoke the power at any time, so long as you are capable of understanding what you are doing. That is a separate legal document. You can also change the details, if you wish, by completing a new Enduring Power of Attorney form.

If you do 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 Reaburn Solicitors Securities facilities (service provided free of charge) and keep a copy to refer to.

You may consider it appropriate to give a copy to anyone else who may need to be involved such as:

1. Your Doctor (for personal matters);
2. Your Accountant/Financial Planner;
3. Your Stockbroker;
4. A family member or friend.

We will, of course, retain a copy (preferably the original) in our security section at no cost to you.

If you are admitted to hospital, you should take a copy with you and ask for it to be attached to your chart.

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

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

Your Attorney's responsibilities are clearly set out in the legislation and on the form. 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 Public Guardian or make an application to 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.

Where can I go for advice?

Apart from ourselves, you can make enquiries of the Public Guardian or the Public Trustee. You may prefer to ask your Doctor to help you if you want to give someone Enduring Power of Attorney for personal matters.

ADVANCE HEALTH DIRECTIVE

Exactly what is an Advance Health Directive?

An Advance Health Directive is a document in which you give general instructions about your future health care.

It comes into effect only if you are unable to make your own decisions.

Why should I make such a directive?

People who are seriously ill are often unconscious or otherwise unable to communicate their wishes – at the very time when many critical decisions need to be made. So it is wise to make your wishes known before this happens.

When should I make one?

The best time to make an Advance Health Directive is now, before the matter becomes urgent.

However, it is particularly important to do so if you are about to be admitted to hospital, or if you have a medical condition that is likely, at some stage, to affect your ability to make decisions.

How does it work?

1. You fill out a document stating what type of treatment you would wish to have for various medical conditions;
2. You keep the original in a safe place, give a copy to your Doctor and let other people know that it exists, particularly your family and hospital staff;
3. Medical staff can refer to it if you become so ill that you can no longer make decisions for yourself;
4. If the directions in the form are inadequate for any reason, the form authorizes your Attorney for personal matters to make health-care decisions on your behalf.

What happens if I do not make an Advance Health Directive and I become so ill that I cannot speak for myself?

You would have no way of making your wishes known.

Decisions about your treatment would be made by your Attorney for personal matters (if you have one), or the Public Guardian, a Government body set up to protect adults with impaired decision making capacity.

Can anyone make an Advance Health Directive?

Yes, anyone over 18 who is capable of understanding the nature of the decisions and foreseeing their effects can make an Advance Health Directive.

What issues can I cover in this directive?

1. You can give general instructions. For example, you can mention:
 - (a) Any special medical conditions that your health-care providers should know about, such as diabetes or an allergy to certain medication;
 - (b) Any religious beliefs that could affect your treatment;

- (c) Any particular treatment you would *not* wish to have;
2. You can give directions about how far you want your treatment to go if, for example, it turns out that your condition is:
 - (a) Terminal (you are unlikely to survive for longer than 12 months);
 - (b) Incurable (there is not known cure);
 - (c) Irreversible (there is no possibility that you will recover);
 3. You can consider various medical conditions, such as coma or severe brain damage, and explain whether you would want particular types of medical intervention to keep you alive;
 4. You can add any other matters that have not already been covered;
 5. You can also use this form to appoint an Attorney for personal matters if you don't already have one. You just complete the section called "Appointing an Attorney for personal matters". You can authorize your Attorney for personal matters to make decisions about any health-care issues that you haven't mentioned explicitly;

Note: You cannot give anyone else the authority to decide when to withhold or withdraw measures that are designed to keep you technically alive. You are the only person who can give such directions. You can do this in your Advance Health Directive.

Does this mean that I can give instructions for my Doctor to help me die?

No. Euthanasia is illegal in Queensland. By law, your Doctor cannot give you anything, such as an injection or an overdose of your painkiller, to hasten your death.

However, you can ask to be given palliative care only. This is treatment that is not aimed at a cure or at keeping you alive at any costs, but at ensuring that you are kept as comfortable and pain-free as possible.

Where can I get help with my Advance Health Directive?

You should feel free to discuss it with us. The Advance Health Directive must be signed by a Doctor who should be involved in the whole process. In particular, your Doctor can explain any medical terms that you are unsure about.

There is a section of the document a Doctor must complete, which shows that you fully understood the directions you gave, and their effect, when you completed the document.

You should also discuss the directive with your family and your Attorney/s for personal matters.

Who else is involved in completing the form?

Besides you and your Doctor, there must be a witness.

Your witness must be 18 or over, and must be a justice of the peace, commissioner for declarations, solicitor or notary public. He or she must not be your Attorney for personal matters, a relation of yours or of your Attorney, or anyone being paid to take care of you or a beneficiary under your Will.

The witness for an Advance Health Directive or an Enduring Power of Attorney is doing much more than just witnessing your signature. He/she must also state that you understood the decisions you have made.

People who do not speak or read English well enough to complete such forms on their own would need the help of a qualified, registered interpreter.

What will I do with the completed form?

As mentioned previously, we would prefer to retain the original copy in our security section, free of charge. You should, however, consider giving a copy to your Doctor and a family member or friend.

You may also wish to carry a card in your purse or wallet stating that you have made a directive, and where it can be found.

RESPONSIBILITIES OF AN ATTORNEY

What are my responsibilities as an Attorney?

You are required by law to act honestly and with reasonable care to protect the interests of the person you are acting for.

In particular, you must:

1. Recognize that the person you are acting for has the right to maximum participation in decision-making;
2. Presume that this person has the capacity to make a particular decision until there is conclusive evidence that this is not the case;
3. Respect the person's human worth and dignity and equal claim to basic rights;
4. Encourage the person's self-reliance;
5. Take into account the person's values;
6. Ensure that your decisions are appropriate to the person's characteristics and needs;
7. Recognize the person's right to confidentiality.

For health matters you must also make decisions that:

1. Are appropriate for promoting and maintaining the person's health and well-being;
2. Take account of the person's wishes;
3. Take account of information from the person's Doctor.

In addition, if there are treatment options, the least restrictive one should be chosen.

PUBLIC GUARDIAN

Who is the Public Guardian?

As stated earlier, the Public Guardian is an independent officer appointed by the Government to protect the interests of people with decision-making disabilities.

What are the powers of the Public Guardian?

The Public Guardian can:

1. Offer support and advice to Attorneys;
2. Supervise an Attorney if there is any concern about the manner in which the Attorney is performing his/ her role;
3. Make decisions about medical matters in cases where there is no Enduring Power of Attorney with power to make health-care decisions and no-one to act as statutory health Attorney;
4. Resolve disputes between joint Attorneys;
5. Investigate and deal with inappropriate behaviour by an Attorney.

How does the Public Guardian deal with inappropriate behaviour by an Attorney?

The Public Guardian has the authority to:

1. Conduct an audit;
2. Examine the Attorney under oath;
3. Obtain a warrant for access to the Attorney's premises.

The Public Guardian can suspend the power of any Attorney found to have behaved irresponsibly.

SUMMARY

This document has been prepared by us with a view of raising some of the issues you should consider when giving us instructions. We stress that it is not legal advice but information. You should feel free to discuss any of the issues raised with us.