



WILLS and ESTATES

Information about Enduring Powers of Attorney

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WHAT IS AN ENDURING POWER OF ATTORNEY?

An enduring power of attorney is a legal document that enables you to appoint another person to make decisions about your assets and finances. This could become necessary or useful if you become ill or incapacitated, or are travelling.

The person you appoint is called your financial attorney. The power is “enduring” because it continues to be effective even if you later lose legal capacity.

WHY SHOULD YOU APPOINT A FINANCIAL ATTORNEY?

Appointing a financial attorney ensures that decisions about your assets and your finances are made by a person of your choice, in the event of you being unable to make those decisions yourself. You could lose that ability if you become incapacitated due to dementia, other illness or an accident. If you become incapable, and you have not appointed an attorney, the Guardianship Tribunal (NSW) or Victorian Civil and Administrative Tribunal (VCAT) will need to appoint someone to make decisions on your behalf. The person appointed, called an administrator, may not be the person you would have wished to have appointed. Alternatively, it might be a trustee company.

YOUR FINANCIAL ATTORNEY IS GIVEN SUBSTANTIAL POWERS

The power to make decisions about

your finances and assets are substantial powers. For instance, your financial attorney can sell your home and withdraw money from your bank account. You therefore need to appoint someone you trust, in whom you have complete confidence and who you believe would always act in your best interests.

Your financial attorney cannot make decisions about lifestyle issues, such as where you live, nor decisions about medical treatment. These powers can be given by an appointment of an enduring guardian (NSW) and an enduring power of attorney (medical treatment) (VIC).

HOW YOU APPOINT A FINANCIAL ATTORNEY

To appoint a financial attorney you must be over 18 years of age and you must have capacity. That is, you must understand what you are doing by granting the financial power of attorney.

To have the necessary legal capacity you must understand:

- ◆ The types of decisions your financial attorney can make;
- ◆ That you have the right to specify conditions, limitations or instructions in the document granting the power;
- ◆ That the power can be expressed to commence immediately or at another time;
- ◆ That the power can be revoked at any time while you have capacity;
- ◆ That the power continues even if you become incapacitated; and
- ◆ That once incapable, you cannot revoke the power or effectively oversee its use.

To be a legally effective document, an enduring power of attorney must be drafted in accordance with the relevant legislation in each State, and must be witnessed by two adults, one of whom is authorised to witness statutory declarations. The witnesses must both certify that you are signing freely and voluntarily, and that you appear to have legal capacity.

In New South Wales, a solicitor must give a certificate certifying, amongst other things, that he or she explained the effect of the power before it was signed, and that you appeared to understand the effect of the document.

Once the enduring power of attorney has been executed by you, your financial attorney must then sign an acceptance of the appointment to validate it. This can be done at the time when you sign the documents, or can be done at a later time.

YOUR OPTIONS IN APPOINTING AN ATTORNEY

When completing the form appointing a financial attorney you need to decide:

- ◆ Whether you want the power to commence immediately, at some future date or on some future occasion;
- ◆ Whether you want to stipulate any conditions or limitations in the document;
- ◆ Whether you wish to appoint one, or more than one financial attorney; and
- ◆ If you appoint more than one, you need to decide whether they are to act jointly, so that they must make decisions unanimously, or whether they may act severally, meaning that any one of them can make a decision on your behalf.

Another option you have is to appoint an alternative financial attorney for each principal attorney you appoint. For example, you can decide to appoint A, but if A is unable to act for any reason, such as death, illness or being absent, then you appoint an alternative for each principal appointment.

USE OF THE POWER

We recommend that once the appointment of your financial attorney is signed, the original be kept securely at our office. If the power does not need to be exercised immediately, we suggest your financial attorney be aware of the location of the original so that he or she can, when necessary, obtain certified copies of the document from us. If it becomes necessary to use the power, your financial attorney may find that

several copies are needed for various institutions such as banks, share registries and Centrelink.

There is no public registry which records appointments of financial attorneys, and no requirement for attorneys to report to any authority about their decisions. It is important to safeguard the original document and be careful about distribution of copies.

CANCELLATION OF THE APPOINTMENT

You can cancel the appointment by signing a revocation deed and giving written notice of the revocation to your financial attorney. This can only be done if you have the necessary capacity to understand the effect of what you are doing. Your financial attorney needs to be notified of the cancellation of the appointment.

If it is not cancelled by revocation, the power remains in place until your death, unless your financial attorney becomes legally incapable, bankrupt or dies. After your death, the executor appointed in your will becomes responsible for your assets and finances.

QUESTIONS

If you or your financial attorney have any questions which arise about your enduring power of attorney, Fleming Muntz can provide specialist advice.

DISCLAIMER

This document is a guide only. It is not legal advice. You should consult us about appointing a financial attorney.