

Enduring Powers of Attorney

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The information provided in this guide is general in nature and should not be relied upon as legal advice. You should speak to a lawyer at OFRM about your particular circumstances.

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Types of Enduring Power of Attorney

There are two branches of Powers of Attorney. The old-style Power of Attorney is either general in nature or it allows very specific limited powers to an attorney. In either situation upon the incapacity of the person who made the Power of Attorney, then the Power of Attorney becomes ineffective.

The majority of Powers of Attorney that are made today are the Enduring types (or EPAs). This means that if a person becomes incapable of making decisions the Powers of Attorney continues to be effective and valid.

Those types are:

- Financial and Personal Enduring Power of Attorney (p. 3)
- Appointment of Medical Treatment Decision Maker Enduring Power of Attorney (p.4)

Choosing an Attorney

An **attorney** is someone appointed by you to make decisions at your express direction or when you are incapacitated. The types of decisions they can make and actions they can take are limited by the powers granted to them.

The person who makes the Power of Attorney is called **the Donor** or **the Principal**.

How many Attorneys can you choose?

It is possible to nominate one or more attorneys and they can act either jointly, separately or in a majority. Jointly means all must act together and agree on all decisions made.

You can also nominate one individual to be your initial attorney, but if that person is unable to act you can then nominate a substitute attorney or attorneys.

Importance of choosing the right Attorney

While your attorney (or attorneys) should only make decisions at your express direction while you have capacity, it is still possible that they might make inappropriate decisions without your knowledge.

One notable disaster involving a Financial Enduring Power of Attorney occurred more than ten years ago in Victoria. A 30-year old man had become a paraplegic as a result of a work related incident. He received \$300,000 compensation and placed that money in an account with the Commonwealth Bank. After completing rehabilitation, he returned to live with his mother. This event occurred prior to internet banking and as it was difficult for the gentleman to attend the bank himself, he made an Enduring Power Attorney in favour of his mother and authorised her to withdraw funds as he needed from time to time. Tragically, the mother had an addiction to poker machines and started to withdraw very large sums on a weekly basis, which were entirely gambled away. After 12 months, his mother had exhausted the compensation benefit of \$300,000 and it was only then that the disaster was discovered. The mother was charged with theft and the matter had a large amount of coverage in the media. While the mother was ultimately sent to jail, the bank had no obligation to repay the money to the son, as he had given a complete authority to his mother to make transactions on his behalf. For all the bank might have known, the money was given by the mother back to the son and he was making decisions in relation to the money.

You need to be aware that:

- The choice of an attorney is extremely important, and you should not allocate this task to anyone unless you are completely confident that they will act honestly and sensibly.
- The activities of an attorney are not audited or supervised.
- While there are legal options to recover money from attorneys, if they act inappropriately, there may not be any funds left to recover. As the example above demonstrates, the mother had no funds left after 12 months to repay her son.
- While you have capacity, you may revoke the Enduring Power of Attorney at any time.
- If you have lost capacity, then any other person may on your behalf apply to VCAT to have the Enduring Power of Attorney revoked. VCAT will need to be satisfied that it is in your best interest to have the Enduring Power of Attorney revoked. Mere suspicions that the attorney might do the wrong thing are rarely going to be adequate evidence for VCAT.
- The choice of two or more people to act jointly or in a majority can be highly effective in reducing the risk of dishonesty or an inappropriate decision.

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Financial and Personal Enduring Power of Attorney

This document allows the attorney to sign on behalf of the donor or principal any document which has a financial connection. This could involve:

- Transactions with bank accounts
- Payment of accounts
- Dealings with investments and shares
- Buying and selling property
- Payment for accommodation needs, including a hospital or nursing home
- Selling existing assets and the purchase of other assets

Direction & Capacity

Financial transactions can only be made in accordance with the expressed directions of the principal, unless the principal lacks capacity. Then these transactions can only be made if they are in the best interest of the principal.

The personal side of the EPA can allow an attorney to make decisions about:

- Where you live, whether permanently or temporarily
- Whether you attend church
- Whether you give gifts to family and friends
- Who you live with
- Whether or not you should be permitted to work including with who and the type of work
- Consent to any health care that is in your best interest (this is in contrast to a Medical Treatment Decision Maker which allows for the consent and refusal of health care)
- Restricting visitors to such an extent as may be necessary in your best interest and to prohibit visits by any person if your attorney reasonably believes that visits by that person would have an adverse effect on you

For some people, the choice of residence if they lose capacity is a very important matter. In these situations, the appointment of an Enduring Power of Attorney—Personal might be a very sensible option.

As an example of what can be allowed, it might be the habit of a parent to put \$100 in a Christmas card for each of their adult children. If the parent lost capacity to make decisions, the attorney is permitted to send a Christmas card on behalf of the donor which encloses a further \$100. While it is not a decision that is in the best financial interests of the principal it is allowable. When making a Financial and Personal Enduring Power of Attorney it is possible to add additional comments which

could limit those types of gifts, but it is very difficult to predict those types of transactions when the Enduring Power of Attorney may not come into use until many years in the future.

Appointment of Medical Treatment Decision Maker Enduring Power of Attorney

Every adult has the right to consent to medical treatment or refuse medical treatment. If you are unable to make these decisions due to being unconscious or lacking capacity, then your Doctor is able to obtain consent from your **next of kin** for that medical treatment. Relevant legislation refers to a “responsible person” and the first of the following persons qualifies in this role:

- An appointed medical treatment decision maker;
- A guardian appointed by VCAT;
- The first of the following with a close and continuing relationship with the person:
 - The spouse or domestic partner;
 - The primary carer of the person;
 - The oldest adult child of the person;
 - The oldest parent of the person;
 - The oldest adult sibling of the person.

For most people, if they have not made a specific choice of a person to make medical decisions for them, then their spouse or nearest relative becomes the person able to consent to medical treatment. This may or may not, be the best choice.

However, it is possible to appoint a Medical Treatment Decision Maker as a person who can make medical decisions for you. **Only** if a Medical Treatment Decision Maker is appointed **can your medical agent** make the decision to **refuse or withdraw** medical treatment.

Advance care directive

A person may only create an advance care directive if they have decision-making capacity. An advance care directive must be witnessed by two adults; one of these must be a medical practitioner.

There are two forms of statement a person may include in their advance care directive:

- An instructional directive
- A values directive

Instructional directive

An instructional directive allows a person to either consent or refuse a particular medical treatment.

If the person subsequently does not have the capacity to make a decision about a treatment, the instructional directive will apply, as though the person has consented to or refused the treatment.

Any statement not explicitly identified as an instructional directive, will be considered a values directive.

Values directive

A values directive allows a person to make more general statements about their preferences and values, and what matters to them.

If the person has not included a relevant instructional directive, then the health practitioner will need to obtain consent from the medical decision maker to provide treatment.

Sometimes the decision to be made by your medical decision maker is harrowing and extremely emotional. Consequently, when appointing a Medical Treatment Decision Maker it is important that you discuss what your advance care directives are **in advance**. This can be difficult when you are fit and well and have no medical problems so it is easier and useful to discuss hypothetical scenarios. Once you have appointed a Medical Treatment Decision Maker it would be reasonable to have ongoing discussions with your medical agent from time to time, particularly if any illnesses develop.

Organ Donation

Your next of kin will make the ultimate decision for you about organ donation. You can be registered for organ donation, but your family can override that decision. This might be a surprise to some, but it is recognition that your living family members have to live with the outcome.

So if you want to be an organ donor, please tell your family and let them know your reasons. You might find that after a conversation with you that they wish to become organ donors too.

For more information on organ donation visit the www.donatelife.gov.au site.

Prescribed forms and procedure for signing documents

Each of the Financial and Personal, and Appointment of Medical Decision Maker Enduring Powers of Attorney has prescribed forms which must be used. Significantly, there are **restrictions** about the witnessing of these documents. One important obligation is that at least one of the witnesses must be a person who is eligible to witness affidavits and both witnesses must certify that you have decision making capacity in relation to the document.

It is therefore essential to discuss these important documents with a lawyer and have the lawyer prepare them so you can be assured they are valid.

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Our Wills & Estates Lawyers

If you require further information or assistance about Enduring Powers of Attorney or your will contact Russell Robertson, Accredited Wills and Estates Specialist at O'Farrell Robertson McMahon or any of our Wills and Estates team.

Russell Robertson

Accredited Wills & Estates Specialist, Director



Your will and estate planning is something you really want to make sure you get right, you also want the process of doing that to be with someone you trust. Russell Robertson is passionate about both the legal technicalities of will-making but also about making sure you understand the process and the choices involved. Russell works with you to make a will which will give you and your family peace of mind. "It's human nature to be apprehensive thinking about death, it's my role to expertly guide you in the necessary conversation and decisions to make sure your will and powers of attorney are right for you and your family." As an Accredited Specialist in Wills and Estates, Russell is able to provide over 30 years of experience as a lawyer. That knowledge and experience will ensure that the process is not just easy but comfortable for you. Russell leads our Wills & Estate team and is also able to assist in probate and wills disputes.

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Madeleine Debono

Wills & Estates Lawyer



Estates, probate, estate administration. Mention of these legal processes often leads to images of musty law offices and slow old-fashioned manual processes full of legal mumbo jumbo. Working with OFRM Wills & Estate lawyer Madeline Debono is the exact opposite. "Sorting out the estate of a loved one should never be an overwhelming or stressful event. My role is to work with my clients to make sure they both understand the process and that the process occurs smoothly". Madeline's empathy and ability to navigate the legal and practical issues means she is the ideal modern wills & estate lawyer.

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Emily Chamberlain

Wills & Estates Lawyer



"What a Wills & Estate Lawyer does every day, is exactly why I worked so hard to become a lawyer." Some people think it unusual that a young lawyer would be so passionate about wills and estates, but Emily has found her calling in our Wills & Estates team. The people skills that she honed in working in hospitality through university and her genuine love of connecting with people mean that Emily is able to alleviate the stress for clients when dealing with the estate of loved ones or making their own will. Emily is able to assist you in preparing your will and powers of attorney and in estate administration.

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Sophie Hogan

Wills & Estates Lawyer



"Being able to provide options, alternatives and advice to clients whether it be in their estate planning or in the administration of estates is a key part of my work as a Wills and Estate lawyer" says OFRM lawyers Sophie Hogan. Sophie assists clients with Wills & Powers of attorney as well as the administration of estates. Sophie finds great satisfaction in using her legal knowledge and skills to alleviate the stress for families dealing with the affairs of a deceased loved one.

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Things to consider

- ☐ Do you have a valid and up-to-date Will?
- ☐ Do you have a Financial and Personal Enduring Power of Attorney?
- ☐ Is your attorney aware of their obligations?
- ☐ Are you confident your attorney will act responsibly?
- ☐ Do you want a **joint, majority** or **individual** attorney?
- ☐ Do you have an Appointment of Medical Treatment Decision Maker Enduring Power of Attorney?
- ☐ Have you discussed your medical treatment wishes with your family?
- ☐ Have you registered as an organ donor?
- ☐ Have you discussed with your family your wishes to donate your organs?

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