



Enduring Powers of Attorney (EPOA)

What is an Enduring Power of Attorney?

You may think, if you have a valid Will in place, then you have completed your 'estate plan', but have you thought about planning for your loss of capacity?

People are living longer these days, and incapacity is on the rise as a result. You need to think about how your affairs are dealt with if you lose capacity (due to accident or illness, for example). Who will be responsible for keeping your financial affairs in order? Who will be responsible for consenting to your medical care and treatment? And who will decide where you will live?

In each state of Australia, you can prepare an Enduring Power of Attorney (EPOA) which is a document that allows you to appoint people of your choice to make certain decisions on your behalf. In certain states, this is called something different, such as in the Northern Territory it is called an 'Advance Personal Plan'. The power is most commonly used in the situation where you lose capacity to be able to make or communicate

decisions for yourself, and you need other persons (called your 'Attorneys') to be authorized to make those decisions for you.

The two main types of decisions to be made on your behalf include Financial decisions and Personal/health decisions.

Financial decisions relate to the management of your finances, and include decisions such as:

- + paying your bills and taxes;
- + selling or renting your family home;
- + using your income to pay for your needs; and
- + making authorised investment decisions on your behalf.

Personal/health decisions relate to your care and welfare, including your health care. They include decisions such as:

- + where or with whom you live (e.g. do you need to move into a residential care facility, such as an aged care home, and if so, which facility);
- + decisions of a cultural or religious nature;

and

- + consenting to medical treatment on your behalf.

In **Queensland**, you can appoint people as your attorneys under an Enduring Power of Attorney to make financial and/or personal/health decisions on your behalf.

In **Victoria**, you can appoint someone to make financial and personal decisions under an Enduring Power of Attorney document, but not medical treatment decisions. A separate document is required to cover medical treatment decisions.

In **New South Wales**, an 'Enduring Power of Attorney' document only covers financial decisions. You will need a separate document known as an 'Enduring Guardian' document to appoint someone to make medical and lifestyle decisions for you if you have lost capacity. See our Fact Sheet on '[New South Wales Enduring Guardian documents](#)' for more information.

Why do I need an Enduring Power of Attorney?

It is strongly recommended that everyone over 18 years of age have a current EPOA. Having a well drafted and thought through EPOA provides you with the peace of mind by knowing that the people you have chosen will be making decisions for you when the time comes, if required.

You cannot make an EPOA once you have lost capacity. If you lose capacity without a valid EPOA in place, it may be possible for certain family members to make some health care decisions for you, but you have no say in who those persons are, so they may not be the persons you would have selected.

In terms of your financial affairs, if you lose

capacity and do not have an EPOA in place, there is no automatic right for your loved ones to 'step in' for you. They may need to apply to the relevant State Civil and Administrative Tribunal (e.g. QCAT, NCAT or VCAT) to be appointed as your Administrator or Guardian in order to handle your financial affairs (such as selling your home to fund your entry into a nursing home, for example). Alternatively, the relevant Public or State Trustee may take over management of your financial affairs. Administrators can also be subject to annual reporting requirements to the relevant Tribunal.

A much simpler solution is for you to have a valid and appropriate EPOA in place now that clearly sets out who you wish to handle your affairs for you if you are no longer capable of doing so and sets the parameters of their power, in accordance with your overall estate plan. This will avoid a lot of hassle and 'red-tape' for your loved ones if you do lose capacity in the future.

Should I have any additional terms in the Enduring Power of Attorney?

An EPOA is a very powerful legal document that gives your attorneys a great deal of power over your affairs. In many ways it is just as important as your Will, if not more so. Whilst it is true that you can download and prepare an EPOA form from the internet, time and time again these 'tick and flick' forms are proving in many cases to be inadequate when they eventually need to be relied on.

In particular, special financial terms may need to be included to ensure that your attorneys are able (or not able) to enter into certain transactions on your behalf. For example, the standard EPOA form does not allow your attorney to use your assets or transfer funds to themselves. You may want to allow this if your attorney is for example,

your spouse.

Do you want your attorneys to be able to access your super early, or renew or create binding death benefit nominations? Giving an attorney the full powers that the standard EPOA form allows may seriously affect your estate plan.

We strongly recommend that these additional clauses be drafted in your EPOA and in line with your Will, so that an attorney (whether inadvertently or otherwise) does not deal with your assets in a way that spoils the gifts in your Will (e.g. selling your house which was gifted to your children in your Will, etc) and also deals with your assets (while you are living without capacity) in a way that you would want them to.

Furthermore, if you have assets in structures such as Family Trusts, private companies or self-managed superannuation funds, a well drafted and appropriate EPOA is vital for ensuring that the control of these entities and their underlying assets passes to the people that you trust on your loss of capacity.

Who should I appoint as my attorney?

Your choice of attorney is also significant. The power you give away is an important one, which must only be given to those you trust and who will be best at acting on your behalf in relation to the decisions that need to be made. You want to be sure that they will have your best interests at heart.

You can appoint different attorneys for personal/health decisions and for financial decisions, and you can appoint more than one attorney. We recommend seeking advice about your options

in this regard. In each State there are some restrictions on who can act as an attorney (for example you can't appoint a bankrupt for your financial affairs) so it's important that you don't invalidate your EPOA before it needs to be used.

Estate First Lawyers can assist you with drawing up an effective and appropriate EPOA that is suitable for your circumstances.

"Pull the plug!" - Medical Directives

Many people feel very strongly about what medical treatment they do or do not want to receive if they are in hospital, especially in the 'end stage' of life. You have the option of preparing a medical directive that allows you to pre-emptively outline what medical treatment or health care you do or do not wish to receive in certain circumstances (for instance in the terminal phase of an incurable illness or if you are so seriously ill or injured that you are unable to live without the use of life-sustaining measures). By doing so, you are effectively making these types of decisions for yourself now, while you are still able to do so.

See our Fact Sheet on '[Health & Medical Directives](#)' for more information.

We can help

Our team at Estate First is experienced in preparing enduring powers of attorney and advance health directives at fixed-fee rates. It is important that these documents are prepared with precision and care to cater for your specific circumstances and to ensure that they will be effective when they are needed most. Please contact us on 1300 132 567 or email us at info@estatefirst.com.au to discuss how we can help you with this.

This information is general in nature and should not be acted upon without first obtaining legal advice on your particular situation.

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