ENDURING POWER OF ATTORNEY (FINANCIAL)

WELDEN & COLUCCIO lawyers

The Estate Specialists

What is an Enduring Power of Attorney?

An Enduring Power of Attorney is a legal document which enables you to appoint a person to make decisions on your behalf about your finances and assets.

The exercise of that power may be "general" and take effect immediately, or "enduring" when the appointment continues to be effective and enforceable if you lose mental capacity or "specific" listing a specific period of time the document is to operate.

Why you should appoint an Attorney?

All adults should have an Enduring Power of Attorney to ensure that your affairs are administered by a person, or persons, of your choice (usually immediate family members but need not be).

You may nominate more than one attorney to make decisions for you and you may appoint them either jointly, jointly and severally or as alternatives.

You could lose mental capacity due to an accident, dementia or other illness. Should you lose mental capacity and have not appointed an attorney the Guardianship Board has power to make an appointment but it may not choose who you would have wished – for example the Public Trustee – and the process takes time.

What authority does my spouse and/or children have?

Very little unless specific powers are given to them pursuant to your estate planning documents. It is not the law that your spouse and/or children automatically have the right to make decisions on your behalf if you lose mental capacity. They may bring an application for such authority to the Guardianship Board and other relevant Government bodies. All of this is potentially financially and emotionally expensive for yourself and your loved ones. This can be avoided by having professionally prepared estate planning documents.

Considerations to be made

The power you grant to your attorney is significant. That person has the power to deal with real estate and withdraw and spend money from your bank accounts (but only if it is in your best interests). Other important matters you should also be aware of:

- you have the right to specify limitations or conditions,
- the power can be expressed to commence immediately or at some future time,
- the power can be revoked at any time whilst you retain mental capacity.

How do you appoint an Attorney?

You must be over 18 years of age and sign a document in the presence of an authorised witness such as a Justice of the Peace or solicitor. All attorneys that you appoint must also sign the document; but unlike in other States the attorney's signature need not be witnessed.

It is therefore necessary that you seek the consent of those you intend to appoint and ensure that they understand their rights and obligations.

Relevant principles to be observed by your Attorney

Your attorney must act with reasonable diligence to protect your interests, or he/she may be liable to compensate for any financial loss occasioned.

Your attorney cannot make decisions about your medical treatment or daily care. Those decisions are made by a person appointed under an Advance Care Directive.

Cancellation of the appointment

To cancel the appointment of an attorney you must sign a document revoking the power and a copy of this revocation should be given to all attorneys appointed. Separation from a spouse or partner does **not** revoke their appointment as an attorney.

It is suggested that in the event of separation or divorce you should revoke the power of attorney and appoint another.

Destruction of any original or superseded appointment is also recommended.

On the date of your death the power of attorney ceases and the executor named in your Will becomes responsible for your assets and finances.

INFORMATION FOR PERSONS WHO ARE APPOINTED AS AN ATTORNEY

When does the power commence?

The power granted to you as an attorney may commence immediately upon execution and continue notwithstanding the subsequent legal incapacity of the donor. Alternatively the power may not commence until incapacity occurs. The document you sign will detail this.

If it is expressed to commence only upon incapacity occurring, you may be required to obtain specialist medical opinion as to your donor's mental capacity in order for you to be able to exercise the power granted to you.

The period of incapacity may not be permanent. In this case the power granted to you might be enforceable only during the period of incapacity.

More than one attorney may be appointed, however, the document will determine whether your appointment is made jointly with another, jointly and severally with another or as an alternative.

Your responsibilities

You should understand that the power granted to you is significant. You must always act in the best interests of your donor. If you fail to do so you may be liable to compensate for any financial loss suffered.

You must retain accurate records of all dealings and transactions made using the power granted to you. Anyone with a proper interest may apply to the Supreme Court requiring you to file a copy of all records and accounts, these records may also be audited.

If your donor becomes mentally incapacitated and the power granted to you has not been revoked you are unable to renounce your appointment without leave of the Supreme Court.

You cannot make decisions about the donor's medical treatment and daily care. Those decisions are made by a person appointed under an Advance Care Directive.

Cancellation of the Appointment

Your appointment as an attorney can be cancelled by your donor serving upon you a notice of revocation. The revocation does not become effective until it has been served upon you.

If you die or become mentally incapacitated then your appointment as an attorney also ceases.

If your donor dies then your appointment as an enduring attorney comes to an end and any executor appointed under the donor's Will becomes responsible for their assets and finances.

Our Recommendation

If you are called upon to act as an attorney you should seek professional legal, financial and accounting advice whenever possible especially if you believe the sale or disposition/transfer of significant assets is required.

You should generally avoid transactions that involve a conflict of interest. If you believe a decision is required that may appear to also affect your own personal financial position, you should not act without authority or direction of the Supreme Court.

WELDEN & COLUCCIO lawyers

Phone: 08 7225 8703
Fax: 08 7225 8704
greg@welcolawyers.com.au
jason@welcolawyers.com.au
194A Prospect Road, Prospect SA 5082
PO Box 1016 Prospect East SA 5082

THE LAW SOCIETY OF SOUTH AUSTRALIA GOLD ALLIANCE FIRM

COVER OF EXCELLENCE®