



Power of Attorney Basics

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OUTLINE

- What is an Enduring Power of Attorney?
- Who can be an attorney?
- Who can make an Enduring Power of Attorney?
- Why make an Enduring Power of Attorney and what happens if you do not make an Enduring Power of Attorney?
- Important things to consider when advising on Enduring Powers of Attorney

What is an Enduring Power of Attorney?

- Names an attorney
- Gives powers
 - financial and property
 - healthcare and medical research
 - personal care
- Directions
- Conditions/limitations

Who can be an attorney?

- A person who is reliable, honest and responsible.
- In relation to financial matters, an attorney should also be financially literate and willing to seek legal and financial advice if required.
- A client can appoint one or more attorneys.
- A client should choose people who can cooperate with each other and work together in his or her best interests.

Independent person as an attorney

- The client does not have a family member or friend they trust.
- There is family conflict.
- The client has complex family arrangements (e.g. second marriage, stepchildren, family disputes).
- The client has complex assets that need to be managed efficiently (eg trusts, companies, commercial property, SMSF).
- The client's trusted family members and friends reside overseas.

How can attorneys be appointed?

- Severally;
- Jointly (the attorneys must agree on all the decisions); and
- Jointly and severally.

Things attorneys cannot do

- An attorney cannot make a Will for the principal, act in the role as a parent of a child of the principal or consent to the marriage of a principal.
- Unless instructed by the principal, an attorney cannot:
 - Enter into conflict transactions;
 - give reasonable gifts or financial benefits to an attorney or other dependents for their reasonable living expenses.

Things an attorney cannot do

Council of the Law Society of the ACT v Legal Practitioner [2022] ACAT 34

- Attorney sought advice from lawyer about whether it would be permissible for her to borrow the \$400,000 from her mother.
- Lawyer advised loan was permissible.
- Not permitted by sections 34, 42 and 48 of the *Powers of Attorney Act 2006*.
- Finding of unsatisfactory professional conduct.

Who can make an Enduring Power of Attorney?

- Meet with the client in person particularly where:
 - Instructions are communicated by a third party, whether or not related to the client;
 - there is no written instruction or confirmation of instructions signed by the client;
 - the client is of advanced age, or is hospitalised or resides in a nursing home; and
 - the client is suffering any physical disability, or a condition raising the question of mental capacity.

Doubt as to client's capacity

- Ask open ended questions.
- Ask another colleague who is a solicitor to also meet with the client to form their own assessment.
- Obtain a medical report from a GP, geriatrician, appropriate medical specialist, clinical psychologist or registered nurse.

Re Clara (Guardianship) [2019] ACAT 46

- Clara made an enduring power of attorney in the ACT appointing John and his daughter, Jill, as her attorneys.
- She also signed another document called Enduring Power of Attorney NSW in which she appointed John and Jill to be her attorneys.
- Tribunal ordered that Clara's Enduring Power of Attorney was revoked.
- John and Susan's applications be dismissed.
- Clara did not have capacity to make the Enduring Power of Attorney.
- Public Trustee and Guardian is appointed guardian for Clara and the Public Trustee and Guardian is appointed as manager to manage all of the property including finances of Clara.

Key takeaways from *Re Clara* (Guardianship) [2019] ACAT 46

- Presumption of capacity is rebutted an assessment of capacity should be determined by reference to the evidence as a whole.
- In the absence of evidence as to the basis for a solicitor's certification little to no weight can be placed on the certification.
- Medical report writers should give reasons for their opinions and outline the evidence relied upon.

Why make an Enduring Power of Attorney?

- Control who is appointed as your attorney and guardian
- Insert directions and limitations you are comfortable with including in relation to:
 - power to deal with superannuation;
 - reporting and record keeping
 - preferred advisors; and
 - healthcare wishes.
- Avoid delay, cost and unintended outcomes

What happens if a client does not make an Enduring Power of Attorney?

Jane (Guardianship) [2019] ACAT 18

- Jane lived alone, her husband predeceased her and she had no children.
- Jane's GP became concerned about her capacity and filed an application for the Public Trustee and Guardian to be appointed as Jane's guardian and attorney.
- Evidence from many sources that Jane's ability to make decisions for herself regarding her accommodation, her health care and her finances was impaired.
- The Tribunal was satisfied that if a guardian was not appointed, Jane's needs will not be met and her interests will be significantly adversely affected.
- Public trustee and guardian was appointed the guardian and manager for Jane.

What happens if a client does not make an Enduring Power of Attorney?

- A client has not appointed persons to control his or her assets in the event that her or she loses capacity.
- Persons may be appointed who the client would never have appointed.
- Persons may apply to the Guardianship Tribunal to appoint an attorney or in a worst case scenario appoint a financial manager over the client's estate.
- Family members may strongly disagree with the orders made by the Guardianship Tribunal.
- Unnecessary expense.

Tips when advising on an Enduring Power of Attorney

- Review the legislation in the relevant state or territory and ensure you are familiar with the requirements.
- Ensure you obtain instructions from the client i.e. meet with them alone.
- If you have doubt about your client's capacity ask open ended questions, obtain the necessary medical reports.

QUESTIONS

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