

# A Guide to Enduring Powers of Attorney

***Have you considered who will attend to your property, assets and welfare if you become mentally incapacitated and you are unable to take care of your affairs?***

Most responsible people realise the need for a will to order their affairs. It is equally important to make arrangements for your affairs to be managed, if by accident, illness or the ageing process, you become incapable of doing so.

In the absence of proper arrangements those left to deal with the administration of the personal affairs of an incapacitated relative face a distressing task often more difficult than dealing with the affairs of someone who dies without a will.

An Enduring Power of Attorney ("EPA") can significantly assist in the tragic circumstances of incapacity. It will not lessen the pain and grief of the event but it does allow for the orderly administration of the incapacitated person's affairs.

If YOU do not make the choice while you can, then someone else will have to, when you cannot.

## **What Is An Enduring Power of Attorney?**

An EPA is a power of management and/or guardianship given to someone you choose ("Attorney(s)") while you are mentally competent but which assists the management of your affairs if you lose mental capacity. The difference between an EPA and an ordinary power of attorney is that an ordinary power of attorney does not give a person or organisation the right to act on your behalf if you lose mental capacity.

## **Who Needs To Make Enduring Powers of Attorney?**

Everyone should have EPAs. In particular, people diagnosed with the early onset of dementia, Alzheimer's disease or other conditions which will cause mental competence to deteriorate, those going into hospital for major surgery, travelling overseas or in any situation of risk should seriously consider completing EPAs.

## **Who Is Legally Permitted To Make An Enduring Power of Attorney?**

- If you are a person aged 20 years or more, and understand the nature and effect of the powers granted, you can make an EPA.
- You must understand the "broad essentials" of what is involved (that you are providing the mechanism for another person to manage your affairs, even if you are unable to identify precisely all of your property or assets), and you must be able to give instructions personally to the lawyer preparing the documents.

- While family members can assist, secondhand instructions, however well intended, are not acceptable.
- If there is any doubt as to the donor's ability to grant a power of attorney a medical certificate should be obtained which confirms capacity.

## **What Should My Enduring Power of Attorney Cover?**

- There are two types of EPA. "Property" and "Personal Care and Welfare". You can make either or both.
- You can have a Property EPA covering all of your property or affairs or limit it to just some of your property (for example - bank accounts and house). Most people keep coverage under a Property EPA broad, to avoid the need for update as assets change.
- Your Welfare EPA can cover all your personal welfare or be limited to certain aspects (for example - accommodation and health care).

## **Who Should I Appoint?**

- You need to have confidence in the person/s you appoint (your Attorney/s) as they may be required to exercise very wide powers over your affairs - competently, sensitively and honestly.
- Your Attorney may well need practical support from your family and other friends to carry out their tasks.
- The appointed Attorney/s must be adult (20 years or more) with mental capacity and not bankrupt.
- A trust company such as the Public Trustee can be appointed Property Attorney but not a Welfare Attorney.
- Recent changes in the Protection of Personal & Property Rights Act ("PPPR Act") require EPA to be witnessed by a lawyer, legal executive or an officer of a trustee corporation. The signature of the donor must be witnessed by a person who is independent of the attorney. Independent witnessing for the donor may require separate law firms to be involved. This may significantly increase the cost of completing the EPA. This is particularly likely if you appoint your spouse or partner your attorney. There are alternatives to get around this situation which we can discuss with you.

### How Many People Can I Appoint Under My Enduring Power of Attorney?

- You may appoint different people to be your Property Attorney/s and/or Welfare Attorney or combine these two roles in the same person.
- There can be more than one Property Attorney either acting jointly or severally.
- There can only be one Welfare Attorney acting at any one time.

### Can My Attorney(s) Appoint Successors?

- Attorneys cannot appoint their own successors.
- You can if you so wish name successor Attorneys who are authorised to act if your first choice is unable or unwilling to do so.

### Are There Any Limits On These Powers?

- You control the administration of your affairs whilst you are mentally capable. Your attorney must only act under your directions.
- A relevant health practitioner will decide, if the question arises, whether you are mentally capable or not. Under an EPA for personal care and welfare an attorney cannot act on significant matters without a certificate from a relevant health practitioner that the donor is mentally incapable.
- You can revoke or change your EPA at any time provided you understand what you are doing.
- You must specify if your attorney is able to make gifts to themselves, relatives or charities from your assets and if the attorney can recover their expenses from your assets.
- You can specify if your attorney is required to consult with anyone else before acting and what matters must be consulted on.
- Concerned relatives or friends can apply, under the PPPR Act to have any aspect of the EPA and the actions of the Attorney(s) reviewed by the Family Court.
- As EPAs are not registered with the Family Court in the first instance, the Court's ability to intervene where there are problems, depends on the vigilance of family and friends. Where Attorneys are in doubt about their powers (for example to make a new will) they should always apply to the Family Court for directions.

### What Are The Duties Of An Attorney?

- To act within the terms of the EPA;
- To act in the donor's best interests;

- To consult with the donor, any other person specified in the EPA and any other Attorney(s) appointed;
- To comply with the minimum standards under the PPPR Act;
- If the Family Court reviews the EPA, to adhere to any order or directions of the Court;
- Generally not to act to his or her own benefit at the expense of the donor;
- To apply to the Family Court for directions where areas of doubt may arise.

### When Does An EPA Cease To Have Effect?

- On the donor's death;
- If revoked by a competent donor;
- When an attorney gives notice to the donor while the donor is still mentally competent or after loss of competence to the Family Court advising that the attorney is no longer willing to act;
- Where more than one Property Attorney is appointed to act jointly and one of them dies, ceases to act or becomes incapable of acting;
- When the attorney dies, becomes bankrupt or mentally incapable;
- When the Family Court intervenes and exercises its powers under the PPPR Act to revoke an attorney's appointment or to appoint someone else as Court appointed welfare guardian or property manager.

### What Costs Are Involved In Making An Enduring Power of Attorney?

This will depend on your particular property and/or welfare needs and whether you wish to appoint one or more attorneys and/or successors.

### What About People Already Incapable?

Where a person is unable to sign EPAs due to existing mental incapacity a relative or professional adviser can apply to the Family Court for a property manager and/or a welfare guardian to be appointed.

Welfare guardians and property managers carry out similar tasks to an attorney but under closer Court supervision. We are experienced in this area and are able to help if a member of your family is in this situation.

Of course making EPA while still competent removes the stress and hassle of family or friends having to make a relatively expensive and time consuming application to the Family Court when mental capacity is lost.