

Acting as an Attorney

If you have agreed to act as an attorney for someone under an enduring power of attorney, you have certain rights and responsibilities. It is important that you understand your new role and the importance of it.

The law around enduring powers of attorney (“EPA”) changed in September 2008, bringing with it new restrictions on what donors, attorneys and their lawyers can do. The information set out below applies to EPAs made after that time. Some of the details will also apply to any EPAs already in effect that time.

What are Enduring Powers of Attorney?

An enduring power of attorney is a formal document where one person (the “donor”) gives authority for another person (the “attorney”) to act in their name. It can only be made when the donor is mentally capable and understands what they are doing. It allows the attorney to act on behalf of the donor and to make decisions on their behalf if needed.

There are two types of enduring power of attorney:

- An EPA in relation to personal care and welfare gives the attorney the power to make legal decisions about a donor’s care and welfare (e.g. where they should live and decisions regarding certain medical treatment).
- An EPA in relation to property gives the attorney the power to act in respect of property, which can include land, bank accounts, jewellery, shares, insurance policies etc.

What do I need to know?

First of all, make sure you’re familiar with the EPA document(s). Your donor may have included conditions or restrictions in the document, including requiring you to consult with and provide information to other people. A personal care and welfare EPA only comes into effect if the donor has become “mentally incapable”, but a property EPA may either come into effect once it is signed or if the donor has

become incapable. Clause 4 of the property EPA will state when it comes into effect. If two or more people have been appointed to act as property attorneys, check whether the document requires you to act “jointly” or “severally”. If you are acting jointly, you will both have to agree at all times. Severally means that either of you can act independently.

In addition to any conditions set out in the document, the Protection of Personal and Property Rights Act 1988 (“the PPPR Act”) governs what you are able to do when acting as an attorney. Read through the notes in the EPA document as these outline the requirements of the PPPR Act.

At all times, an attorney’s paramount consideration must be to promote and protect the welfare and best interests of the donor, while seeking at all times to encourage them to exercise their own capacity and act on their own behalf to the greatest extent possible.

If the donor has appointed separate attorneys in relation to property and personal care, the attorneys must consult each other regularly to ensure that the donor’s interests are not prejudiced through any breakdown in communication between them. In the event of conflict between the attorneys, generally the personal care attorney’s decision will prevail.

When can I begin to act as attorney?

If you are appointed as personal care and welfare attorney, the donor must be “mentally incapable” before you are able to act as attorney. This means that the donor is deemed to lack capacity to make a decision about a matter relating to their personal care and welfare (or to communicate that decision), understand the nature of that decision or foresee the consequences of it.

Some personal care matters are so important that they require a doctor to assess capacity before an attorney can act. An attorney must not act in respect of a “significant matter” unless a medical professional has certified the donor is mentally incapable, or has previously provided that certificate. A significant

matter means a matter that has, or is likely to have, a significant effect on the health, wellbeing, or enjoyment of life of the donor (for example, a permanent change in the Donor's residence, entering residential care, or undergoing a major medical procedure).

If you are appointed as property attorney, check the EPA document to see when you may begin to act. If the EPA doesn't come into effect until after the donor has become mentally incapable, they are deemed mentally incapable in relation to property if they are not wholly competent to manage their own affairs in relation to their property. You will need a certificate from a doctor to confirm this before you are able to act.

What can't I do?

A personal care and welfare attorney cannot:

- Refuse consent to the administration of any standard medical treatment or procedure intended to save the donor's life or to prevent serious damage to their health; or
- Make any decision about the donor entering into a marriage or civil union, or the dissolution of one;
- Make any decision relating to the adoption of any child of the donor; or
- Consent to certain medical treatment (some brain surgery, medical experiments or electroconvulsive treatment).

Ordinarily a property attorney can only use a donor's property for the donor's benefit. If the donor has included a specific exemption in the EPA document, their property can be used for the benefit of another person but that person must be named and any conditions put in observed.

In addition, a property attorney can receive payments for out-of-pocket expenses but not for lost wages or remuneration reasonably incurred if the attorney produces receipts or other evidence, unless the EPA

document specifically states otherwise. An Attorney who has accepted appointment in a professional capacity (for example, a lawyer) or has done work in a professional capacity to give effect to decisions taken under the EPA can be paid for that work, unless the EPA states otherwise.

When do I stop acting?

Your role as an attorney ceases at the point the donor has died. In addition, if you become bankrupt, become subject to a Personal or Property Order under the PPPR Act yourself, or a patient within the meaning of the Mental Health (Compulsory Assessment and Treatment) Act 1992 detained in a hospital, your authority ceases.

At any time that the donor is still mentally capable they can revoke their EPA and remove you as attorney. They will need to do so in writing to you. After you receive a notice of revocation, you are no longer allowed to act as attorney.

Who checks on what I'm doing?

The donor may have included requirements that you consult and provide information to certain people.

In addition, the Family Court can monitor the performance of attorneys and can vary the EPA terms, but it will do so only if an application is made to the court. It can be asked to review decisions attorneys make. Attorneys themselves can ask the court for directions if they are having difficulty carrying out any of the donor's instructions or deciding what to do (for example, if they receive conflicting advice). The court can give directions about matters relating to the exercise of the EPA, can require an attorney to produce accounts, records and information, and revoke an attorney's appointment if it feels the attorney is not acting in the donor's best interests.

If you would like to know more, please contact our Personal Planning and Business Solutions Team.