

Powers of attorney

Powers of attorney are an important means of ensuring that decisions can be made on your behalf in circumstances when it is impractical or inconvenient for you to make those decisions yourself. A power of attorney is a legal document that allows you (the principal) to appoint a person or persons (the attorney) to make decisions regarding your financial, personal and health affairs. Subject to any limitations placed on your attorney's powers by you or by legislation, your attorney steps into your shoes and makes decisions for you as if you were making them yourself.

Types of powers of attorney

The titles given to each type of power of attorney and the requirements for preparing a valid power of attorney vary between each State and Territory. If you hold assets in more than one jurisdiction, then it may be necessary for you to execute a power of attorney in multiple jurisdictions.

There are two categories of powers of attorney; general powers of attorney and enduring powers of attorney.

- General power of attorney

A general power of attorney is commonly used for particular transactions. For example you may appoint your stockbroker as your attorney to buy and sell shares on your behalf, or a real estate agent to sell your holiday house.

- Enduring power of attorney

An enduring power of attorney is often prepared at the same time as your Will and is an effective estate planning tool. The difference between a general power of attorney and an enduring power of attorney is that a general power is automatically revoked if you lose the capacity to make decisions whereas an enduring power continues regardless of capacity. In most States and Territories there are three types of enduring power of attorney:

- Enduring power of attorney for financial matters

This is the document that most people are well advised to prepare. It allows you to appoint a trusted person to make financial decisions (e.g. to operate bank accounts) on your behalf if, for reasons of geography or health or otherwise, you are unable to or decide not to make your own financial decisions.

- Enduring power of attorney for medical matters

This document allows you to appoint someone to make decisions regarding your medical care. If you have not appointed an attorney for medical matters, then normally your close relatives will make those decisions on your behalf. This document is particularly important if your preferred decision maker is someone other than a close relative.

- Enduring power of attorney for guardianship

This document allows your guardian to make decisions regarding your personal matters such as accommodation and support services. Again it is more likely to be needed when your preferred decision maker is someone other than a close relative.

The need for a power of attorney

A power of attorney can save considerable time, cost and inconvenience for you, your family and your business. It removes the time and cost involved in someone applying to a court or tribunal for a decision to be made on your behalf if you have not appointed an attorney and the need for one arises.

In particular, an enduring power of attorney is an invaluable document because it allows you to plan for the future. For example if you are in a car accident and cannot make decisions because you are unconscious, then during your incapacity your spouse may need to access your bank accounts to pay for day-to-day living expenses and your medical care. If you have not made a financial enduring power of attorney, then the bank may not allow your spouse to access your bank accounts without court or tribunal approval. This can take time and is a costly process.

An enduring power of attorney should be made while you are in good health and capable of giving directions to your attorney about how you wish your affairs to be conducted.

Choosing your attorney

The only legal requirement is the person is over a specified age (normally 18 depending on the State or Territory) and is mentally competent. Often an attorney will be a relative, close friend or trusted professional such as your lawyer, accountant or financial advisor. The choice is yours, but there are a few points you should keep in mind when selecting an attorney:

- Your attorney should be a trusted person. Choose someone who you know will act in your best interests and who has knowledge of the way you conduct your personal and business affairs.
- Make sure your attorney understands your wishes. You should discuss your wishes with them or write them a letter.
- Make sure your attorney does not have a conflict of interest that will make it impossible for them to act in your best interests.
- You can choose different attorneys for different matters. For example, the person you choose to be your financial attorney can be different from the person who you appoint as your medical attorney. Choose the person who is most suitable for the job.

In some States and Territories you can appoint more than one attorney. Some people prefer to do this to avoid giving one person the legal capacity to undertake all acts on their behalf, particularly if they are giving their attorney very wide powers. Also if you are appointing someone as your financial attorney who has little financial experience, then you may want to appoint a professional such as an accountant or financial advisor to act as a joint decision maker.

Can I limit my attorney's powers?

Yes. You can specify particular limitations on the powers granted to your attorney and you can also give directions to your attorney as to how the powers should be exercised. Each State and Territory also imposes statutory restrictions on the exercise of powers granted to an attorney. For example, your attorney must always act in your best interests.

What if I change my mind?

You can revoke your power of attorney at any time while you have capacity. A power of attorney can be a very useful document but in the wrong hands it can be a very dangerous document. So if you are unhappy with your choice of attorney, you have doubts about your attorney's ability to act in your best interests or circumstances change so your choice of attorney is no longer suitable, then you should cancel the power of attorney immediately and appoint a new attorney.

McMahon Clarke Legal specialises in estate planning and wealth management for private clients.
We work with you to develop an estate plan that takes into account your personal circumstances.

For more information contact a member of our private client team on 07 3831 8999 or info@mcmahonclarke.com