

What is a Power of Attorney?

A Power of Attorney is a document that gives other people authority to make decisions on your behalf. The document only operates while you are alive and ceases upon your death.

The person that makes this document is called the “Principal”. The person who has been appointed to make decisions on your behalf is called an “Attorney”. There are two (2) types of Power of Attorney documents: A General Power of Attorney and an Enduring Power of Attorney.

General Powers of Attorney:

A General Power of Attorney is a document best used to appoint someone to make financial decisions on your behalf for a specific timeframe or event. For example, if you are going overseas at a time when your property is being sold or purchased, you could execute a General Power of Attorney, authorising someone to sign documents in relation to such a transaction.

A General Power of Attorney can only be used while you are able to make your own decisions and cannot be used when you have lost capacity.

A person has lost capacity to make a decision if they can no longer:

- ✓ understand the nature and effect of a decision;
- ✓ freely and voluntarily make a decision; and/or
- ✓ communicate the decision in some way.

Your General Practitioner or Medical Specialist will be able to assist you and your Attorneys to determine whether you have lost capacity.

Enduring Power of Attorney

An Enduring Power of Attorney is a document used to appoint someone to make decisions relating to:

- ✓ General personal/health matters; and/or
- ✓ Financial matters.

This kind of document can operate while you are capable of making decisions on your own behalf and also when you have lost capacity.

When can my Attorney start making decisions on my behalf?

Your Attorney/s can only make decisions on your behalf for general personal/health matters when you yourself no longer have the capacity to make decisions in relation to these kinds of matters.

Some examples of general personal and health matters include:

1. Consenting to particular types of health care; and
2. Decisions about where and with whom you live with.

In relation to financial matters, you can nominate when your Attorney's power will commence:

1. Immediately;
2. On a certain date; or
3. When you no longer have the capacity to make decisions in relation to these kinds of matters.

Some examples of financial matters include:

1. Decisions about investing your income and savings; and
2. Withdrawing money from your bank account.

The nomination you make for your Attorney's financial powers will depend on your individual circumstances. You can, if you like, stipulate different commencement dates for when each Attorney can act in relation to financial matters.

Who should I appoint as my Attorney?

An Enduring Power of Attorney is a very powerful document. When you appoint someone to act as your Attorney, you are potentially giving that person total control over your assets and the ability to make personal decisions about your healthcare and living arrangements when you no longer have the capacity to make these decisions yourself. However, an Attorney must always act in your best interests.

You should therefore consider carefully who you would appoint as your Attorney. Your Attorney should be someone who will be responsible and that you trust with your own affairs. **Your Attorney must:**

1. Be at least eighteen (18) years old;
2. Not be your paid carer or health provider; and
3. Not be a service provider for a residential facility where you are residing

Can I appoint more than one Attorney?

You can appoint more than one (1) Attorney to act jointly or severally or as a majority. You can also nominate several Attorneys to act successively (that is, an Attorney's power will commence when the power given to another Attorney comes to an end).

When you are making an Enduring Power of Attorney, you should consider appointing more than one (1) Attorney. This is because if your first named Attorney is unavailable, becomes incapable or dies, further Attorney/s can commence acting on your behalf, without the need for a new Enduring Power of Attorney to be completed.

When will my Enduring Power of Attorney come to an end?

An Enduring Power of Attorney will be revoked and no longer effective if:

1. You die;
2. You get married (unless your spouse is already named as your Attorney). If your spouse is your Attorney, your marriage will only revoke powers given to other named Attorneys;
3. You get divorced. If you have appointed more than one (1) Attorney, a divorce will only revoke the power given to your former spouse;
4. All of your Attorneys lose capacity or die;
5. You make a new Enduring Power of Attorney and/or Advance Health Directive that is inconsistent with your current document;
6. Your Attorney (or if more than one, all of your Attorneys) withdraws from their appointed role. Your Attorney may decide that they no longer wish to act on your behalf. **In these circumstances:**
 - a. You (the principal) must have capacity to make your own decisions; and
 - b. Your Attorney must give written notice to you of their intention to withdraw.

If you no longer have capacity to make your own decisions, your Attorney cannot withdraw from their role without permission from the Queensland Civil and Administrative Tribunal (QCAT) or the Supreme Court.

Your Attorney can no longer act on your behalf if they die, lose capacity, becomes bankrupt or if they become a paid health carer.

If an Attorney fails to act in your best interests, a Court or Tribunal may also decide to revoke or change an Attorney's power.

Are there any restrictions on my Attorney's power?

There are some personal decisions which an Attorney cannot make on your behalf, including:

1. Making or revoking a Will, Power of Attorney or an Advance Health Directive;
2. Voting at an election on your behalf;
3. Consenting to your marriage;
4. Special health matters, including sterilisation, termination of a pregnancy, experimental health care and donation of organs and tissue while you are still alive.

For more specific medical related decisions, you should consider completing a separate document known as an "Advance Health Directive". This document operates concurrently with your Enduring Power of Attorney and sets out your wishes in relation to certain medical treatments that you do and do not want to receive.

You can also limit your Attorney's power by expressly stating in the document that you do not want your Attorney/s to act in relation to certain matters or decisions. For example, you can limit your Attorney's power to make or renew a Binding or Non-Binding Death Benefit Nomination for your Superannuation funds.

Are there any powers that are not automatically given to my Attorney?

There are some financial powers that are not automatically given to your Attorneys. Depending on your individual circumstances, sometimes it is appropriate to include additional clauses in your document that will allow your Attorneys to act in these matters.

Some examples of these matters include:

1. Entering into "Conflict of Interest transactions": In these instances, your Attorney will benefit from a decision that they have made on your behalf. For example, a conflict may arise where an Attorney buys your motor vehicle at a price that is lower than its market value;
2. Making decisions on your behalf and in your role as a Trustee or Appointor of a Trust, or as a Director of a Company;
3. Allowing your Attorney to inspect a copy of your Will. If your Attorney is dealing with or disposing of assets on your behalf, they should consider if this will impact on any specific gifts that you leave to people in your Will.

What happens if I do not have an Enduring Power of Attorney?

If you do not have an Enduring Power of Attorney in place and you lose capacity to make your own decisions, your family members and/or close friends are not automatically authorised to make financial or personal health decisions on your behalf. In these circumstances, your loved ones would need to make an Application to QCAT or the Supreme Court to determine who will have the power to make decisions on your behalf. This can be extremely stressful and an expensive process and can be avoided if you execute an Enduring Power of Attorney while you still have the capacity.

Brisbane

Level 7 Northpoint
231 North Quay
Brisbane QLD 4000

Wilston

131 Kedron Brook Road
Wilston QLD 4051

Postal

P.O. Box 13125
George Street 4003

delaneyanddelaney.com.au

Brisbane ☎ (07) 3236 2604
Wilston ☎ (07) 3856 5600