



Presentation for Alzheimers Australia Qld

21 September 2009

Introduction

A person may delegate legal authority to another person to do acts on his/ her own behalf. This is called a “power of attorney”.

Appointing a Power of Attorney

To appoint a power of attorney, the principal (the person on whose behalf the attorney acts) must have the ‘capacity’ to do so. To have capacity, the principal must be able to understand the act of appointment and the nature of the act the attorney is to carry out. The principal must freely and voluntarily make the decision to appoint a power of attorney. In addition, capacity requires that the principal is able to communicate the decisions in some way.

So the 3 points are: -

1. Able to understand the nature and effect of decisions about the matter;
2. Freely and voluntarily make decisions about the matter; and
3. Able to communicate decisions in some way.

There are different types of power of attorney. They include: -

1. General Power of Attorney;
2. Enduring Power of Attorney: -
 - a. Financial matters;
 - b. Personal matters;
3. Advance Health Directives; and
4. Statutory Power of Attorney.

General Power of Attorney

A general power of attorney gives the attorney the authority to do, on the behalf of the principal anything that this person might authorise the attorney to do, provided it is permitted by law. As you can see, the general power of attorney is a very broad power. However, an attorney is not authorised to act on behalf of the person in “personal matters”. Only an attorney under an enduring power of attorney may exercise power for a personal matter for a principal.

What are ‘personal matters’?

A personal matter is defined in the *Power of Attorney Act* to be a matter relating to the persons care and welfare. This may include where and with whom he/she lives, whether he/she works and their place of work, what education he/she undertakes, health care, whether he/she obtains a licence and day to day issues such as diet and dress.

When is it exercisable?

A power of attorney may specify a time or occasion in which it will become exercisable. This means that, if you only want the power of attorney to become exercisable on a particular date or for a particular reason, you can include this in the power of attorney. If a power of attorney does not specify a time on which the power is exercisable, the power becomes exercisable once the power of attorney is made.

When a General Power of Attorney will be revoked

A general power of attorney will be revoked: -

1. If the principal (the person on whose behalf the attorney acts) becomes a person who has impaired capacity.

The situation is different if the principal's capacity does not become impaired but rather they become incapable of communicating decisions about their financial, property or legal affairs in some way. In this circumstance, the power of attorney may remain on foot and may not be revoked. However, this decision can only be made by a court so, should this situation arise, it is necessary for you to obtain legal advice.

2. If the principal or attorney passes away.
3. At the election of the attorney: an attorney can resign from being a power of attorney and their powers will be revoked accordingly.
4. If the attorney becomes bankrupt or insolvent.

Additionally, a power of attorney may be revoked in writing in the approved form. The principal must take reasonable steps to advise all attorneys affected by the revocation and, if the power of attorney is registered, to deregister the power of attorney.

A power of attorney can also be revoked according to its terms.

Enduring Power of Attorney

What is an Enduring Power of Attorney?

By an enduring power of attorney, an adult principal may authorise an eligible attorney to do anything in relation to their financial or personal matters that is allowed by law, if the principal had capacity for the matter when the power was exercisable.

So there are two kinds of enduring power of attorney: -

1. Enduring power of attorney to act in relation to financial matters; and
2. Enduring power of attorney to act in relation to personal matters.

What is a financial matter?

A financial matter is a matter relating to the principal's financial or property matters. To give a few examples, financial matters might include: paying maintenance and rent for the principal and the principal's dependants, carrying on a trade or business, performing contracts, insuring the principal's property, discharging a mortgage over the principal's property, paying rates, and the list goes on.

We spoke about personal matters earlier when discussing general power of attorney, but just to recap, a personal matter is a matter relating to the principal's care and welfare. As stated earlier, a general power of attorney does not authorise the attorney to act for the principal in relation to personal matters. So, if a principal would like to appoint an attorney to act for them in relation to personal matters, an enduring power of attorney is recommended.

Another important attribute of an enduring power of attorney is that, unlike a general power of attorney, it is not revoked by the principal's loss of capacity. This means that, if the principal's capacity becomes impaired, the attorney is still able to act for them in relation to their personal or financial matters.

Principal's capacity to make an enduring document

A principal may only make an enduring power of attorney if he/she understands the nature and effect of the enduring power of attorney.

Understanding the nature and effect means understanding the following matters: -

- That the principal may specify or limit, in the enduring power of attorney, the power to be given to a power of attorney and instruct the attorney about the exercise of the power;
- When the power begins;
- That attorney will have full control over the matter subject to the terms of the enduring power of attorney;
- That the power continues even where the principal loses capacity; and
- That when the principal has impaired capacity, he/she is unable to effectively oversee the use of the power.

Who may be an Attorney under an Enduring Power of Attorney?

A person may become an attorney under an enduring power of attorney if they are: -

1. At least 18 years; and
2. Not a paid health carer or health provider for the principal; and
3. Not a service provider for a residential service where the principal is a resident; and
4. If given power for a financial matter, not bankrupt.
5. An eligible attorney may also be the public trustee or a trustee company or an adult guardian.

A **health provider**, as discussed above, cannot become an attorney under an enduring power of attorney. However, 'health provider' is defined as a person who provides health care in the practice of a profession or the course of business. This means a professional health carer rather than a friend or family member who provides the care services outside or in replacement of their work.

A **paid carer** is also not able to become an attorney under an enduring power of attorney. A 'paid carer' is someone who cares for a person (the principal) and is paid for these services. A person is not paid for their services if this payment is provided by the Government EG: by Centrelink for providing home care. This means that, if you receive financial support from the government for your provision of health care to another person, you are not excluded from

becoming an attorney under an enduring power of attorney, provided you fulfill the other requirements listed.

When is it exercisable?

A principal may specify in an enduring power of attorney, a time or occasion, on which the power for a financial matter is exercisable. If this is not specified, it becomes exercisable once the enduring power of attorney is made.

Also, if a time or occasion is stipulated, and before the time or occasion, the principal loses capacity, the power of attorney is exercisable during the periods in which the principal has impaired capacity.

In contrast, power for a personal matter is exercisable only during periods in which the principal has impaired capacity.

When/how is an Enduring Power of Attorney revoked?

An enduring power of attorney can be revoked in the same manner as a general power of attorney (except for the fact that there is no revocation upon impairment).

Additionally: -

- It is revoked if the principal gets married, unless the attorney is the principal's new spouse;
- It is revoked if the principal gets divorced, if the attorney is the principal's ex-spouse;
- It is revoked if the attorney becomes a paid carer, or health provider for the principal – to the extent that the enduring power of attorney gives power for a personal matter; and
- It is revoked if the attorney becomes the service provider for a residential service whether the principal is a resident – to the extent it gives power to that attorney.

Responsibilities of attorneys

Attorneys have general and specific responsibilities. Specific responsibilities include: -

- Duty to keep records;
- Duty to keep property separate;
- Duty to avoid transactions that involve a conflict of interest; and
- Duty in relation to gifts (an attorney must not give away the principal's property except where the principal would be likely to do so).

Advance Health Directives

An advance health directive is a document created by a person with capacity setting out their wishes in relation to health conditions that they have foreseen as future possibility. This may include appointing an attorney to act for them in relation to health matters.

An advance health directive may: -

1. Give directions about health care matters and special health care matters for the principal's future health care;
2. Give information about these directions;

3. Appoint one or more persons as an attorney; and
4. Provide terms in general about exercising the power set out in the Advance Health Directive.

So, an Advance Health Directive may appoint a specific attorney to act for the principal in relation to health care matters but this is not always the case. Rather than appoint an attorney for health matters, a principal may instead set out their wishes about future health care treatment so that they can be sure that their wishes will be complied with, should they lose capacity to make their own decisions.

Who can make an Advance Health Directive?

Anyone who is an adult and has capacity as an adult, may make an Advance Health Directive for themselves in relation to future health care. It will allow an adult to give directions including: -

- Consenting to particular future health care when necessary and despite objection by the principal when the health care is provided.
- Requiring a specific life-sustaining measure to be withheld or withdrawn.

An advance health directive has priority over other powers of attorney for health matters.

When does an Advance Health Directive operate?

An Advance Health Directive only operates while the principal has impaired capacity for the matter covered by the direction. If the principal has capacity, they are able to consent to or reject health care treatment on their own and an Advance Health Directive will not be necessary.

As referred to above, an Advance Health Directive may give directions requiring specific life-sustaining measures to be withheld or withdrawn. However, an advance health directive providing this will only operate in limited circumstances. These circumstances include: -

1. Where the principal has a terminal illness that is incurable he/she is expected to die within 1 year; or
2. The principal is in a persistent vegetative state and has irreversible brain damage; or
3. The principal is permanently unconscious and has severe brain damage so that there is no reasonable prospect of the principal regaining consciousness; or
4. The principal's illness/injury is so severe that there is no reasonable prospect that the principal can survive without life sustaining measures.

There must also be the situation wherein a principal has no reasonable prospect of regaining capacity for health matters.

Consequence of an Advance Health Directive

An advance health directive may be very helpful where a person has suffered a long battle with a particular illness or where he/she has particular religious belief systems.

Failing to comply with an Advance Health Directive is very serious, and a doctor who fails to do so may be liable in legal proceedings including an action for trespass to the person, assault and battery or negligence.

Section 37 of the *Powers of Attorney Act* makes it clear that the Act does not authorise euthanasia or affect certain provisions of the Criminal Code.

Statutory Health Attorney

A statutory health attorney is the person authorised to do particular things for a principal in particular circumstances in relation to health care. The statutory health attorney is the first in order, of the following people who is readily available and culturally appropriate to exercise power for the matter: -

- A spouse of the adult if the relationship is close and continuing;
- A person who is 18 years or more and who has the care of the adult, but is not a paid carer: a person has the care of the adult if the person provides domestic services and support to the adult, or arranges for the adult to be provided with domestic services and support;
- A person who is 18 years or more and is a close friend or relation of the adult and is not a paid carer.

These people have the power to make health decisions in relation to a person where no-one has been appointed as an attorney for this purpose.

A statutory health attorney may make any decision about the health matter that the adult in question could lawfully have made if they had capacity for the matter.

When is it exercisable?

A statutory health attorney's power for a health matter is only exercisable during periods where the adult has impaired capacity for the matter.

Appointment of a Guardian or Administrator

Powers of attorney are created by the adult principal (the person for whom the attorney acts) while they have the capacity to do so.

The appointment of a guardian or administrator is different in that an appointment will be made by the Guardianship and Administrative Tribunal rather than the adult and the adult concerned is generally already suffering from impaired capacity. A person who is concerned about the capacity of someone close to them, may seek legal advice and go to the Tribunal to obtain an order appointing them as the guardian or administrator of the person with the impaired capacity.

The distinction between guardian and administrator is related to their purpose.

A **guardian** is appointed to act on the behalf of the person with impaired capacity in relation to personal matters. An **administrator** is appointed to act in relation to financial matters.

As discussed earlier, a personal matter is defined to be a matter relating to a person's care and welfare including their residence, place of work etc. We also discussed that a financial matter is a matter relating to the principal's financial or property matters.

In accordance with the terms of the appointment, an administrator or guardian is authorized to do anything in relation to a personal matter that the adult could have done if the adult had capacity for the matter when the power is exercised.

When will a Guardian or Administrator be appointed?

A Guardian or Administrator will be appointed where the tribunal is satisfied that: -

1. The adult has impaired capacity; and
2. A decision must be made in relation to the matter that involves, or is likely to involve, unreasonable risk to the adult's health, welfare or property; and
3. Without appointment: -
 - a. the adult's needs will not be adequately met; or
 - b. the adult's interests will not be adequately protected.

Who is eligible to be a Guardian or Administrator?

A Guardian may only be appointed if the person is at least 18 years old and not a paid health carer, or health provider, for the adult, or the adult guardian and the tribunal considers the person appropriate for the appointment.

An administrator may only be appointed if the person is at least 18 years, is not a paid carer or health provider for the adult, and is not bankrupt, or if the person is a public trustee or trustee company.

In deciding whether a person is appropriate for appointment as a guardian or administrator for an adult, the tribunal must consider the following matters: -

- a) General principles of health, well being and value;
- b) Health care principles including autonomy and expressing the adults views;
- c) The extent to which the adult (with impaired capacity) and the persons interests are likely to conflict;
- d) Whether the person and adult are compatible inc. the persons ability to communicate with the adult;
- e) Where more than 1 person is to be appointed as guardian or administrator, whether they are compatible with each other;
- f) Whether the person would be available and accessible to the adult;
- g) The person's appropriateness and competence to perform functions and exercise powers;
- h) The nature of the criminal history of any person and whether this will adversely affect the adult.

The fact that you are related to an adult with impaired capacity does not mean that you cannot become a guardian or administrator. Your interests might conflict in some cases but in many cases that will not be the case. Also, the fact that a person may be a beneficiary of an adult's estate does not necessarily mean that interests will conflict.

Duty of Guardian or Administrator

A guardian or administrator who may exercise power for an adult must exercise that power honestly and carefully to protect the adult's interest. Also, a guardian or administrator who may exercise power for an adult must, when exercising the power, exercise it as required by the terms of any order of the tribunal.

Conclusion

For any clarification or advice, please contact Kelly Legal. Kelly Legal has a number of solicitors who practise in this area including: -

- Sean Kelly LLB, MBA, M Tax Law
- Sean Russell BCom, LLB (Hons)
- Paul Kelly LLB
- Liz Catton LLB (Hons), LLM

Sean Kelly
Principal LLB MBA LLM Tax Law
Direct phone: (07) 4911 0525

Kelly Legal
Level 1, 78 Victoria Street
PO Box 1035
MACKAY QLD 4740
Phone: (07) 4911 0500
Fax: (07) 4911 0599

