

POWER OF ATTORNEY AND GUARDIANSHIP



Power of Attorney – What is it and who can create it?

- A Power of Attorney is the delegation of legal authority to a person to do acts on his/her own behalf.
- To appoint a power of attorney, the principal (person for whom the attorney acts) must have the 'capacity' to do so. This means that he/she must:
 - Be able to understand the nature and effect of decisions about the matter;
 - Freely and voluntarily make decisions about the matter;
 - Be able to communicate decisions in some way.

Types of Power of Attorney

- General Power of Attorney
- Enduring Power of Attorney
 - Financial Matters
 - Personal Matters
- Advance Health Directives
- Statutory Power of Attorney

Other Forms of acting on behalf of person without capacity

- Guardian
- Administrator
- Adult Guardian
- Public Trustee

General Power of Attorney

- A general power of attorney gives the attorney the power to do, on behalf of the principal, anything that this person might authorise the attorney to do, provided it is permitted by law.
- Not authorised to act in 'personal matters': matters relating to the persons care and welfare.
- Power of Attorney may specify a time or occasion on which it will become exercisable.

General Power of Attorney: revocation

A general power of attorney will be revoked:

1. If the principal becomes a person who has impaired capacity;
2. If the principal or attorney passes away;
3. At the election of the attorney;
4. If the attorney becomes bankrupt or insolvent.

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 personal or financial matters that is allowed by law, if the principal had capacity for the matter when the power was exercisable.

There are 2 kinds of enduring power of attorney:

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

A **financial** matter is a matter relating to the principal's financial or property matters. A **personal** matter is a matter relating to the principal's care and welfare.

Enduring Power of Attorney - Capacity

- Principal must have capacity to make an enduring power of attorney.
- After Enduring Power of Attorney is made, it will not be revoked upon the principal's loss of capacity.

Who may be appointed?

A person may be appointed under an enduring power of attorney if he/she is:

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.

When is an Enduring Power of Attorney exercisable?

- Enduring Power of Attorney may specify time or occasion but if not stipulated exercisable from the time it was made.
- Only exercisable for personal matters during periods in which the principal has impaired capacity.
- Also if impaired before date of commencement of financial power.

Enduring Power of Attorney – formal requirements

1. Signed by the principal or 'eligible signer'.

'Eligible signer' must be 18 years of age, not a Witness to the document, not the attorney.

2. Signed by 'eligible witness'.

'Eligible witness' includes a Solicitor or Commissioner for Declarations, not the attorney or eligible signer, not a paid health carer or health provider.

When will an Enduring Power of Attorney be revoked?

- An Enduring Power of Attorney may be revoked by the Principal at any time he/she has capacity.
- Revoked if principal gets married – unless attorney is principal's new husband/wife.
- Revoked if principal gets divorced – if attorney is principal's ex-husband/wife.

Advance Health Directives

What is an advance health directive?

A document created by a person with capacity, setting out their wishes in relation to future health conditions that they have foreseen as a possibility.

An advance health directive may:

1. Give directions about health care 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;
4. Provide terms in general about exercising the power set out in the advance health directive.

Who can make an Advance Health Directive?

Anyone who is an adult and has capacity.

It will allow an adult to give directions including such as:

- consenting to future health care when necessary
- Requiring specific life sustaining measures to be withheld or withdrawn (operates in very exceptional circumstances).

Statutory Health Attorney

A statutory health attorney is a person authorised to do particular things for a principal in relation to health care.

A 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:

1. Spouse of the adult if relationship is close and continuing;
2. A person, who is at least 18, who has care the of the adult but is not paid;
3. A person who is at least 18 years and is a close friend or relation of the adult and is not a paid carer.

Statutory Health Attorney

A Statutory Health Attorney may make any decision about the health matter that the adult could lawfully have made if they had capacity for the matter.

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

Guardian and Administrator

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

An **administrator** is appointed to act in relation to 'financial matters'.

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;
2. A decision must be made in relation to the matter that involves, or is likely to pose an 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 adequately be met.

Who is eligible to be a Guardian or Administrator?

A **guardian** may be appointed if the person is at least 18 years old and is not a paid carer, or health provider for the adult, or the adult guardian is not 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.

Who is an appropriate person for appointment as a guardian or administrator

Tribunal will consider:

1. Whether person will comply with general principles of health, well being and value;
2. Whether person will comply with health care principles including autonomy.
3. Extent to which the adult (with impaired capacity) and the persons interests are likely to conflict.
4. Whether person and adult are compatible inc. persons ability to communicate with adult.
5. If more than 1 attorney is appointed, whether they are compatible.
6. Whether person would be available and accessible to adult.
7. Person's appropriateness and competence to perform functions and exercise powers.
8. Criminal History of any person and whether this will adversely affect the adult.

Adult Guardian

The adult guardian is an independent statutory officer appointed to protect the rights and interests of adults who are not able to make decisions for themselves.

The Adult Guardian may assist the impaired adult in by:

- Acting as the adult's decision maker in certain situations;
- Consenting to health care issues for the adult;
- Investigating allegations of neglect or abuse.

Public Trustee

The public trustee may be appointed to act on behalf of an incapacitated person where an attorney, guardian or administrator has not been appointed.

Public Trustee acts as an attorney and is superior over other powers of attorney.

In conclusion...

Powers of Attorney:

- General
- Enduring
 - Financial
 - Personal
- Advance Health Directives
- Statutory Health Attorney

Other Forms:

- Guardian
- Administrator
- Adult Guardian
- Public Trustee

The contents of this presentation are not intended as professional advice.
You should obtain independent legal advice before relying or acting on
any statements or opinions contained in this presentation.

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QUESTIONS???

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Presentation

