

What **You Must Know** About **POWERS OF ATTORNEY**





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A Power of Attorney is a critical document for you.

A Power of Attorney is a legal document authorising another person to make decisions on your behalf.

There are two types of Power of Attorney:-

General Power of Attorney

This type of Power of Attorney is used for a specific purpose (e.g. to sign a particular Contract) or for a specific time period (e.g. while you are away on vacation). It is a Power of Attorney that ceases to have effect if you lose capacity.

It is also the same type of Power of Attorney that companies would use.

Enduring Power of Attorney

This type of Power of Attorney “endures” or continues to have effect after you have lost capacity and cannot make decisions yourself. An Enduring Power of Attorney can be used for two purposes:-

- Financial matters;
- Personal/health matters.



If you are appointing the same persons to act in financial as well as personal/health matters then you need only one Enduring Power of Attorney document to do this. Any Power of Attorney (General or Enduring) ceases to have effect when the giver of the Power of Attorney dies. At that time the deceased person's Will takes effect.

Great care needs to be taken when you are creating an Enduring Power of Attorney because this document may have effect after you have lost capacity. You would not be able to state what your intentions were at the time when you made the document and how you wanted the Power of Attorney to be exercised. Indeed the Power of Attorney document may itself be the only evidence of your wishes.

Another reason for great care to be taken is because the prescribed form of Enduring Power of Attorney needs to be carefully crafted and specific provisions inserted to meet your wishes. The standard prescribed form of Enduring Power of Attorney is not a "one size fits all". Enduring Powers of Attorney for financial matters usually need to be amended from the standard form and all Powers of Attorney require specific instructions to be inserted into them to meet individual needs. I shall discuss this further in later chapters.

Powers of Attorney may be registered in the Titles Office for dealing with real property however there is presently no general register for Powers of Attorney. For this reason, it is essential that you securely store and can locate your original Power of Attorney.



Do you need a Power of Attorney? Yes, you do.

The reason you need a Power of Attorney is because it is in the nature of all humans to deny our mortality and human frailty. I often see clients who say to me that “I shall establish a Power of Attorney when I need it”. My answer to those clients is that “You need it now”.

There is a notion that Enduring Powers of Attorney are only for the benefit of the elderly who may be imminently suffering dementia. This could not be further from reality. A young person severely injured in a motor vehicle accident has as much need to have an Enduring Power of Attorney in place as a person who is four times their age. More correctly, it is the family of that young person who have the need for that Enduring Power of Attorney to exist.

Just as with having a Will, a Power of Attorney benefits your family and loved ones rather than yourself. Putting an Enduring Power of Attorney in place is a selfless act. Failing to put an Enduring Power of Attorney in place is your selfish omission.

For the elderly, Powers of Attorney are nonetheless critical. Aged Care Facilities and Nursing Homes have a requirement for Enduring Powers of Attorney to exist as a pre-requisite for entry into their facilities.



When any person loses capacity and they do not have an Enduring Power of Attorney in place the options are limited and unattractive. Either a family member shall need to make an application for a Court Order at significant expense or alternatively the financial affairs of that person shall be managed by the Public Trustee and health decisions managed by the Office of the Public Guardian.

So failure to have an Enduring Power of Attorney will result either in unnecessary significant expense payable by you otherwise your financial and personal affairs shall be administered by a Public Servant.

The alternative is that at modest cost (much less than a Court Order) you create an Enduring Power of Attorney for financial matters and an Enduring Power of Attorney for personal/health matters. By doing this you can ensure that decisions are made in your best interests by the persons who you trust.

The decision is a no brainer. You must have an Enduring Power of Attorney.



3 who do I appoint under a Power of Attorney?

The appointment of a Power of Attorney is a vital issue.

Whom you would appoint will often vary between whether it is a Power of Attorney for financial matters or an Enduring Power of Attorney for personal/health matters.

Financial Power of Attorney

If your Financial Power of Attorney is a General Power of Attorney it may be for a specific purpose or limited to a specific time frame. If this is the case you will probably have identified the person who you wish to appoint as your Attorney. They are likely to be the person most suited for a specific task that you want done.

However for an Enduring Financial Power of Attorney it may be less clear as to who you should appoint in this role.

Your Financial Attorney shall be making decisions that will affect the control and ownership of the assets which you own. You would therefore be wanting to appoint persons who shall make considered and prudent decisions. Persons who will recognise when it is important to seek professional advice.



The characteristics of a Financial Attorney are similar to the characteristics of the persons you would appoint as Executors for your Will. For this reason, and because people often make their Powers of Attorney in conjunction with making their Will, they often appoint the same persons to fulfil the roles of Attorneys before they die and Executors after they die. Ideally you would be able to identify family or friends who have these characteristics and who you can appoint as your Attorneys.

If you appoint only one person as your Attorney it is statistically a 50/50 chance that they shall be available to fulfil that role when you need them. It is therefore prudent to appoint more than one Attorney and this can be done successively. – i.e. appoint A to be your Attorney but if they are unable to act for any reason then appointing B to act in their place. Alternatively you may choose to appoint multiple Attorneys to act at the one time.

If you choose to appoint more than one Attorney to act at the same time you may choose how they will make their decisions – unanimously, individually or if more than two, by majority.



Enduring Power of Attorney for Personal/Health matters


These types of Power of Attorney can only take effect after you have lost capacity. For this reason and also because of the personal and sensitive nature of the decisions to be made my clients usually choose to appoint family members to fulfil this role.

As with Financial Powers of Attorney you may, and should, appoint more than one Attorney and you may choose how your Attorneys shall make their decisions on health/personal matters for you.

Attorneys Acceptance

It may seem trite, however, you cannot force someone to be your Attorney if they do not want to do that. It is important to check with your proposed Attorneys that they are willing to fulfil that role. Do this before you instruct your Lawyer to prepare the Power of Attorney document.

Your Attorneys must sign their acceptance of appointment as an Attorney (whether Financial or Health) before they may act as your Attorney.



4 how do I make a Power of Attorney?

Your Power of Attorney can be made in different ways.

The principal rule is that Powers of Attorney must be made in the approved form pursuant to the provisions of the Powers of Attorney Act 1998. However certain Powers of Attorney will be valid as long as there is substantial compliance.

It is important to recognise that with most Powers of Attorney the formal requirements to create the Power of Attorney must be strictly adhered to. This includes compliance with requirements relating to:-

- (a) eligible Attorneys;
- (b) eligible Witnesses.

Whilst Power of Attorney documents can be obtained either online or at shops it is not recommended that you create such an important document on a DIY basis. There are many pitfalls that can result in a Power of Attorney have no legal effect.



Although there is a “Standard Form Power of Attorney” it is not a document that will meet everyone’s needs. Typically Powers of Attorney must be crafted in their terms to ensure that they are legally effective for the desired purpose. For example a “Standard Form Power of Attorney” does not:-

- (a) between a husband and wife, allow the Attorney to deal with any jointly owned property including the family home;
- (b) authorise transactions relating to Superannuation;
- (c) permit and authorise dealing with digital assets including Facebook and social media accounts.

If you want to create a Power of Attorney it is recommended that you obtain legal advice from your Solicitor. They will be able to ensure that the needs of yourself and your family’s circumstances are specifically protected by crafting the document to meet your needs.



What is a General Power of Attorney?

Simply put a General Power of Attorney is a non-enduring Power of Attorney. It may not include powers for personal matters.

Whilst the Powers of Attorney Act 1998 does specify an approved form for a General Power of Attorney, strict compliance with that form is not necessary and substantial compliance will be sufficient.

So why and when are General Powers of Attorney used?

Typically General Powers of Attorney are used for express activities, often, when there is a known timeframe. For example, if I know that I will be overseas and I want to authorise for a certain thing to be done in my absence (sign an Agreement/Contract etc.) then I would use a General Power of Attorney to appoint one or more persons to do this on my behalf in my absence. In this circumstance the Power of Attorney would expressly refer to the permitted activity and would not grant authority to the Attorney beyond that activity. The Power of Attorney could be limited in time, for example, to cease “upon my return to Australia” or “by the 31st of December in this year”.

A General Power of Attorney is therefore distinctly different from an Enduring Power of Attorney.



What is an Enduring Power of Attorney?

An Enduring Power of Attorney is one that continues to have validity when the Principal/ Donor has lost legal capacity.

Originally Powers of Attorney ceased to be valid when the Donor of the power lost their own legal capacity. This was premised upon the basis that it would be too dangerous for persons to exercise the power as an Attorney when the person who had donated that power was no longer available to supervise the exercise of the power.

As people's longevity came to frequently exceed their legal capacity it was realised that this principle could not continue. It was recognised that the risk of a rogue Attorney was a lesser threat than the non or maladministration of estates between loss of capacity and death.

As a result State Governments in Australia in the 1980's brought in legislation to permit Powers of Attorney to continue to operate after the Donor had lost capacity. However Powers of Attorney for health and personal matters were not introduced until many years later in 1998.



7 financial Powers of Attorney

What is a Financial Power of Attorney?

A Financial Power of Attorney is the traditional Power of Attorney that most people think of when they hear the words “Power of Attorney”. It is a Power of Attorney where you as the Principal grant the power to another person to be able to deal with your financial assets. It includes the power to sign Contracts and documents on your behalf in respect of financial matters.

There is a common misconception that husband’s and wives’ already have that right by law. They do not.

A Financial Power of Attorney may be for a specific purpose, for example to sign a particular document or to do a certain act. Such Powers of Attorney are in the form of a General Power of Attorney.

Alternatively, it can be an Enduring Financial Power of Attorney. If it is an Enduring Power of Attorney, you can specify when that Power of Attorney may be activated – e.g. “In the event that I am medically certified as having lost mental capacity to make decisions.”

It may be granted to one or more persons. If you are appointing more than one Attorney to act then it is important for you to specify how those Attorneys shall make their decisions – individually, unanimously, by majority or in some other manner.



You may also choose to cascade the power on to an alternate Attorney in the event that your first choice of Attorney is unable to act for any reason. Typically couples will appoint their partner as Attorney in the first instance but if that partner is unable to act then they appoint friends or children to act as their Attorney.

A Financial Power of Attorney – whether General or Enduring – must be in the approved form. If it is an Enduring Power of Attorney it cannot be granted to a paid carer, health provider or residential service provider where the Principal is a resident, nor to a bankrupt person.

Financial Powers of Attorney are legal documents that require care and experience in their preparation. They are not a “one size fits all” document. For example, many people have downloaded and used the standard Enduring Financial Power of Attorney form from the Queensland Government website unaware that this document would not permit their spouse to even deal with their most important asset – the jointly owned matrimonial home.

Financial Powers of Attorney should only be prepared by your Solicitor.



What is a Health Power of Attorney? What is a Personal Power of Attorney?

They are simply one Power of Attorney – a Power of Attorney for both health as well as personal matters. This is a Power of Attorney where the Principal grants the power to another person to be able to make decisions:-

- (a) about health matters – for example what medical treatment the Principal shall receive;
- (b) personal decisions for the Principal – for example where the Principal shall reside.

Unlike General and Financial Powers of Attorney a Personal/Health Power of Attorney may not be used for convenience. It is a Power of Attorney only for circumstances of necessity, namely, when the Principal donor of the Power of Attorney has lost their capacity to make decisions for themselves about these matters.

You may grant this power to one or more persons and you may decide how multiple Attorneys are to make their decisions – individually, unanimously, by majority or otherwise. You should also consider the appointment of an alternate Attorney in case your first choice of Attorney is unable to act for any reason. Whilst it is not always the case with Financial Powers of Attorney, usually Personal/Health Powers of Attorney appoint family members to act.



If you want to make an Enduring Power of Attorney for financial matters and an Enduring Power of Attorney for Health/Personal matters and you want to appoint the same people to fulfil those roles then you can incorporate this into one Enduring Power of Attorney for both. It is not necessary to have separate Enduring Powers of Attorney unless you wish to appoint different persons to fulfil those roles, in which case a long form document is available.

A Personal/Health Power of Attorney must be in the approved form. As with Enduring Financial Powers of Attorney it cannot be granted to a paid carer, health provider or residential service provider where the Principal is a resident.

An Enduring Power of Attorney for Health/Personal matters can co-exist with an Advance Health Directive. In this case the Health Attorney is only permitted to make those decisions which are not already covered in the Advance Health Directive.



What is an Advance Health Directive?

An Advance Health Directive is often called a “Living Will”. This has always intrigued me as a Will deals primarily with a person’s wealth and physical assets after death. An Advance Health Directive does not do this.

Nonetheless the Oxford Dictionary definition of “a living Will” accurately describes an Advance Health Directive. That definition is:-

“a written statement detailing a person’s desires regarding future medical treatment in circumstances in which they are no longer able to express informed consent, especially an advance directive”.

An Advance Health Directive is therefore a document in which you state your wishes as to how you will be treated medically in the event that you have lost the capacity to make those decisions. It is a document that ceases to have any effect on your death.

There is a prescribed form for an Advance Health Directive and in order to make such a document the law requires you to have medical advice available to you at the time you are making those decisions. You must therefore make an appointment with your Medical Practitioner and take the Advance Health Directive form to that GP for the purpose of obtaining medical advice on your decision making and to certify that you have the capacity to understand the nature and likely effect of the decisions you are making. Your GP is required to certify in the document to that effect.



After you have completed your medical appointment and certification there is a further essential step in completing a witnessed statement of understanding, usually completed with your Solicitor who will then ensure that the Advance Health Directive has been fully and validly created.

Great care and consideration needs to be taken when recording your decisions in an Advance Health Directive – particularly in pondering the possibilities of future circumstances and the effect which your decisions may have on your family and loved ones at that future time.

When preparing Advance Health Directives for our clients we recommend that our clients take time to consider the issues and questions in that document thoroughly and “pencil in” their wishes into the document before they visit their Medical Practitioner. It is also essential to give notice to your Doctor’s receptionist that your appointment is for the purpose of an Advance Health Directive to ensure that sufficient time has been allocated for this purpose.

If you wish to make an Advance Health Directive please contact Malcolm McColm for advice and assistance.



How do I change my Power of Attorney?

Can I change my Power of Attorney and is it hard to do so?

As long as you have legal capacity your Power of Attorney is under your control and may be revoked or changed by you.

Non-Enduring Powers of Attorney

If the Power of Attorney you have granted is non-enduring, you can revoke it either orally or in writing. If your capacity becomes impaired your non-enduring Power of Attorney is automatically revoked.

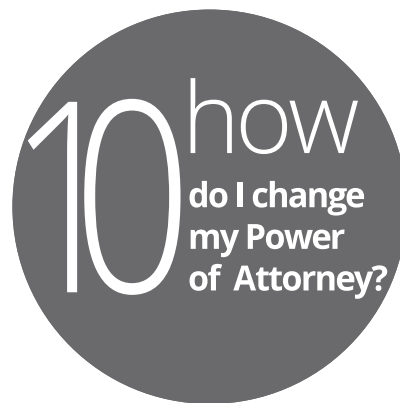
A non-enduring Power of Attorney will also be revoked:-

- (a) if the Attorney suffers impaired capacity;
- (b) if the Attorney resigns;
- (c) if the Attorney becomes bankrupt or insolvent;
- (d) if either the Attorney or the Principal die.

Enduring Powers of Attorney

Revocation of an Enduring Power of Attorney must be made in writing and must be in the approved form for Financial Enduring Powers of Attorney.

An Enduring Power of Attorney will also be revoked to the extent that it is inconsistent with a later Enduring Power of Attorney by the same Principal.



An Enduring Power of Attorney will also be revoked:

- (a) by a subsequent marriage to the extent that it gives power to someone other than the spouse;
- (b) by subsequently entering into a civil partnership to the extent that it gives power to someone other than the Principal's civil partner;
- (c) by divorce to the extent that it gives power to a divorced spouse;
- (d) if the Attorney resigns or suffers impaired capacity;
- (e) if the Attorney for financial matters become bankrupt or insolvent;
- (f) if either the Principal or the Attorney die;
- (g) if the Attorney becomes a paid carer or health provider for the Principal, the Power of Attorney to the extent that it gives power for a personal matter to the Attorney.

There can be other circumstances where a Power of Attorney is revoked and if you need advice on this you should seek that from a Legal Practitioner who is experienced in this area of law.

All Principals who are revoking any form of Power of Attorney have a legal obligation to take reasonable steps to advise all Attorneys of the revocation. If the Power of Attorney has been registered there is a legal obligation on the Principal to deregister it.

Care must be taken to ensure that you fulfil not only the practical aspects of revocation but also your legal responsibilities. If you intend to revoke an existing Power of Attorney you must take legal advice from an experienced Solicitor to ensure that it is done correctly.



11 where to keep my Power of Attorney?

Where shall I keep my Power of Attorney?

There is only one original Power of Attorney that is signed – be it for Financial matters or for Personal/Health matters. The original document is an important document that must be kept securely – preferably in fire proof safe custody. This also applies to your Advance Health Directive, however of course it is essential for you to ensure that a copy of your Advance Health Directive is also held by your Medical Practitioner.

There is no register of Personal/Health Powers of Attorney or Advance Health Directives. General and Enduring Powers of Attorney for Financial matters may be registered with the Department of Natural Resources in Queensland. However typically this does not occur unless and until there is a need to use the Power of Attorney for the purposes of a transfer of property in the Titles Office. This is usually to avoid unnecessary expenditure of registration costs – not only of the Power of Attorney but also of any future Revocation of that Power of Attorney.

The Solicitor who has prepared your Power of Attorney will usually offer a free safe custody service for these documents. McColm Matsinger Lawyers offers such a facility to their clients.

If proof of the Power of Attorney is required by a third party – e.g. a Retirement Village, Nursing Home or Bank – your Solicitor can prepare a certified copy upon request.

If you require clarification of any of your options regarding storage and security of your documentation contact Malcolm McColm at McColm Matsinger Lawyers.

Now where to from here?

For assistance with your estate planning
or to have any query answered, please contact
Malcolm McColm

McColm Matsinger Lawyers

Level 4/ 57 The Esplanade Maroochydore Queensland
PO Box 737, Maroochydore QLD 4558
Telephone: (07) 5443 1800
Web: www.mmlaw.com.au
Email: info@mmlaw.com.au

