

Enduring Power of Attorney

What is a Power of Attorney?

A Power of Attorney is simply a document under which a person (“the donor”) gives to another person (“the donee”) the power to act on their behalf : to stand in their shoes. The extent to which the donee can stand in the shoes of the donor is governed by the terms of the Power of Attorney document itself.

The effect of a Power of Attorney is that all acts done by the donee with the power held by them will have the same legal effect as if they had been done by the donor.

Why are Powers of Attorney so Important?

Medical science of the 1990’s has prolonged our life on this planet longer than at any other time before by protecting us from disease and accidents. The killers of yesterday are no longer killing us. The problem is however that they are disabling us, sometimes beyond our own ability to care for ourselves. That is where the Enduring Power of Attorney comes into its own.

Have you ever thought what would happen if, for some reason, you were unable to conduct your normal personal and business affairs?

What if you were involved in a car accident and fell into a coma?

What if you contracted Alzheimer’s disease?

In these circumstances there is a need for a Power of Attorney. Putting a Power of Attorney in place provides the peace of mind that your important transactions (personal and business) will continue to be carried out by persons that **you** have chosen and in whom **you** have confidence.

What is an Enduring Power of Attorney?

An Enduring Power of Attorney is a Power of Attorney that continues beyond the time that the donor is unable to make decisions due to accident or illness and is unable to conduct their affairs. In legal terms this is referred to as legal capacity. This is an important concept. By its very nature an Enduring Power of Attorney is an extremely valuable document which provides peace of mind and the certainty that business and personal affairs can continue in an orderly fashion.

It is important to remember that only an Enduring Power of Attorney continues past the incapacity of the donor. A limited or general Power of Attorney actually ceases to operate once the donor has a mental disorder or impairment affecting judgement and behaviour.

Most people will want a Power of Attorney to become operative should they become incapacitated. If, however, a Power of Attorney was not an **Enduring** Power of Attorney, then the donor’s unsoundness of mind would bring the Power of Attorney to an end ! This would often defeat the very purpose for which a donor may have brought the Power of Attorney into existence in the first place.

What is the Difference?

An Enduring Power of Attorney continues to operate after a person becomes incapacitated. An ordinary Power of Attorney doesn't. For many people the **only** time they want a Power of Attorney to be operative is **when** they become incapacitated, not before. If the person is not guided to ensure that an Enduring Power of Attorney is drawn up and properly signed and witnessed, this objective will not be achieved.

What are the Benefits of an Enduring Power of Attorney?

The principal benefit of an Enduring Power of Attorney is the fact that it **will endure** that donor's condition. Importantly, it is in these circumstances that a Power of Attorney is most desperately required.

By putting an Enduring Power of Attorney in place now the donor can choose who they want to look after their affairs. The choice of the most appropriate person will depend upon a range of factors including the types of tasks that the donee will have to perform and the experience and knowledge required to perform those tasks.

By putting an Enduring Power of Attorney in place now, the donor has the flexibility to direct how their affairs will be conducted and by whom.

If a person does not have an Enduring Power of Attorney in place, their business and financial estate planning is deficient. This deficiency must be overcome to ensure the safeguarding of a person's assets.

When does my Enduring Power of Attorney take effect?

Your Enduring Power of Attorney takes effect when you become incapacitated and your Attorney obtains a declaration by the Guardianship and Administration Board that you do not have legal capacity, ie you are unable by reason of mental disorder to make reasonable judgements.

Your Attorney needs to complete a special form provided by the Board and submit this with medical evidence.

When can I make and revoke the Power of Attorney?

While you have the mental capacity you can **make** and then **revoke** your Power of Attorney at any time.

If there is doubt about your legal capacity speak to your doctor. Your doctor can give you a note stating that you are competent to sign.

What are the Attorney's duties?

Your Attorney must :

- 1) act in your best interests at all times;
- 2) act honestly and protect your assets;
- 3) prepare and keep records of all dealings and transactions, and
- 4) not renounce a power during any period of your legal incapacity, except with the permission of the Public Guardian.

What can a Power of Attorney not do?

- Exercise the Power of Attorney for their own benefit or advantage (unless specifically authorised).
- Act outside the terms of the Power of Attorney.
- Perform the donors duties as trustee.
- Perform guardianship functions.
- Perform a donor's function as trustee.
- Prepare and sign the Will of the donor.
- Act illegally.

When does a Power of Attorney become ineffective?

- Death of a donor.
- Supervening incapacity of donor e.g. bankruptcy, unsoundness of mind (unless an Enduring Power of Attorney exists).
- Revocation by the donor.