

# Enduring Powers of Attorney

## Responsibilities and duties of an attorney

### Key points

- As an attorney appointed under an Enduring Power of Attorney, you will have the power to make certain decisions on behalf of another person
- An attorney must exercise the power given to them honestly and with reasonable care, and comply with the enduring power of attorney document, any court requirement and the legislation
- Attorneys must protect the principal's interests and abide by certain duties and principles, otherwise the attorney may be removed and may even have to compensate the principal

### What is an Enduring Power of Attorney?

1. An Enduring Power of Attorney (**EPOA**) is a legal document that allows a person (the principal) to give another person (the attorney) the power to make decisions on the principal's behalf. It continues even if the principal loses capacity to make decisions and cannot give instructions to their attorney.
2. You can be appointed as an attorney for financial, personal and health matters.
3. The principal may:
  - (a) appoint different people as their financial attorney and as their personal/health attorney
  - (b) include particular instructions or exclusions to their attorney's powers.

### How an attorney can make decisions

4. If more than one attorney is appointed, they can be appointed to act:
  - (a) jointly (all agreeing)
  - (b) severally (any one to decide)
  - (c) by majority
  - (d) a combination of the above.

### When does your power of attorney begin?

5. The principal can specify that their attorney's powers in relation to financial matters begin immediately (the date they sign the document) or commence on a date specified or on a specified occasion, such as when the principal actually loses capacity.
6. An attorney's powers in relation to personal and general health care matters begin only if the principal is incapable of understanding the nature of and foreseeing the effects of a decision or of communicating that decision.

### What are financial matters?

7. Examples of financial matters include:
  - (a) deciding how income should be invested
  - (b) selling any of the principal's assets
  - (c) paying debts
  - (d) paying maintenance and accommodation expenses.

### What are personal and health matters?

8. Personal matters include decisions such:
  - (a) as where and with whom the principal lives

- (b) whether they work or undertake education or training
  - (c) day-to-day issues, like diet and dress.
9. Health matters include all decisions about their health care. As an attorney, you can:
- (a) decide whether to consent, refuse to consent or withdraw consent to particular types of health care (such as an operation)
  - (b) consent to the withdrawing or withholding of life-sustaining medical treatment if, for instance, the principal becomes terminally ill or are in a state of permanent or persistent unconsciousness.
10. A principal can give instructions about health care decisions by making an advance health directive. It comes into effect only if they are unable to make their own decisions and only if they are terminally ill.
11. An advance health directive can also be made for mental health regarding future treatment and care.
12. An advance health directive overrides any decision by an attorney for matters that are covered by the advance health directive. An attorney still has the authority to make decisions for matters outside of the advance health directive.

### What are an attorney's responsibilities?

13. As an attorney, you must exercise the power given to you honestly and with reasonable care. It is an offence not to do so, and you may also be required to compensate the principal.
14. You must comply with the terms of the enduring power of attorney, and any other court requirement. In addition, you must abide by the general and health-care principles imposed by the *Powers of Attorney Act 1998*. For example, you must:
- (a) recognise the principal's right to confidentiality and dignity
  - (b) take into account the principal's existing relationships, values and culture
  - (c) respect their views and wishes.

### What are the principles that an attorney must be guided by?

#### Health care principles

15. Any health-care decision you make for the principal must:
- (a) maintain or promote the principal's health or well-being or is in all the circumstances, in the principal's best interests
  - (b) be made in the way that is least restrictive of the principal's rights
  - (c) where possible, take account of the principal's views and wishes, along with information given by the principal's health-care provider.

#### Financial decisions

16. Any investments you make on the principal's behalf while they lack the capacity to make financial decisions must be those that are named in the *Trusts Act* as investments a trustee is authorised to make or are approved by the Court. (Court means either the Supreme Court or the Guardianship and Administration Tribunal).

#### For all decisions

17. If the principal has appointed other attorneys, you must consult with them regularly and make your decisions in accordance with any specific provision the attorney has made in the power of attorney document.

## Specific responsibilities

### Duty to keep records

18. If you have the power to make financial decisions, you must keep reasonable records of dealings and transactions made under the power. It is an offence not to do so, and the Court or Adult Guardian may require you to produce them.

### Duty to keep property separate

19. You must keep your property separate from the principal's property unless you and the principal own the property jointly.

### Duty to present a management plan and get approval for unauthorised transactions

20. If you make a financial decision, you must present a plan of management to the Court if the Court requires it.
21. If the principal's capacity to make decisions is impaired, you must also get approval from the Court for any transactions that have not been authorised in this document.

### Duty to avoid transactions that involve conflict of interest

22. You must not enter into transactions that could or do bring your interests (or those of your relation, business associate or close friend) into conflict with those of the principal. For example, you must not buy the principal's car unless you pay at least its market value.
23. However, you may enter into such a transaction if it provides for the needs of someone that the principal could reasonably be expected to provide for, such as their child.
24. You may also enter into a conflict of interest transaction if it has been authorised by the Court or in the EPOA itself. For example:
  - (a) If the principal and the attorney own assets in individual names, those assets may be needed by both of them for nursing home entry or living once one of them has lost capacity.
  - (b) A power of attorney may specifically allow for the confirmation and renewal of binding death benefit nominations in circumstances where the principal may need to renew or confirm the binding death benefit nomination for their superannuation.
  - (c) A principal may give their attorney the power to vote on their behalf as a shareholder in any company, and for the attorney to use those voting rights to appoint themselves as a director. That power is not automatic under some company constitutions.

### Duty in relation to gifts

25. You must not give away the principal's property except where the principal would be likely to do so, for example as a marriage gift to a relation of the principal or a donation to their favourite charity (so long as the size of the gift is reasonable in the circumstances).

### Power to maintain the principal's dependants

26. You may give reasonable maintenance to the principal's dependants.

## Can I be held liable?

27. Yes, you can be held liable if you use the enduring power of attorney knowing that it has been changed or revoked, or knowing of an event that effectively revokes it, or even if you have reason to believe that it has been revoked.
28. The Court and the Adult Guardian have the power to protect the principal's interests. You may be required to produce a summary of receipts and expenditure or more detailed accounts, and these may be audited. You may also be required to give evidence in relation to the exercise of your powers. If the Court or Adult Guardian believes that you have not adequately protected the principal's interests, you may be removed or your enduring power of attorney may be revoked, and you may be required to compensate the principal.

## Where can I go for advice?

29. Cooper Grace Ward can advise you about any specific questions in relation to an EPOA and in relation to your power and responsibilities under it. The Court, the Adult Guardian or the Public Trustee can also give you advice.
30. The Court can also make a declaration about the validity of an EPOA or whether your power to make a decision for the principal has begun.

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