

This information is general and not a substitute for legal advice. The Legal Services Commission provides free advice for most legal problems.

Contact the Legal Helpline 1300 366 424

(TTY 8463 3691) www.lsc.sa.gov.au www.lawhandbook.sa.gov.au

WHAT IS POWER OF ATTORNEY?

If you give another person your 'power of attorney', it simply means that you give that person the power to act on your behalf (for example, to buy and sell things for you or operate your bank account). Giving a 'power of attorney' does not mean you lose control over your affairs. You can still deal with all matters, while your 'donee' (the person you appoint to act on your behalf), can do those things that you have authorised. The donee must agree to act for you, you cannot make someone your donee against their wishes. A power of attorney can be for a limited time, or until your death or mental incapacity. If you wish to have an attorney in case you become of unsound mind, you must make an 'enduring power of attorney'.

ENDURING POWER OF ATTORNEY

An enduring power of attorney is a power of attorney that continues to operate even though you may later become of unsound mind, for example, if you are unable to communicate after a stroke or become senile. Only enduring powers of attorney continue to operate if you lose your mental capacity, ordinary powers of attorney cease automatically. Taking the time to make an enduring power of attorney means your financial affairs can be looked after by someone you know and trust. You cannot make a power of attorney after you become of unsound mind. To be capable of signing a power of attorney, a person must understand the nature and effect of the document. If a person's mental capacity may be in doubt, then it is best to get a doctor's written opinion confirming that the donor was of sound mind at the time of signing.

I HAVE A WILL, ISN'T THAT ENOUGH?

A will has legal force after your death. A power of attorney is for your financial affairs while you are alive. When you die, your power of attorney ceases automatically. That is why it is important to have both an enduring power of attorney and a will.

MEDICAL AND WELFARE

A power of attorney does not give someone the right to make decisions about your welfare or medical treatment. Nor does it authorise someone to vote on your behalf. It only deals with legal and financial matters. There are other documents that deal with non-financial matters:

- An **enduring power of guardianship** can authorise someone to make decisions about your medical treatment and your general welfare such as where you live and who can visit you.
- A **medical power of attorney** only deals with medical treatment.
- An **anticipatory direction** states how you wish to be treated if in the final stages of a terminal illness or a vegetative state, and unable to make necessary decisions.

By making both an enduring power of attorney, which covers legal and financial affairs, and an enduring power of guardianship, you are essentially making a 'living will', to ensure your wishes are known if you become unable to make decisions for yourself.

HOW DO I MAKE AN ENDURING POWER OF ATTORNEY?

The easiest way is to buy an Enduring Power of Attorney Kit, available from the Legal Services Commission, Information SA, and the Lands Titles Office. The Kit includes all the forms with detailed instructions and answers to common questions. An Enduring Power of Guardianship Kit is also available. The do-it-yourself Enduring Power of Attorney Kit fully explains how to complete and use the forms. If, after reading the Kit, you are in anyway uncertain, it is recommended that you seek legal advice. **No one else can make a power of attorney for you. You must do it yourself while you are of sound mind.**

You should first ask yourself what powers you want to give to the donee. If you simply want someone to operate your bank account for you, you do not need a formal power of attorney. Contact your bank and ask them what form of authorisation they need to allow someone to act on your behalf. If you want to give the donee wider powers you must complete an Enduring Power of Attorney Form. You will usually need to complete at least two copies, one copy in case it needs to be deposited and one copy for each donee to use.

MUST I REGISTER A POWER OF ATTORNEY?

Once you have completed the forms you have a valid power of attorney, it does not have to be registered. You need only deposit the forms with the Lands Titles Office if you wish the donee to deal with real estate. There is a fee charged for the deposit of the forms. If it is not necessary to deal with real estate immediately, you could keep the forms in a safe place and they can be deposited later at the Lands Titles Office. A bank will normally take a copy of the power of attorney for their records. For shares, you may have to register the power of attorney against your shares in the company's share register.

RESPONSIBILITIES OF THE DONEE

- If the person who gave you an enduring power of attorney becomes of unsound mind, you must continue to act for that person. If you want to give up the power, you must arrange to have it removed by the Supreme Court or an administrator appointed by the Guardianship Board.
- You must keep full and proper records of everything you do.
- You must be seen to be acting at all times in the best interests of the person who gave you the power. Other people may disagree with what you do and challenge your actions.
- If you act improperly you are personally responsible to pay for any losses caused. You may even be guilty of a criminal offence.
- You cannot be paid for your work, except for any out-of-pocket expenses directly connected with carrying out the power of attorney. You will need to keep receipts to prove these costs.

SAFEGUARDING YOUR INTERESTS WHEN MAKING A POWER OF ATTORNEY

You should always be careful when giving someone the power to act for you. Make sure the person to whom you give an enduring power of attorney is someone you can trust absolutely. You should understand that you are giving that person complete authority to deal with your financial affairs.

A word of warning: your donee may use the power against your interests. For example, the donee could sell your house and take the money. If you lose your mental capacity, you may not even realise what has happened. It is a criminal offence for a donee to misuse a power of attorney, but no agency oversees powers of attorney to make sure that donees are doing their job properly. If a donee is acting improperly, the Supreme Court can remove the power of attorney or the Guardianship Board can appoint an independent administrator. There are some ways you can protect yourself. You can limit the powers you give so that the donee cannot deal with all your property. If that does not suit your needs, you can appoint two people to act jointly, so that they both have to sign before anything can be done. You can also put a clause in an enduring power of attorney to say that it will only come into effect in certain circumstances, such as a doctor certifying that you are incapable of managing your own affairs.

WHAT IF I DO NOT HAVE AN ENDURING POWER OF ATTORNEY?

If you have not made an enduring power of attorney while of sound mind, your relatives may not be able to handle your affairs informally. While banks, Centrelink and hospitals are generally sympathetic and will help with simple matters, it may be necessary to apply to the Guardianship Board for an Administration Order. These Orders are made for the protection of persons who cannot handle their financial affairs.

GUARDIANSHIP BOARD

If there is no enduring power of attorney, the Guardianship Board may appoint as administrator the Public Trustee, a trustee company or any individual such as a family member or friend, an accountant or lawyer. In deciding who should be appointed, the Board must consider:

- the wishes of the person with the mental incapacity, both past and future, if these wishes can be established by some supporting information
- whether there are any family arrangements or relationships that should not be disturbed
- the compatibility of the proposed administrator with the person whose affairs they are to manage
- whether the proposed administrator would be readily available and competent to perform the role
- whether there would be any conflict of interest arising from the appointment.

Often the Public Trustee is appointed as the administrator, and a friend or relative is appointed as a liaison person. An administrator has similar powers to someone acting under a power of attorney, but he or she is supervised by the Guardianship Board.

For further information contact:

PUBLIC ADVOCATE 8269 7575 (toll free 1800 066 969)

GUARDIANSHIP BOARD 8368 5600 (toll free 1800 800 501)

Level 8, ABC Building, 85 North East Road

COLLINSWOOD SA 5081

ENDING AN ENDURING POWER OF ATTORNEY

You can cancel your enduring power of attorney at any time while you are still of sound mind. You should do this in writing, and send a copy to the donee and to anyone that the donee may have dealings with, for example, a bank or the Lands Titles Office. A revocation form is included in the Enduring Power of Attorney Kit.

WHERE TO GET THE KITS

You can buy the Enduring Power of Attorney Kit and the Enduring Power of Guardianship Kit from the Legal Services Commission and Service SA

108 North Terrace, Adelaide 5000

Telephone 13 23 24

**To order copies of this free fact sheet visit
www.lsc.sa.gov.au or telephone 8463 3528.**

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