

POWER OF ATTORNEY



This information is general and is not a substitute for legal advice. The Legal Service Commission provides free advice for most legal problems. Contact the [Legal Helpline on 1300 366 424](tel:1300366424) www.lsc.sa.gov.au www.lawhandbook.sa.gov.au

WHAT IS POWER OF ATTORNEY?

If you give another person a 'power of attorney', it simply means 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 general power of attorney can be created for a specified time. Otherwise, a general power of attorney ceases when you die, or if you become legally incapacitated. If you wish to have an attorney in case you become legally incapacitated, 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 legally incapacitated, for example, if you become of unsound mind or are unable to communicate in any way, perhaps after a stroke. 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 legally incapacitated. To be capable of signing a power of attorney, a donor must understand the nature and effect of the document. If a person's capacity to do so may be in doubt, then it is best to get a doctor's written opinion confirming that the donor appeared able to understand the nature and effect of the document 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 (whether general or enduring) ceases automatically. That is why it is important to have both an enduring power of attorney and a will.

ADVANCE CARE DIRECTIVES

A power of attorney does not give someone the right to make decisions about your welfare or medical treatment. It only deals with legal and financial matters.

For non-financial matters you should complete an Advance Care Directive. It allows you to:

- write down your wishes, preferences and instructions for your future health care, end of life, living arrangements and personal matters; and/or
- appoint one or more Substitute Decision-Makers to make these decisions on your behalf if you are unable to make them for yourself.

You may have heard of documents such as Enduring Power of Guardianship, Medical Power of Attorney and Anticipatory Direction. If you have completed one or more of these documents in the past they will still be legally effective or you can make an Advance Care Directive to replace them.

For more information about how to complete an Advance Care Directive, visit www.advancecaredirectives.sa.gov.au.

By making both an enduring power of attorney, which covers legal and financial affairs, and an Advance Care Directive, 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 to make an enduring power of attorney is to buy an Enduring Power of Attorney Kit from the Legal Services Commission or Service SA. The do-it-yourself kit includes the required forms, detailed instructions and answers to common questions.

The 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.

POWER OF ATTORNEY



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 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 in case it needs to be deposited and one for each donee to use.

DO 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 to 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 land now but it might be in the future, the form can still be deposited immediately so as to ensure that it has been completed properly. This avoids the risk that the form will have to be corrected later, which is a problem if it is an enduring power of attorney and the donor is legally incapacitated when any correction needs to be done. In this case, the form could not be corrected, as it is the donor who has to authorise corrections. Alternatively, the form may be kept in a safe place and deposited when the necessity arises.

A bank will normally want 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 legally incapacitated, 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 have an administrator appointed by SACAT.
- You must keep full and proper records of everything you do. Any interested person can insist on seeing these records.
- 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. Even if you believe you are a beneficiary of the donor's will, having a power of attorney gives you no entitlement to the donor's assets.

- If you act improperly, you are personally responsible to pay for any losses caused. You may also 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 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 donees are doing their job properly. If a donee has acted improperly, the Supreme Court can remove the power of attorney or SACAT 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 you have legal capacity, 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 SACAT for an Administration Order. These orders are made for the protection of persons who cannot handle their financial affairs.

POWER OF ATTORNEY



SA CIVIL & ADMINISTRATIVE TRIBUNAL

If there is no enduring power of attorney, SACAT 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 Tribunal must consider:

- the wishes of the person with the legal 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 SACAT.

FOR FURTHER INFORMATION CONTACT:

PUBLIC ADVOCATE 8342 8200 (toll free 1800 066 969)

SACAT 1800 723 767

ENDING AN ENDURING POWER OF ATTORNEY

You can cancel your enduring power of attorney at any time while you still have legal capacity. 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 KIT

You can buy the Enduring Power of Attorney Kit from the Legal Services Commission, Service SA online, or from 108 North Terrace, Adelaide (telephone 13 23 24).

For details of publication and legal information resources
visit lsc.sa.gov.au or telephone 8111 5555

© 5/2019 Legal Services Commission