

Handbook for Attorneys, Powers of attorney & enduring powers of attorney – Tasmania

What is a power of attorney?

It is a legal document for a person to appoint someone else (you) to manage their finances and property.

Terms used:

- **Attorney** – the person appointed, you.
- **Donor** – in Tasmania, this is the person making the document.
- **Enduring Power of Attorney** - a legal document where a person appoints someone else to manage their finances and property which continues (endures) after the person can no longer manage their finances because of loss of mental capacity.
- **Financial estate** – the assets (eg: car, house, savings), debts and property of the donor.
- **Jointly** – Where there is more than one Attorney, they must make decisions and act in agreement.
- **Severally** – Attorneys can make decisions about the person’s finances on their own/separately.
- **Mental capacity** – having the capacity to understand a decision and its consequences. Also, the person (donor) understands the nature and effect of a decision.
- **Will** - a written document setting out where a person’s financial estate goes after they die.

You can’t make decisions about a person’s health or lifestyle as an attorney. You can only make decisions about the person’s financial affairs. Appointment as a guardian allows you to make health and lifestyle decisions for another person.

You must be 18 years of age or older to be appointed as an attorney.

The person may appoint more than one attorney to make decisions together (jointly) or separately (severally).

The person can limit the powers you have as their attorney. For example, they could appoint you only to deal with a particular task like buying or selling their house or paying their bills while they are overseas.

Tasmania Legal Aid acknowledges and pays respect to the Tasmanian Aboriginal people as the traditional owners and continuing custodians of the land and waters of this island, lutruwita (Tasmania), where we live and work.

What is an enduring power of attorney?

A power of attorney ends if the person loses mental capacity, but an enduring power continues (endures), after the person can no longer manage their finances because of loss of mental capacity.

Enduring powers of attorney are recommended for all adults as future planning documents in case of unexpected illness, injury or generally age related decline.

This handbook focusses on enduring powers of attorney as these are most common but also applies generally to powers of attorney.

When can a person make an enduring power of attorney?

Anyone who is 18 years or older can make an enduring power of attorney as long as they understand the nature and effect of the document – have mental capacity.

Also, you must accept the role of enduring power of attorney by signing the document.

What does 'mental capacity' mean?

As adults, we all have the right to make decisions until such time as we lose *mental capacity*.

A person who has *mental capacity* can understand the effect of the document, what an attorney can and cannot do, and has at least a basic understanding of their financial affairs.

Mental capacity often be difficult to determine. For example, when a person is diagnosed with dementia, their capacity to make decisions varies at different times.

Before a person can appoint you as their enduring attorney, they must understand:

- That they can specify or limit your power and give you specific instructions, for example to sell your house.
- When the power starts.
- That when the power starts, you will have full control over their financial affairs as set out in the document.
- They can cancel (*revoke*) the document if they have *mental capacity*.
- The power you have as attorney continues after they lose *mental capacity*.
- If the person loses *mental capacity*, they will not be able to oversee the use of the enduring power of attorney.

If you have concerns about a person's ability to understand these things, you should get advice from a health professional and/or a lawyer **before** accepting the role of attorney.

When does your role start?

The enduring power of attorney document must be signed and registered with the Tasmanian Land Titles Office before it can be used. There is a fee to register it. For more information visit:

www.dpipwe.tas.gov.au/land-tasmania/land-titles-office

The person can state that the power starts at a future date. It could be when a medical specialist confirms the person can no longer manage their financial affairs. This must be related to mental functioning (capacity) rather than physical frailty.



What are your duties/responsibilities as an attorney?

If you agree to be someone's attorney, you are taking on a really important role. You have a number of responsibilities.

As an attorney, there are some important rules to follow. You must:

- Protect the interests of the person (sometimes called acting in a person's best interests). Always ask: 'is what I am about to do as attorney best for the person?'
- Keep accurate records of all financial and legal transactions for 7 years after your role ends (including receipts, bank statements, and legal documents).
- Only do the things that the enduring power of attorney document says you can do. It does not allow you to make medical or lifestyle decisions for the person such as where they live or who they see.
- Even if the person does not have mental capacity, wherever possible you still need to speak with them about what you are planning to do, listen to what they want, and follow their wishes as closely as you can.
- While the person has capacity to make decisions about their finances, you should only assist them when they ask for your help and do what they ask you to do.

If the person loses mental capacity to make decisions about their financial affairs, it is called entering the enduring phase. We recommend that you get medical evidence of the person's lack of mental capacity to manage their finances. This could be a report from a medical practitioner or specialist who will need to assess the person.

- Keep the person's money in a separate bank account in their name and use money for the benefit of the person only.
- Keep the person's finances confidential unless the person or document allows you to share the information or you are required legally to disclose it.
- Avoid doing anything that will be a conflict of interest between your duties as an attorney and your own interests (including family members), unless the document says you can. For example, you shouldn't rent out the person's property at reduced rent to yourself or your friend, relative or business associate.
- Get financial or taxation advice when needed.

Some things you can do as an attorney (subject to what is stated in the document appointing you)

- Buy things for the person that they need such as clothes, appliances, toiletries, haircuts etc.
- Pay for bills, insurance, repairs, or maintenance related to the person's property.
- Pay the person's debts.
- Make gifts, but see further information below.
- Invest the person's money.
- Sign deeds, contracts and other documents for the person.
- Rent out the person's property and end or renew a rental agreement.
- Collect rent from the person's property.
- Sell the person's property - including their house, investments and personal belongings.
- Change (**sever**) a joint tenancy or take out a mortgage for the person.
- Deal with the person's superannuation.
- Stop the person's right to apply for a grant of probate where the person has been appointed as an executor of someone else's Will.
- Stop the person's right to a grant of letters of administration.
- Carry on the person's business.
- Agree to any changes to a partnership the person has entered into.
- Bring and defend legal proceedings in the person's name and settle a legal claim.
- Pay for the education of the person's spouse or child, parent or other person who is dependant on the person for financial support.

Signing documents

When signing a document, make sure you do this as the attorney for the person. The easiest way to do this is for the document to be signed like this: *'John Smith', attorney for 'Jane Doe'*.

You should always make known that you are the attorney before doing anything for the person. Otherwise, you could be held personally liable for any contract made on the person's behalf.

When is it ok to make a gift from the person's funds?

As an attorney you can give gifts to the person's friends or relatives using the person's property or money, unless the document appointing you says you can't. There are some rules about gifts:

- You can make gifts to a relative or close friend of the person *and* for a special occasion such as a birth or marriage.
- You can give donations if the person made similar donations when they had mental capacity.
- You can also give gifts to others if they are something that the person made, or similar to what they made, when they had mental capacity. The value of any gift must also be reasonable in the person's financial circumstances.



As an attorney, you must not:

- Mix your money with the person's money; you should keep the person's finances totally separate from yours.
- Take payment for the time you spend carrying out your role as attorney unless the document says you can be paid. If the person needs a medical opinion about their capacity, then the person must pay any costs. You should only use the person's money for expenses that are directly connected to your role as attorney (such as mileage or printing costs).
- Enter into any transaction using the person's money that benefits or even appears to benefit you or your relatives, friends or business associates - unless the document says you can do it.
- Make a Will for the person even if they have lost mental capacity. The person must get their own legal advice about making or changing their Will.
- Make decisions about what health care or medical treatment the person should get, or not get.
- Vote for the person in an election.
- Decide where the person can live.
- Decide if or where the person can work.
- Decide if the person goes to school, or attends training.
- Decide on day-to-day matters relating to diet, recreation, hobbies, companions, pet ownership, sexual expression, dress, hairstyle, who the person spends time with, or whether they can join clubs, associations or political parties.
- Make any decisions about adoption for the person.
- Consent to the person marrying, separating or divorcing, or starting or ending a personal relationship.
- Decide whether the person enters into a surrogacy arrangement.

Some of these are decisions that are made by a person's guardian or close relative. Tasmania Legal Aid and the Tasmanian Civil and Administrative Tribunal (Guardianship stream) have fact sheets about guardianship and enduring guardianship:

www.legalaid.tas.gov.au/factsheets/enduring-guardianship/

www.tascat.tas.gov.au/guardianship/publications_/factsheets



Before agreeing to be an attorney you should consider:

- Whether the person has the mental capacity to appoint you as their attorney.
- If the person is unable to manage their financial affairs due to mental incapacity, and they do not have a valid enduring power of attorney, an application can be made to the Tasmanian Civil and Administrative Tribunal (Guardianship stream) to appoint an administrator to make those decisions for the person. You can ask to be appointed by the Board.
- **The powers given to you as an attorney are only valid if the person had the mental capacity to appoint you (see, ‘What does ‘mental capacity’ mean? on page 2).**
- Do you have the the right financial skills and knowledge to be an attorney?
- Do you have time to do the things you need to as an attorney? It can be a very time consuming role that you don’t get paid for.
- Do you live near the person? Living far away from the person you are attorney for may make your role harder especially if the person is hard of hearing, cannot communicate over the phone or by video or their mental capacity declines.
- It can be a stressful being an attorney and cause family conflict.

What if things go wrong?

There can be consequences for attorneys who don't do the right thing.

You can:

- be charged with a criminal offence if you dishonestly use an enduring power of attorney to obtain a financial advantage for yourself (or another person) or cause a loss to the person.
- be ordered to pay the person back for any loss they suffer from your failure to protect their interests.
- be removed as the attorney.

You also have some rights as an attorney:

- You have the right to all information that the person is entitled to. This includes a copy of the person's Will, if they lose mental capacity.
- You can apply to the Tasmanian Civil and Administrative Tribunal for advice and direction if you are unsure what to do in a particular situation.
- You can resign from your role as attorney (see below).

Ending an enduring power of attorney

An enduring power of attorney ends when:

- The person revokes (cancels) it and registers this with the Land Titles Office. They also need to notify you in writing that they have done this. You, and other people, are entitled to rely on the enduring power of attorney if you are not aware that it has been revoked.
- *If the enduring power of attorney is registered, and the notice to revoke is registered with the Recorder of Titles, you and other people are **not** allowed to rely on the enduring power of attorney.*

- The person dies.
- The attorney dies, becomes incapacitated, bankrupt or insolvent.
- You can end your role as attorney by writing to the person who appointed you and telling them you no longer want to do it.
- You can also ask to hand over your role to the Public Trustee. The Public Trustee is an independent organisation that acts on behalf of the Tasmanian community. The Public Trustee charges the person fees for its work. For more information visit:

www.publictrustee.tas.gov.au or call 1800 068784

- The Tasmanian Civil and Administrative Tribunal (Guardianship stream) can also change and revoke powers of attorney, and they can also appoint alternative attorneys. For more information visit:

www.tascat.tas.gov.au/guardianship/publications_/factsheets

Top tips for you

- Carefully consider whether you are able to take on the role.
- Read the document appointing you carefully before you sign it and get legal advice if you are unsure about something.
- Carefully follow the terms of the document and the *Powers of Attorney Act 2000* (Tas). Make sure you know what you can and cannot do.
- Always consult the person, as much as you can, to find out what they want you to do.
- Keep records of everything you do as attorney for 7 years.
- Keep a copy of the document in a safe place.
- Get legal advice if you are unsure about your role or seek direction from the Tasmanian Civil and Administrative Tribunal (Guardianship stream):

www.tascat.tas.gov.au/guardianship/publications_/factsheets

Case Study 1

Erin is 79 and has appointed her daughter, Tanya, to be her enduring power of attorney. Tanya agrees to take on the role. The document is signed and registered with the Tasmanian Land Titles Office.

Tanya later loses her job. Tanya knows that Erin has left all her money to her under her Will. Tanya decides to take small amounts of Erin's money to pay some of her own bills. She does not tell Erin that she has done this.

Problems with what Tanya has done:

- Tanya has used Erin's funds for herself.
- Tanya should have taken legal advice about her duties as an attorney.
- Erin should take legal advice about recovering the money and revoking the enduring power of attorney.
- This is an example of elder abuse.

Case Study 2

Jack is renting a home owned by his father, Phil. Jack is also his father's attorney under an enduring power of attorney. They have an agreement that Jack pays Phil \$200 a week in rent by directly depositing money into Phil's bank account.

After a period of time Jack stops paying rent because he is not paid to be his father's attorney and it takes up a lot of his time. He doesn't tell his father.

Problems with what Jack has done:

- Jack is required to act in the best interests of Phil and is not entitled to be paid to act as his attorney.
- Phil can recover the money that Jack has failed to pay.
- This is an example of elder abuse.

Need legal advice

Phone

1300 366 611 and ask to be put through to Senior Assist

Email

senior.assist@legallaid.tas.gov.au

Website

www.legallaid.tas.gov.au

In an emergency call 000

Our partners

Tasmania Police Assistance Line

131 444

Tasmanian Elder Abuse Helpline

1800 441169

Advocacy Tasmania

1800 005 131

Relationships Australia

1300 364 277

COTA Tasmania

03 6231 3265

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