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Let's chat

Enduring power of attorney documents (QLD) – August 2022

With:

Darius Hii – Tax and estate planning lawyer; Chartered Tax Advisor; and Director at Chat Legal

Information provided is general in nature; precise application depends on specific circumstances

Another important estate planning tool



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- Loss of capacity should equally be considered as part of an estate plan
- A lot of information available on Government websites:
 - <https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/power-of-attorney-and-making-decisions-for-others/power-of-attorney>
 - Explanatory guide exists on how to complete
- Best to walk through explanatory guide with client before completing enduring power of attorney document
- Lawyer assistance required?
 - Can provide context on the various options available



Enduring power of attorney

- Applicable while living
- Allows people to make financial and/or personal/health decision on your behalf
- Doesn't deal with serious health issues – advance health directive
- Allows you to provide comments about your personal views and wants that your attorney needs to consider
- Contrast with a general power of attorney:
 - Enduring = endures on loss of capacity



Financial matters

- Anything the principal can do in relation to financial or property matters including:
 - Paying maintenance and accommodation expenses for principal and dependents
 - Paying principal's debt
 - Receiving and recovering money payable to the principal
 - Carrying on a trade or business of the principal
 - Paying rates, taxes, insurance premiums or other outgoings for principal's property
 - Investing for the principal in authorised investments
 - Undertaking real estate transactions for the principal
- See Schedule 2 of Powers of Attorney Act 1998 (QLD)



Personal matters

- Personal matter other than a special personal matter or special health matter, relating to principal's health care, or welfare
- Generally includes:
 - Where principal lives and who principal lives with
 - Services provided to the principal and if the principal works
 - Any education/training principal undertakes
 - Day-to-day issues such as diet and dress
 - General health care and legal matters not relating to principal's financial or property matters
- Special matters not included includes making Will/ power of attorney, voting, adopting, consenting to marriage etc
- See Schedule 2 of Powers of Attorney Act 1998 (QLD)



Who to act as attorney

- Must be eligible:
 - Has capacity and over 18 years
 - Not been a paid carer of principal within last 3 years
 - Not health provider for the principal or service provider for a residential service where the principal is a resident
 - Not be a bankrupt, the public trustee or a trustee company (if being granted attorney over financial matters)
- Who normally chosen:
 - Family
 - Spouses/children
 - Parents/siblings
 - Wider family
 - Trust friends

Things for attorney to consider for principal



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- General principles – e.g.
 - Same human rights and fundamental freedoms
 - Empowering adult to exercise human rights and fundamental freedoms
 - Maintenance of adult's existing supportive relationships
 - Maintenance of adult's cultural and linguistic environment and values
 - Liberty and security
- Health care principles – e.g.
 - Same human rights and fundamental freedoms
 - Performance of functions and exercise of powers
 - Substituted judgement
- Suggested attorney consider these principles prior to exercising discretion



How attorneys can act?

- Severally – either or
- Jointly – all attorneys
- Simple majority
- Other methods available
- If not specified, then assumed appointed jointly



When does the power start

- Financial:
 - Immediately
 - On loss of capacity
 - Some other date
 - If not specified, then effective immediately
- Personal/health:
 - On loss of capacity



Limitations on attorney powers

- Attorney to avoid conflict transactions:
 - Situations when you may want attorney to enter into conflict transactions
- Limitation on ability to make gifts:
 - Situations when you may not want to restrict ability for attorney to make gifts



More obligations for attorney

- Record keeping
- Keeping property separate
- Maintaining confidential information
- Power to invest in reasonable manner



Notification requirements

- New form allows requirement for attorney to notify other persons in certain scenarios
- A layer of oversight
- Further confirming record keeping requirements for attorney (financial matters)



Consequences for attorney

- Criminal liability
- Paying compensation
- Accounting for profits
- Other remedies including specific performance

Contact details

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