

Why should you have an enduring power of attorney and an appointment of medical treatment decision maker?

Most of us understand the importance of having an up-to-date Will, but how many of us have thought about who would manage our affairs if we became incapacitated?

An enduring power of attorney and an appointment of medical treatment decision maker are legal documents that allow you to appoint a person to make decisions about your financial matters, personal matters and your medical treatment.

In Victoria these appointments are contained in two separate documents:

- an **enduring power of attorney** which allows you to appoint one or more persons (your attorneys) to make financial and/or personal decisions for you, and
- an **appointment of medical treatment decision maker** which allows you to appoint a person (your medical treatment decision maker) to decide what medical treatment you receive.

How does an enduring power of attorney and an appointment of medical treatment decision maker work?

- If you are an adult with decision making capacity then you may complete, sign and have witnessed an enduring power of attorney and an appointment of medical treatment decision maker.
- You may nominate one or more attorneys for financial and/or personal matters and a medical treatment decision maker for medical treatment decisions. These may be the same or different people.

- Each person appointed must agree to act by signing to accept his or her appointment.

Your attorney's and medical treatment decision maker's decisions have the same legal force as if you had made these decisions yourself.

Why make an enduring power of attorney and appointment of medical treatment decision maker?

By making an enduring power of attorney and an appointment of medical treatment decision maker you get to choose who manages your financial, personal and medical treatment decisions if you cease to have decision making capacity.

If you lose decision making capacity and you do not have an enduring power of attorney in place there may be no one with the legal authority to make financial and personal decisions for you.

Your health practitioner must also determine who is responsible for your medical treatment decisions.

A significant burden can be placed on your family who are trying to cope with the uncertainty of your wishes and appropriate actions to take on your behalf.

In these circumstances your family, friends or advisers may need to apply to the Victorian Civil and Administrative Tribunal (VCAT) for the appointment of an administrator of your estate and guardian of your personal affairs and medical treatment decisions.

Aside from time delays where bills may be left unpaid and investments ignored, VCAT may not appoint the person you would have chosen.

Who can you appoint as your attorney and medical treatment decision maker?

For financial and personal matters an individual is eligible to be appointed as your attorney if this person is:

- 18 years of age or older
- not an insolvent under administration, such as an undischarged bankrupt
- not your care worker, health provider or accommodation provider.

Please note that a care worker does not include a person who receives a government carer payment.

Additional requirements apply if your attorney for financial matters has been convicted or found guilty of an offence involving dishonesty which is punishable by imprisonment of three or more months.

Additional requirements also apply for your attorney for financial matters if you have a self-managed superannuation fund.

For medical treatment matters your medical treatment decision maker must be 18 years of age or older.

How many attorneys and medical treatment decision makers can you appoint?

For financial and personal matters, you may appoint one or more adults as your attorneys and, for financial matters, you may also appoint a trustee company such as Australian Executor Trustees.

Where you appoint more than one attorney their powers can be exercised:

- jointly, requiring all to act together
- jointly and severally, allowing all to act together or each to act independently of the other
- severally, where each will act independently of the other, and
- by majority, requiring all to act on a majority rules basis.

You can also appoint one or more alternative attorneys if any of your attorneys is unwilling or unable to act.

It's important that the arrangements you decide upon can work at a practical level so that decisions are made in a timely manner.

For medical treatment matters you may only have one medical treatment decision maker. While you may appoint more than one person it is the first person on this list who is reasonably available, willing and able to act at that time.

When does your enduring power of attorney and appointment of medical treatment decision maker commence?

You can choose when you want your enduring power of attorney for financial and personal matters to commence. You can specify in the enduring power of attorney that it commences:

- immediately, which means your attorney can act on your behalf regardless of whether or not you have decision making capacity
- when you cease to have decision making capacity, or
- such other time, circumstances or occasion.

In contrast, your medical treatment decision maker may only act if you have lost decision making capacity.

When will your enduring power of attorney and appointment of medical treatment decision maker end?

An enduring power of attorney and an appointment of medical treatment decision maker ends if:

- you revoke it
- you die
- all your attorneys/medical treatment decision makers die or are otherwise no longer eligible or able to act
- if VCAT revokes the power, or
- you put in place a later enduring power of attorney or appointment of medical treatment decision maker revoking the earlier one.

Importantly, your marriage, separation or divorce does not automatically revoke an existing enduring power of attorney.

What powers does your attorney and medical treatment decision maker have?

An attorney for **financial** matters can make decisions on your behalf in relation to any matter relating to your financial and property affairs.

It includes decisions in relation to such things as:

- buying and selling real estate
- paying your expenses
- accessing your bank accounts, and
- buying and selling investments.

An attorney for **personal** matters can make decisions in relation to your personal and lifestyle affairs.

It includes decisions in relation to such things as:

- health care matters
- access to support services, and
- living arrangements, including where and with whom you live.

While the powers of your attorney are broad there are some limits on their powers. Your attorney cannot, for example, make or revoke your Will or make decisions about the care and well-being of a child.

Where you have appointed a different attorney for financial matters and for personal matters who disagree on a decision (such as your living arrangements) then, unless you provide otherwise in your enduring power of attorney or VCAT orders, the decision of your attorney for personal matters will prevail to the extent of any such inconsistency.

Your **medical treatment decision maker** may consent to or refuse the commencement or continuation of medical treatment or a medical research procedure.

Medical treatment means physical or surgical therapy, treatment for mental illness, dental treatment, prescription pharmaceuticals and palliative care which is administered by a health practitioner to diagnose a physical or mental condition, prevent disease, restore or replace a bodily function because of disease or injury or improve your comfort and quality of life.

You can impose conditions and provide instructions to your attorney and medical treatment decision maker.

For your medical treatment decisions, this also includes separately putting in place an advance care directive in which you can provide an instructional directive and a statement of your preferences and values regarding your future medical treatment.

Can your attorney act for your interstate and overseas assets?

Your enduring power of attorney is prepared in accordance with Victorian laws.

We recommend you seek specific advice with regards to any assets you own interstate or overseas.

It may be in your best interests to have a separate enduring power of attorney in each jurisdiction where you own assets.

Similarly, if you move interstate or overseas we recommend you seek advice with regards to whether your appointment of medical treatment decision maker will be recognised in that jurisdiction.

Do you need to register your enduring power of attorney and appointment of medical treatment decision maker?

There is no general registration system for enduring powers of attorney and appointments of medical treatment decision maker in Victoria.

If your attorney for financial matters is ever required to deal with real estate then your attorney will however need to register your enduring power of attorney with the Department of Environment, Land, Water & Planning in Victoria at that time.

For your appointment of medical treatment decision maker, it is important you share information with your health practitioner about the planning you have done in relation to your future medical treatment decisions.

Who should you appoint as your attorney or medical treatment decision maker?

Your attorney is required to, amongst other things:

- act in your best interests with honesty and due diligence
- keep accurate records and accounts
- avoid acting where there is, or may be, a conflict of their interests with yours unless you have specifically authorised this in the document, and
- separate your assets from theirs.

However, given the autonomous power your attorney enjoys it's important you give due consideration to appointing someone:

- you trust will only ever act in your best interests and not their own
- you are confident has the ability and is willing to take on the role
- you can rely upon to act in a considered and timely manner, including obtaining professional advice where appropriate, and
- who will consider and act in accordance with your wishes.

This may involve appointing a combination of attorneys, appointing an independent professional trustee such as Australian Executor Trustees as your attorney for financial matters and/or imposing appropriate conditions and instructions in the enduring power of attorney which are relevant to your circumstances.

For medical treatment matters your medical treatment decision maker must make medical treatment decisions on your behalf that he or she reasonably believes you would have made yourself if you had decision making capacity.

It's therefore important to consider appointing someone you can rely upon to be available to act, who will be your strong advocate and will respect your values and preferences.

A separate advance care directive can be an effective means for documenting your values and preferences, as well as any instructions you have regarding your future medical treatment.

How can we help you?

We recommend every adult has enduring powers of attorney and appointment of medical treatment decision maker for financial, personal and medical matters.

It is the only way you control who makes decisions on your behalf if you cease to have decision making capacity, whether due to accident or illness, during your lifetime.

For further information about our estate planning services, please contact a member of our Estate Planning Team in Victoria by email to melbourne@aetlimited.com.au or by telephone on **1800 882 218**.