

What is my role as an Enduring Power of Attorney?



A guide for people appointed as
Attorneys, Powers of Attorney and
Enduring Powers of Attorney.

Acknowledgement of Country

Tasmania Legal Aid acknowledges and pays our respect to the Palawa/Tasmanian Aboriginal people as the Traditional Custodians of the land and waters of Lutruwita/Tasmania, where we live and work.

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Terms used in this guide

Donor: in Tasmania, this is the person who decides on the power of attorney.

Attorney: the person (or persons, if more than one) who is given the power to make decisions on the donor's behalf.

Power of attorney: a legal document that appoints someone to manage another persons finances and property.

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.

Will: a written legal document setting out where a person's financial estate goes after they die.

What is a power of attorney?



It is a legal document that appoints someone to manage another persons **finances** and **property**.

What can a power of attorney do?

- ✓ They can only make decisions about the person's financial affairs.
- ✓ They 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 of an 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. This is called a **particular power of attorney**.
- ✗ They can't make decisions about a person's **health** or **lifestyle** as an attorney.

What is an enduring power of attorney?

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

Enduring powers of attorney may be considered for adults as future planning documents in case of unexpected illness, injury or generally age related decline to appoint someone they trust as their attorney.

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

Who can be an enduring power of attorney?

Anyone who is 18 years old or older. They must have the mental capacity to understand the nature and effect of the document.

They must accept the role of enduring power of attorney by signing the document.

What does 'mental capacity' mean?

Mental capacity is your ability to understand information and make decisions about your life. 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 legal document, what an attorney can and cannot do, and has a basic understanding of their financial affairs.

Mental capacity can 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 another person as their enduring power of 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.
- ✓ Once the power starts, you will have full control over their financial affairs as set out in the document.
- ✓ The donor can cancel (revoke) the document if they have mental capacity.
- ✓ The enduring power of attorney continues after the person loses 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 requirements, you should get advice from a health professional and/or a lawyer before accepting the role of attorney.

When does the role start?

The enduring power of attorney document must be signed and registered (for a fee) with the Land Titles Office before it can be used.

For more information visit: www.nre.tas.gov.au/land-tasmania/land-titles-office/power-of-attorney-forms

What are the responsibilities of an attorney?

If you agree to be someone's attorney, you have a few responsibilities to fulfil your duties as an attorney correctly:

- ✓ 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 this 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.
- ✓ 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.
- ✓ Listen to what they want and follow their wishes as closely as possible. If the person does not have mental capacity, you still need to speak with them (where possible) about what you are planning to do.
- ✓ 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.

If the person loses the 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 medical assessment done by a medical practitioner or specialist.



Things you can do as an attorney:



- ✓ 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, (see further information opposite) or 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?

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.

Things you can't do as an attorney:



- ✘ 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.
- ✘ Elder abuse prevention.

Some of these are decisions that must be made by a person's guardian or close relative. Tasmania Legal Aid and the Tasmanian Civil and Administrative Tribunal (TASCAT – Guardianship stream) have more information.

Enduring guardianship:

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

Guardianship:

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

Phil's story

Jack is renting a home owned by his father, Phil (who is 70 years old). 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 some 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 Jack's decision:

- ✗ 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 abuse of an older person.

For more information, call our Senior Assist team:

1300 366 611



Things to consider

- ? Does 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 6).
- ? Do you have the the right financial skills and knowledge to be an attorney?
- ? Do you have time to do the things required of the role? 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.

Things to consider before accepting the role

- ? Carefully consider whether you want 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 (TASCAT – Guardianship stream).

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.

Erin's story

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.

Problems with Tanya's decision:

- ✗ Tanya has used Erin's funds for herself.
- ✗ Tanya should get legal advice about her role as an attorney.
- ✗ Erin should take legal advice about recovering the money and revoking the enduring power of attorney.
- ✗ This is an example of abuse of an older person.

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1300 366 611



Your rights as an attorney

- ✓ You have the right to access 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 page 19).

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 068 784**
- 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

Tips to remember

- 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

Don't forget...

If you, or someone you know is experiencing, or at risk of, elder abuse – Tasmania Legal Aid's Senior Assist can provide information, legal help, support with safety planning, counselling and connect you to other services.

Our team can support you to make your own decisions.

Call our Legal Help line on:

1300 366 611

and ask for Senior Assist.

If you would like to refer someone to our service or ask questions, email us at:

senior.assist@legalaid.tas.gov.au



Other services

Advocacy Tasmania

Advocacy, support and referral services.

1800 005 131 | www.advocacytasmania.org.au

Council On The Ageing (COTA) Tasmania

COTA offers many support services for older people.

03 6231 3265 | www.cotatas.org.au

(Tasmanian) Elder Abuse Helpline

A helpline providing information and referrals about elder abuse.

1800 441 169 (9am – 5pm) | SMS: **0457 806 963**

www.elderabuse.tas.gov.au

Tasmania Legal Aid

Free information and help for a range of legal problems.

1300 366 611 | www.legalaid.tas.gov.au

Relationships Australia - Tasmania

Includes mediation and counselling services

1300 364 277 | www.tas.relationships.org.au/locations/

Senior Assist, Tasmania Legal Aid

Legal help and assistance for people at risk of, or experiencing, elder abuse.

1300 366 611 | www.legalaid.tas.gov.au/senior-assist

Tasmania Police

Non-urgent: **131 444**

In an emergency call

000

(Police, Ambulance and Tasmania Fire Service).

Disclaimer

This guide should not be used as substitute for legal advice.

No responsibility is accepted for any loss, damage or injury, financial or otherwise, suffered by any person acting or relying on the information contained within this guide, or omitted from it.

1300 366 611

www.legalaid.tas.gov.au

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