

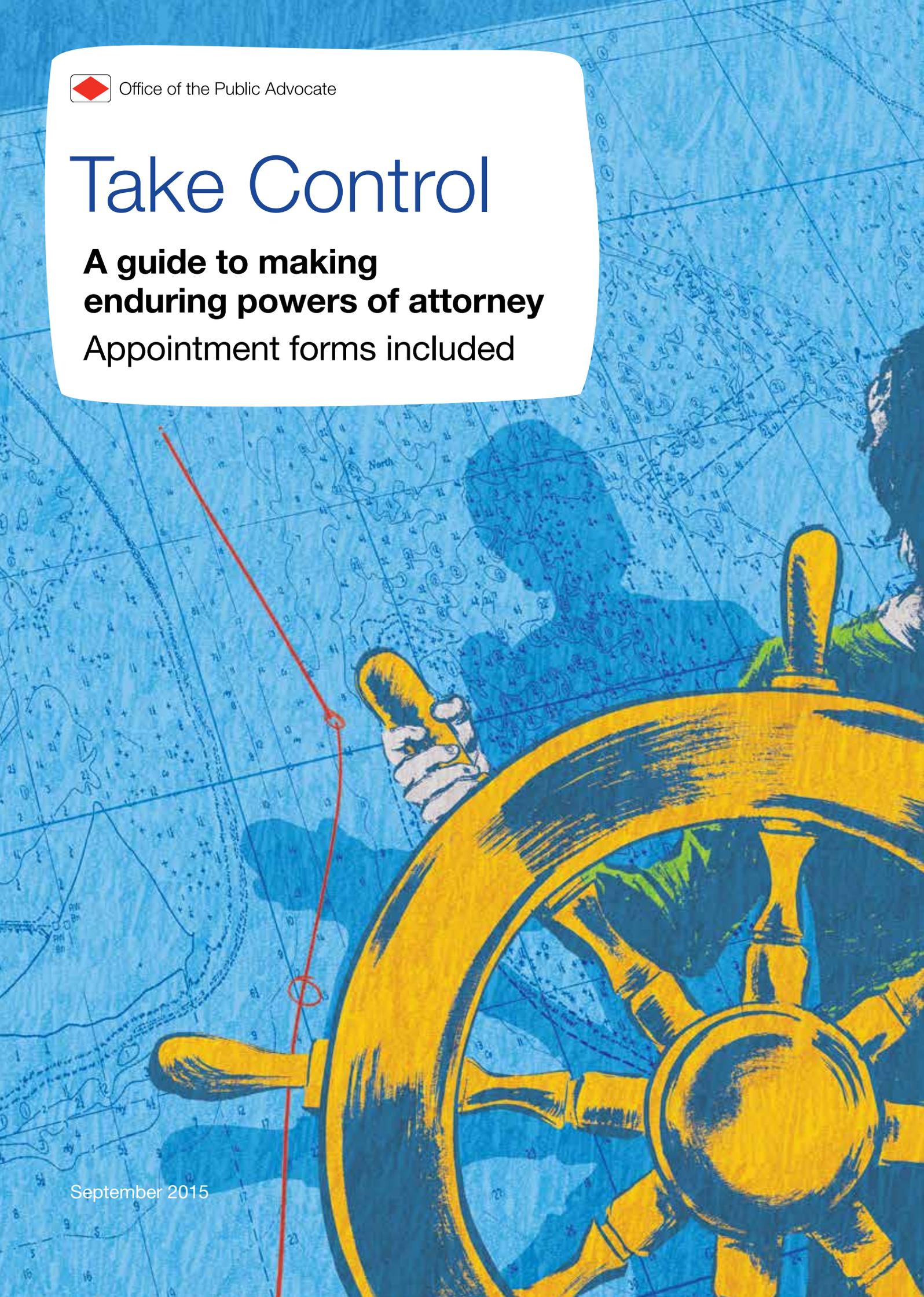


Office of the Public Advocate

Take Control

**A guide to making
enduring powers of attorney**
Appointment forms included

September 2015



The Office of the Public Advocate (OPA) acknowledges Victoria's Aboriginal communities and their rich culture. OPA pays respect to their Ancestors, Elders and communities, who are the custodians of the land on which we work.

Changes to the law

Powers of attorney laws changed in Victoria on 1 September 2015. Enduring powers of attorney (financial) and enduring powers of guardianship made before this date are valid under the new *Powers of Attorney Act 2014*. There has been no change to the medical enduring power of attorney.

To find out more and to check for changes to the law, visit OPA's website or call OPA's Advice Service.

OPA Advice Service: 1300 309 337

TTY: 1300 305 612

www.publicadvocate.vic.gov.au

Take Control: a guide to making enduring powers of attorney

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About this guide

This guide has been produced by the Victorian Office of the Public Advocate (OPA) to assist people to make enduring powers of attorney. OPA aims to protect and promote the rights and interests of people with disability. Making enduring powers of attorney is a way a person can exercise choice and control now in case they are unable to make decisions in the future.

OPA recommends that everyone 18 years of age and older consider making enduring powers of attorney because anyone can have an accident or illness that affects their ability to make decisions.

Personal stories

Personal stories appear in this booklet to illustrate the choices available when making enduring powers of attorney. The stories provide examples of the types of considerations that may guide people's choices.

The personal stories are hypothetical. Any resemblance to any person is entirely coincidental.

Other powers of attorney

OPA produces information about other powers of attorney.

Supportive attorney

Supportive attorney appointments are about promoting autonomy and dignity for a person who is able to make various decisions themselves, provided they have support to make and give effect to those decisions. For information about supportive attorney appointments, see OPA's website: www.publicadvocate.vic.gov.au

A person who wants to make a supportive attorney appointment can order OPA's *Guide to appointing supportive attorneys*.

General non-enduring power of attorney

The general non-enduring power of attorney is mostly used for a set purpose and set time. For example, it may be used when a person travels overseas and needs someone else to take care of their property and finances while they are away. For information about making a general non-enduring power of attorney see OPA's website.

Enduring powers of attorney for planning for the future

People plan for their futures in many ways. Making enduring powers of attorney is one way of planning for the future.

What are enduring powers of attorney?

Enduring powers of attorney are legal documents that let a person appoint someone to make decisions for them. The powers 'endure' which means they continue if, and when, the person who made the appointment is unable to make decisions about matters.

Why make enduring powers of attorney?

Being able to appoint substitute decision makers helps individuals plan for:

- their future medical treatment and care
- the management of their financial affairs into the future
- other personal and lifestyle matters.

Enduring powers of attorney people can make in Victoria

The two enduring powers of attorney for appointing substitute decision makers are:

- the enduring power of attorney
- the medical enduring power of attorney.

For clarity, in this booklet OPA uses the term 'medical enduring power of attorney' for the enduring power of attorney (medical treatment).

Enduring power of attorney

When a person makes an enduring power of attorney they choose another person (or people) to make decisions for them about:

- financial matters, including any legal matter that relates to their financial or property affairs
- personal matters, such as where they live, support services they might need and their health care (including whether to consent to their medical or dental treatment).

Medical enduring power of attorney

When a person makes a medical enduring power of attorney, they appoint a medical agent who can decide whether to consent to medical or dental treatment, and can refuse medical treatment on their behalf. The medical agent can only act if the person is unable to make their own decisions about medical or dental treatment.

The decisions of the medical agent about whether to consent to medical or dental treatment take precedence over the decisions of an attorney appointed for personal matters who also has the power to consent to these.

If it is important to a person that there is someone who can refuse medical treatment on their behalf, then the person should make a medical enduring power of attorney.

How to make an enduring power of attorney

A person who makes an enduring power of attorney appoints another person (or people) to make decisions for them about:

- financial matters
- personal matters or
- both financial matters and personal matters.

The person who makes the appointment is known as the **principal**. The principal must be 18 years of age or older and have **decision making capacity** to make the enduring power of attorney. No one else can make a power of attorney on behalf of another person.

The person, or people, the principal appoints are known as the **attorney(s)**.

An enduring power of attorney does not have to be prepared by a lawyer. However, if the principal has complex financial and legal affairs or complex family dynamics, the advice of a lawyer may be helpful.

Decision making capacity

A person has decision making capacity if they are able to:

- understand the information relevant to the decision to make an enduring power of attorney and **the effect of this decision**
- retain that information to the extent necessary to make the decision
- use or weigh that information as part of the process of making the decision and
- communicate the decision and their views and needs in relation to the decision in some way, including by:
 - speech
 - gestures or
 - other means.

i See page 28 for information about what it means to understand the effect of the decision to make an enduring power of attorney.

Enduring powers of attorney are made under the *Powers of Attorney Act 2014*.

The attorney's decisions have the same legal force as if the principal had made them.

Step-by-step instructions about how to make an enduring power of attorney follow.

Step 1:

Decide what, who and when

The principal decides:

- what powers to give
- who to appoint
- when the powers start.

What powers to give

The principal decides the types of decisions their attorney(s) can make. These can be decisions about:

- all financial matters
- all personal matters
- all personal and financial matters.

Or the principal can limit the attorney(s)' power to making decisions about specific financial and personal matters.

Financial matters are any matter relating to the principal's:

- financial affairs or
- property affairs.

Financial matters include any legal matter that relates to the financial or property affairs of the principal. Examples of financial matters are: paying expenses, making investments, undertaking a real estate transaction and carrying on a business.

i See 'What these words mean' on page 55 and 56 for more examples.

Personal matters are matters relating to the principal's:

- personal affairs and
- lifestyle affairs.

Examples of personal matters are: health care matters, including decisions about whether to consent to medical treatment, access to support services and where and with whom a person lives.

Luke's story

Luke has decided to make an **enduring power of attorney**. He wants his attorney to have power to make decisions about **all financial matters**. If he is ever unable to make decisions about financial matters he wants there to be someone who can make sure his bills are paid and can manage his finances.

Luke decides to also appoint an attorney for **all personal matters**. If he ever becomes very ill and unable to make his own medical decisions, he wants someone he has chosen to be the person who can make decisions about whether to consent to his medical treatment.

He also wants this person to be able to make decisions about where he lives, if he is ever unable to make these decisions himself, in case he becomes so unwell that there is a question about whether he is able to live independently at home.

Luke doesn't want the person he appoints to be able to refuse medical treatment on his behalf so he doesn't plan to make a **medical enduring power of attorney**.

The principal can place conditions on the attorney(s)' powers. The principal can also give instructions to the attorney(s) about how they want them to use the powers.

Restrictions or conditions on the giving of gifts

The principal can include a condition or restriction on the giving of gifts in the enduring power of attorney.

Even if no condition or restriction is included the *Powers of Attorney Act 2014* says that an attorney for financial matters may only give a gift from the principal's property (including a gift of money) if:

- the gift is reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances and
- the gift is
 - to a relative or a close friend of the principal and is of a seasonal nature or for a special event (such as a birth or marriage) or
 - a type of donation that the principal made (when the principal had decision making capacity for the matter) or that the principal might reasonably be expected to make.

Ella's story

Ella has many children, grandchildren, siblings, nieces and nephews. Ella includes a condition in her enduring power of attorney that birthday and Christmas presents only be given to her grandchildren.

Things that an attorney can't do

An attorney appointed for all personal matters has power to consent to medical treatment but does not have the power to refuse medical treatment. Only a medical agent appointed under a medical enduring power of attorney or a guardian appointed by the Victorian Civil and Administrative Tribunal (VCAT) with power to make decisions about medical treatment can refuse medical treatment on behalf of another person.

An attorney does not have power to do the following things on behalf of the principal:

- vote
- make decisions about the care or wellbeing of their children
- make (or revoke) a will
- make (or revoke) an enduring power
- consent to a marriage or a sexual relationship or the dissolution of a marriage
- make decisions about adoption of a child
- enter into surrogacy arrangements
- manage the principal's estate on their death
- consent to an unlawful act.

Things an attorney can't do unless the principal has authorised this

For an attorney to be able to do the following, the principal must authorise this in the enduring power of attorney:

- provide from the principal's property for the needs of a dependant of the principal
- pay the attorney for carrying out the role of attorney.

Conflicts of interest

An attorney can't enter into a transaction where there is, or may be, a conflict between the duty of the attorney to the principal and the interests of the attorney (or the attorney's relative, business associate or close friend). This is known as a **conflict transaction**.

However, there may be a situation where the principal wants to authorise an attorney to enter into a conflict transaction. The principal can authorise a specific conflict transaction or a specific kind of conflict transaction.

Luis' story

Luis is making an enduring power of attorney. He wants to appoint his adult son Martin to be his attorney for financial matters. Next year Martin will move into a house that Luis owns. Luis realises that he should think about whether there will be a conflict transaction that he will want to authorise.

The principal can authorise a conflict transaction:

- in the enduring power of attorney or
- after making the enduring power of attorney, but only while the principal has decision making capacity to authorise this.

A principal should consider getting legal advice before authorising their attorney to enter into conflict transactions.

There are some transactions that the *Powers of Attorney Act 2014* says an attorney can enter into even though there may be a conflict between the duty of the attorney to the principal and the interests of the attorney. An attorney for financial matters may:

- give reasonable gifts from the principal's property to the attorney, the attorney's relatives or the attorney's close friends (📘 see 'restrictions or conditions on the giving of gifts' on page 7 for details of what gifts are permitted).
- provide for the maintenance of a dependant of the principal if this is authorised in the enduring power of attorney.

Depending on the circumstances, an attorney may be able to sell property held jointly by the attorney and the principal even if the principal has not authorised this. Visit OPA's website: www.publicadvocate.vic.gov.au or call OPA's Advice Service on 1300 309 337 for more information about this complex area.

Who to appoint

The most important decision when making an enduring power of attorney is choosing who to appoint. With enduring powers, whoever is appointed will have the authority to make decisions for the principal after the principal no longer has decision making capacity to change or cancel the appointment. Many people choose their life partner or an adult child. Others prefer to appoint another family member, a friend with expertise in the area, an accountant, a lawyer, or a trustee company.

What to consider when choosing who to appoint

The principal should feel confident that the person or agency has the ability and is willing to take on the role.

The person (or people) that the principal appoints needs to be **eligible** to be appointed as an attorney and agree to be an attorney.

Who is eligible to be an attorney?

A person is eligible to be an attorney if the person is:

- 18 years of age or older
- **not** insolvent under administration and
- **not** a care worker, a health provider or an accommodation provider for the principal.

(A person who is an undischarged bankrupt is an example of a person who is 'insolvent under administration'.)

A person who has been convicted or found guilty of an offence involving dishonesty (that is punishable by imprisonment of three months or more) is only eligible to be appointed as an attorney for financial matters if they have disclosed the conviction or finding of guilt to the principal. That the person has disclosed the conviction or finding of guilt needs to be recorded in the enduring power of attorney.

The principal can appoint a trustee company as an attorney for financial matters only.

A trustee company is not eligible to be an attorney for financial matters if a proceeding has commenced against the company to wind it up.

Mei's story

Mei is making an enduring power of attorney. She wants to choose two people to be her attorneys for financial matters and one person to be her attorney for personal matters.

To help her decide who to appoint she has written a list of the things that she thinks are important in the people she appoints. For her attorneys for financial matters she wants people who handle money well, are trustworthy and won't upset the rest of the family. For her attorney for personal matters she wants someone who will know what she wants, is someone she is fond of and who is fond of her, lives close by, and is confident to talk to doctors.

Appointing more than one attorney

The principal may appoint more than one attorney for all or any matters. The principal can also specify the matters for which each attorney is to act.

How attorneys are to act

If the principal appoints more than one attorney for all or any matters the principal may appoint the attorneys to act:

- **jointly** — the attorneys must make decisions together (and all sign any document)
- **jointly and severally** — the attorneys can make decisions together or independently (and either all sign any document, or one attorney alone can sign any document)
- **severally** — the attorneys can make decisions independently (and one attorney alone can sign any document)
- **by a majority** — a majority need to agree to make a decision (and the majority who agree sign any document).

If the principal does not specify how the attorneys are appointed, the attorneys act jointly.

When deciding how attorneys are to act, consideration should be given to ensuring this is a workable arrangement.

Martina's story

Martina is making an enduring power of attorney. She appoints her husband, Francesco, and one of her adult daughters, Sofia, to be her attorneys for all financial matters. She appoints Francesco and Sofia to act jointly. This means they must make decisions together.

Even though Martina has appointed Francesco and Sofia to act jointly, if Francesco dies before Martina, the law says that Sofia will be able to continue to act as attorney and will be able to make decisions alone. If Martina wants to make sure there are always two people to make decisions together, she could appoint alternative attorneys to act as back-ups for Francesco and Sofia.

Appointing alternative attorneys

The principal can appoint an **alternative attorney** for any attorney they have appointed.

When an alternative attorney acts

The principal can specify the circumstances in which an alternative attorney is authorised to act. If the principal does not specify any circumstances, an alternative attorney is authorised to act if the attorney for whom they are appointed dies, does not have decision making capacity for the matters they were appointed to make decisions about, is otherwise not willing or able to act, or is no longer eligible to be an attorney.

Daniel's story

Daniel makes an enduring power of attorney and appoints his life partner, Alex, as his attorney for all personal matters.

Daniel realises that Alex could die before him or that he may become unable to make decisions for Daniel. For this reason, Daniel appoints one of his nieces, Paula, as alternative attorney for Alex. Daniel appoints Paula because he thinks she has a good understanding of his wishes about his health care and accommodation.

When powers will start

The principal can nominate in the appointment form when the attorney(s)' powers start.

This can be:

- immediately
- when the principal ceases to have decision making capacity for the matters or matter
- another time, circumstance or occasion.

The principal can specify that the power start at different times for financial and personal matters. Or the principal can specify that the power start at a different time for a specified matter.

If the principal does not specify when the power starts, it begins immediately for all matters.

If the power starts when the principal ceases to have decision making capacity for the matter(s)

The principal can specify in the enduring power of attorney people or organisations that the attorney should notify before commencing to exercise power for the first time because the principal does not have decision making capacity for that matter.

If the power starts immediately

If the power starts immediately (while the principal still has decision making capacity for the matters) the **principal oversees the use of the attorney's power** and the attorney acts at the direction of the principal.

Ana's story

Ana is making an enduring power of attorney. She has decided that the power will start immediately for financial matters because she would like support to manage her finances now.

For personal matters she has chosen for it to start when she no longer has decision making capacity to make decisions about personal matters. Ana wants to stay in charge of where and how she lives her life until she becomes unable to make these types of decisions.

Hassan's story

Hassan has appointed his youngest son, Ahmad, and his daughter, Maryam, as his attorneys for all financial matters. He has appointed Ahmad as his attorney for personal matters because Ahmad lives close by.

Hassan has chosen for the powers to start when he ceases to have decision making capacity for the matters.

Hassan has included instructions in the enduring power of attorney that Ahmad and Maryam notify his oldest son, Ali, who lives interstate before commencing to exercise their power for the first time.

Step 2: Complete the form

It is important the enduring power of attorney appointment form is completed but not signed until witnesses are arranged.

i See page 35 for the form.

If the principal has a physical disability that prevents them from signing the form they may direct another person to sign for them in their presence and in the presence of the witnesses.

i See page 26 for more information.

If the principal can't read English, they should only sign the form once it has been interpreted and they understand what the document says.

i See page 26 for more information.

Step 3: Sign the form in front of witnesses

Witnessing requirements

Two witnesses who are 18 years of age or older are required to witness the principal signing the form. One must be:

- someone authorised to witness affidavits or
- a medical practitioner (a medical doctor).

The witnesses must:

- not be an attorney under the enduring power of attorney
- not be a relative of the principal or relative of an attorney
- not be a care worker or accommodation provider for the principal
- not be a person who is signing at the direction of the principal (because the principal is unable to physically sign the enduring power of attorney).

Each witness must certify that:

- the principal appeared to freely and voluntarily sign in their presence; and
- at the time the principal signed the instrument, the principal appeared to have decision making capacity in relation to the making of the enduring power of attorney.

Attorneys sign a statement of acceptance in front of a witness

After the principal has signed the form in front of witnesses, each attorney and alternative attorney appointed must sign a statement of acceptance in front of a witness who is 18 years of age or older. This can happen on a later date.

i See page 22 for steps to take after the enduring power of attorney is made.

Example of how to complete the form

Read Mary's story below. Turn over to see how Mary completes her enduring power of attorney appointment form.

Mary wants to appoint her husband, John, and her adult daughter, Lea, as her attorneys for financial matters.

She wants to appoint John as her attorney for personal matters.

Mary wants to appoint her adult son, Ray, as her back-up for John (as alternative attorney for John).

Mary decides that her attorneys are to act jointly and severally for financial matters. This means John and Lea can make decisions together or independently. She will appoint just one attorney, John, for personal matters.

Mary decides the enduring power of attorney will start immediately for financial matters and when she ceases to have decision making capacity for personal matters.

Mary has a sister Kim with an intellectual disability who she supports financially. She wants her attorneys to be able to provide for the needs of her sister. She decides to authorise her attorneys to provide for the needs of her dependant in the enduring power of attorney.

Mary thinks that if she was ever unwell she would want her attorney for personal matters, John, to be able to share confidential information about her health with other family members.

EXAMPLE ONLY

Keep all pages of this form together.

Enduring Power of Attorney Appointment

This enduring power of attorney is made under Part 3 of the Powers of Attorney Act 2014 and has effect as a deed under section 81 of the Act.

Section 1: Principal (You)

The person making this enduring power of attorney is known as the 'principal'. Whenever you see the word 'principal' in this form, it means you.

Name of principal

Mary Smith

Residential address

Street name and number

1 Main Street

Suburb or town

City

State

Victoria

Postcode

Revocation of previous enduring powers of attorney

Under section 55 of the Powers of Attorney Act 2014 any other enduring power of attorney will be revoked to the extent of any inconsistency with this enduring power of attorney, unless you specify otherwise.

Please select one option

I specify that all previous enduring powers of attorney made by me under the Powers of Attorney Act 2014 are revoked.

OR

I specify below that the following previous enduring powers of attorney made by me under the Powers of Attorney Act 2014 are not revoked.

Section 2: Your attorney

The next two pages allow you to appoint an attorney and an alternative attorney (if required). You also need to specify what decisions your attorney can make.

I appoint the person listed below as my attorney.

Name of attorney

Insert your attorney's name or business name, if appointing a company. Insert position, if appointing the occupant of a position.

John Smith

Residential or business address

Street name and number

1 Main Street

Suburb or town

City

State

Victoria

Postcode

What decisions can this attorney make?

You can specify the matters for which you authorise your attorney to act on your behalf (Option A), or you can authorise your attorney to do anything on your behalf (Option B). If you select Option A, you must also select the matters that you authorise.

Please select one option.

Option A: Specify the matters

I authorise my attorney to do anything on my behalf that I can lawfully do by an attorney for the matters specified below.

► Please select one option

Only personal matters

Only financial matters

Both personal and financial matters

If you do not want to authorise this attorney to exercise power for all personal or financial matters, specify each matter that you do want to authorise.

OR

Option B: Do anything

I authorise my attorney to do anything on my behalf that I can lawfully do by an attorney.

EXAMPLE ONLY

Do you want to appoint an alternative attorney for this attorney?

No **Go to Section 3 on page 8**

Yes **Provide details**

I appoint the person listed below as my alternative attorney.

Name of alternative attorney

Insert business name, if appointing a company.

Ray Smith

Residential or business address

Street name and number

3 Main Street

Suburb or town

City

State

Victoria

Postcode

When can your alternative attorney act?

You can specify below when your alternative attorney can act. If you do not specify, an alternative attorney can **only** take the place of the attorney if:

- the attorney is unable or unwilling to act
- the appointment of your attorney is revoked (cancelled) because they are no longer eligible to be your attorney (for example, the attorney becomes your care worker or health provider).

The next two pages allow you to appoint a second attorney and an alternative attorney (if required). You also need to specify what decisions your attorney can make.

I appoint the person listed below as my attorney.

Name of attorney

Insert your attorney's name or business name, if appointing a company. Insert position, if appointing the occupant of a position.

Lea Smith

Residential or business address

Street name and number

2 Main Street

Suburb or town

City

State

Victoria

Postcode

What decisions can this attorney make?

You can specify the matters for which you authorise your attorney to act on your behalf (**Option A**), or you can authorise your attorney to do anything on your behalf (**Option B**). If you select Option A, you must also select the matters that you authorise.

Please select **one** option.

Option A: Specify the matters

I authorise my attorney to do anything on my behalf that I can lawfully do by an attorney **for the matters specified below**.

▶ Please select **one** option

Only personal matters

Only financial matters

Both personal and financial matters

If you do not want to authorise this attorney to exercise power for **all** personal or financial matters, specify each matter that you do want to authorise.

OR

Option B: Do anything

I authorise my attorney to do **anything** on my behalf that I can lawfully do by an attorney.

Section 3: How your attorneys can act

You can choose how your attorneys are to act when they make a decision for you. You can also choose whether they act differently for personal and financial matters.

Only complete this section if you have appointed more than one attorney.

If you do not complete this section, and you have more than one attorney, it will be assumed that you have appointed your attorneys always to act as joint attorneys (together).

How must the attorneys act?

Please select one option.

- Act as **joint** attorneys (together): The attorneys must make decisions together and they must all agree.
- Act as **several** attorneys (separately): Each attorney must make decisions separately.
- Act as **joint and several** attorneys (act together, or act separately): The attorneys can make decisions separately but if they make a joint decision, they must all agree.
- Act by **majority** attorneys: Where there are more than two attorneys, decisions are only made when more than half of the attorneys agree. For example, if there are three attorneys, then two out of the three must agree to a decision.

If different attorneys are appointed for different matters, specify below how you wish the attorneys to act (jointly, severally, jointly and severally or by majority) and for which matters.

For the sake of clarity, I confirm:

- my attorneys appointed for financial matters, John Smith and Lea Smith, are to act as joint and several attorneys,
- my attorney appointed for personal matters, John Smith, is a single appointment.

Section 4: Start date

If you do not complete this section, your attorney(s) can start making decisions immediately on the making of this enduring power of attorney.

When can the attorney(s) start making decisions?

OR

At the same time for all matters

Please choose one option.

Immediately on the making of this enduring power of attorney

When I cease to have decision making capacity for the matter(s)

At any other time, circumstance or occasion Specify

At different times for different matters

Complete all that apply.

Immediately on the making of this enduring power of attorney, for these matters Specify

Financial matters.

When I cease to have decision making capacity for these matters Specify

Personal matters.

At any other time, circumstance or occasion, for these matters Specify

Specify the time, circumstance or occasion:

Specify the matters:

EXAMPLE ONLY

Section 5: Conditions and instructions (optional)

Your attorney(s) is required to consider any conditions and/or instructions that you specify when making decisions for you. You do not have to place conditions or give instructions unless you want to.

The exercise of power under this enduring power of attorney is subject to the conditions and/or instructions set out below.

Conflict transactions (optional)

Only fill in this section if an attorney has been appointed for **financial matters**.

Sometimes there may be a conflict between the duty of your attorney(s) to you and an interest of their own, or of a relative, business associate or close friend. You can authorise (give permission) for your attorney to enter into transaction(s) even if there is a conflict of interest.

I authorise my attorney(s) to enter into the following conflict transaction(s):

Gifts (optional)

Only fill in this section if an attorney has been appointed for **financial matters**.

An attorney for financial matters can use your money or other financial assets to give a gift or donation. Gifts must be of a seasonal nature or for a special event and be made to your relatives or close friends. An attorney can also give a gift to themselves, their relatives, close friends or organisations with which they have a connection. The donation must be the type of donation made when you had capacity or that you might reasonably be expected to make. All gifts and donations must be reasonable in the circumstances, particularly having regard to your financial situation.

Specify any conditions or restrictions that you want to place on the making of gifts or donations.

Maintenance of your dependants (optional)

Only fill in this section if an attorney has been appointed for **financial matters**.

You can specify in your enduring power of attorney if you want your attorney for financial matters to use your money or other financial assets to provide for the needs of one or more of your dependants (for example, one of your children). The amount made available by your attorney to maintain your dependants must not be more than what is reasonable having regard to all the circumstances, in particular your financial circumstances, unless you specify otherwise in your enduring power of attorney.

Specify if you want to authorise your attorney for financial matters to provide for the maintenance of your dependant(s) from your money or other financial assets and, if so, whether you want to authorise an amount that is more than what is reasonable in the circumstances.

I authorise my attorneys for financial matters to provide for the needs of my sister, Kim Jones, who is currently my dependant.

Payments to attorney(s) (optional)

An attorney is not allowed to be paid to act as your attorney, unless payment is authorised in the enduring power of attorney or by law.

You can authorise your attorney(s) to be paid by specifying below how your attorney(s) are to be paid and any limits on how much they can be paid.

Additional conditions or instructions (optional)

You may want to set out additional conditions and/or instructions to guide your attorney(s). You may also want to specify a person(s) to be notified by the attorney, when the attorney starts acting for you, when you no longer have decision making capacity.

Enter conditions and instructions below.

I authorise my attorney for personal matters to disclose confidential health information to my children Lea Smith and Ray Smith.

Ending or cancelling an enduring power of attorney

An enduring power of attorney ends if:

- the principal revokes (cancels) the power (while they have decision making capacity to do so)
- VCAT revokes the power
- the person who made the appointment dies
- all attorneys are no longer eligible to act or are unable to act.

An enduring power of attorney is also revoked by a later enduring power of attorney so far as the later power of attorney is inconsistent.

How the principal revokes (cancels) an enduring power of attorney

The principal can revoke the enduring power of attorney or the appointment of an attorney at any time, as long as they have the decision making capacity to do so. They must revoke the power by completing a revocation of enduring power of attorney form. If they make a new enduring power of attorney, they can revoke a previous enduring power of attorney that was made under the *Powers of Attorney Act 2014* on the appointment form.

See OPA's website for the revocation form or call OPA's Advice Service for more information.

OPA's website also has information for people who made enduring powers of attorney before 1 September 2015. Visit the website for information about how to revoke an enduring power of attorney (financial) made under the *Instruments Act 1958* or an enduring power of guardianship made under the *Guardianship and Administration Act 1986*.

How to make a medical enduring power of attorney

A medical enduring power of attorney is a legal document where a person appoints another person (their medical agent) with power to make decisions about medical treatment on their behalf.

Consent to medical treatment

Doctors and dentists generally need a patient's consent to undertake treatment.

📘 See **medical decision making** on page 33 for more information and exceptions.

A person may be temporarily or permanently unable to consent to medical or dental treatment.

The *Guardianship and Administration Act 1986* specifies a hierarchy of people authorised to consent to medical treatment on behalf of a patient who can't consent. The first person on this list who is available, willing and able to make medical and dental treatment decisions on behalf of the patient is considered the **person responsible** and can provide consent.

📘 See this list and read about the role of the person responsible on page 33.

A medical agent appointed under a medical enduring power of attorney is first on the list.

Refusal of medical treatment

The *Medical Treatment Act 1988* lists who can refuse treatment on a patient's behalf.

Only a person appointed as a medical agent under a medical enduring power of attorney or a guardian appointed by VCAT with medical treatment decision making powers can refuse medical treatment on behalf of a patient who can't consent.

Decision making capacity to make a medical enduring power of attorney

The person who makes the appointment must be 18 years of age or older and have capacity to make the appointment. They must be 'of sound mind' and understand the import (the effect) of the document.

Advance care planning

A person may make a medical enduring power of attorney as part of advance care planning. Advance care planning is when a person discusses (and often writes down) their preferences for their medical care so that if, in the future, they become unable to make medical treatment decisions for themselves, those close to them and their doctor will know their preferences. The person may then choose to appoint someone who has power to make medical treatment decisions for them if they are ever unable to make these decisions.

Decisions about personal matters

Anyone making a medical enduring power of attorney should also consider making an enduring power of attorney. This is because their medical agent can't make decisions for them about personal matters such as choosing support services, choosing a health care provider, deciding where they will live, and deciding therapies or rehabilitation services.

When power starts

The appointment begins **only** if and when the person who made the appointment is unable to make decisions about their medical treatment. They may have lost decision making capacity to make these types of decisions permanently due to their condition, or might be unable to make these decisions temporarily, for example, if they are unconscious as a result of an accident or illness.

To make a medical enduring power of attorney follow these step-by-step instructions.

Step 1: Decide who to appoint

The person making the medical enduring power of attorney appoints one person as their medical agent. The person should be someone who the person making the appointment trusts to respect and carry out their wishes. The appointment begins only if and when the person who made the appointment is unable to make decisions about their medical treatment.

A second person can be appointed as **alternate agent**. The alternate agent can only make decisions if the medical agent

- cannot be contacted or their whereabouts is unknown
- is deceased
- does not have decision making capacity to make the medical decision(s).

Before acting, the alternate agent must complete and provide a statutory declaration explaining why they believe the medical agent is unable to act. Contact OPA's Advice Service on 1300 309 337 for more information.

Step 2: Complete the form

The person making the appointment should complete the form according to the instructions but not sign it until they have checked witnessing requirements and arranged for witnessing of the signature.

Step 3: Sign the form in front of witnesses

Witnessing requirements

Two witnesses are required to witness the person signing the form, and one must be someone authorised to witness statutory declarations. The medical agent or alternate agent can't be a witness.

There are steps to take after the medical enduring power of attorney is made. See page 22.

Each witness must state that they believe the person making the medical enduring power of attorney

- is of sound mind and
- understands the import of the document (understands the effect of the document).

If there is any doubt about whether the person has decision making capacity to make the medical enduring power of attorney, an independent assessment of their capacity should be obtained. An assessment could be made by a doctor, psychologist or lawyer.

Ending or cancelling a medical enduring power of attorney

A medical enduring power of attorney ends under any of the following circumstances:

- the person who made the appointment revokes the power while competent (has decision making capacity) to do so
- the person who made the appointment later appoints another medical agent
- VCAT revokes the power
- the person who made the appointment dies
- the medical agent dies or does not have capacity to make decisions (where there is no alternate agent)
- the medical agent and alternate agent die.

The person who made the appointment can revoke (cancel) the appointment at any time as long as they have capacity to do so. They can revoke the power by telling the agent that their power is withdrawn or by destroying the medical enduring power of attorney document and any copies. OPA recommends that they complete a revocation of medical enduring power of attorney form and give a copy to their agent, and to anyone who knows of the appointment such as the person's doctor. If a person appoints a new medical agent, any earlier appointment is automatically revoked (cancelled), but they should still notify the first medical agent that their power has been revoked.

See OPA's website for the revocation form or call OPA's Advice Service for more information.

Steps to take after enduring powers of attorney are made

Forms are not registered

Powers of attorney forms are not registered in Victoria. They should not be sent to the Office of the Public Advocate (OPA).

Step 1: Storage and certified copies

The person who made the appointment should keep the original form in a safe place, and give their attorney(s) and/or medical agent certified copy(ies).

Who can certify copies?

People authorised by law to administer an oath can certify that a photocopy of the form is a true and complete copy of the original form. Someone authorised by law to administer an oath means someone authorised to witness affidavits.

Certifying copies

Each page, other than the last page, of the copy must be certified by the **authorised person** to the effect that the copy of that page is a true and complete copy of the corresponding page of the original instrument. The last page of the copy must be certified to the effect that the copy of the instrument is a true and complete copy of the original instrument.

Step 2: Check attorneys and medical agent have the information they need

The person making the appointment places a lot of trust in their attorneys and medical agent by appointing them. It is important that attorneys and medical agents have the information they need.

i This booklet has tear-out **Advice for Attorneys** and **Medical Decision Making** fact sheets on pages 29 and 33.

The Medical Decision Making fact sheet is for the person appointed to make medical decisions. This will be the medical agent or, if no medical agent has been appointed, may be an attorney for personal matters. **i** See page 33 for further explanation.

An attorney for financial matters will need to know where to find relevant information about the principal's finances. This may include information such as bank account and insurance details, financial and legal records, and contact details for the principal's lawyer and accountant.

The medical agent will need to know the wishes of the person about their medical treatment, including their views about possible medical procedures.

People authorised to witness affidavits and statutory declarations

People who are commonly asked to witness affidavits and statutory declarations are listed below. Some of these people may charge a fee.

i For full lists of who can witness affidavits and statutory declarations see: www.justice.vic.gov.au/affidavit and www.justice.vic.gov.au/statdec

People authorised to witness affidavits (authorised to administer an oath)

People authorised to witness affidavits in Victoria include:

- a Justice of the Peace or a bail justice
- a public notary
- a legal practitioner under the *Legal Profession Uniform Law Application Act 2014 (Vic)* (a lawyer)
- a police officer of or above the rank of sergeant or, for the time being, in charge of a police station.

People authorised to witness statutory declarations

People authorised to witness statutory declarations in Victoria include:

- a Justice of the Peace or a bail justice
- a legal practitioner (a lawyer)
- a police officer
- a person registered under the Health Practitioner Regulation National Law to practise in the medical profession, other than as a student (a medical doctor)

- a person registered under the Health Practitioner Regulation National Law to practise in the dental profession as a dentist, other than as a student.
- a person registered under the Health Practitioner Regulation National Law to practise in the pharmacy profession, other than as a student (a pharmacist).

Justices of the Peace

Justices of the Peace are authorised to witness both affidavits and statutory declarations. This means they can witness enduring powers of attorney and can certify that a photocopy of a document is a true and complete copy of the original document. Justices of the Peace are volunteers and do not charge for their services.

i Find the locations and times that members of the community can access Justices of the Peace on the Department of Justice & Regulation website: www.justice.vic.gov.au

A person who wants a Justice of the Peace to witness an enduring power of attorney appointment will need to organise another person who is eligible to be a witness to come with them to the Justice of the Peace because two witnesses are required. The second witness can't be one of the people appointed. See the summary of enduring powers of attorney on page 25 for who can be a witness.

When no enduring powers of attorney have been made

If a person hasn't made enduring powers of attorney and they do not have capacity to make decisions about matters, then only VCAT can appoint someone with the legal authority to make decisions on behalf of that person.

VCAT has an obligation to take the views of the person into account when appointing someone with the authority to make decisions for them, but ultimately it is VCAT's decision whether to appoint someone and who to appoint.

Financial decisions — VCAT can appoint an administrator

If VCAT decides the person with disability needs someone to make decisions about their financial affairs, it will appoint an **administrator**. An administrator is a person appointed by VCAT to make financial decisions if a person is unable to make these decisions themselves.

Personal and lifestyle decisions VCAT can appoint a guardian

If VCAT decides that a person with disability needs someone to make decisions about personal and lifestyle matters for them, it will appoint a **guardian**. A guardian is a person appointed to make personal and lifestyle decisions on behalf of someone else. This can include decisions about medical treatment.

Medical decision making

A situation may arise where a person is unable to make their own decisions about their medical or dental treatment and they have not made an enduring power of attorney appointing an attorney for personal matters, or a medical enduring power of attorney. If this happens, the Guardianship and Administration Act sets out who can consent to medical treatment. This person is known as the **person responsible**.

i See medical decision making on page 33 for more information.

Summary of enduring powers of attorney

	Enduring power of attorney	Medical enduring power of attorney
What decisions can the person appointed make?	The principal decides the matters about which their attorney(s) can make decisions. These can be decisions about financial matters and personal matters (including decisions about whether to consent to medical treatment).	Medical, including decisions about whether to consent to medical or dental treatment and whether to refuse medical treatment.
When does it begin?	The principal can choose whether it will start: immediately, on a particular date, on an occasion, or when they cease to have decision making capacity for the matter(s).	When the principal is unable to make decisions about medical treatment.
When does it end?	When the principal, or VCAT cancels it; the principal makes a later enduring power of attorney that is entirely inconsistent; the principal dies; there are no attorneys able or eligible to act as an attorney.	When the principal or VCAT revokes (cancels) it, the principal dies or the medical agent dies or is unable to make decisions and there is no alternate agent.
What limits can be put on the decision making powers?	The principal can place conditions on the exercise of the power and can give instructions about the exercise of the power.	None. But there are limits in the Act as to the decisions that can be made.
Who can cancel it?	The principal while they have decision making capacity to do so, or VCAT if the person who made it is not able to do so.	The principal while they have decision making capacity to do so, or VCAT if the person who made it is not able to do so.
Can more than one decision maker be appointed?	Yes	No
Can the person appoint an alternate decision maker?	Yes — called an ‘alternative’	Yes — called an ‘alternate’
Witnessing requirements	Two witnesses, one who is authorised to witness affidavits or is a medical practitioner. Can’t be an attorney; a relative of the principal or of an attorney; or a care worker or accommodation provider for the principal.	Two witnesses, one authorised to witness statutory declarations. Can’t be medical agent or alternate agent.

If the person can't physically sign the form

If the principal cannot physically sign the appointment form(s) another person can sign the form(s) in the presence of the principal and at the direction of the principal.

The **enduring power of attorney** form has a space for this. Although the **medical enduring power of attorney** form does not have a space for this it is recommended that similar wording is used. The person signing at the direction of the principal must be 18 years of age or older, not a witness and not an attorney or medical agent under the enduring power of attorney or the medical enduring power of attorney.

In addition to the other things that the witnesses must certify they will also need to certify that:

- in their presence the principal appeared to freely and voluntarily direct the person to sign for the principal
- the person signed the instrument in the presence of the principal and the witnesses

For suggested wording for the medical enduring power of attorney see 'Section A1: Signed at the direction of the principal' of the enduring power of attorney appointment form.

If the person needs an interpreter

It is important that the witnesses are satisfied that the form has been explained in a language that the person making the appointment understands. OPA recommends using an independent and qualified interpreter accredited by the National Accreditation Authority for Translators and Interpreters. It is recommended that the witnesses complete and sign the statement below:

Certificate of witnesses

To the best of our knowledge and belief:

- this [enduring power of attorney/ enduring power of attorney (medical treatment)] was read out and interpreted to the principal in [language] by [name and address of interpreter]
- the interpreter is not [an attorney/a medical agent] appointed under this document, a relative of the principal, or a relative of the [attorney/ medical agent].

[Witnesses sign under this statement]

More information

See OPA's website for more information including a short summary of enduring powers of attorney in languages other than English.
www.publicadvocate.vic.gov.au

Information for witnesses

The responsibility of witnesses goes beyond making sure that the signature of the person making enduring powers of attorney is genuine.

This fact sheet has information for witnesses who witness a person making:

- an enduring power of attorney
- a medical enduring power of attorney.

If a witness has doubts about the person's decision making capacity to make an enduring power of attorney or a medical enduring power of attorney, they should refuse to witness the form. They should also refuse to witness the form if the person appears to be signing it under duress, undue influence or pressure from another person. The witness should contact the Office of the Public Advocate (OPA) Advice Service on 1300 309 337 if concerned.

When witnessing an enduring power of attorney

Each witness to someone making an enduring power of attorney must certify that:

- the principal (the person making the enduring power of attorney) appeared to freely and voluntarily sign in their presence; and
- that, at the time the principal signed the instrument, the principal appeared to have **decision making capacity** in relation to the making of the enduring power of attorney.

Decision making capacity

A person has capacity to make an enduring power of attorney appointment if they are able to:

- understand the information relevant to this decision and the effect of this decision
- retain that information to the extent necessary to make the decision
- use or weigh that information as part of the process of making the decision and
- communicate the decision, and their views and needs in relation to the decision in some way, including by speech, gestures or other means.

Witnesses need to be satisfied that the person making the enduring power of attorney understands the effect of this decision and should ask questions to check this.

Understanding the effect of the decision to make an enduring power of attorney includes understanding:

- that the principal may, in the enduring power of attorney, place conditions on the power given to the attorney and give instructions to the attorney about the exercise of the power given to the attorney
- when the enduring power of attorney commences
- that once the power of attorney is exercisable in relation to a matter, the attorney has the same powers the principal has to do anything for which the power for that matter is given
- that the principal may revoke (cancel) the power of attorney at any time while they have decision making capacity in relation to the power of attorney
- that the power of attorney continues even if the principal subsequently loses decision making capacity for matters included in the power of attorney
- that, at any time the principal does not have decision making capacity, they will be unable to effectively oversee the use of the power.

Who can witness an enduring power of attorney?

Two witnesses are required. One witness must be authorised to witness affidavits or be a medical practitioner (doctor).

Witnesses cannot be an attorney; a relative of the principal or the attorney; or a care worker or accommodation provider for the person making the appointment.

Who can witness a medical enduring power of attorney?

Two witnesses are required. One witness must be authorised to witness statutory declarations. This includes medical practitioners.

The medical agent or alternate agent cannot be a witness.

When witnessing a medical enduring power of attorney

A witness to someone making a medical enduring power of attorney needs to state that they believe that the person making the appointment is of sound mind and understands the import (the effect) of the form.

The person making the appointment should be able to tell the witnesses things like:

- what sorts of powers the person they have appointed as their medical agent will have
- what sorts of decisions the medical agent will have the authority to make
- when and how the medical agent will have the authority to exercise that power
- the effects that the medical agent's power could have on them
- how they may cancel or change the arrangement in the future.

More information

i See page 26 of the Take Control booklet for information about how the form should be signed and witnessed:

- if the person can't physically sign the form or
- if an interpreter is needed.

Witnesses can call OPA's Advice Service on 1300 309 337 if they have queries about their role.

Advice for Attorneys

When an attorney (or alternative attorney) formally accepts their appointment, they state that they understand their obligations under the *Powers of Attorney Act 2014* and the consequences of failing to comply with those obligations.

An attorney is appointed by a person, known as the principal, as the principal's substitute decision maker. Only someone who is eligible to be an attorney can be appointed.

i Page 9 of *Take Control* has information about who is eligible to be an attorney.

This tear-out fact sheet provides an overview of the role and responsibilities of attorneys. To print out more copies and for more information visit the Office of the Public Advocate (OPA) website or contact OPA's Advice Service.

Tel: 1300 309 337
www.publicadvocate.vic.gov.au

When the role starts

The principal nominates in the enduring power of attorney appointment form when the attorney(s)' power starts. The power may start at different times for different matters. If the principal has not specified when the power starts, it

starts as soon as the enduring power of attorney is made. However, the attorney may not need to do anything immediately.

If the power comes into effect when the principal ceases to have decision making capacity for the matter(s), then the attorney may be asked to show evidence of this, such as a medical certificate. Contact OPA's Advice Service for more information.

Attorney may need to notify other parties that they are acting

The enduring power of attorney may identify people or organisations that the attorney should notify before exercising the power for the first time because the principal does not have decision making capacity for that matter. See OPA's website or contact OPA's Advice Service for more information.

Attorney's powers

Attorneys can only make decisions about matters for which they have been appointed. These are set out in the enduring power of attorney appointment form.

The principal will have specified for each attorney that they can make decisions about:

- financial matters
- personal matters
- both financial and personal matters or
- specific financial and/or personal matters.

Financial matters

A financial matter is any matter relating to the principal's financial or property affairs, and includes any legal matter that relates to the financial or property affairs of the principal.

Financial matters include paying rates, taxes and insurance premiums; undertaking a real estate transaction for the principal; and making money available to the principal for their personal use.

Personal matters

A personal matter is any matter relating to the principal's personal or lifestyle affairs. Personal matters include any legal matter that relates to the principal's personal or lifestyle affairs.

Personal matters include where and with whom the principal lives, and health care matters, including consenting to medical treatment.

Things an attorney can't do

An attorney can't vote, make decisions about the care or wellbeing of the principal's children, make (or revoke) a will, make (or revoke) an enduring power, consent to a marriage or a sexual relationship or dissolve a marriage, make decisions about adoption of a child, enter into surrogacy arrangements, manage the principal's estate on their death or consent to an unlawful act.

An attorney can't delegate their power. If an attorney is no longer able to carry out the role only an alternative attorney already appointed is able to step in.

Conditions and instructions

The appointment form will state whether the principal placed conditions on the exercise of an attorney's power or gave any instructions.

Making decisions with more than one attorney

The appointment form will state if more than one attorney has been appointed for any or all matters.

If there is more than one attorney for any or all matters the principal will have appointed the attorneys to act:

- jointly — the attorneys must make decisions together (and all sign any document)
- jointly and severally — the attorneys can make decisions together or independently (and either all can sign any document, or one attorney alone can sign any document)
- severally — the attorneys can make decisions independently (and one attorney alone can sign any document) or
- by a majority — a majority need to agree to make a decision (and the majority who agree sign any document).

If the principal has not specified how the attorneys are appointed, the attorneys act jointly.

When attorneys disagree

There may be occasions when attorneys disagree. OPA's Advice Service can provide advice about what to do if this happens.

When the principal has decision making capacity for the matters

If the power has commenced immediately (while the principal still has decision making capacity for the matters) the principal oversees the use of the attorney's power and the attorney acts at the direction of the principal.

The principal may have decision making capacity for some matters and not for others.

When the principal does not have decision making capacity for the matters

If, and when, the principal ceases to have decision making capacity for the matters, the attorney must apply principles set out in the Act.

The attorney must:

- act in a way that is as least restrictive of the principal's ability to decide and act as is possible in the circumstances and
- ensure that the principal is given practicable and appropriate support to enable the principal to participate in decisions as much as possible.

When the attorney makes a decision about a matter on behalf of the principal, the attorney must:

- give all practicable and appropriate effect to the principal's wishes
- take steps (reasonably available) to encourage the principal to participate in decision making and
- act in a way that promotes the personal and social wellbeing of the principal.

Promoting the personal and social wellbeing of the principal includes recognising their inherent dignity, having regard to their existing supportive relationships, religion, values and cultural and linguistic environment, and respecting confidential information relating to the principal.

Duties of the attorney

An attorney must:

- act honestly, diligently and in good faith
- exercise reasonable skill and care
- not use the position for profit (unless the enduring power of attorney authorises the attorney to be paid)
- avoid acting where there is, or may be, a conflict of interest (unless the enduring power of attorney specifically authorises this)
- not disclose confidential information (unless authorised by the enduring power of attorney or by law)
- keep accurate records and accounts.

Keeping records

An attorney must keep accurate records and accounts of:

- all dealings and transactions made for financial matters and

- all material dealings and transactions made for personal matters.

Keeping property separate

An attorney for financial matters must keep their property separate from the principal's property. This does not apply to property owned jointly by the principal and attorney.

An attorney is not entitled to be paid unless this is authorised

An attorney under an enduring power of attorney is not entitled to any remuneration (to be paid from the principal's property) unless the principal has specifically authorised this in the enduring power of attorney.

How an attorney signs documents

An attorney may need to execute an instrument (sign a document) for the principal. This must be done in a way that shows that the attorney executes (signs) it as an attorney for the principal. See OPA's website for an example.

Providing for the principal's dependants

An attorney for financial matters can provide from the principal's property for the needs of a dependant of the principal if the principal authorised this in the enduring power of attorney. This must not be more than what is reasonable unless the principal has stated otherwise. The attorney should take into account the principal's financial circumstances.

Conflict transactions

An attorney for financial matters must not enter into a transaction where there is, or may be, a conflict between the duty of the attorney to the principal and the interests of the attorney (or the attorney's relative, business associate or close friend), unless authorised by the principal or VCAT to do so. This type of transaction is known as a **conflict transaction**.

An attorney who enters into a conflict transaction that the principal has not properly authorised may be liable to pay compensation or, if the attorney acts dishonestly, could be charged with an offence. A principal can only authorise a conflict transaction when they have the decision making capacity to do so. If the authorisation is not in the enduring power of attorney, an attorney may be asked to show evidence that a conflict transaction was properly authorised.

An attorney who has any concerns that a conflict of interest may arise should call OPA's Advice Service or visit OPA's website for more information about conflict transactions.

Conflict transactions that are allowed

An attorney may:

- in some circumstances give reasonable gifts from the principal's property to the attorney, the attorney's relatives or the attorney's close friends. (See 'Gifts' below.)
- provide for the maintenance of a dependant of the principal if this is authorised in the enduring power of attorney.

Depending on the circumstances, an attorney may be able to sell property held jointly by the attorney and the principal even if the principal has not authorised this. Call OPA's Advice Service for more information about this complex area.

Gifts

An attorney for financial matters may only give a gift from the principal's property (including a gift of money) if:

- the gift is reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances and
- the gift is
 - to a relative or a close friend of the principal and is of a seasonal nature or for a special event (such as a birth or marriage) or

- a type of donation that the principal made (when the principal had decision making capacity for the matter) or that the principal might reasonably be expected to make.

Before making any gifts, the attorney should check that the principal did not include any condition or restriction on the giving of gifts in the enduring power of attorney.

The attorney must keep a written record of any gift made to the attorney, a relative or close friend of the attorney, or an organisation with whom the attorney has a connection where the total value of the gift is over \$100. The attorney must record the amount and the person or organisation to whom the gift was given.

An attorney can be ordered to pay compensation

If the attorney fails to properly undertake their duties or obligations and this results in a loss to the principal, the attorney may be ordered by VCAT or the Supreme Court to compensate the principal for the loss.

See OPA's website for more information.

Offences

An attorney who dishonestly uses the enduring power of attorney to:

- obtain financial advantage for themselves or for another person or
- cause loss to the principal or another person

can be charged with a criminal offence under the *Powers of Attorney Act 2014*.

See OPA's website for more information.

If an attorney is no longer eligible or wants to resign

If an attorney wants to resign or is no longer eligible to be an attorney they must take steps set out in the *Powers of Attorney Act 2014*. For more information see OPA's website or contact OPA's Advice Service.

Medical decision making

Medical consent

Doctors and dentists need a patient's consent (agreement) before performing medical or dental treatment.

If a patient is incapacitated, consent is not needed where there are reasonable grounds that emergency treatment is necessary to:

- save the patient's life
- prevent serious damage to the patient's health
- prevent suffering from significant pain or distress.

If a patient is incapacitated consent is also not needed for:

- providing first aid
- administering a prescribed drug within recommended dosages
- a non-intrusive examination such as a visual examination.

A patient who is 18 years of age or older can consent if they are able to understand, retain, evaluate and weigh up information about the general nature and effect of the proposed procedure and can communicate their decision.

If a patient is unable to consent to treatment, there is a hierarchy of people who can make medical and dental treatment decisions on behalf of the patient. The person highest on this list is known as the **person responsible**.

Whoever is first on the following list is the **person responsible** and can consent to medical treatment for the patient.

The person responsible

1. A medical agent appointed by the patient under an **enduring power of attorney (medical treatment)**
2. A person appointed by the Victorian Civil and Administrative Tribunal (VCAT) to make decisions about the proposed treatment
3. A guardian appointed by VCAT to make medical/dental decisions for the person
4. A person appointed by the patient on or after 1 September 2015 as an attorney for personal matters under an **enduring power of attorney** or before 1 September 2015 as an enduring guardian with health care powers under an enduring power of guardianship
5. A person appointed by the patient in writing to make decisions about their medical/dental treatment including the proposed treatment
6. The patient's spouse or partner
7. The patient's primary carer (cannot be a paid professional carer)
8. The patient's nearest relative, who is 18 years of age or older, in the following order: a. child, b. parent, c. sibling (including adopted and half siblings), d. grandparent, e. grandchild, f. uncle or aunt, g. nephew or niece.

When there are two relatives in the same position (for example, a brother and sister) the elder person is the person responsible, regardless of gender.

Role of the ‘person responsible’

The person responsible can decide on behalf of the patient whether to consent to medical treatment and must make decisions that are in the best interests of the patient. This means considering:

- the wishes of the patient and their family
- the consequence to the patient if the treatment is not carried out
- any alternative treatment available
- the nature and degree of any significant risks associated with the treatment or any alternative treatment
- whether the treatment to be carried out is only to promote and maintain the health and wellbeing of the patient.

Decisions they cannot make

If the patient’s inability to consent is likely to be temporary, the person responsible can only consent if the treatment is not against the patient’s wishes and if failure to treat would result in a significant deterioration of the patient’s condition.

The person responsible cannot consent to special procedures, including the termination of pregnancy, removal of tissue for transplant or procedures that are reasonably likely to lead to the patient’s permanent infertility. In these cases, an application for consent must be made to VCAT.

The person responsible cannot refuse treatment on the patient’s behalf.

The person responsible cannot consent to psychiatric treatment on behalf of a patient who is unable to make their own decisions about psychiatric treatment, including electroconvulsive therapy (ECT).

If the patient is a compulsory patient under the *Mental Health Act 2014* and cannot consent to non-psychiatric medical treatment, there is a different list of people who can provide consent.

Refusal of medical treatment

The *Medical Treatment Act 1988* lists those who can refuse treatment on a patient’s behalf. Only a person appointed as a medical agent under a medical enduring power of attorney or a guardian appointed by VCAT with medical treatment decision making powers can refuse medical treatment on behalf of a patient who cannot consent.

To do this, the medical agent or guardian must sign and have witnessed a *Refusal of Treatment Certificate: Agent or Guardian of Incompetent Person* form. More information and the form is available on OPA’s website.

To sign, a medical agent or guardian must:

- have been given sufficient information about the patient’s condition
- understand this information
- understand what they are doing by signing the certificate
- make the decision voluntarily (advice can be given, but they must not be coerced)
- believe that either the medical treatment would cause the patient unreasonable distress, or that there are reasonable grounds for believing the patient would, after serious consideration, have considered the treatment unwarranted.

A medical agent or guardian can’t refuse palliative care such as pain relief, and food and water while the patient is still able to eat and drink.

OPA’s website has more information about medical consent, including consenting to medical research. Visit: www.publicadvocate.vic.gov.au

Or call OPA’s Advice Service 1300 309 337 for more information.

Forms

Find here:

- the enduring power of attorney appointment form
- the medical enduring power of attorney appointment form.

The enduring power of attorney appointment form

The Department of Justice & Regulation has created an online enduring power of attorney appointment form. Find the online form on OPA's website.

A hardcopy version of the form is provided in this booklet for those who prefer to fill in the hardcopy form.

The hardcopy version allows the principal to appoint up to two attorneys. If the principal wants to appoint more than two attorneys they should use the online form.

i Page 13 of this booklet has an example of how to complete sections of the form.

The medical enduring power of attorney appointment form

The medical enduring power of attorney appointment form can only be filled out using the hardcopy form.

The form is provided in this booklet.

See an example of how to complete the form on OPA's website.

For more copies of the appointment forms visit OPA's website.

Also, for revocation forms (forms for cancelling powers of attorney) visit OPA's website.

OPA's website has more information about powers of attorney or to find out more call OPA's Advice Service 1300 309 337.

www.publicadvocate.vic.gov.au

Keep all pages of this form together.

Enduring Power of Attorney Appointment

This enduring power of attorney is made under Part 3 of the **Powers of Attorney Act 2014** and has effect as a deed under section 81 of the Act.

Section 1: Principal (You)

The person making this enduring power of attorney is known as the 'principal'. Whenever you see the word 'principal' in this form, it means you.

Name of principal

Residential address

Street name and number

Suburb or town

State

Postcode

Revocation of previous enduring powers of attorney

Under section 55 of the **Powers of Attorney Act 2014** any other enduring power of attorney will be revoked to the extent of any inconsistency with this enduring power of attorney, unless you specify otherwise.

Please select **one** option

I specify that all previous enduring powers of attorney made by me under the **Powers of Attorney Act 2014** are revoked.

OR

I specify below that the following previous enduring powers of attorney made by me under the **Powers of Attorney Act 2014** are not revoked.

.....
.....
.....
.....
.....
.....
.....
.....

Section 5: Conditions and instructions (optional)

Your attorney(s) is required to consider any conditions and/or instructions that you specify when making decisions for you. You do not have to place conditions or give instructions unless you want to.

The exercise of power under this enduring power of attorney is subject to the conditions and/or instructions set out below.

Conflict transactions (optional)

Only fill in this section if an attorney has been appointed for **financial matters**.

Sometimes there may be a conflict between the duty of your attorney(s) to you and an interest of their own, or of a relative, business associate or close friend. You can authorise (give permission) for your attorney to enter into transaction(s) even if there is a conflict of interest.

I authorise my attorney(s) to enter into the following conflict transaction(s):

.....
.....
.....
.....

Gifts (optional)

Only fill in this section if an attorney has been appointed for **financial matters**.

An attorney for financial matters can use your money or other financial assets to give a gift or donation. Gifts must be of a seasonal nature or for a special event and be made to your relatives or close friends. An attorney can also give a gift to themselves, their relatives, close friends or organisations with which they have a connection. The donation must be the type of donation made when you had capacity or that you might reasonably be expected to make. All gifts and donations must be reasonable in the circumstances, particularly having regard to your financial situation.

Specify any conditions or restrictions that you want to place on the making of gifts or donations.

.....
.....
.....
.....

Maintenance of your dependants (optional)

Only fill in this section if an attorney has been appointed for **financial matters**.

You can specify in your enduring power of attorney if you want your attorney for financial matters to use your money or other financial assets to provide for the needs of one or more of your dependants (for example, one of your children). The amount made available by your attorney to maintain your dependants must not be more than what is reasonable having regard to all the circumstances, in particular your financial circumstances, unless you specify otherwise in your enduring power of attorney.

Specify if you want to authorise your attorney for financial matters to provide for the maintenance of your dependant(s) from your money or other financial assets and, if so, whether you want to authorise an amount that is more than what is reasonable in the circumstances.

.....

.....

.....

.....

Payments to attorney(s) (optional)

An attorney is not allowed to be paid to act as your attorney, unless payment is authorised in the enduring power of attorney or by law.

You can authorise your attorney(s) to be paid by specifying below how your attorney(s) are to be paid and any limits on how much they can be paid.

.....

.....

.....

.....

Additional conditions or instructions (optional)

You may want to set out additional conditions and/or instructions to guide your attorney(s). You may also want to specify a person(s) to be notified by the attorney, when the attorney starts acting for you, when you no longer have decision making capacity.

Enter conditions and instructions below.

.....

.....

.....

.....

Section 6: Principal's signature

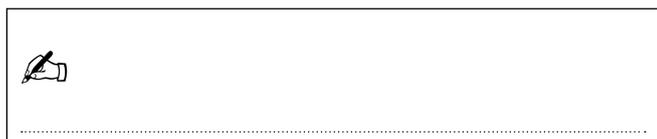
You need to sign and date this form by hand. You must sign the form in front of two witnesses. They must then sign and date the form in front of you and each other. One witness must be a medical practitioner, or be a person who is authorised to witness affidavits. A list of people who are authorised to witness an affidavit can be found at justice.vic.gov.au/affidavit.

If you need someone to sign for you due to a physical disability, do not fill out this section. Fill out **Section A1** on page 15.

In this section, the word 'we' means the witnesses. The word 'principal' means the person making this enduring power of attorney.

Name of principal

Signature



Date

Witnesses

Each witness **certifies** that:

- the principal appeared to freely and voluntarily sign this instrument in our presence, and
- at that time, the principal appeared to us to have decision making capacity in relation to making this enduring power of attorney, and
- we are not attorneys under this enduring power of attorney, and
- we are not relatives of the principal or of an attorney under this enduring power of attorney, and
- we are not care workers or accommodation providers for the principal.

Name of authorised witness

Residential or business address

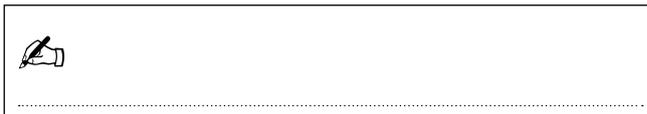
Street name and number

Suburb or town

State

Postcode

Signature



Qualification (as a medical practitioner or person authorised to witness affidavits)

Date

Name of other witness

Residential or business address

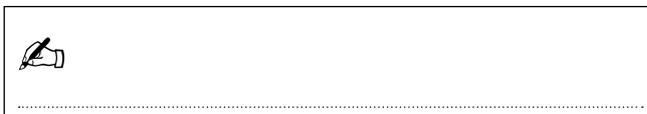
Street name and number

Suburb or town

State

Postcode

Signature



Date

Section 7: Statement of acceptance of appointment by attorney

This section needs to be read and signed by each attorney being appointed. A witness must also sign the witness certificate for each attorney.

This section can be completed at the same time as the principal completes their section or at a different time.

Attorney

I **accept my appointment as attorney** for the principal under this enduring power of attorney and state that:

- I am eligible under Part 3 of the **Powers of Attorney Act 2014** to act as an attorney under an enduring power of attorney, and
- I understand the obligations of an attorney under an enduring power of attorney and under the **Powers of Attorney Act 2014** and the consequences of failing to comply with those obligations, and
- I undertake to act in accordance with the provisions of the **Powers of Attorney Act 2014** that relate to enduring powers of attorney.

If appointed for financial matters and you have been convicted or found guilty of an offence involving dishonesty

I have disclosed to the principal that I have been convicted or found guilty of an offence involving dishonesty.

Name of attorney

Residential or business address

Street name and number

Suburb or town

State

Postcode

Signature


.....

Date

Witness

I witnessed the signing of the statement of acceptance by the attorney.

Name of witness

Residential or business address

Street name and number

Suburb or town

State

Postcode

Signature


.....

Date

Attorney

I **accept my appointment as attorney** for the principal under this enduring power of attorney and state that:

- I am eligible under Part 3 of the **Powers of Attorney Act 2014** to act as an attorney under an enduring power of attorney, and
- I understand the obligations of an attorney under an enduring power of attorney and under the **Powers of Attorney Act 2014** and the consequences of failing to comply with those obligations, and
- I undertake to act in accordance with the provisions of the **Powers of Attorney Act 2014** that relate to enduring powers of attorney.

If appointed for financial matters and you have been convicted or found guilty of an offence involving dishonesty

I have disclosed to the principal that I have been convicted or found guilty of an offence involving dishonesty.

Name of attorney

Residential or business address

Street name and number

Suburb or town

State

Postcode

Signature


.....

Date

Witness

I witnessed the signing of the statement of acceptance by the attorney.

Name of witness

Residential or business address

Street name and number

Suburb or town

State

Postcode

Signature


.....

Date

Section 8: Statement of acceptance of appointment by alternative attorney

This section needs to be read and signed by each alternative attorney you are appointing. A witness must also sign the witness certificate for each alternative attorney.

This section can be completed at the same time as the principal completes their section or at a different time.

Alternative attorney

I accept my appointment as an alternative attorney under this enduring power of attorney and state that:

- I am eligible under Part 3 of the **Powers of Attorney Act 2014** to act as an attorney under an enduring power of attorney, and
- I understand the obligations of an attorney under an enduring power of attorney and under the **Powers of Attorney Act 2014** and the consequences of failing to comply with those obligations, and
- I undertake to act in accordance with the provisions of the **Powers of Attorney Act 2014** that relate to enduring powers of attorney, and
- I understand the circumstances in which the alternative attorney is authorised to act under the **Powers of Attorney Act 2014**, and
- I am prepared to act in place of the attorney for whom I am appointed, if still eligible to act as attorney, when authorised to do so under the **Powers of Attorney Act 2014**.

If appointed for financial matters and you have been convicted or found guilty of an offence involving dishonesty

I have disclosed to the principal that I have been convicted or found guilty of an offence involving dishonesty.

Name of alternative attorney

Residential or business address

Street name and number

Suburb or town

State

Postcode

Signature


.....

Date

Witness

I witnessed the signing of the statement of acceptance by the alternative attorney.

Name of witness

Residential or business address

Street name and number

Suburb or town

State

Postcode

Signature


.....

Date

Alternative attorney

I accept my appointment as an alternative attorney under this enduring power of attorney and state that:

- I am eligible under Part 3 of the **Powers of Attorney Act 2014** to act as an attorney under an enduring power of attorney, and
- I understand the obligations of an attorney under an enduring power of attorney and under the **Powers of Attorney Act 2014** and the consequences of failing to comply with those obligations, and
- I undertake to act in accordance with the provisions of the **Powers of Attorney Act 2014** that relate to enduring powers of attorney, and
- I understand the circumstances in which the alternative attorney is authorised to act under the **Powers of Attorney Act 2014**, and
- I am prepared to act in place of the attorney for whom I am appointed, if still eligible to act as attorney, when authorised to do so under the **Powers of Attorney Act 2014**.

If appointed for financial matters and you have been convicted or found guilty of an offence involving dishonesty

I have disclosed to the principal that I have been convicted or found guilty of an offence involving dishonesty.

Name of alternative attorney

Residential or business address

Street name and number

Suburb or town

State

Postcode

Signature

Date

Witness

I witnessed the signing of the statement of acceptance by the alternative attorney.

Name of witness

Residential or business address

Street name and number

Suburb or town

State

Postcode

Signature

Date

Section A1: Signed at the direction of the principal

If you need someone to sign for you, at your direction, they must be 18 years or older. They cannot be an attorney under this enduring power of attorney or a witness to the signing of this form.

I sign this enduring power of attorney at the direction of and in the presence of the principal.

Name of principal

Name of person signing at the direction of the principal

Residential or business address

Street name and number

Suburb or town

State

Postcode

Signature


.....

Date

Witnessed by:

Each witness **certifies** that:

- in our presence, the principal appeared to freely and voluntarily direct the person to sign for the principal and that person signed this instrument in our presence and in the presence of the principal, and
- at that time, the principal appeared to us to have decision making capacity in relation to making this enduring power of attorney, and
- we are not attorneys under this enduring power of attorney, and
- we are not relatives of the principal or of an attorney under this enduring power of attorney, and

- we are not care workers or accommodation providers for the principal, and
- we are not the person who is signing at the direction of the principal

Name of authorised witness

Residential or business address

Street name and number

Suburb or town

State

Postcode

Signature


.....

Qualification (as a medical practitioner or person authorised to witness affidavits)

Date

Name of other witness

Residential or business address

Street name and number

Suburb or town

State

Postcode

Signature


.....

Date

You have reached the end of this form. You do **not** need to submit this form anywhere.

You need to complete it, make sure it is signed and witnessed properly, and then keep the original in a safe place. You should give your attorney(s) a certified copy of this form.

ENDURING POWER OF ATTORNEY (MEDICAL TREATMENT)

THIS ENDURING POWER OF ATTORNEY is given on the

..... day of 20
Print date here *Print month here* *Year*

by
Print your full name here

of
Print your address here

under Section 5A of the *Medical Treatment Act 1988*.

Cross out the following option if you also wish to appoint an alternate agent.

1. I APPOINT
Print the full name of your agent here
of
Print your agent's address here
to be my agent.

OR, *Cross out the following option if you do not wish to appoint an alternate agent.*

1. I APPOINT
Print the full name of your agent here
of
Print your agent's address here
to be my agent
and
Print the full name of your alternate agent here
of
Print your alternate agent's address here
to be my alternate agent.

2 I AUTHORISE my agent or, if applicable, my alternate agent, to make decisions about medical treatment on my behalf.

3 I REVOKE all other enduring powers of attorney (medical treatment) previously given by me.

SIGNED, SEALED AND
DELIVERED by:

.....
Sign your name here

We
Print your witnesses' names here

each believe that
Print your name here

in making this enduring power of attorney (medical treatment) is of sound mind and understands the import of this document. WITNESSED by:

.....
Witnesses sign here

**Person authorised to witness
statutory declarations**

.....
Name of witness

.....
Address of witness

.....
Witnesses sign here

Other witness

.....
Name of witness

.....
Address of witness

What these words mean

administrator: a person appointed by the Guardianship List of the Victorian Civil and Administrative Tribunal (VCAT) to make decisions about financial matters on behalf of someone with a disability who is unable to make those decisions for themselves

accommodation provider: a person who is, in a professional or administrative capacity, directly or indirectly responsible for or involved in the provision of accommodation to the individual

affidavit: a written statement that is confirmed by the oath or affirmation of the party making it before a person authorised to receive affidavits. The statement is witnessed by a person authorised under section 123C of the *Evidence (Miscellaneous Provisions) Act 1958*

alternate agent: a person appointed to stand in place of a medical agent

alternative attorney: a person appointed to stand in place of an attorney

attorney: a person appointed to make decisions about financial matters, personal matters, or both financial and personal matters for another person

care worker: a person who performs services for the care of an individual and receives remuneration for those services, but does not include a person who receives a carer payment from the government for providing home care for the individual or a person who is a health provider

certified copy: copy of a document which an authorised person has certified as a true and complete copy of the original

close friend: a person who has a close personal friendship with another person and a personal interest in that person's welfare

decision making capacity: having the ability to understand the information relevant to this decision and the effect of the decision, and retain that information to the extent necessary to make the decision, and use or weigh that information as part of the process of making the decision and communicate the decision and the person's views and needs as to the decision in some way, including by speech, gestures or other means.

deed: a document that is signed, sealed and delivered

enduring: in this setting it means the power continues (endures) even if the person giving it loses the capacity to make decisions about matters

financial matters: any matter relating to the principal's financial or property affairs and includes any legal matter that relates to the financial or property affairs of the principal.

Examples of financial matters are:

- making money available to the principal for the principal's personal expenditure
- paying expenses for the principal
- paying debts of the principal
- receiving and recovering money payable to the principal

- carrying on any trade or business of the principal
- performing any contracts entered into by the principal
- paying rates, taxes and insurance premiums or other outgoings for the principal's property
- preserving or improving the principal's property
- making investments for the principal
- undertaking any real estate transaction for the principal
- withdrawing money from or depositing money into an account of the principal with a financial institution.

(See OPA's website for more examples)

guardian: a person appointed by the Guardianship List of VCAT to make personal lifestyle decisions, such as decisions about where the person will live. A guardian only makes decisions for someone with disability who is unable to make those decisions themselves

health provider: a person who provides health care in the practice of a profession or in the ordinary course of business

legal matters: use of legal services for the principal's benefit; or bringing or defending a legal proceeding or hearing in a court, tribunal or other body on behalf of the principal, including settling a claim before or after a legal proceeding or hearing starts.

medical agent (or agent): a person appointed under an enduring power of attorney (medical treatment) to make decisions about medical treatment

offence involving dishonesty: an offence that involves dishonesty and that is punishable by at least three months' imprisonment

personal matters: any matter relating to the principal's personal or lifestyle affairs. Personal matters include any legal matter that relates to the principal's personal or lifestyle affairs.

Examples of personal matters are:

- where and with whom the principal lives
- persons with whom the principal associates
- whether the principal works and, if so, the kind and place of work and employer
- whether the principal undertakes education or training, the kind of education or training and the place where it takes place
- daily living issues such as diet and dress
- health care matters, including whether to consent to medical treatment.

principal: the person who makes the enduring power of attorney or medical enduring power of attorney

relative: any of: spouse or domestic partner, child, parent or step-parent, sibling or step-sibling; grandparent, grandchild, uncle or aunt, nephew or niece

statutory declaration: a document in which a person makes a statement and acknowledges that it is made in the belief that, if the statement is false, the person is liable to penalties for perjury. The statement is witnessed by a person authorised under section 107A of the *Evidence (Miscellaneous Provisions) Act 1958*

Victorian Civil and Administrative Tribunal (VCAT): deals with disputes, including guardianship and administration matters and powers of attorney matters

witness: a person who is present when someone signs a document and who has responsibilities that include confirming that the signature is genuine by adding their own signature

Where to get help

Office of the Public Advocate (OPA)

Call OPA's Advice Service for information about enduring powers of attorney or find more information on the OPA website.

Level 1, 204 Lygon St
Carlton VIC 3053
OPA Advice Service: 1300 309 337
TTY: 1300 305 612
Fax: 1300 787 510
www.publicadvocate.vic.gov.au

Victoria Legal Aid

Legal Help

For free information about the law and how Victoria Legal Aid can help you, call Legal Help on 1300 792 387, Monday to Friday, from 8.45 am to 5.15 pm.

More information is available on the Victoria Legal Aid website
www.legalaid.vic.gov.au

Victorian Civil and Administrative Tribunal

Level 5, William Cooper Justice Centre
223 William Street,
Melbourne Victoria 3000
Tel: 9628 9911
Toll Free: 1300 079 413
Fax: 9032 1155
www.vcat.vic.gov.au

Federation of Community Legal Centres

Call or visit website for your nearest community legal centre or specialist legal centre for people with disability or mental illness.

Tel: 9652 1500
www.communitylaw.org.au



If you need an interpreter:

Call the Translating and Interpreting Service for an interpreter to help you speak to any of the agencies in this section. Ask the interpreter to put you through to the agency you need. This is usually free.

Tel: 131 450



If you are deaf or have a hearing or speech impairment:

Use the National Relay Service to phone any of the agencies in this section.

This is free. To make an internet relay call and for more information about the NRS visit: www.relayservice.com.au

TTY users: Call 133 677 and then ask for the phone number you need. Include the area code.

Speak and Listen users: Call 1300 555 727 and then ask for the phone number you need. Include the area code.

Office of the Public Advocate

Level 1, 204 Lygon St

Carlton VIC 3053

OPA Advice Service: 1300 309 337

TTY: 1300 305 612

Fax: 1300 787 510

www.publicadvocate.vic.gov.au

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