

Your voice — Trust your choice

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2017

Tips for seniors making enduring powers of attorney

A companion to *Take Control*



Office of the
Public Advocate



Acknowledgments

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Disclaimers

The information provided relates to Victorian law and making an enduring power of attorney in Victoria. If you are making enduring powers of attorney to operate in other states, territories or countries, refer to resources from those jurisdictions for information, as the legislative requirements vary.

The legal information provided in this booklet is of a general nature and readers may require legal advice for specific circumstances. The Office of the Public Advocate expressly disclaims any liability howsoever caused to any person in respect of any action taken in reliance on the contents of this publication. If you need legal advice, the organisations listed at the back of this booklet may be able to help you.

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 and any resemblance to any person is coincidental.

About the cover image

The cover image is a reproduction of an artwork painted by June Patterson called 'Maureen'. Elements from her work have been stylised and used throughout the booklet, designed by Nicholas Hopkins.

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About the Office of the Public Advocate

The Office of the Public Advocate (OPA) is an independent statutory body of the Victorian State Government. The Public Advocate is appointed by the Governor in Council for seven-year terms and is answerable to the Parliament.

The office has responsibility for guardianship services in Victoria and supports a number of volunteer programs which safeguard the interests, rights and dignity of Victorians with disability or mental illness.

OPA provides advice and information on the rights of people with disability or mental illness.

The OPA Advice Service is available Monday to Friday, 9 am to 4.45 pm, and can be contacted on: **Phone:** 1300 309 337 **TTY:** 1300 305 61

What this guide is about

This booklet is for older people. It includes helpful tips, case studies, and sample wording to assist you to think about, and make, your enduring power of attorney.

The Office of the Public Advocate (OPA) publication, *Take Control: A guide for making enduring powers of attorney* provides guidance on completing your enduring power of attorney form. This booklet is a companion to, and should be read with, that guide.

For further information about completing an enduring power of attorney, *Take Control* and the enduring power of attorney form are available on the OPA website at www.publicadvocate.vic.gov.au or by calling the OPA Advice Service on 1300 309 337.

Why plan ahead for your future?

We all have the right to make our own decisions. However, there may be a time when you are unable to make decisions for yourself and need someone else to make particular decisions for you.

Making an enduring power of attorney is one way that you can take control now, so that decisions are made as you would want them in the future.

An enduring power of attorney is where you give someone you trust the legal authority to make decisions on your behalf, for example, about where you might live, or about what happens to your house, other property or pets.

Are there any risks in making an enduring power of attorney?

The majority of enduring powers of attorney work well. It is, unfortunately however, not possible to guarantee that your enduring power of attorney will only be used in the way you want.

Your enduring power of attorney may be misused by someone that you trust – or thought you could trust. Most victims of abuse of enduring powers of attorney are older people.

However, there are important steps that you can take to reduce the risk of things going wrong.

This guide can help you decide whether to make an enduring power of attorney. If you decide to make one, this guide will help minimise the risk of abuse by making an enduring power of attorney that:

- captures your wishes about decisions that might be made on your behalf
- ensures the right people are involved in the decisions that are made on your behalf.

I'm so glad dad planned ahead – Francesco's story

My father, Francesco, was diagnosed with dementia a number of years ago. His condition declined until he needed significant support to live at home.


He recently had a fall and was taken to hospital. Dad wanted to return home after the fall. The hospital organised an assessment of whether dad was able to make this decision. He was assessed as not being able to make the decision because of his advanced dementia.

Dad had appointed me as his attorney for financial and personal matters to make these decisions for him, if he was ever unable to make his own decisions.

Staff at the hospital encouraged me to consider discharging dad to an aged care facility, because of the risk of another fall.

case

study



In the early stages of dad's dementia, dad had talked to me and my sister, about his wishes. I felt confident that dad wanted to live at home for as long as possible with the help of services – even if this meant there was a risk that he might fall again.

My sister would have preferred dad to move into residential care because she thought that dad would be safer there. However, she accepted my decision that dad would go home, knowing that this was what dad said that he would want and that we had organised services and tried to make things as safe as possible for him.

While I still worry about dad falling, I've taken steps to minimise that risk. I have peace of mind that I have made the decision that dad would have wanted, in the circumstances.

In the example above, the hospital arranged for a formal assessment of Francesco's decision-making capacity.

What does decision-making capacity mean?

The ability to make a specific decision at the time when the decision needs to be made is called decision-making capacity.

Generally, this means you are able to make a decision if you can:

- understand the facts and choices involved
- remember the information and weigh up the consequences
- communicate the decision in some way.

The law presumes that you have decision-making capacity unless there is something that suggests you do not. An assessment of your capacity to make a decision is not based on your appearance, your age or the fact that you have made a decision that others think is unwise.

You have decision-making capacity if you are able to make the decision with appropriate support.

You may be able to make decisions about some things but not others, depending on how complex the decision is. For example, you may be able to make a decision to buy a family member a gift, but be unable to make a decision about the consequences of entering into a contract to purchase a mobile phone.

Your ability to make decisions may change depending on a range of factors. For example, you may be someone who is more alert in the morning than the afternoon, or you may find it hard to make decisions when you are tired.

Your ability to make decisions can temporarily be affected by factors like medication, stress, illness or grief.

You may have experienced some decline in memory or mental agility as you have aged, or you may have been diagnosed with a condition, such as dementia. This does not, necessarily, mean that you do not have the ability to make a specific decision at a specific time.

This guide can help you to take steps now, to ensure that decisions are made as you would want them to be made in the future, including when you do not have capacity to make a decision yourself.

Everyone can plan ahead

In this booklet, family includes biological family, extended families, step families, adoptive families and families of choice. Some family members may also be in a carer role.

While the understanding of family, and how decisions are made within families varies between cultures, this booklet is for everyone.

This booklet relates to the Australian context. Some of the suggestions in the booklet may be new to you, or differ from how decisions are normally made in your family and your culture.

However, planning ahead can benefit you and your family, regardless of your lived experience and cultural background.

key

message

Ways to plan ahead

Where to start

A good place to start to plan ahead is to talk to those close to you about your wishes and what is important to you.

Having these conversations early means that you can:

- consider things carefully while you are well and not under pressure
- seek advice if you need it
- make sure that the people close to you know what you want to happen in the future, if you are unable to decide for yourself.

There are different ways you can try to start the conversation with your family and friends, particularly if they are reluctant to discuss what might happen to you in the future.

For example, you could talk about what has happened to other people you know, or mention something you've seen on television or heard on the radio that has started you thinking.

Further information for anyone looking to plan ahead is available from the Alzheimer's Australia website, *Planning Ahead, My Plans* at www.fightdementia.org.au/planning-ahead

The more information you can give to those close to you, the better prepared they will be to make a decision the way you would want it to be made.

Other ways to make your wishes known

You may not have close family or friends who you would be comfortable discussing your wishes with.

Even if you do, it can be helpful to write down your wishes and preferences or keep a journal or a blog on your thoughts about the future.

If you document your wishes, make sure that they can be found and give a copy to people who may need to know, for example, your regular doctor.

Steps you can take now











You can take steps now to put in place arrangements for the lifestyle and care you want in the future.

Think about what you can do now to:

- make it easier to manage your affairs for as long as possible
- make sure that you are supported if you need help
- make sure a trusted person knows what you want and can make a decision for you if you are unable to make that decision for yourself.

For example, consider whether some or all of the following options may be appropriate for your circumstances.

Table 1. Options to consider due to circumstance and decision-making ability

Ability	Option to consider	Example or comments
	Set up direct debits to authorise payment of bills from your account.	You can authorise your phone company to withdraw the amount that you owe from your bank account each month when your bill is due.
	Centrelink deductions can be made from your Centrelink payments to pay bills directly.	You can set up a deduction with Centrelink to pay your electricity bill or rent on a regular basis.
	A debit card can be provided to another person to use up to a set limit.	You can give someone a debit card with \$200 on it to use to pay for your shopping. This money may be periodically deducted from your account.
	A gift card can be provided to another person.	You can give someone a gift card for a set amount to use to pay for your shopping.
	Make a 'Centrelink nomination' authorising a person to do things on your behalf like make enquiries, changes and receive payments.	You can nominate someone to let Centrelink know your new address after you move. If you are prepared to appoint this person for Centrelink, you might consider appointing them as your attorney.
	Make an 'authority to operate', enabling another person to use your bank account.	Important: It is preferable to appoint that person as your attorney for financial matters rather than use an authority to operate. This is because your attorney has obligations to you that a person acting on an authority to operate does not.
	Authorise another person to help you deal with telecommunications and utility companies.	Important: Be sure that you understand what you are authorising. For example, are you allowing someone to speak on your behalf, or letting them sign you up for expensive goods and services.
	Appoint a 'supportive attorney' to help you to make and give effect to decisions.	<p>You can authorise a supportive attorney to ask for information on your behalf, or communicate your decision to another person, but the decision is still made by you.</p> <p>This appointment can be useful now but, unlike the enduring power of attorney, it does not operate if you are unable to make decisions yourself.</p> <p>For information about supportive attorney appointments, see OPA's website, www.publicadvocate.vic.gov.au</p>
	Appoint an enduring attorney to make decisions on your behalf, effective immediately.	<p>You could appoint someone to access your bank account to pay your bills, starting immediately.</p> <p>Important: This does not take away your right to make your own decisions or be involved in the decision-making process.</p>
	Appoint an enduring attorney to make decisions on your behalf when you are no longer able to make decisions yourself.	You could appoint someone to make personal, financial and/or medical decisions for you when you are unable to make those decisions yourself in the future.

 can make decision  need support  unable to make decision

The rest of this booklet is about enduring powers of attorney and should be read together with *Take Control*.

Step 1

Choose someone you trust to make decisions for you

The most important decision when making an enduring power of attorney is choosing who to appoint.

The role of attorney is powerful and carries significant responsibilities.

In all circumstances, your attorney must:

- act honestly, diligently and in good faith
- act with reasonable skill and care
- keep accurate records and accounts

When making a decision on your behalf, if you are unable to make the decision yourself, your attorney must:

- act on your wishes in so far as it is possible to do so
 - take steps to encourage you to take part in the decision-making
 - act in a way that promotes your personal and social wellbeing.
-

It is very important that you trust the person or people you appoint.

If there is no one that you trust to appoint, you can appoint someone independent like a trustee company. Otherwise you shouldn't make an enduring power of attorney.

If you don't appoint anyone, and are unable to make a decision when it needs to be made, the Victorian Civil and Administrative

Tribunal (VCAT) can appoint someone to make the decision, such as the Public Advocate or a trustee company.

If there is someone you trust, possibly a life partner, an adult child, another family member or a friend, you can make an enduring power of attorney. You can also consider appointing an accountant, a lawyer or a trustee company. You should ask about their fees before doing so.

Who you choose will depend on the nature of the power and the type of decision required. See the OPA website or *Take Control* for information about who is eligible to be an attorney.

Choosing your attorney

It can be useful to start by identifying the qualities that are important to you. Different qualities and skills may be relevant for different types of decisions.

You can appoint more than one attorney to have the same or different decision-making powers.


Examples of qualities that may be important to you include:

- trustworthiness
- the ability to manage money well
- the ability to stay calm in a crisis
- the confidence to speak up on your behalf
- availability
- willingness to listen to, and act on your wishes and preferences, rather than their own
- the confidence to talk to doctors and lawyers.

Once you have identified the qualities that are important to you, think about the people close to you objectively.

Things that you should do:

- Make sure you consider all your options, for example, trusted friends, siblings, grandchildren, nieces and nephews. You don't have to appoint your adult children or life partner.

- 
- Consider the age of the person you have in mind.
 - Think about who will be able to make good decisions for you during, what may be, a period of crisis.
 - Think about appointing one or more alternative attorneys in case your attorney is unable or unwilling to act when the power starts. See the OPA website and *Take Control* for information about alternative attorneys.
 - Be cautious about appointing someone experiencing their own difficulties, including financial problems or addiction.
 - Be cautious about appointing someone just to maintain harmony within the family now. It may be that the best way to ensure family harmony in the long-term is to talk about issues now. This way you can participate and appoint the person who is best suited to the role.

Things that you should not do:

- You should not appoint someone solely because of their position in the family, for example, because they are the eldest child.
- Don't appoint someone if you are feeling pressured to do so. It is up to you to decide who to appoint. If you are feeling pressured, OPA or Seniors Rights Victoria can help.

What to do once you have decided who you would like to appoint as your attorney

- Talk to the person that you are thinking of appointing. See if they take the time to listen to what you want, that they understand the role and are willing to accept it. You should be confident that the person you appoint will be able to follow your wishes under pressure.
- If you feel comfortable to do so, explain to other family members or friends why you have chosen your attorney at the time you make the appointment. Also think about including those reasons in your enduring power of attorney document to prevent problems later.

Jan changes her mind after talking to the people close to her

case

study

Jan is making an enduring power of attorney. She is considering appointing her friend, Frances, to make financial and personal decisions on her behalf if she is unable to make those decisions herself.

When Jan raises the topic with Frances, they discuss the types of decisions that Frances may need to make if she accepts the role, including engaging services to assist Jan with daily living, if that becomes necessary.

Frances tells Jan that she is silly to waste her money paying a stranger to care for her, when she is available and willing to assist.

Jan explains that she wants to maintain her privacy by engaging a professional carer rather than someone she knows. Frances still insists that it would be much better for Jan if she looked after her.

Frances has offered to assist Jan in the past. While Frances has good intentions, Jan has found that she is very busy and as a result, is unreliable.

Jan then speaks to her friend, Sophia. Sophia listens and asks questions to understand Jan's wishes and preferences. She says that she understands how important privacy is to Jan. She would be happy to arrange services for Jan if that becomes necessary and if that is what she wants.

Jan decides to appoint Sophia as her attorney.



Step 2

Decide what powers to give

You decide what types of decisions your attorney(s) can make.

Medical treatment

You can plan ahead for your medical treatment and care. There are a number of options available including:

- documenting your wishes in relation to future care
- appointing another person to make medical treatment decisions for you, if you are unable to make a medical treatment decision in the future.

The role of the medical treatment decision-maker is specified in the law. See the OPA website for further information.

This booklet is about planning for your future financial and personal decisions.

Financial and personal matters

You can authorise another person to make decisions on your behalf in an enduring power of attorney in relation to the following types of matters:

- financial matters
- personal matters.

See the OPA website and *Take Control* for further information.

Some examples of financial matters are paying expenses, withdrawing money from a bank account, and selling a property.

Examples of personal matters include where and with whom you live and daily living issues such as diet and clothing.

The decisions your attorney can make

Your attorney can only make decisions about matters for which they have been appointed.

Misunderstanding the scope of the role

case

study

Anthony is attorney for financial matters for his mother, Margaret.

As Margaret's care needs increase, her partner, Clara, is no longer able to care for her at home and Margaret moves into residential care.

Anthony has never respected Margaret and Clara's relationship. Anthony tells the facility not to let Clara visit Margaret.

In this example, Anthony has acted outside the scope of his role.

An attorney with authority to make decisions about only financial matters, cannot make decisions about who you spend time with.

Even if Anthony did have authority, he must act to promote Margaret's personal and social wellbeing and consider Margaret's wishes.

Limiting the decisions that your attorney can make

You can limit your attorney's power to making decisions about specific financial and personal matters.

If you do not limit your attorney's powers, your attorney is authorised to do anything on your behalf that can lawfully be done by an attorney. You can grant this power for either personal or financial matters, or for both.

It is important to give careful thought to the types of situations that may arise in the future, so that the limitations you put in place do not prevent your attorney from being able to do things that you would have wanted them to be able to do.

Limiting the power

I authorise my attorney for financial matters to pay my expenses and to withdraw from any bank account in my name funds that are required to pay those expenses.

OR

I authorise my attorney for financial matters to do anything that I can lawfully do for financial matters, except the sale of my house.

OR

I authorise my attorney for personal matters to do anything that I can lawfully do for personal matters, except decide where and with whom I live.

sample

wording

Decisions involving financial and personal powers

Some decisions involve both financial and personal powers, for example, the decision to sell your home and move in with family.

You can appoint different people, or the same person to make financial and personal decisions, but bear in mind that different skills might be helpful for the different types of decisions.

If you appoint different people to the roles of personal and financial attorney, and they cannot agree on a decision they are both authorised to make, the decision of the personal attorney overrides the decision by the financial attorney.

Step 3

Decide when the powers will start

You choose when your attorney's powers start.

This can be:

- immediately
- when you cease to have decision-making capacity
- another time, circumstances or occasion.

By specifying that all or some of your attorney's powers start immediately, you will be able to:

- oversee and monitor the use of your attorney's powers while you are able to do so
- obtain practical help early. For example, if you are unwell and find it difficult to get to the bank but still have decision-making capacity, your attorney can withdraw money from your bank account and pay bills for you.

While you have decision-making capacity for the matter, your attorney must act according to your instructions.

Importantly, having an attorney does not remove your rights to make decisions. For example, the fact that your attorney is paying your bills does not mean that you are unable to withdraw money from your bank account.

key

message

You can still make your own decisions while you still have decision-making capacity for that matter, even after you have appointed an attorney.

You may prefer that the power starts in the future when you are not able to make the relevant decision.

If you choose this option, you may have decision-making capacity to make decisions about some things, but not others, depending on how complex the decision is.

Your attorney's role could start by making one or two decisions on your behalf. They may make more decisions later depending on your capacity to make each decision.

If your attorney's role starts when you cease to have decision-making capacity, your attorney must:

- act in a way that does not limit your ability to participate in making the decision
- ensure that you have support to participate in the decision-making process as much as possible.

Misunderstanding the obligations of an attorney and when a power can be used

Peter appointed his son, Michael, as his attorney for financial and personal decisions. Michael's power starts when Peter ceases to have decision-making capacity.


Peter suffers a stroke and is hospitalised, but he retains decision-making capacity.

Michael doesn't understand that the power has not yet started because Peter still has decision-making capacity. Without consulting Peter, he tells the hospital staff that he is Peter's attorney and arranges for him to be discharged to an aged care facility.

In this example, Michael breached a number of his obligations as an attorney.

case

study



He acted on a power that he did not yet have. Even if the power had started, Michael is obliged to support Peter to participate in making the decision to the greatest extent possible.

Finally, you can specify a time, circumstance, or occasion from when the power is able to be used, for example, if you know that you are going to hospital.

Step 4

Helpful tips and sample wording

Your attorney has a lot of responsibility. There is no independent oversight of how attorneys make decisions unless concerns are raised.

However, there are things that you can do yourself to make your wishes clear and prevent things from going wrong.

Hassan appoints his adult daughter as his only attorney

Hassan has two children, Ahmad and Maryam. He appoints Maryam as his attorney for all financial matters. The power commences immediately.

Maryam is experiencing financial difficulties and withdraws money from Hassan's account to pay her household expenses. Ahmad only discovers this when there are insufficient funds in the account to pay Hassan's nursing home fees.

case

study

There are things that Hassan could have done to reduce the risk of this happening.

1. Appoint more than one attorney to act jointly

One of the best ways of ensuring that your power of attorney is used as you intended is to involve other people in the exercise of the power.

A way to do this is to appoint more than one attorney to act jointly. This means that the attorneys must make decisions together.

Appointing more than one attorney to act jointly ensures that one attorney cannot act alone, making it less likely that the document will be misused.

To complement this important safeguard, it is important to discuss your wishes regarding financial matters with your bank. For example, you may want to avoid internet banking, as this allows a financial attorney to manage your finances without consulting the other attorney.

A variant of appointing joint attorneys is to appoint three or more attorneys to act as a majority. See the OPA website and *Take Control* for further information.

However, it may not always be practical to appoint more than one attorney to act jointly. If your attorneys cannot agree on what is to be done, they may have to go to VCAT.

key

message

One of the best ways of making sure that things don't go wrong is to involve other people in the use of the power.

2. Appoint more than one attorney to act jointly and severally, that is, separately

It might be impractical to require multiple attorneys to make decisions together all the time.

It is possible to allow multiple attorneys to act separately as well as together to provide some flexibility to their decision-making. They can all sign any document or one attorney alone can sign. This is called acting jointly and severally.

If you do this, it is important to let your attorneys know what your expectations are. For example, let them know that for practical reasons you've appointed them jointly and severally (individually), but that you expect them to discuss all or some decisions with each other.

You could require each of them to notify the other of financial transactions above a certain amount by including this in your enduring power of attorney.

Consider including a condition about what you want in your enduring power of attorney document.

My attorneys for financial matters may act jointly or severally. When acting jointly (acting together) they must all agree. When one of my attorneys acts severally (acts separately), they must notify the other attorney(s) of the decision before giving effect to it.

OR

My attorneys for financial matters may act jointly or severally. When acting jointly (acting together) they must all agree. When one of my attorneys acts severally (acts separately), they must notify the other attorney of any proposed transaction above \$500 before carrying it out.

However, it is important to ensure that the arrangement is workable.

If the attorneys don't communicate well in ordinary circumstances, it is unlikely that they will be able to work together under pressure.

It may be preferable to appoint one person as attorney and consider some of the following options to reduce the risk of things going wrong.

3. Include a requirement that your attorney provide information to a trusted person

A way of involving another person is to include a requirement that your attorney provide regular statements or reports to that person.

The person you choose to receive the reports is able to make an application to VCAT if they do not receive the reports, or if they have any queries.

My attorney(s) for financial matters must provide annual accounts to my sister [name]. I authorise my attorney(s) for financial matters to disclose confidential information and documents that are required by [name].

4. Give your attorney permission to disclose confidential information to a trusted person

If you want to involve another person who is not an attorney in the exercise of the power, it is important to give your attorney permission to provide confidential information to that person.

Your attorney has an obligation to keep your personal information confidential. You must authorise your attorney to disclose confidential information to other people if you want that to occur.

This is the case even if you have always shared confidential information with that person in the past.

sample

wording

I authorise my attorney(s) for financial matters to disclose confidential information concerning my finances to my children [name] and [name].

OR

I authorise my attorney(s) for personal matters to disclose confidential information concerning the exercise of their power to my sister [name].

5. Require an independent assessment of decision-making capacity

You may choose for the power to start when you don't have decision-making capacity for the decision.

If you choose this approach, you should make sure the assessment is based on independent medical evidence rather than only the opinion of your attorney. Your attorney is unlikely to be qualified to make such a decision.

You can specify in the enduring power of attorney that your attorney must obtain a medical report from your general practitioner or a specialist indicating that you do not have decision-making capacity for that matter. Examples of specialists include neuropsychologists and geriatricians. This would generally involve a referral from your general practitioner.

When deciding the type of evidence you require, if any, bear in mind that the power may need to be activated quickly and that it may take weeks or months for your attorney to obtain a specialist report.

The powers given to my attorney for financial matters can only be exercised once my attorney for financial matters obtains an opinion from my general practitioner that I do not have decision-making capacity for the relevant financial matter.

sample

wording

I consent to my general practitioner providing confidential medical and personal information to my financial attorney for this purpose.

6. Require your attorney to tell another person when the power starts

If the power starts when you cease to have decision-making capacity for the matter, you can specify in the enduring power of attorney that your attorney notify a person or people before using the power for the first time.

For example, consider a requirement that your attorney notify a family member or a trusted friend or professional adviser before exercising the power.

If that person has any concerns about the attorney's assessment, they can make an application to VCAT for independent consideration.

My attorney for financial matters must notify my friend [insert name] before exercising their powers for the first time.

sample

wording

7. Conditions and instructions on powers

If you want to make your wishes clear in your enduring power of attorney, you can specify conditions, give instructions or include information about your preferences to be taken into account by your attorney.

For example, one of the most significant personal decisions that we may need to make as we age is whether to move into residential care.

You don't have to give anyone the power to make that decision. However, thinking about this life transition now, provides the opportunity to tell those close to you what's important to you so that you get the care and support that you want when you need it.

For example, it may be very important to you that you can take your cat wherever you live, or that you are provided a particular diet, or have access to certain social activities. This is a power given to your attorney for personal matters.

sample

wording

If I need to move into residential care, I would prefer to live in a facility that allows pets.

OR

If I need to move into residential care, my attorney must ensure that I am only provided Halal food.

Your connection to your community might be important to you.

You may wish to direct your attorney to respect your identity and lived experience to ensure continued connection with your community.

This may be particularly relevant if you are someone from an Aboriginal or Torres Strait Islander, culturally and linguistically diverse and/or lesbian, gay, bisexual, trans and gender diverse or intersex background or community.

sample

wording

My attorney must respect my [insert identity] identity, enable my relationships and friendships within the [insert community] community to continue, continue my subscription to [insert name of magazine] and facilitate my attendance at meetings of [insert social or support group] while I am able to attend.

A final word about conditions and instructions

Including conditions and instructions in your enduring power of attorney can help ensure that your wishes are respected, if you are no longer able to make particular decisions yourself.

It is important, however, to ensure that any conditions you include are practical and valid. For example, you cannot direct your attorneys to do anything that is outside their powers or to do anything that is against the law.

Anna makes a power of attorney

Anna is making an enduring power of attorney. She wants to appoint her daughter, Miriam, as her attorney for financial and personal matters. It is very important to Anna that she is able to practice her Jewish faith.

case

study

Anna appoints Miriam as her attorney for financial and personal matters and includes a number of conditions.

For example, Anna includes a condition requiring Miriam to notify her brother, Joe, if she decides to sell Anna's house.

Anna's conditions read:

My attorney for financial matters must notify my son, Joe, before implementing a decision to sell my house.

If I need to move into residential care, my attorney for personal matters must ensure that I am able to continue to practice my Jewish faith.

8. Authorising payment to your attorney

Your attorney can be reimbursed for expenses incurred in carrying out the role.

However, your attorney is not permitted to be paid to act as your attorney unless you authorise payment in the enduring power of attorney document.

While the law says that you can authorise payment, this is very rare. The role of attorney is often performed by a family

member or trusted friend in a voluntary capacity. Most people do not complete this section of the form.

There may be circumstances where it is appropriate to compensate your attorney for their time, for example, if you are thinking of appointing a professional to the role and there is a large amount of work to be done which will be time consuming.

If you do want to authorise payments to your attorney, you must include this in your enduring power of attorney. If you do this, think about specifying affordable limits on how much your attorney can be paid.

sample

wording

I authorise payment of \$ [insert amount] per year from my estate to my attorney to be paid on 30 June each year, commencing [date].

Misunderstanding entitlement to payment

case

study

Pat has appointed her niece, Jenny, as her personal and financial attorney.

Pat now has advanced dementia and her care needs have increased.

Jenny arranges for the sale of Pat's property and her admission to an aged care facility. Jenny ensures that Pat's bills are paid and visits her regularly.

Jenny transfers funds from Pat's account each month as compensation for all of the work that she has done for Pat.

She thinks that Pat would have wanted her to be paid for her efforts. However, there is no provision authorising this in the enduring power of attorney.

In the example above, Jenny has breached her obligations as attorney. Jenny is not entitled to be paid from Pat's money, unless Pat has specifically authorised this in the enduring power of attorney.

This is the case even if it is likely that Pat would have authorised payment when she had decision-making capacity.

9. Conflicts of interest

If your attorney has been appointed as attorney for financial matters, they must not enter into a transaction where they have a conflict between their duty to you and their own interests.

This also includes the interests of their relatives, business associates or close friends.

This is the case unless the transaction is authorised by you, or by VCAT.

This type of transaction is known as a conflict transaction.

Lack of understanding of conflicts of interest

case

study

Kosta is financial attorney for his father, Vasili.

Kosta's son, Jim, had a car accident and needed money to repair his car.

Kosta withdrew money from Vasili's account to pay for the repairs because Vasili had always helped Jim when he got into trouble. Kosta also thought that his father would have wanted to help Jim.

However, there is no provision authorising a transaction involving a conflict of interest in the enduring power of attorney.

In this example, by paying for the repairs from Vasili's account, Kosta has breached his obligation to avoid acting where there is a conflict of interest.

Kosta has no authority to withdraw the money to help Jim, even if Vasili had provided similar help to Jim in the past.

It also makes no difference if Kosta feels sure that Vasili would agree to help if he could make the decision. As an attorney, Kosta cannot use Vasili's money in this way.

If you do want to authorise your attorney to enter into a conflict transaction, include this in your enduring power of attorney. It is very rare that this is done.

key**message**

Your attorney can only do things that you have clearly authorised them to do.

Even if your attorney knows you would have wanted them to do something, they cannot do this unless the power of attorney allows them to.

Alternatively, if you don't authorise conflict transactions your attorney can make an application to VCAT seeking authorisation.

sample**wording**

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

Allow my grandchildren [name] to stay rent free in my property at [address] while they are studying full-time, provided I still own this property.

10. Gifts

Your attorney for financial matters can give a gift from your property, including a gift of money, in limited circumstances.

This includes giving a gift to a family member of your attorney that would otherwise be a conflict transaction.

The gift must be reasonable given your circumstances.

The gift can only be:

- to a relative or a close friend of yours for an occasion such as a birthday, birth or marriage, or
- the type of donation that you usually make.

You can also place additional conditions on the giving of gifts in your enduring power of attorney.

sample**wording**

My attorney is only authorised to give gifts up to the value of \$100.

Misunderstanding obligations regarding gifts

Margaret has appointed her son, Lachlan, as her financial attorney.

case

study

Margaret has always spent about \$50 on each of her grandchildren for their birthdays.

Lachlan purchases a \$3,000 computer for his daughter's birthday using Margaret's money.

In this example, Lachlan has breached his obligations as attorney. The gift was a lot more expensive than the gifts Margaret usually gives her grandchildren for their birthdays.

11. Keeping property separate

Your attorney for financial matters must keep your property separate from their own property. This does not apply to property owned jointly by you and your attorney.

Misunderstanding obligations – Part 1

Martin is financial attorney for his father, Luis. He regularly does Luis' grocery shopping when he does his own.

case

study

He puts all the groceries through together.

Sometimes he pays using his money, and on other occasions, he uses Luis' funds.

He thinks that this is all right because it all works out in the end.

In this example, Martin has breached his obligations to keep his property separate from Luis' property.

Martin must keep his shopping basket separate from Luis' and pay for his own shopping separately from Luis'.

12. Keeping records

Your attorneys must keep accurate records.

Misunderstanding obligations – Part 2

case

study

Martin throws the receipt in the bin and does not keep a record of what he purchased with Luis' money.

In this example, Martin has breached his obligations to keep accurate records about the decisions he has made on behalf of Luis.

Martin must keep receipts for the items bought for Luis.

13. Ensure other trusted people understand the role and obligations of your attorney

Consider providing a copy of this booklet to all family members and friends to ensure they understand your attorney's role and obligations.

Anyone with a special interest in your affairs can make an application to VCAT for an order in relation to your enduring power of attorney.

An application can be made if there are concerns about the conduct of your attorney, or to require them to account for their conduct.

If your attorney breaches their obligations to you:

- they may have to pay compensation, if the breach has caused you a loss
- they could be charged with a criminal offence, if the breach involved dishonesty, for instance, taking money from your bank account for themselves
- they could have their powers revoked by you, as long as you have capacity to make that decision, or if you do not have capacity, by VCAT.

Step 5

Complete the enduring power of attorney form

Once you have thought about what you want to include in your enduring power of attorney and who you would like to appoint, complete the enduring power of attorney form.

When you have filled in the form, you must sign your enduring power of attorney in front of witnesses.

Finally, arrange for your attorney to sign the 'statement of acceptance of appointment'. Your attorney must also sign in front of witnesses. Your enduring power of attorney is not effective if your attorney has not signed the statement of acceptance of appointment.

See the OPA website for the enduring power of attorney form, information about witnessing requirements and *Take Control*.

www.publicadvocate.vic.gov.au

You can only make an enduring power of attorney using the correct form and the document must be witnessed correctly.

key

message

Step 6

After you have made your enduring power of attorney

Storage and certified copies

- Tell important people in your life that you have made an enduring power of attorney.
- Keep the original form in a very safe place, and give your attorneys a certified copy. The OPA website and *Take Control* have more information about this.

Stay involved

- You are still able to make decisions for which you have decision-making capacity, even if you have appointed an attorney for those matters.
- Continue to manage as much as you can for as long as you can.
- Review your accounts and ask questions of your attorney to ensure that you understand how decisions are being made on your behalf.
- If you have any concerns, raise these with your attorney or seek advice from your lawyer, OPA or Seniors Rights Victoria.
- Your attorney can be held accountable if they have not complied with their obligations to you.

Review

- Diarise to review your enduring power of attorney every two to three years for as long as you are able.
- Make sure the choices that you made are still suitable for your current circumstances.

- Make sure that the person you appointed is still prepared to be your attorney. If you want to make any changes you will need to make a new enduring power of attorney. You can make a new enduring power of attorney at any time while you have decision-making capacity to do so.
- Also review your enduring power of attorney if your circumstances change. If you move overseas, get divorced, married or enter a relationship, you may need to make a new enduring power of attorney.

Revoking your enduring power of attorney

- You can revoke, or cancel, your enduring power of attorney at any time, so long as you have the decision-making capacity to do so. Visit the OPA website for further information.

Table of sample wording

Page	Topic	Sample wording
17	Limiting powers	<p>I authorise my attorney for financial matters to pay my expenses and to withdraw from any bank account in my name funds that are required to pay those expenses.</p> <p>OR</p> <p>I authorise my attorney for financial matters to do anything that I can lawfully do for financial matters except the sale of my house.</p> <p>OR</p> <p>I authorise my attorney for personal matters to do anything that I can lawfully do for personal matters except decide where and with whom I live.</p>
23	Attorneys acting jointly and severally	<p>My attorneys for financial matters must act jointly or severally. When acting jointly (acting together) they must all agree. When one of my attorneys acts severally (acts separately), they must notify the other attorney(s) of the decision before giving effect to it.</p> <p>OR</p> <p>My attorneys for financial matters may act jointly or severally. When acting jointly (acting together) they must all agree. When one of my attorneys acts severally (acts separately), they must notify the other attorney of any proposed transaction above \$500 before carrying it out.</p>
23	Requirement that your attorney provide information to a trusted person	<p>My attorney(s) for financial matters must provide annual accounts to my sister [name]. I authorise my attorney(s) for financial matters to disclose confidential information and documents that are required by [name].</p>
24	Give your attorney permission to disclose confidential information to a trusted person	<p>I authorise my attorney(s) for financial matters to disclose confidential information concerning my finances to my children [name] and [name].</p> <p>OR</p> <p>I authorise my attorney(s) for personal matters to disclose confidential information concerning the exercise of their power to my sister [name].</p>
25	Require an independent assessment of decision-making capacity	<p>The powers given to my attorney for financial matters are only exercisable once my attorney for financial matters obtains an opinion from my general practitioner that I do not have decision-making capacity for the relevant financial matter. I consent to my general practitioner providing confidential medical and personal information to my financial attorney for this purpose.</p>

Page	Topic	Sample wording
25	Require your attorney to tell another person when the power starts	My attorney for financial matters must notify my friend [insert name] before exercising their powers for the first time.
26	Conditions and instructions on powers	<p>If I need to move into residential care, I would prefer to live in a facility that allows pets.</p> <p>OR</p> <p>If I need to move into residential care, my attorney must ensure that I am only provided Halal food.</p> <p>OR</p> <p>My attorney must respect my [insert identity] identity, enable my relationships and friendships within the [insert community] community to continue, continue my subscription to [insert name of magazine] and facilitate my attendance at meetings of [insert social or support group] while I am able to attend.</p>
28	Authorising payment to your attorney	I authorise payment of \$ [insert amount] per year from my estate to my attorney to be paid on 30 June each year, commencing [date].
30	Authorising conflict transactions	<p>I authorise my attorney(s) to enter into the following conflict transaction(s):</p> <p>Allow my grandchildren [name] to stay rent free in my property at [address] while they are studying full-time, provided I can still own this property.</p>
30	Gifts	My attorney is only authorised to give gifts up to the value of \$100.

Checklist

Use this checklist to guide you through the process of making an enduring power of attorney that:

- reflects your wishes
- includes conditions to reduce the risk of things going wrong.

Where to start

- Have you had a discussion with those close to you?
- Have you decided that making an enduring power of attorney is right for you?

Choosing someone you trust to make decisions for you

- Have you considered what qualities are important to you when choosing an attorney?
- Have you chosen someone you trust to be your attorney?
- Have you discussed the appointment and your wishes with that person?
- Is that person willing to take on the role and listen to what you want?

Deciding what powers to give

- Have you decided what powers to give to your attorney?

Deciding when the powers should start

- Have you decided when the powers will start?

Helpful tips

Have you considered:

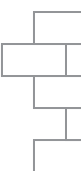
- appointing more than one attorney to act jointly (together)?
- appointing more than one attorney to act jointly and severally (together or alone) or as a majority?
- including an instruction that your attorney provide reports to another trusted person?
- authorising your attorney to disclose confidential information?
- including an instruction requiring your attorney to obtain an independent assessment of your decision-making capacity?
- including an instruction that another person is notified before the power is used for the first time?
- including other conditions and instructions to your attorney?
- whether you want to authorise payment to your attorney?
- whether you want to authorise conflict transactions? For example, allowing a person to live in your house free of charge.
- whether you want to place any limits on the gifts that your attorney can make?
- providing a copy of this booklet to others?

Complete the enduring power of attorney form

- Have you got the latest form and is it the one you need?
Remember to read the information about witnessing requirements.

After you have made your power of attorneys

- Have you stored your enduring power of attorney in a safe place?
- Have you given your attorneys a certified copy of the enduring power of attorney?
- Have you diarised to review your enduring power of attorney every two or three years?



Where to get help

Office of the Public Advocate (OPA)

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

Seniors Rights Victoria

Level 4, 98 Elizabeth Street
Melbourne VIC 3000
Phone: 1300 368 821
Email: info@seniorsrights.org.au
Website: www.seniorsrights.org.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 VIC 3000
Phone: (03) 9628 9911
Toll Free: 1300 079 413
Fax: (03) 8685 1404
E-mail: humanrights@vcat.vic.gov.au
Website: www.vcat.vic.gov.au



If you need an interpreter

Call the Translating and Interpreting Service for an interpreter to help you to 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.

Phone: 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.

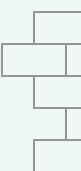
Speak and Listen users: Call 1300 555 727 and then ask for the phone number you need. Include the area code.

If you need further information about Centrelink Centrepay

Centrelink

Reply Paid 7800
Canberra BC ACT 2610
Phone (Older Australians): 132 300
Fax: 1300 786 102

Further details about Centrepay are available at:
www.humanservices.gov.au/customer/services/centrelink/centrepay





Office of the
Public Advocate

Office of the Public Advocate
Level 1, 204 Lygon Street, Carlton, Victoria 3053
DX 210293 Phone: 1300 309 337
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Fax: 1300 787 510
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