

WHAT IS A POWER OF ATTORNEY?

What if you become mentally incapable and can't look after yourself or make decisions about your own affairs? Who can make decisions about your welfare, deal with your property, operate your bank accounts or pay your bills?

A power of attorney gives someone the authority to act legally on your behalf when you can't.

You need to be capable of granting the power in the first place. You can choose how wide the powers of the grant should be and, to give added protection, you may want to appoint more than one attorney, stating whether they can act separately or must act together.

You can grant an ordinary power of attorney if, for example, you are going overseas and will be letting your house or if you want someone to manage your bank account. The power can be for a specified period or ongoing. However, it will cease to exist in the event that you lack legal capacity – for instance, if you have an accident that leaves you with brain damage – or if you die, in which case the power passes to your executor or administrator.

If you want someone to act for you when you are no longer able to manage your affairs, you will need to arrange, while you are still capable, an enduring power of attorney (EPOA). An ordinary power of attorney cannot be converted to an enduring power if you no longer have the ability to authorise this.

If you become incapacitated and haven't arranged an EPOA, those wanting to care for you or make legal decisions on your behalf will need to apply for court orders under the Protection of Personal and Property Rights Act. This takes longer and is more expensive than setting up an EPOA.

There are two types of EPOA - one gives the attorney the right to manage your financial affairs and deal with property and the other the right to make decisions about your personal care and welfare. Ideally, you should arrange both. The powers can be given to the same person or different people, but need to be granted separately, even when done in the same document. You can choose whether the EPOA for property will have immediate effect or take effect only if you become mentally incapable. An EPOA for personal care and welfare can take effect only if you are mentally incapable.

The attorney has a very responsible role and may have to make decisions about whether to sell property or raise a mortgage to pay for your care, about what should be done regarding your business and any other financial interests. This is a big commitment and a highly responsible and powerful role. You might want to appoint two people, requiring them to act jointly, in which case both signatures will be required for all documents requiring a signature.

You can only appoint one person to hold an EPOA for your personal care and welfare, but you can specify if you want the attorney to act generally or only in relation to specific matters.

Any mentally capable person who is not a bankrupt can act as an attorney provided they are over 20 years. Like a will, an EPOA can be revoked, replaced or varied at any time before you become mentally incapable. This needs to be done in writing properly signed and witnessed and people relying on the authority need to be notified.

You can appoint your lawyer as your attorney, but he or she will expect remuneration for their services. You may also wish to provide for payment for anyone else acting as an attorney. Discuss the issues with your lawyer who will advise you about the implications of what you propose and what is required to ensure your wishes are enforceable.

WHAT IS A WILL?

A will can be one of the most important documents that you sign. Without a will, you cannot be sure that your assets end up in the hands of those you wish to have them.

Your will gives instructions to the people who will administer your estate. It tells them what you want to happen with your property.

A will must be in a certain form and be correctly witnessed if it is to have any effect. You must be over 18 or married to make a valid will. Of course, you must be of sound mind.

If you are aged between 16 and 18 you can still make a will but a Court or the Public Trustee must approve it.

WHY DO I NEED A WILL?

Without a will, you die intestate. This means that your estate will be distributed under the Administration Act. Your spouse/partner, your children and your immediate family inherit your assets in amounts and proportions that are set out in the Act. There is no flexibility and what the Administration Act dictates should happen to your assets may not be what you want or suitable for your particular circumstances.

Other consequences of not making a will are:

- You may cause unnecessary anxiety and uncertainty for the family members who survive you.
- Administration of your estate usually costs more and can take longer.

WHY POWERS OF ATTORNEY AND WILLS ARE A MUST

- People that you may have wanted to have provided for may not benefit under the Administration Act and therefore this can cause hardship and/or acrimony between those who receive something under the Act and those who do not.
- If you have young children, you will have lost your opportunity to appoint a guardian of your children in the case where both you and your partner/spouse die.

WHAT SHOULD I PUT IN MY WILL?

You should include:

- The names of the people who will be administering your estate when you die. These are called the executors and/or the trustees. Your executor/trustee should be someone you trust and whom you consider responsible enough to carry out your wishes under your will. You should also check that they are willing to be your executor/trustee.
- You may appoint guardians of your children.
- You need to consider for whom you have a legal duty to provide. These are usually your children and your partner/spouse unless there is good reason for not providing for them.
- It should provide for payment of your debts.
- It may contain detail about how you wish to be buried/cremated.
- Any specific instructions as to what is to happen to particular property e.g. if you have a favourite piece of jewellery that you wish to ensure goes to a particular person upon your death, this should be specified.
- What you want to happen to your assets.
- Your will may contain specific powers for your trustees if this is appropriate.

WHEN SHOULD I CHANGE MY WILL?

It is good practice to review your will every two or three years to ensure it is still relevant to your circumstances. You should definitely review your will and update it if your circumstances change. Examples of when you should update your will are:

- If you marry. If there is a will in existence before you marry it will automatically be revoked upon your marriage unless you have made a specific form of will called "a will made in contemplation of marriage."
- If you enter into a de facto relationship. The Property (Relationships) Act 1976 provides that from 1 February 2002 your partner will have a claim on your estate.
- If you enter in to a Civil Union, your existing will remains valid (it is not automatically revoked as in the case of marriage) so it is important to update your will at this time.
- If you have children.
- If you separate from your partner/spouse. Your will is not automatically revoked so you will need to change your will if you do not wish to have your ex-partner/spouse benefit.

DO I NEED A LAWYER?

No. But if you want to get it right and, if you want to ensure that one of the most important documents that you will ever sign is correct and enforceable, then it is advisable to get legal advice about what you say and how you say it in your will. What a lawyer will do is:

- Advise you on how you can best and most fairly provide for your family members and others.

WHY POWERS OF ATTORNEY AND WILLS ARE A MUST

- Advise you on who will legally be able to make a claim against your estate, and how that can be dealt with in your will to reduce the likelihood of your will being challenged after your death.
- Express your wishes so that they have legal effect and there are no problems with interpretation or implementation after you die.
- Offer alternatives for you to consider.
- Advise you on trusts for your beneficiaries.
- Ensure your will is validly executed. If a will does not comply with the Wills Act, it will be invalid.

A will is a legal document and your lawyer is the appropriate professional to assist you.

HOW MUCH WILL IT COST?

A simple will can be completed for around \$175.00 plus GST. If wills are more complex and there are family trusts, a number of beneficiaries, or there are blended families or other considerations, the cost of preparation will be more. We are happy to give you an estimate of costs for a will for your particular circumstances.

For more information, contact LawWorks at the address below.