

Power of Attorney & Guardianship

A power of attorney is a legal document which is made by a person known as the ‘principal’. This document authorises another person (the ‘attorney’) to act on the principal’s behalf in certain areas. There are two main types of power of attorney: general power of attorney and enduring power of attorney. Delegating power by preparing a ‘power of attorney document’ is a useful device for both short-term absences and long term planning in the area of finance. If the principal wishes to appoint someone to make decisions on their behalf on matters other than finance, for example in medical and personal decisions, an Enduring Guardian can be appointed.

Power of Attorney

A general power of attorney is most frequently used in situations where the principal is absent, for example on a holiday or temporarily ill. The principal gives the attorney permission to make decisions in the financial arena. This may include managing and spending the principal’s money, buying, selling, leasing or mortgaging the principal’s house (or other real estate) and buying or selling shares, for the principal.

The principal should only appoint someone who is responsible and trustworthy. This may include family members or close friends.

The attorney’s duties and responsibilities are to:

- Keep proper and accurate details of the principal’s finances;
 - Obey instructions given them by the principal and those contained in the legal document;
 - Keep finances and money separate from the principal’s;
- Not do anything that creates conflicting interests between the parties.

Registration of Power of Attorney

It is essential to register a power of attorney at the Department of Lands if the attorney will have dealings with the real estate of the principal, for example selling, leasing, or mortgaging real estate. If the attorney will not be involved in these matters, there is no obligation to register the power of attorney. However, the benefits of registration include preventing the document from loss and destruction (it will be recorded as a public document); and providing evidence if disputes arise regarding the authority of the attorney to deal with the principal’s money and assets.

After a power of attorney document is prepared, usually by a lawyer, the document must be signed and witnessed, as required under section 19 of the *Powers of Attorney Act 2003*. Witness certificates which may become an annexure are normally made by lawyers.

Enduring Power of Attorney

The main difference between an enduring power of attorney and a general power of attorney is that a general power of attorney is not effectual once the principal loses the mental capacity to make decisions regarding financial matters. On the other hand, an enduring attorney will be effectual even when mental capacity is lost. An enduring power of attorney, like a general power of attorney, can allow for decisions to be made in the areas of the principal’s property and financial affairs, for example, in buying and selling property or shares, and in paying bills.

Creating an enduring power of attorney

An enduring power of attorney can only be created if the principal is capable of understanding the range of decisions which they are authorising the attorney to make. If there is some doubt as to whether the principal has the capacity to make a power of attorney, professional assessment by a neuropsychologist or geriatrician should be made before the creation of the enduring power of attorney.

Revocation

A power of attorney may be revoked as long as the principal has the mental capacity to do so (at the time of revocation).

The requirement for revocation is that the attorney must be notified of the revocation by the principal either in writing or orally. However, it is better if the power of attorney is revoked by written communication, especially if the power of attorney is to be registered at the Department of Lands. If the attorney is not notified of the revocation, they are still entitled to deal with the principal's property or finances.

Enduring Guardianship

An enduring guardian is similar to an enduring power of attorney. However, an enduring guardian would have the power to make lifestyle and personal decisions (for example, where the principal should live, and what health care the principal should receive) on the principal's behalf. The principal decides what functions the enduring guardian will be able to make. Functions refer to the decisions that the principal allows the enduring guardian to make on their behalf. Also, more than one enduring guardian may be appointed. If more than one guardian is appointed, they may be directed to act either jointly or separately. For a guardian to act jointly, all decisions must be agreed upon by the guardians. If acting separately (known as severally), each enduring guardian can make decisions separately from each other. Sometimes the principal may wish for the enduring guardians to act jointly and severally.

Criteria to appoint an Enduring Guardian

There are certain criteria that must be met in order to create an enduring guardianship. The principal must be at least 18 years old and in a sound state of mind, with the capacity to understand his or her actions.

Criteria to be an Enduring Guardian

The principal should choose someone they trust to make decisions on their behalf. Further, the appointed guardian must be at least 18 years old. The appointed enduring guardian CANNOT be someone who at the time of appointment provides professional or administrative services to the appointer for a fee or payment. The guardian also cannot be a *relative* of a person providing professional or administrative services for a fee or payment to the appointer.

Functions of an Enduring Guardian

An enduring guardian may take on as many functions as the principal desires. This is practically done by inserting or taking out functions from the legal document. However, there are some functions which a guardian is not allowed to consent to. Obviously, a guardian must not consent to unlawful acts. They also cannot exercise the following functions:

- Make a will
 - Vote on behalf of the principal
 - Consent to marriage
 - Manage Finances
- Overrule any objections made by the principal regarding medical treatment

Revoking the appointment of an enduring guardian

In some instances, the principal may decide that they no longer want the current guardian to act for them. In the cases where the principal is still in a sound state of mind, a *Revocation of Appointment of Enduring Guardian* form needs to be completed, signed and witnessed by a lawyer.

It should be noted that marriage has the instantaneous effect of revoking a pre-existing enduring guardian.

Disputes which may arise between the appointed enduring guardian and those concerned about the welfare of the principal may be reviewed by the Guardianship Tribunal upon application. In the circumstance that the appointed guardian dies or in some other way cannot continue, the principal has the right to appoint a new guardian. In circumstances where the principal no longer has the capacity to appoint a new guardian, the Guardianship tribunal may appoint someone on their behalf.

Comasters is able to prepare for clients, 'general power of attorney', 'enduring power of attorney' and 'enduring guardianship' legal documents.

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Important: This is not advice. Clients should not act solely on the basis of the material contained in this paper. Our formal advice should be sought before acting on any aspect of the above information.

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