Types of powers of attorney

General power of attorney

A general power of attorney is often used in a business context by a corporation or an individual. It can authorise your attorney to deal with your financial affairs and comes into effect on the date you elect (ie it is not dependent on you losing the capacity to make decisions). It may limit the extent to which your attorney may deal with your affairs. A general power of attorney is normally used for the purchase and sale of land, eg while you are overseas.

Enduring power of attorney

Under an enduring power of attorney (EPA), you may give your attorney the power to deal with all or any part of your financial, personal and health matters. An EPA for financial matters can come into effect either immediately when you lose capacity, or on a specific date or at a specific event. There are a number of other considerations regarding this decision. It is advisable to seek legal advice to ensure your choice is fully informed.

If your attorney under an EPA acts in conflict of their duties and your interests (eg in financial relationships), they would enter a 'conflict transaction' which they can only do if you authorise such a transaction. It is best to discuss this with your solicitor.

Revoking an enduring power of attorney

Your EPA is automatically revoked:

- on your death
- when you marry, unless your new spouse is your existing attorney
- when you divorce, if your attorney was your spouse
- when you appoint a new attorney
- if your attorney dies or loses decision-making capacity
- if your attorney becomes unqualified, for example, bankrupt or a paid health care provider.

You can choose to revoke your EPA at any time providing you are capable of understanding what you are doing. Your solicitor can advise you on the procedures to follow.

Legal costs

Just as estates vary in size and complexity, the legal costs to prepare a will and power of attorney will differ. At your first appointment, ask your solicitor about the costs involved.

Looking for a solicitor?

You can find one via the Queensland Law Society referral service at qls.com.au or phone 1300 367 757.

Queensland Law Society

Contact us

1300 FOR QLS (1300 367 757)
F 07 3842 5999 | info@qls.com.au

Law Society House
179 Ann Street, Brisbane Qld 4000

GPO Box 1785, Brisbane Qld 4001

qls.com.au

QLSPIB_ESTATE_OCT2012

a legal guide to making your will and enduring power of attorney

estate planning

public information

Queensland Law Society

What is estate planning?

Estate planning is the overarching term used for making decisions in relation to:

- preparing a will – which allows you to nominate how your assets are to be distributed, who are the guardians for your children and who are the Executors and Trustees of your estate
- preparing an enduring power of attorney – which allows you to nominate how you would like to have your personal, financial and health care matters managed, should you lose capacity to make those decisions.

What is a will?

A will is a legal document which, as far as possible, ensures your assets are distributed according to your wishes after you die. Your will can cover all your assets in your own name such as your house, land, car, shares and bank accounts. It does not cover life insurance or superannuation.

In your will you appoint an executor to distribute your assets to your beneficiaries (those you choose to receive your assets). Your choice of an executor should be carefully considered as the role can be very demanding and often complex, requiring legal and financial knowledge or guidance.

Any person of sound mind from the age of 18 years, or, in certain circumstances, under 18, can make a will.

What happens if I don't make a will?

Dying without a will (called 'intestacy') means your assets will be distributed according to rigid formulae set down by the laws of intestacy. Those laws may:

- force the sale of the family home or family car so that the debts can be satisfied and allow other beneficiaries to claim their share of your assets
- not provide future financial protection for your children and grandchildren
- give your assets to the government, if you have no relatives or any other persons who are entitled to benefit.

Furthermore, you lose your autonomy as to who will administer your estate.

Preparing your will

A will is a complex legal document which should be prepared by your solicitor. Before visiting your solicitor, you should consider:

- who to appoint executor and their powers
- who to appoint guardian of your children and how you would like to provide for your children's future
- what your current assets and liabilities are
- who should receive your assets
- your life insurance
- your preferred funeral arrangements
- your superannuation.

Can I prepare my own will?

You can prepare your own will but you do so at the risk of causing costly and emotional legal battles among relatives, should a dispute arise after you die. When preparing a will, a number of legal requirements must be followed or else it may be ineffective. If this occurs, and you have no valid earlier will, you may be presumed to have died intestate, with the laws of intestacy to apply, unless the invalidity is rectified by court process, which can be expensive.

Alternatively, if your handmade will fails to express your wishes clearly, the court may need to interpret your will, which may add further costs and emotional burden to your loved ones.

Changes to your will

You are free to alter your will at any time and as often as you wish, so long as you have testamentary capacity to do so.

Your circumstances may change significantly over time so it is advisable to regularly review your will in the event of:

- the birth of children or grandchildren
- death of a beneficiary or executor
- financial changes
- home or property changes.

On marriage, your current will is automatically revoked unless it states it is made in contemplation of your marriage. Any will you have in favour of a divorced spouse is immediately revoked once the divorce becomes finalised.

Is there such a thing as a 'free' will?

The Public Trustee and trustee companies prepare wills at no cost to the will-maker. However, you should check what charges may be involved if they administer your estate, and other issues such as the appointment of your executor.

Can I appoint someone else to act on my behalf?

You can legally appoint a trusted friend or relative, to act on your behalf to handle your affairs by signing an enduring power of attorney. This person is known as your attorney and may handle your affairs, or have the power to act on your behalf.

An enduring power of attorney is just as important as a will. While a will operates on your death, an enduring power of attorney operates during your lifetime.

Appointing an attorney

Your appointed attorney:

must be	must not be
over 18 years of age	your paid carer or health care provider
someone you trust	bankrupt
able to understand fully what the appointment means	your service provider for residential service where you are a resident eg retirement village
capable of looking after your affairs	