



# ENDURING POWERS OF ATTORNEY

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# AUSTRALIA'S FIRST NOT FOR PROFIT LAW FIRM



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# WHAT IS A POWER OF ATTORNEY??

- A power of attorney is a document by which one person (the principal) authorizes one or more other persons (the attorney(s)) to make particular decisions and do particular things on a principals behalf.

*Powers of Attorney Act 1998 (QLD)*

- All powers of attorney are authorized and exercised under the
- There are strict requirements for entering, exercising and revoking a power of attorney.
- A power of attorney can be registered (particularly if dealing with land S.132 – 137 Land Titles Act 1994 it must be registered)

# POWERS OF ATTORNEY

## ■ Who can you appoint as your attorney?

- Individual who is at least 18 years of age.
- Not be the principals paid carer (excl. a person receiving a carer's pension).
- Not be the principals health practitioner.
- Not be a service provider for a residential service where the principal is a resident.

## ■ What kind of decisions can your attorney make?

- Personal or health matters and / or financial matters.

# TYPES OF POWERS OF ATTORNEY

A General Power of Attorney  
("POA")

An Enduring Power of Attorney  
("EPOA")

# GENERAL POWER OF ATTORNEY – POA



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Gives authority to the attorney to make **decisions** on behalf of the Principal in relation to a financial matter.

A **Financial matter** is defined in the Powers of Attorney Act 1998 (QLD) as follows:-

- (a) paying maintenance and accommodation expenses for the principal and the principal's dependants, including, for example, purchasing an interest in, or making another contribution to, an establishment that will maintain or accommodate the principal or a dependant of the principal;
- (b) paying the principal's debts, including any fees and expenses to which an administrator is entitled under a document made by the principal or under a law;
- (c) receiving and recovering money payable to the principal;
- (d) carrying on a trade or business of the principal;
- (e) performing contracts entered into by the principal;
- (f) discharging a mortgage over the principal's property;
- (g) paying rates, taxes, insurance premiums or other outgoings for the principal's property;
- (h) insuring the principal or the principal's property;
- (i) otherwise preserving or improving the principal's estate;
- (j) investing for the principal in authorised investments;
- (k) continuing investments of the principal, including taking up rights to issues of new shares, or options for new shares, to which the principal becomes entitled by the principal's existing shareholding;
- (l) undertaking a real estate transaction for the principal;
- (m) dealing with land for the principal under the *Land Act 1994* or *Land Title Act 1994*;
- (n) undertaking a transaction for the principal involving the use of the principal's property as security (for example, for a loan or by way of a guarantee) for an obligation the performance of which is beneficial to the principal;
- (o) a legal matter relating to the principal's financial or property matters;
- (p) withdrawing money from, or depositing money into, the principal's account with a financial institution.

# GENERAL POWER OF ATTORNEY – POA

- Frequently used by people who are either physically unable to manage their own financial affairs or would like to appoint someone they trust to manage their financial affairs whilst they are away on holiday.
- It must be in the approved form (S.11) and signed by the principal or at the direction and in the presence of the principal (S.12).
- A general power of attorney can provide terms or information about exercising the power (S.8)
- A Principal may specify when and in what circumstances the power can be exercised. If the document does not specify a time when it is exercisable, it will begin immediately after it is made (S.9 of the Act).
- The Principal can appoint one or more eligible attorneys to be either joint or several attorneys (S.13)



# REVOCATION OF A GENERAL POWER OF ATTORNEY

- On the advice of the Principal (s.16)
- By a document revoking it . Must be in the approved form (S.17)
- If the Principal becomes of impaired capacity (S. 17 to 18)
- On the death of the Principal (S.19)
- According to its terms (S.20) if the General Power of Attorney is expressed to operate for a specific term or purpose
- If the Attorney dies (S.24) or resigns (S.21) or becomes a bankrupt (S.23)
- If the Attorney becomes a person who has impaired capacity (S.22)

# ENDURING POWER OF ATTORNEY - EPOA

- Gives authority to the eligible attorney to make financial and personal decisions on behalf of the principal. Personal matters include health matters.
  - Personal matters (Schedule 2, part 2) include but are not limited to decisions regarding:
    - Living arrangements of the Principal
    - Diet;
    - Dress; and
    - Health care (Schedule 2 part 4) (including withholding or withdrawal of a life- sustaining measures).

But what does enduring mean??

Enduring means that the power of the attorney will continue even after/ if the principal loses capacity to make decisions

# ENDURING POWER OF ATTORNEY – CAPACITY & REQUIREMENTS

The principal must have capacity to make an Enduring Power of Attorney. Capacity is to be proven and cannot be assumed. Capacity is determined by the principals understanding of the nature and the effect of the enduring power of attorney. (S.41).

The enduring power of attorney must be in an approved form, be signed and dated by the Principal in the presence of an eligible witness (S.44). The eligible witness (s.31) must also complete a certificate that the principal appeared to have the capacity to make the enduring power of attorney.

The eligible witness must not be a 'relation' of the principal or attorney

The attorney/ attorneys must accept the appointment by also signing the enduring document.

The principal may appoint more than 1 eligible attorney(s) (s.43).

# WHEN DOES AN ENDURING POWER OF ATTORNEY START

When can the attorney begin making decisions??

For financial decisions?

The principal can nominate if they wish their attorney to begin making decisions either:

- a. Straight away; or
- b. On a particular date or occasion (i.e. only once they have lost capacity)

For health and personal decisions?

The attorney can make health and personal decisions on behalf of the principal only if the principal lacks capacity for making personal decision.

# WHAT POWERS CANNOT BE GIVEN

## *Schedule 2 part 2*

“Special personal matter”, for a principal, is a matter relating to 1 or more of the following—

- (a) making or revoking the principal’s will;
- (b) making or revoking a power of attorney, enduring power of attorney or advance health directive of the principal;
- (c) exercising the principal’s right to vote in a Commonwealth, State or local government election or referendum;
- (d) consenting to adoption of a child of the principal under 18 years;
- (e) consenting to marriage of the principal;
- (f) consenting to the principal entering into a civil partnership;
- (g) consenting to the principal terminating a civil partnership;
- (h) entering into, or agreeing to enter into, a surrogacy arrangement under the *Surrogacy Act 2010* ;
- (i) consenting to the making or discharge of a parentage order under the *Surrogacy Act 2010*.

# WHAT POWERS CANNOT BE GIVEN

*Schedule 2, part 2*

"Special health care" , of a principal, is health care of the following types—

(a) removal of tissue from the principal while alive for donation to someone else;

Note—

■ For the situation after the principal has died, see the Transplantation and Anatomy Act 1979 , particularly section 22 .

(b) sterilisation of the principal;

(c) termination of a pregnancy of the principal;

(d) participation by the principal in special medical research or experimental health care;

(e) electroconvulsive therapy or a non-ablative neurosurgical procedure for the principal;

(f) prescribed special health care of the principal.

# REVOKING AN ENDURING POWER OF ATTORNEY - EPOA

- The EPOA can be revoked at any time provided that the principal still retains capacity.
- Death, marriage or divorce of the principal
- The EPOA may also end if the attorney withdraws. This occurs in instances where the attorney becomes incapable, becomes the principal's paid carer or health – care provider, goes bankrupt or passes away themselves.

# RESPONSIBILITIES OF ATTORNEYS

An attorney must:

- Keep records; and
- Keep property separate and
- Act as required by the power
- Act honestly and with reasonable diligence (s.66)
- Must **not** use confidential information gained because of being an attorney (S.74A)

An attorney may:

- Invest in authorised investments;
- Give away some of the principal's property; and
- Maintain the principal's dependents.
- Avoid conflict transactions (S.73)

Note: there is a presumption of undue influence by the attorney over the principal. (s.87)

An attorney may be ordered to compensate the principal (s.106)



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## CASE LAW - RE RPB [2013] QCAT 77

- Betty is a 86 years old.
- She has 2 sons. Peter who lives in California and Robbie who lives in Townsville.
- In 2012 Betty gave EPOA to her brother John and her son Robbie.
- After Betty fell and broke her hip she decided to sell her home to move into residential care close to Robbie.
- Robbie sold Betty's home but did not consult Peter.

Consider

1. Did Betty have capacity; and
2. Is Robbie acting in a way that is inconsistent with his duties as Betty's attorney

Issues??

Peter believes that Betty did not have capacity to appoint an EPOA and did Robbie abuse his power as Betty's attorney

## CASE LAW – RFG [2019] QCAT 97

- On 1 June 2014 RFG is diagnosed with moderate Alzheimer's dementia.
- RFG was placed in a BUPA nursing home as her ability to care for herself has declined.
- On 13 January 2018 RFG signed an Enduring Power of Attorney appointing family members as her attorneys for financial and personal health matters.
- This EPOA was to operate immediately.
- When RFG moved into the nursing home her attorneys were obligated to lodge an Assets and Income Assessment with Centrelink to determine fees.
- BUPA's policy in the absence of an assessment is to charge full fees.
- An assessment was never lodged and RFG was charged full fees of which she cannot afford.
- RFG now has a substantial debt.

### Issues Tribunal considered:

1. Validity of the EPOA
2. The need for an Administrator
3. JP's practises for witnessing EPOAs
4. The need for a Guardian

# ADVANCE HEALTH DIRECTIVE (“AHD”)



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- AHD is a document written whilst a person has capacity and for the purpose of acting as a substitute decision maker at a later time when they no longer have capacity.
- The document specifies what health care decisions a person wants in the event they can no longer make those decisions for themselves, including directions relating to life sustaining measures.
- It can be as detailed as you wish, however it cannot authorise euthanasia.

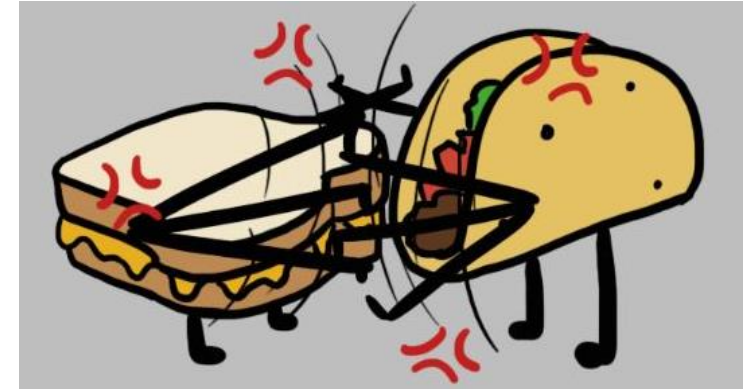
# ADVANCE HEALTH DIRECTIVE (“AHD”)

Who?

A person must be over the age of 18 and have capacity in order to prepare an AHD.

Witness?

The person preparing the AHD must have it witnessed by their treating doctor.



AHD vs. attorney

AHD takes precedent!

# ADVANCE HEALTH DIRECTIVE (“AHD”)

## Differences between a AHD and EPOA?

- EPOA is more general and gives the attorney power to make all health decisions.
- AHD focuses on specific wishes.
- AHD allows for the appointment of an attorney for health and personal, but not financial.

## What kind of decisions does it provide for?

- Information health professionals should know i.e. health conditions, allergies, religious/ spiritual/ cultural beliefs that could affect care.
- What medical treatments a person wishes to receive or decline.
- Current and future health decisions.
- Decisions about end of life care.

AHD's are particularly useful to assist an attorney when they are uncertain about making a decision. An attorney can simply refer to the AHD that has already been prepared.

## CASE LAW – HUNTER AND NEW ENGLAND AREA HEALTH SERVICE V A (2009) 72 NSWLR 88

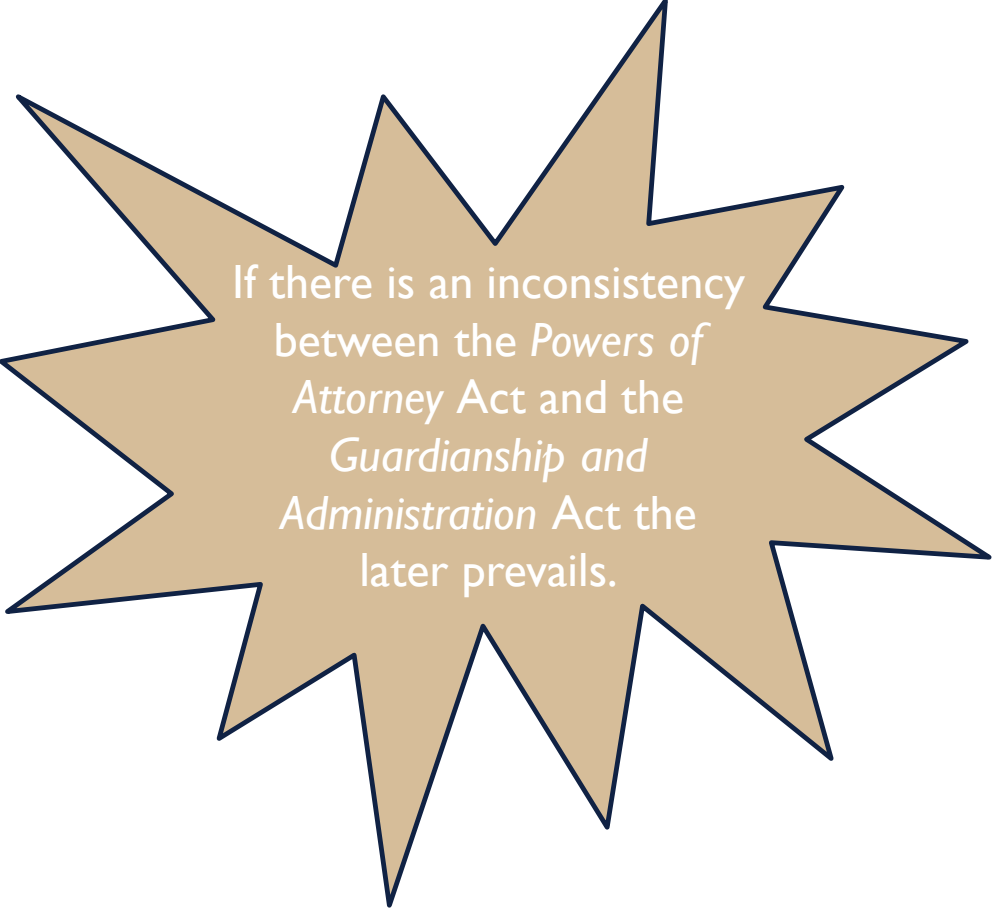


- A was a Jehovah's Witness.
- A completed a 'worksheet' that expressed his refusal for dialysis treatment should he ever require it.
- One (1) year after A completed this document he was admitted to hospital suffering from septic shock and respiratory failure.
- A was treated by mechanical ventilation and kidney dialysis.
- The hospital sought a decision from the Court as to whether A's worksheet was considered an Advance Health Directive.
- The Court decided that the worksheet was considered a Common Law Advance Health Directive and should be treated as such.

# STATUTORY HEALTH ATTORNEYS

- A Statutory Health Attorney is where an adult with impaired capacity has not appointed an attorney nor made an advance health directive for health matters.
- Power is exercisable during any or every period the adult has impaired capacity for the matter.
  - However, this does not include a special health matter.
- A Statutory Health Attorney is a spouse, a person at least 18 years of age who has care of the adult and is not a paid carer or a person at least 18 years of age who is a close friend or relation of the adult and who is not a paid carer.
- No formal procedure to appoint a Statutory Health Attorney

# GUARDIANSHIP AND ADMINISTRATION ACT 2000



If there is an inconsistency between the *Powers of Attorney Act* and the *Guardianship and Administration Act* the later prevails.

- There is a relationship between the *Powers of Attorney Act* and the *Guardianship and Administration Act*.
- The *Powers of Attorney Act* is to be read in conjunction with the *Guardianship and Administration Act* and provides for:
  - The Tribunal may appoint a guardian for an adult with impaired capacity for personal matters and financial matters.
  - The Tribunal may consent to withholding or withdrawal of a life- sustaining measure.



# REMEDIES

## Jurisdiction

- The Supreme Court
  - The *Powers of Attorney Act* does not affect the Supreme Courts inherent jurisdiction as the courts jurisdiction in based on the need to protect those who lack capacity.
  - This gives authority for the Court to appoint an attorney for an individual who is unable to adequately safeguard their own interests.
- QCAT – Queensland Civil & Administrative Tribunal
  - This tribunal is given the same powers as the Supreme Court

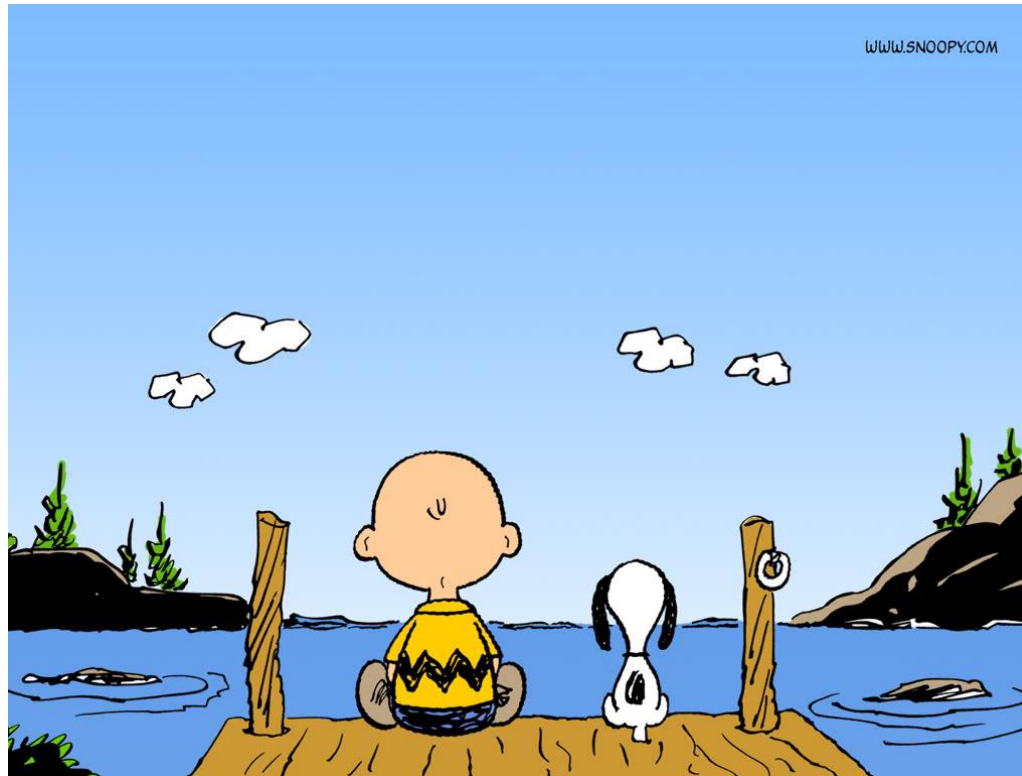


# ANY QUESTIONS?



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# THANK YOU



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