ADLV LAW
FIERCELY ON YOUR SIDE

How effective is your Enduring Power of Attorney?

Most people understand the importance of making an Enduring Power of Attorney. If you are not able to make financial decisions for yourself, your Enduring Attorney can step into your shoes and keep things in order on your behalf.

However, not all Enduring Powers of Attorney are created equal. In fact most standard documents are insufficient to enable your Enduring Attorney to do things that you would ordinarily expect them to be able to do. For example, unless specifically authorised your Enduring Attorney cannot look after your spouse or kids. This is because an Enduring Attorney is generally only authorised to act in your interests – and not in the interests of your family and other loved ones.

What you require is a modern Enduring Power of Attorney that covers the following issues:

Support for your family

Generally, your Enduring Attorney must act solely in your interest – which does not extend to them financially supporting your family and other dependants. If your Enduring Attorney supports your family without an express authority to do so they can end up being sued by your executor, or one of your beneficiaries. In fact, if you regained mental capacity, you could sue them yourself!

Acknowledging conflicts of interest

Similar to the issue raised above, if you appoint your spouse as your Enduring Attorney (which is very common), and they do something that benefits themselves (even if it also benefits you, e.g. paying the mortgage), once again they are exposed to being sued by your executor or a beneficiary under your estate (e.g. your children). We can include provisions that ensure they are not exposed to this risk.

Authorising disclosure of information

Your attorney is most likely going to need to disclose some of your personal information to third parties, as well as require third parties to disclose your personal information to them. Strict privacy laws mean that many people and authorities will not disclose information to your Enduring Attorney without your express authority. We include this authority in the Enduring Power of Attorney, as well as in a separate Consent to Disclosure.

Access to your Will

We generally recommend you give your Enduring Attorney access to your Will, so they can make decisions on your behalf with knowledge of how you want your estate to be divided up when you die. In some states, if your Enduring Attorney deals with your property in a manner that is inconsistent with your Will, then the person who would have benefited under your Will may have an action against them.

Management of your superannuation benefits

Superannuation is often a significant asset – and one that your Enduring Attorney may require access to in order to properly provide for you and your family while you are incapacitated. Your Enduring Attorney may also be advised to withdraw certain super benefits on your behalf prior to your death in order to minimise the extent of tax on those benefits. Without express authority, your super fund trustees may refuse to act on the directions of your Enduring Attorney. This issue is even more important if you have a self-managed super fund.

Maintenance of your lifestyle

Your Enduring Attorney has a wide discretion as to how you are looked after. They can determine the extent of your lifestyle, and things like whether you stay at home or are funded into a nursing home. In order to narrow this discretion (and provide your Enduring Attorney with helpful guidance) you can give specific instructions as to the lifestyle in which you with to be maintained – either prioritising your standard of living or maximising the value of your estate.

Authority in relation to trusts

If you are a controller or trustee of any trust, you can expressly authorise your attorney to act in those roles on your behalf. In some states, the ability to authorise your Enduring Attorney to operate your trusts is more limited, but this issue should always be looked into if you are involved with these structures.

Paying gifts and donating to charity

You can allow your attorney to give gifts to specific people or charities. (Otherwise, giving away your money may not be deemed to be in your best interests, and expose your Enduring Attorney to liability.)

Holding you Enduring Attorney to account

You should only appoint someone as your Enduring Attorney if you truly trust them. However, even so, having checks-and-balances in place is always a good idea. For example, requiring your Enduring Attorney to account for their actions to one or more other persons. Not only can these checks keep your Enduring Attorney on the straight-and-narrow, they can also be used to ensure communication between your Enduring Attorney and family members, so that suspicion does not build up and destroy

What next?

If you would like to speak to someone about putting in place a comprehensive Enduring Power of Attorney, call us on 1300 654 590 or email us at wehelp@adlvlaw.com.au.

Further information can also be found on our website at www.adlvlaw.com.au.