



Frequently Asked Questions

Becoming an Attorney

When a person executes an Enduring Power of Attorney it gives legal authority to another person (**an Attorney**) to make property and financial decisions on their behalf.

If you have been appointed an Attorney, or someone you know has asked you to consider being their Attorney, this Fact Sheet sets out some general legal information about what this would entail.

WHAT SHOULD I KNOW ABOUT THE ROLE?

The role of Attorney is usually voluntary or unpaid.

As an Attorney you are given legal authority to make property and financial decisions on behalf of another person (**the Donor**). The Donor will decide at what point in time they want you to start acting for them.

You should ensure that you are aware of the choice the Donor has made by checking clause 4 on the Enduring Power of Attorney document.

Generally, you will be called on to act when the Donor loses the ability to make property and financial decisions for themselves. In some circumstances and where the Donor has provided for it, you may be called on to make decisions while the Donor still has capacity.

In making decisions you are legally required to act in the Donor's best interests at all times.

If you no longer want to act as Attorney, you need to formally resign or be discharged from the role. How you do this will depend on whether or not the Donor still has capacity to make legally binding decisions.

SHOULD I ACCEPT THE ROLE?

Never accept an appointment as an Attorney unless you are sure the Donor has capacity to make legally binding decisions. If you are unsure about the Donor's capacity, you



should suggest they complete a capacity assessment to confirm they have the ability to make an Enduring Power of Attorney.

Other questions you should ask yourself before deciding whether to accept an appointment as Attorney include:

- Do I know the Donor well enough to make decisions that would be in line with their wishes and beliefs, and the decisions they would make for themselves?
- Do I have a good understanding of the Donor's finances?
- Do I know how to gather information about the Donor's property and finances including investments?
- Do I have a good understanding of how to maintain records of expenditure in case I am ever required to produce these records?
- If I am being asked to be appointed as a joint Attorney, can I work with the other Attorney to make decisions in the Donor's best interests?
- If I am to be appointed jointly and severally as Attorney, can I work effectively with the other Attorney to ensure we make decisions in the Donor's best interests when needed?
- If the Donor has made an Enduring Power of Guardianship, can I work with their Guardian?
- Has the Donor given me copies of or advised where they store other documents relevant to decision making such as their Enduring Power of Guardianship and Advance Health Directive documents, if any?

WHAT AM I OBLIGED TO DO AFTER I SIGN THE ACCEPTANCE?

Your obligations as an Attorney are set out at section 107 of the *Guardianship and Administration Act 1990 (WA)* (the Act). They note that:

- You must exercise your power with reasonable diligence to protect the interests of the Donor (you will be liable for any loss caused if you fail to do this).
- You must keep and preserve accurate records and accounts of all dealings and transactions made under the power (there is a financial penalty for breaching this requirement).
- You must make an application to the State Administrative Tribunal (the Tribunal) if you no longer wish to act and the Donor has lost capacity.
- If you become bankrupt, you must report your bankruptcy to the Tribunal.

CAN I GIVE PRESENTS OR GIFTS USING THE DONOR'S MONEY?

You must also comply with any conditions or restrictions specifically stated in the



Enduring Power of Attorney.

The Act does not provide for you (as Attorney) to give gifts using the Donor's money. That said, the Tribunal has previously found that, as an Attorney, you are not expressly prevented from making a gift on behalf of the Donor (unless the Enduring Power of Attorney prohibits gifting).

If you think of gifting to another using the Donor's money, you must be guided by your duties and obligations to the Donor; in particular, you must consider whether the gift is in the best interests of the donor. Other factors you should consider are:

- You should rarely if ever be the recipient of such a gift.
- The relationship between the Donor and the beneficiary of the gift.
- The purpose of the gift.
- The extent of the Donor's estate.
- The needs of the Donor and any other person dependent on the Donor.
- The likelihood of the Donor making the gift if he or she had capacity.
- The attitude of those with a similar relationship to the Donor who have not received a gift.

If you are in doubt about providing gifts using the Donor's money, you should consider applying for directions from the Tribunal or you should seek legal advice.

CAN I CLAIM FEES?

The Act is silent about the payment of fees for Attorneys. Accordingly, the payment of fees is governed by common law. Under common law, you are only entitled to receive payment for your services as an attorney where there is a contract, express or implied, in relation to payment. Therefore, if there is a contract between you and the Donor, where you agree to perform the duties of Attorney in return for the payment of fees for your services, you are entitled to such payment.

Where the fees are not specified, you will be entitled to reasonable remuneration in accordance with the circumstances of the case. If you are not clear about what level of fees to charge, you may wish to consider an application to the Tribunal in relation to fees.

CAN I CLAIM EXPENSES?

An Attorney is entitled to reimbursement for expenses they legitimately incur in carrying out the role. This entitlement exists whether you are acting in a professional capacity or you are a family member or friend who has been appointed as Attorney. For example, if the Donor requires residential care and you drive to visit several facilities to assist in



choosing the appropriate facility, you can claim for petrol expenses; however, you cannot claim for your time.

SHOULD I HAVE A SEPARATE BANK ACCOUNT TO THE DONOR?

The Public Advocate recommends in the interests of good accounting practices you operate an account strictly for the Donor and the Donor's funds. This will protect you from allegations of exploitation. Funds belonging solely to you should not be mixed with those of the Donor and vice versa.

It is acknowledged that, in cases where existing bank accounts are held jointly by you and the Donor, it may not be practical to operate a separate account for the Donor. Whatever the situation, in recording income and expenditure, you should always identify the Donor's income during the accounting period and how the Donor's money was spent.

WHERE CAN I GET FURTHER HELP

The Office of the Public Advocate provides information and advice on this and related topics.

- Web – www.publicadvocate.wa.gov.au
- Email – opa@justice.wa.gov.au
- Telephone – 1300 858 455

Great Southern Community Legal Services provides legal, advocacy and education services that prioritise the needs of disadvantaged and vulnerable people in our region. To find out more, or if you have any further questions, please contact us and speak with our team.



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