POA-03 Powers of Attorney - enduring

Version 3 - 29/10/2018

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1 General

The Guardianship and Administration Act 1990 (GA Act) created a new, general power of attorney form, authorising the donee(s) to do anything that the donor could legally do except appoint a substitute.

The form is designed for and survives any subsequent legal incapacity of the donor. An enduring power of attorney is effective for the purposes of the Transfer of Land Act 1893 (TLA) (and Property Law Act 1969) as if it were in the form provided for by s.143 of the TLA.

The GA Act specifies any ‘person’ of 18 years or over may appoint an attorney to manage their personal affairs and finances. Therefore, an enduring power of attorney can only be used for personal use.

Note:

- Persons holding positions within a Company such as a Director or Secretary cannot use a personal enduring power of attorney to sign documents on behalf of the company (see section on Power of Attorney by a Company in POA-02). This also includes Trustees of a Trust (see section on Power of Attorney by a Trustee in POA-02).

- Persons holding capacities such as an Executor or Administrator cannot as a general rule delegate their powers. In some cases, the Supreme Court may appoint the Attorney for the incapable Executor or Administrator in the Probate or Letters of Administration.

An enduring power of attorney must be substantially in the form set out in the third schedule of the GA Act, and has three features that very clearly distinguish it from the TLA format, being:

- a general power for the donee(s) to do anything the donor can lawfully do
- an optional choice section where the power may be activated immediately on execution, or at a later date on the occurrence of the incapacity of the donor as certified by the State Administrative Tribunal

or

- a formal acceptance by the donee(s) of the power of attorney, with an acknowledgment of the conditions to apply.

Any person over the age of 18 years with full legal capacity can be appointed as an Attorney. A maximum of two (2) primary donees may be appointed in an enduring power of attorney (see the decision of the Supreme Court in Ricetti –v– Registrar of Titles CIV 1587 of 1999) and two (2) substitute donees. An attorney does not need to live in Western Australia, although their availability and ability to make urgent property and financial decisions on your behalf from another State or country should be considered.

Where more than one (1) donee has been appointed they must state the capacity in which they act. (e.g. Jointly or Jointly and Severally).

An enduring power of attorney in the form of the third schedule of the GA Act may include restrictions on the general powers granted. Where a donor includes express powers in an enduring power of attorney the Registrar will interpret those provisions as limiting or restricting the plenary powers of the attorney. In simple terms these could be seen as a way of the Donor making some of their wishes known, while you have capacity. However, it is not possible to include any condition or restriction which would in some way prevent the attorney from being able to properly manage the Donors’ property and financial matters.

An enduring power of attorney cannot provide for alternate appointments of attorneys upon certain conditions. An example of such improper appointment of attorneys is where a donor has appointed two attorneys in clause 1 of the schedule form and then clause 3 of the schedule form sets out conditions upon which the second attorney may exercise the powers granted to that attorney.

An enduring power of attorney cannot provide for alternate commencement/activation times of primary attorneys and substitute attorneys. An example of such improper commencement times is where a donor has appointed two attorneys in clause 1 of the schedule form to commence immediately and then appointed a substitute attorney in clause 1a of the schedule form to commence on the occurrence of the incapacity of the donor.

Specifying powers that the donee is authorised to exercise, (including conflict of interest clauses that grant transactions between the donor and the donee, including family members), in clause 3 of the enduring power of attorney is not acceptable. (For further information on conditions and restrictions, see 'A Guide to Enduring Power of Attorney in Western Australia', available at http://www.publicadvocate.wa.gov.au).

For Transfer by an Attorney under Enduring Power of Attorney or by an Administrator under Board Order to them self or a family member (see TFR-07 Transfers by an Attorney).

1.1 EPA's made in another State or Territory

Enduring powers of attorney created under the provisions of legislation in other States, Territories and Countries may be deposited at Landgate if they are accompanied by an Order of the State Administrative Tribunal (SAT) under s.104A of the GA Act as amended.
In addition to the SAT Order confirming the enduring powers of attorney’s validity under the GA Act, if the document is older than 3 months it will also need to be accompanied by the statutory declaration of non-revocation, see Noting and Filing of this topic.

NOTE: Someone wishing to deal in WA land should consider making their EPA under the WA GA Act rather than using an EPA from another jurisdiction, as processing time through SAT may vary and cause undue delays. Where incapacity exists, this may not be an option.

1 [Guide updated on 29/10/2018 to add new section 1.1]

2 Appointment of Substitutes

As from 4 December 2000, sections 102 and 104 of the GA Act were amended to allow for the appointment of a person to be a substitute donee of the power only on, or during, the occurrence of events or circumstances specified in the enduring power of attorney. Events or circumstances such as
- death
- mental or physical incapacity
- bankruptcy
- absent for the state or country are commonly used
- Unwilling or unable have also been used, care should be taken with this ambiguous wording as it may place a large burden of the substitute to prove.

The form set out in the Third Schedule of the GA Act has been amended to allow for the appointment of either one or two substitute attorneys.

1.1 Statutory declaration when Substitute is to Act

When the substitute donee(s) execute a document lodged for registration at Landgate, the document must be accompanied by a statutory declaration made by the substitute donee(s) similar to a declaration of non-revocation which includes the minimum statements:
- identify the declarant as the donee(s)
- identify the power of attorney by reference to the donor and the date of execution
- state the donor is still alive
- stating that the events or circumstances specified in the enduring power of attorney have occurred and provide any relevant supporting documentation, and
- state that at the time of signing the document the power of attorney has not been revoked or varied by the Donor or the State Adminstrate Tribunal (SAT).

Note: Section 21 of the GA Act retrospectively validates, subject to certain exceptions contained in s.21 (2), the appointment of a person who was incorrectly appointed as a substitute donee before 4 December 2000.
3 Duration

The duration of an enduring power of attorney cannot be limited to only operate for a certain period of time, e.g. for a period of 12 months commencing on 1st January 2000.

The GA Act does not provide for a time limitation and it would create a conflict or inconsistency between the power of attorney and s.107(c) of the Act which states that the attorney cannot renounce his appointment during the incapacity of the donor.

This means that if the donor became incapacitated before an expiry date shown in the power of attorney, the appointment of the attorney could not cease on the date shown for expiry.

An Attorneys appointment under an enduring power of attorney ceases on the death of the Donor.

4 Noting and Filing

If the attorney(s) wishes to deal in the land of the donor, a original signed copy of the power of attorney (not a photocopy) must be lodged with the Registrar of Titles, who will retain it as part of the permanent records of Landgate justifying the registration of dealings signed by the Attorney. For the purpose of noting and enduring power of attorney under the TLA requires original signed documents.

It is recommended that two (2) Original Signed Enduring Power of Attorney documents are deposited at Landgate. As one signed copy is retained and the second will be returned as the ‘Client Original’. Additional copies that are not identical originals or are certified copies will not be registered as ‘Client Original’.

A Landgate ‘Certified Copy’ of the enduring power of attorney can be ordered after registration for an additional fee. For more information on costs and ordering a ‘Certified Copy’ of an enduring power of attorney please see Certification of original documents on the Landgate corporate website.

1.1 Older than 3 months (Non-Revocation)

Where the power of attorney document to be lodged is dated more than three months previous to the registration date, a statutory declaration of non-revocation or variation made by the donee(s) including any substitute donee(s), and must be lodged with the power of attorney. The declaration of non-revocation or variation must state the following:

- identify himself / herself as the donee
- identify the enduring power of attorney by reference to the donor and date of execution
- that the donor is still alive
- when and how the donee last saw or communicated with the donor (within the last 7 days)
- that the enduring power of attorney has not been revoked by the donor
- that the State Administrative Tribunal or an appointed Administrator has not varied or revoked the enduring power of attorney
and

- that a substitute donee has not been appointed by the State Administrative Tribunal (SAT).

Alternately, a statutory declaration made by the donor of the power of attorney. In that declaration the donor should:

- identify himself / herself as the donor;

- identify the enduring power of attorney by reference to the donee(s) and date of execution

- that the donee(s) is / are still alive

- when and how the donor last saw or communicated with the donee(s) (within the last 7 days)

- that the enduring power of attorney has not been revoked by the donor

- that the State Administrative Tribunal or an appointed Administrator has not varied or revoked the enduring power of attorney

and

- that a substitute donee has not been appointed by the State Administrative Tribunal (SAT).

NOTE: In general, where an EPA is submitted with a SAT Order it must also be accompanied by a statutory declaration. This also includes where any transaction is signed/executed under a SAT Order. See CAP-02 – Incapable persons.

4.1 Upon Loss of Capacity

Where an enduring power of attorney is conditional upon a loss of legal capacity of the donor (option 'B'), as certified by an order of the SAT, a copy of the order must be lodged with each instrument signed by the attorney on behalf of the donor. The instrument must comply with any terms or conditions listed in the order of the SAT.²

In this case, the donee(s), when dealing with land under the power of attorney must also provide a statutory declaration deposing that the SAT has not been revoked or varied or the order changed in any way. The statutory declaration should cover the following minimal points:

- identify himself / herself as the donee

- identify the enduring power of attorney by reference to the donor and date of execution

- that the donor is still alive

- that the Order issued by SAT is still current

- that the State Administrative Tribunal or an appointed Administrator has not varied or revoked the enduring power of attorney or Order

and

- state that at the time of signing the document the appointment was still current.

² [Guide updated on 29/10.2018 to remove sentence: 'Enduring powers of attorney created under the provisions of legislation in other States, Territories and Countries may be deposited at
4.2 Death of an Attorney prior to Lodgement

An enduring power of attorney may still be deposited where one or more of the appointed attorney’s or substitute attorney’s is deceased prior to the lodging of the document. The enduring power of attorney must be substantially in the format of the third schedule of the GA Act and should be accompanied by a statutory declaration and the death certificate of the deceased attorney. Alternatively, if the Donor still has legal capacity a new enduring power of attorney should be created.

The statutory declaration should contain element described in paragraph 4.1 of this guide and those elements set out for a statutory declaration accompanying a Survivorship Application refer to DEC-02 Survivorship.

5 Witnessing Requirements

Section 104(2)(a) of the GA Act states that there must be two (2) attesting witnesses to the enduring power of attorney, both of whom are 18 years of age or older, and at least one of whom is authorised by law to take declarations. Neither of the two witnesses are a person who is being appointed as an attorney or substitute attorney, and must state their full name, address and occupation. For a list of who can witness a statutory declaration in Western Australia see DOC-04 Statutory Declarations.

In early 2012 amendments were made to the witnessing requirements for an Enduring Power of Attorney. The witnessing requirements changed from two (2) qualified witnesses to one (1) qualified and one (1) other, as stated above. Any enduring power of attorney dated prior to the change in 2012 must contain the two qualified witnesses.

5.1 Outside of Western Australia but within Australia

An enduring power of attorney can be executed outside Western Australia. Where it is executed in another State of Australia (i.e. outside Western Australia), the following persons may witness the document:

- any person who, under the law of that place, has authority to take or receive a statutory, solemn or other declaration

or

- any person before whom, under the Commonwealth Statutory Declarations Act 1959, a statutory declaration may be made.

5.2 Outside of Australia

If an enduring power of attorney is executed in any other place, the following persons may witness the document:
- A prescribed consular official who is performing official functions at that place
- A person who is a justice or notary public under the law of that place
- A person who has authority under the law of that place to administer an oath to another person or to take, receive or witness a statutory, solemn or other declaration.

A prescribed consular official means:
- an Australian Consular Officer, or an Australian Diplomatic Officer, within the meaning of the Consular Fees Act 1955 of the Commonwealth
- a British consul or vice consul, or
- an official prescribed by the regulations to be a prescribed consular official.

As one signed copy is retained, it is recommended that two signed copies be created on each occasion so that following lodgement, an authenticated and recorded document identified as the 'Client Original' will be returned to the lodging party to produce with other institutions.

6 Making Amendments to an Enduring Power of Attorney

The GA Act does not specifically provide for the delegated authority for someone other than the Donor or Donee to amend an Enduring Power of Attorney. Therefore, any amendments to the document can only be made by the Donor and acknowledged by the witness or the Donee(s).

Amendments can be made directly to the document or by an original letter from the relevant party.

Amendment to the Donor appointment pages must be made and acknowledged by the Donor and the witness or an original signed and witness letter can be used. The witness must be a qualified witness and it is preferable that the same witness to the document is used.

Amendment to the Donee acceptance page must be made and acknowledged by the Donee(s) and does not require a witness or an original signed letter can be used.

7 Execution of Documents by Attorney

A proper form of execution of a document by an attorney is as follows:

Signed by (Name of Attorney)
as attorney for (Name of Donor) (Signature of Attorney)
in the presence of ) EPA (insert number)

Witness
(Full Name, Address and Occupation)

Variations of this form will be accepted provided it is clear that the person executing the document does so as an attorney.

NOTE: Each Attorney’s signature should be independently witnessed.
8 Also see

- POA-01 Powers of Attorney
- POA-02 Powers of Attorney - types of
- POA-04 Powers of Attorney - revocation
- CAP-02 – Incapable persons

POA-05 Declarations of Trust (Section 55 of the TLA)