

My Duties and Responsibilities as an Attorney Under an Enduring Power of Attorney (EPOA) in Queensland.

The Rights of the Person.

An adult with impaired capacity has the same human rights as other adults.

The right to make decisions is fundamental to the person's dignity and includes the right to make decisions with which others may not agree.

These rights are protected by the General Principles and the Health Care Principle* which every attorney must apply when acting or making a decision for the person.*

The General Principles provide a set of rules to guide attorneys in fulfilling their duties and obligations to the person.



George is a 90-year old man who lives independently at home with his daughter who he is very close to. He has been admitted to hospital. His attorney (Alan) is considering placing him into aged care when discharged from hospital.

George wants to return home to live with his daughter. The hospital staff have said he can return home if there is appropriate in home support. George has the means to afford this, therefore there are no financial or health care barriers to returning home.

The Attorney is considering the following options:

a) *Place George into aged care. This would mean less work for the attorney. But this decision would not take into account George's individual needs and personal preferences.*

X *This decision places George in a position of dependence, when current medical opinion states he can continue independently at home with appropriate in-home support.*

b) *Put in place appropriate in home support services which would allow George to return home. This decision encourages his independence, and respects his right to maintain his close and supportive relationship with his daughter.*

✓ *The role of the attorney is to encourage maximum participation in decision making; take into account the person's views and preferences; and encourage self-reliance.*

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1. I must apply by the General and Health Care Principles.

The [General Principles](#)* include:

- Presuming the person has the capacity to make decisions until loss of capacity is confirmed by health professionals;
- Recognising the person's right to participate (be included) in decisions for which he or she has capacity, that affect his or her life, to the maximum extent;
- Taking into account the person's past actions to determine what his or her views and wishes would be in relation to a decision. This is called Substituted Judgement;
- Respecting the person's human worth and dignity and equal claim to basic human rights, regardless of capacity;
- Recognising the person's role as a valued member of society, encouraging self-reliance and participation in community life;
- Taking into account the importance of the person's existing supportive relationships, values, culture and language;
- Making decisions appropriate to the person's characteristics and needs, including safety; and
- Recognising the person's right to confidentiality.

The [Health Care Principle](#)* states any health-care decision made for the person must:

- Maintain or promote the person's health or well-being, in the person's best interests;
- Be made in the way that is least restrictive of the person's rights; and
- Take into account the person's views and wishes, where possible, along with information given by the person's health-care provider/s.



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2. I must act honestly and diligently to safeguard the person's interests.

Where there is more than one attorney we have a duty to work together, consult regularly, and not allow a breakdown in communication or conflict between ourselves to negatively affect or impact on the person's interests.

For example, safeguarding the person's interests (personal and financial) includes:

- Obtaining an assessment by medical or health professionals if I am aware or suspect the person has lost capacity for some or all decisions;
- Commencing to act as attorney when it is confirmed that capacity is lost, to avoid putting the person at risk;
- Ensuring the person is regularly attended to by health services, has appropriate accommodation, care and support by finding out whether their needs are being met; and
- Paying bills on time, maintaining insurance, updating Centrelink and/or other financial institutions, and submitting tax returns.



My failure to commence acting as attorney can be questioned by the Tribunal and penalties may apply.

3. I must obey and follow the terms of the EPOA document.

The EPOA document contains directions about:

- How Attorneys are appointed: Singularly; jointly*; severally*; jointly and severally*; or successively*;
- What decisions can be made: Financial*; personal and health*; and specific directions;
- When decision making starts: Immediately; on a specific occasion; or loss of capacity; and
- How decisions are to be made: Individually; unanimously; or by majority.



I cannot make decisions on matters not authorised in the document, or if the authority has been revoked*.

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4. I have a strict duty to act carefully or prudently*, and in the person's best interest when managing the person's money and property. Even if the amount involved is small. This includes any legal matter.

For example, I must:

- Keep accurate records of financial and legal transactions;
- Keep the person's property separate from mine or other attorneys, unless jointly owned;
- Obtain financial planning or taxation advice if I am unsure; if there are significant assets or complex arrangements in place e.g. self-managed superannuation funds, share portfolios or businesses. (The cost of advice is paid by the person);
- Invest only in authorised investments*. (Unless the EPOA document directs otherwise);
- Review investments annually; and
- Not disclose confidential information gained in my role as attorney, unless authorised.

5. I must avoid conflict transactions* unless specifically authorised in the EPOA document.

- I must not enter into a transaction that may (or even appear to) benefit me personally or financially as a result of my role as attorney, unless specifically stated in the EPOA document.
- This includes transactions with my, or another attorney's relatives, friends or business associates. For example, selling the person's house to a relative.
- If I consider a conflict transaction is necessary to manage the person's affairs, I must apply to QCAT for a direction*, prior to entering into the transaction.



Financial penalties may apply to unauthorised conflict transactions.

6. I may as attorney for financial matters, unless the EPOA documents states otherwise:

- Provide for the needs of a dependant of the person; and/or
- Make gifts to a relation or close friend of the person of a seasonal nature or for a special event (for example, birthday or marriage). The gift must be of similar type and value as previously made or a gift the person might reasonably be expected to make.



Gifts and Provisions must be reasonable after considering all the person's circumstances, in particular, financial circumstances.

Most people retain capacity for some decisions.

Alisha is 70 years old. Her son Samar, is making decisions as her attorney. Alisha wants to travel to India to visit her son Dev (joint attorney) and extended family. Other family members will travel with her on the journey. Samar has previously argued with his brother in India and ignores Alisha's travel requests.

*Alisha has **clearly stated her wish to travel and has the right to participate in this decision.** Samar has a **duty to work together with other attorneys** and must **not allow a breakdown in communications to impact negatively on Alisha.** Alisha has the **right to maintain relationships with the important people in her life** and Samar **cannot use his authority as attorney to restrict who Alisha sees or has contact with.***

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Glossary

Attorney: Is a person(s) who has the legal power to make decisions for the principal. 'Enduring' means the power to make decisions continues if the principal has lost capacity.

Authorised investments: Are investments that are:

1. Specified in the terms of the document; or
2. Are not speculative or hazardous and are in the best interests of the principle.

Capacity: A person has capacity for a decision if he or she:

1. Understands the nature and effect of the
2. decision to be made; and
3. Makes the decision freely and voluntarily; and
4. Communicates the decisions in some way.

Conflict transactions: Any transaction that results or may result in a conflict between the attorney's duty to act for the principal's benefit and the attorney's own interests. This includes transactions between the attorney's relatives, close friends or business associates.

Direction: An order made by the tribunal for parties to do certain things to progress a matter.

Financial matters: Are matters relating to the principal's finances or property, including legal matters (e.g. paying expenses, carrying on a business, investing, and real estate transactions).

Jointly: All attorneys must make the decision.

Jointly and severally: Attorneys can make decisions together or separately but must keep others informed

Personal and health matters: Are matters relating to the principal's care including health care and welfare (e.g. accommodation, who the principal has contact with, service provision, diet and dress, training, and consenting to treatment).

Principal: The person who made the document appointing the attorney.

Prudent Person: The Prudent Person rule states the attorney's duty to exercise care, diligence, skill and to invest in authorised investments. (See QCAT and Public Trustee websites for Prudent Person Rule fact sheets).

Revoked: The enduring power of attorney document is cancelled by the principal and is no longer valid.

Severally: Any of the attorneys can make the decision but must keep others informed.

Substituted Judgement: If it is possible to work out from the person's past actions what their views and wishes would be, these factors must be considered when any decision is made.

Successive: If the power of the first appointed attorney ends (e.g. death, incapacity, withdrawal), power is transferred to the attorney/s next in line.

Terms: An instruction, condition or limitation, recorded in the document that explains how the power is to be used.

For more information

Enduring Power of Attorney forms.

Queensland Government Publications.

www.publications.qld.gov.au

General Principles and Health Care Principle.

Office of the Public Guardian - Fact sheets.

www.publicguardian.qld.gov.au

Office of the Public Guardian (OPG)

Phone: (07)3234 0870 or 1300 653 187

E-mail: adult@publicguardian.qld.gov.au

www.publicguardian.qld.gov.au

Public Trustee of Queensland (PT)

Phone: 1300 360 044

www.pt.qld.gov.au

Queensland Civil and Administrative Tribunal (QCAT)

Phone: 1300 753 228

E-mail: enquiries@qcat.qld.gov.au

Queensland Legislation.

www.legislation.qld.gov.au

Powers of Attorney Act 1998 Qld.

- a) Financial matter: Schedule 2. Part 1 (1).
- b) Personal matter: Schedule 2. Part 2 (2)
- c) Health matter Schedule 2. Part 2 (4) and (5)
- d) Conflict transaction. Section 73.

Trusts Act 1973 Qld.

- a) Prudent person rule. Section 22.
- b) Authorised investments. Section 23.