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PROTECTION OF PERSONAL AND PROPERTY RIGHTS ACT 1998

The Protection of Personal and Property Rights Act 1988 ("the Act") was designed to provide for the protection and promotion of personal and property rights of persons who are not fully able to manage their own affairs.

Under the Act every person is presumed, until the contrary is proved, to have the capacity to understand the nature, and to foresee the consequences of decisions in respect of matters relating to his or her personal care and welfare and to communicate decisions in respect of those matters.

An individual's property rights are protected by the legislation by allowing applications to the Family Court to protect the individual's personal and property rights when incompetent and to enable an individual, whilst competent, to sign Enduring Powers of Attorney to protect both their property and personal care rights.

ENDURING POWERS OF ATTORNEY

A Power of Attorney gives an Attorney the authority to act on your behalf. Prior to the Act, a Power of Attorney could not be used if the appointer lacked mental capacity to give instructions to their Attorney. Enduring Powers of Attorney were intended to overcome this problem. There are two types of Enduring Powers of Attorney. One is in respect of property and the other is in respect of personal care and welfare.

PROPERTY

An Enduring Power of Attorney in respect of property gives your Attorney power to act on your behalf with respect to any property held by you. You can appoint one or more persons to act as your Attorney in relation to property. Property includes not only land, but bank accounts, shares and other personal property.

An Enduring Power of Attorney can be expressed to take effect only if you become mentally incapable, or it can be expressed to have immediate effect, and continue to operate even if you become mentally incapable.

It is possible to give your Attorney a general authority to act on your behalf or you can limit the appointment to specific circumstances. Either the whole of your property can be dealt with or the power can be limited substantially. Specified conditions and restrictions must be actually stated on the document and like a Will, it can be revoked at any time so long as you have capacity.

If the Enduring Power of Attorney in relation to property is unrestricted, the person using the Power of Attorney on your behalf will need to sign a Statutory Declaration to the effect that your authority has not been revoked at the time the document is used.

PERSONAL CARE AND WELFARE

You can also make an Enduring Power of Attorney in relation to your Personal Care and Welfare. This gives your Attorney power to make decisions on your behalf regarding your personal care, in the event of illness, age or mental incapacity. You can appoint only one person to act as your Attorney in relation to personal care and welfare at any one time. The appointment operates when you become mentally incapable and you do not have the ability to understand the nature of decisions with respect to matters relating to personal care and welfare. Alternatively you can authorise your Attorney to act on your behalf generally or only in relation to specific matters.

Where someone signs an Enduring Power of Attorney for Personal Care and Welfare in terms of the Act the Attorney cannot act for that person on certain matters. These are:

- To make any decisions relating to the person entering into a marriage, or the dissolution of a marriage.

- To make any decision relating to the adoption of a child of the subject person.
- The refusal of consent to any standard medical treatment or procedure intended to save the unwell persons life or to prevent serious damage to the health of that person.
- The giving of consent to the administering of electro-convulsive treatment.
- The giving of consent to the performance on the unwell person of any surgery or other treatment designed to destroy any part of the unwell person's brain or brain functions for the purpose of changing the behaviour of that person.
- The giving of consent to the unwell person taking part in any medical experiment (except of the purposes of saving that person's life or preventing serious damage to that persons health).

WHY SHOULD I SIGN AN ENDURING POWER OF ATTORNEY?

Both types of Enduring Powers of Attorney ensure that you and your assets will be looked after if you are unable to make decisions for yourself.

If you become mentally incapable and you have not made an Enduring Power of Attorney then someone would need to apply to the Family Court for orders before they could manage your affairs. Our experience is that this can be a time consuming and an expensive process and the person appointed may not necessarily be your first preference.

Any individual can be appointed as an Attorney so long as the person is over the age of twenty years, is not bankrupt, and is not

subject to a personal order or property order. An Attorney does not need to be a lawyer or a Trustee Corporation.

If the Enduring Power of Attorney in respect of property is being signed by any party overseas then those signatures will require to be witnessed by a Notary Public or Commonwealth representative although if being signed in Australia it is sufficient for the signatures to be witnessed by a solicitor. This is important particularly if you own real estate which may need to be sold by your Attorney at some future time.

HOW DO I APPOINT AN ATTORNEY

Once you have chosen who you would like to be your Attorney, you must complete certain prescribed forms as found in the Act. Other legal requirements include having your signature witnessed by an independent person (not your Attorney) and also having your Attorney's signature witnessed by an independent person (not you). Your lawyer will hold your original Enduring Power of Attorney document in safe keeping. However, it is advisable that you keep a copy for yourself and also copies for your Attorney.

HOW LONG DOES AN ENDURING POWER OF ATTORNEY LAST?

An Enduring Power of Attorney ceases to have effect when:

- The donor, while still mentally capable, revokes the power;
- The Attorney gives notice in writing to either the donor (if still mentally capable) or if not, to the Court that he/she no longer wishes to act as Attorney;
- The donor dies;

- The Attorney (or a joint Attorney) dies, becomes a bankrupt, becomes mentally incapable or otherwise incapable of acting as Attorney; or
- The Court revokes the power because the Attorney is not acting in the donor's best interests, or the Attorney exerted undue influence or fraud to obtain the Power of Attorney, or is otherwise unsuitable to be the donor's Attorney.

THE OTHER BENEFITS OF THE PROTECTION OF PERSONAL PROPERTY RIGHTS ACT 1998

These include the ability to make an application to the Family Court to have someone appointed to protect the personal rights of an incapacitated person to act as the personal welfare guardian or property manager in terms of the Act.

The people who may apply for the assistance of the Court includes a subject person who seeks the exercise of the Court's jurisdiction in respect of himself or herself, a relative or an Attorney of the person in respect of whom the application is made, a social worker, a medical practitioner or a representative of a welfare group, or any other person with leave of the Court.

The Act sets out the form by which applications are made, what powers the Court has in respect of administering property, how interim and permanent orders are made and consented to, and the powers of welfare guardians and managers. Temporary orders can be made. The obligation of managers to consult and to account are spelt out in the Act. The Act provides for the possibility of pre-hearing conferences and the form of the proceedings before the Court. The proceedings are not open to the public and the Court has the capacity to call for a report on any person before making any orders. There is also a restriction on the publication of reports of proceedings although there are appeal and review rights prescribed in the Act.

HOW IS A PERSONAL WELFARE GUARDIAN AND PROPERTY MANAGER APPOINTED?

The Act specifies which forms must be included to appoint a personal welfare guardian or property manager for the subject person. A medical report on the subject person is required and the Court will also appoint a lawyer to represent that person. Applications to the Court must normally be served on the person for whom the Order is sought, and can also be served on any other person interested in the subject person's welfare.

WHAT DUTIES DO A PERSONAL WELFARE GUARDIAN AND PROPERTY MANAGER HAVE?

Both Guardian and Manager must:

- Be capable of carrying out their duties in a satisfactory manner;
- Act in the best interests of the person for whom they are appointed;
- Consent to be appointed.

This is not an exhaustive list but includes some important duties. A welfare guardian is empowered to make decisions about the subject person's care and welfare, such as medical treatment or where that person should live. Property managers can be appointed to manage property of any value, such as carrying out repairs, carrying on business or selling and letting property. Both appointments may obtain specific directions from the Court if necessary. The welfare guardian must be reviewed every three years or earlier on application and the property manager must file statements annually regarding the particulars of the managed property.

WHEN DO THESE ORDERS EXPIRE?

The powers of a welfare guardian expire if:

- The subject person dies;
- The guardian dies, becomes bankrupt, or becomes incapable of acting;
- The Order is discharged by the Court on a review of that Order

The powers of a manager expire if:

- The subject person dies;
- The Property Manager dies, is adjudged bankrupt, or becomes incapable of acting;
- The Order is discharged by the Court

This Act is a very practical Act to assist and deal with the affairs of people who in relation to property are not wholly competent to manage his or her own affairs, or in relation to their personal care and welfare lack wholly or partly the capacity to understand the nature and to foresee the consequences of decisions in respect of those matters.

The lawyers at Govett Quilliam are well experienced in assessing the rights under the Protection of Personal Property Rights Act and in preparing Enduring Powers of Attorney of both types.

We recommend all clients appoint someone to be their Attorney in either the restricted or unrestricted form. These appointments are good for life although appointments can be revoked and new appointments made and can save lots of family problems and expense.

Please contact Govett Quilliam for further information or to have an Enduring Power of Attorney prepared on your behalf.

Please call this office if you would like further information on any guides prepared by this firm. Copies are available from our website.

- *Asset Protection and Residential Care Subsidies*
- *Business Grants & Assistance*
- *Buying or Setting Up a Small Business*
- *Charities*
- *Companies Act 1993*
- *Consumer Guarantees Act*
- *Credit (Repossession) Act 1997*
- *De Facto Property Rights*
- *Employment Law*
- *Enduring Power of Attorney*
- *Fair Trading Act 1993*
- *Family Trust*
- *Franchising*
- *Health & Safety in Employment*
- *House Buyers and Sellers Guide*
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