

TAX TALKS

Australia's Tax News Podcast - The Podcast for Australian Tax Professionals

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135 | Power of Attorney and Enduring Guardianship

A power of attorney and enduring guardianship complement each other. A power of attorney deals with money, assets and wealth, while an enduring guardianship deals with medical decisions and your general welfare.

Power of Attorney and Enduring Guardianship

How is a power of attorney different to an enduring guardianship? This is the question we asked Peter Bobbin of [Argyle Lawyers](#) in Sydney. Here is what we learned, but please also listen to the audio file above. Peter explains all this much better than we ever could.

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Power of Attorney

A Power of Attorney is a legal document to appoint a person or trustee organisation to manage your assets and financial affairs while you are alive. You might specify what they can and can't do on your behalf. The power of attorney requires both your and your attorney's signature.

Guardianship

If you need someone to make decisions about your lifestyle – where you live, your diet and care etc – you will need to appoint an Enduring Guardian. A separate document is required to do this.

Enduring Guardianship only comes into effect if or when you lose capacity – hence there is only an enduring guardianship – and will only be effective during the period of incapacity, therefore, it may never become operational.

Power v Guardianship

A power of attorney only deals with property and financial matters. It does not give someone the right to make decisions about your lifestyle, medical treatment or welfare. The Enduring Guardianship covers those.

An Enduring Guardian and Enduring Power of Attorney are complementary documents. They can be made separately or together.

General v Enduring

An ordinary Power of Attorney (General Power of Attorney') only lasts while you have capacity to deal with your financial affairs. So it is only good if you need a power of attorney while you are travelling or similar.

For anything beyond that you need an enduring power of attorney. An enduring power continues after you have lost capacity.

Since a guardianship only kicks in after you have lost capacity, any guardianship is an enduring guardianship.

State Based Legislation

Powers of attorney and guardianship are state or territory based legislation. It varies across Australia. So if you move from one state to another, you should get new documents for your new state or territory of residency. Your old documents don't lose their validity but it will get messy if you live in a different state by the time you need them.

Capacity

In order to make a valid Power of Attorney you must have sufficient capacity to understand the nature and effect of the appointment.

Revoke at Any Time

With a power of attorney you are still in control of your financial affairs. It is just a formal authority to manage your financial affairs according to your instructions. You can revoke the enduring power at any time provided you have the capacity to do so.

Civil & Administrative Tribunal

When you lose capacity without an enduring power of attorney in place, the administrative tribunal in your state or territory may appoint a financial manager to take care of your financial affairs.

This happens through a formal hearing and might be against your will. Or they might appoint a person you would not have chosen if you still had capacity. A power of attorney will protect you against all that.

Death

A Power of Attorney as well as Guardianship usually stops when you die. The executor named in your Will then takes over the responsibility of administering your estate.

Will

A power of attorney works while you are alive. Your Will determines what happens to your assets after your death. You should therefore have both an Enduring Power of Attorney and a Will.

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