

Safeguarding your interests

You should always be careful when giving someone the power to act for you. Make sure your donee is someone you trust. You are giving that person complete authority to deal with your financial affairs.

**A word of warning:** your donee may use their power against your interests. For example, the donee could sell your house and take the money. If you lose legal capacity, you may not even realise what has happened. It is a criminal offence for a donee to misuse a Power of Attorney, but no agency oversees the use of the power to make sure donees are doing their job properly. If a donee has acted improperly, the Supreme Court can remove the Power of Attorney or SACAT can appoint an independent administrator.

**You can protect yourself.** You can limit the powers you give so that the donee cannot deal with all your property. If that does not suit your needs, you can appoint two people to act jointly, so that they both have to sign before anything can be done. You can also make your Enduring Power of Attorney come into effect only if you lose legal capacity, and require that a doctor certify that you have lost legal capacity.

Ending an Enduring Power of Attorney

You can **revoke** (cancel) your Enduring Power of Attorney at any time while you still have legal capacity. You should do this in writing, and send a copy to the donee and to anyone that the donee may have dealings with, such as a bank or Land Services SA. A revocation form is included in the Enduring Power of Attorney Kit.

Where can I get the kit?

You can access the Enduring Power of Attorney Kit for free online at [lsc.sa.gov.au](http://lsc.sa.gov.au) or you can buy a hard copy from:

- the Legal Services Commission (telephone Finance on 8111 5555 (option 5)), or
- any Service SA centre (telephone 13 23 24) or through the online shop at [shop.service.sa.gov.au](http://shop.service.sa.gov.au)

What if there's no Enduring Power of Attorney?

If you have not made an Enduring Power of Attorney while you have legal capacity, your relatives may not be able to handle your affairs informally.

While banks, Centrelink and hospitals are generally sympathetic and will help with simple matters, it may be necessary to apply to SACAT for an Administration Order. These orders are made for the protection of persons who cannot handle their financial affairs.

SACAT

If there is no Enduring Power of Attorney, the South Australian Civil and Administrative Tribunal (SACAT) may appoint as administrator the Public Trustee, a trustee company or an individual such as a family member or friend, an accountant or a lawyer. In deciding who should be appointed, SACAT must consider:

- the wishes of the person with the legal incapacity, if these wishes can be established by some supporting information
- whether there are any family arrangements or relationships that should not be disturbed
- the compatibility of the proposed administrator with the person whose affairs they are to manage
- whether the proposed administrator would be readily available and competent to perform the role
- whether there would be any conflict of interest arising from the appointment.

Often, the Public Trustee is appointed as the administrator, and a friend or relative is appointed as a liaison person. An administrator has similar powers to a Power of Attorney, but they are supervised by SACAT.

For further information contact:

**Public Trustee:** 8226 9200 (toll free 1800 673 119)

**SACAT:** 1800 723 767

Legal Helpline 1300 366 424  
Child Support Advice 8111 5576

Legal Services Commission Offices

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| • Adelaide Office<br>159 Gawler Place<br>Adelaide 5000<br>Telephone 8111 5555  | • Port Adelaide Office<br>263 St Vincent Street<br>Port Adelaide 5015<br>Telephone 8111 5460 |
| • Elizabeth Office<br>Suite 2 Windsor Building<br>1 Windsor Square<br>(off Playford Boulevard)<br>Elizabeth Shopping Centre<br>Elizabeth 5112<br>Telephone 8111 5400 | • Port Augusta Office<br>34 Flinders Terrace<br>Port Augusta SA 5700<br>Telephone 8686 2200  |
| • Noarlunga Office<br>Noarlunga House<br>Ramsay Place<br>Noarlunga Centre 5168<br>Telephone 8111 5340  | • Whyalla Office<br>17A Forsyth Street<br>Whyalla 5600<br>Telephone 8620 8500                |

Do you need help calling us?

- |  |  |
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| • Translating and Interpreting Service 131 450                     | • National Relay Service SMS Relay 0423 677 767  |
| • National Relay Service TTY users phone 133 677                   | • National Relay Service Internet Relay users visit <a href="http://nrschat.nrsccall.gov.au">nrschat.nrsccall.gov.au</a> |
| • National Relay Service Speak and Listen users phone 1300 555 727 |  |

Visit us online at [lsc.sa.gov.au](http://lsc.sa.gov.au)

This information is general and not a substitute for legal advice. The Legal Services Commission provides free legal advice for most legal problems.

Power of Attorney



### What is Power of Attorney?

If you give another person a Power of Attorney, you give that person the power to act on your behalf in relation to your **financial and legal affairs** (for example, to buy and sell things for you or operate your bank account).

Giving a Power of Attorney does not mean you lose control over your affairs. You can still deal with all matters, while your **donee** (the person you appoint to act on your behalf) can do those things that you have authorised. The donee must agree to act for you; you cannot make someone your donee against their wishes.

### Who can make a Power of Attorney?

In South Australia, any person who is **18 years** or older and has **legal capacity** can make a Power of Attorney. No one else can make a Power of Attorney for you.

### What does it mean to have legal capacity?

An adult is presumed to have legal capacity. In the context of making a General or Enduring Power of Attorney, legal capacity means that you understand the nature and effect of making the document and are able to communicate it.

### General and Enduring Powers of Attorney

A **General Power of Attorney** can be created for a specified time. Otherwise, it ceases when you die or if you lose legal capacity. If you wish to give someone the power to continue to act on your behalf in the event that you lose legal capacity, you must make an Enduring Power of Attorney.

An **Enduring Power of Attorney** can continue to operate after you have lost legal capacity (for example, if you suffer from an illness or injury that affects your ability to understand matters or communicate your wishes). Taking the time to make an Enduring Power of Attorney means your financial and legal affairs can be looked after by someone you know and trust.

You cannot make a Power of Attorney after you have already lost legal capacity. To be capable of signing a Power of Attorney, you must understand the nature and effect of making the document. If legal capacity is in doubt, it is best to get a doctor’s written opinion confirming that you are able to understand the nature and effect of the document at the time of signing.

### How do I make an Enduring Power of Attorney?

The easiest way to make an Enduring Power of Attorney is to use the **Enduring Power of Attorney Kit** produced by the Legal Services Commission. The do-it-yourself kit includes the required forms, detailed instructions and answers to common questions. If you still have questions or concerns, seek legal advice.

You should first ask yourself what powers you want to give to the donee. If you simply want someone to operate your bank account for you, you do not need a formal Power of Attorney. Contact your bank and ask them what form of authorisation they need to allow someone to act on your behalf.

If you want to give the donee other powers, you must complete an Enduring Power of Attorney Form. You will usually need to complete at least two original copies: one in case it needs to be deposited and one for each donee to use.

### Must I register a Power of Attorney?

Once your Power of Attorney has been completed and signed by you and your donees, you have a valid Power of Attorney. It does not need to be registered. However, if a donee needs to **buy or sell real estate** on your behalf, your Power of Attorney needs to be lodged with Land Services SA. A fee is payable for lodgement.

If it is not necessary to deal with land now but it might be in the future, the form can still be lodged immediately to ensure that it has been completed properly. This avoids the risk that the form will have to be corrected later, which may not be possible if the donor has lost legal capacity when any correction needs to be made. Alternatively, the form may be kept in a safe place and lodged when the necessity arises.

A bank will usually want a copy of your Power of Attorney for their records. For shares, you may have to register your Power of Attorney in the company’s share register.

### Responsibilities of the donee

As a general rule, a donee can do anything that you can do for yourself, except things you must do personally such as marrying, voting and making a will.

For example, a donee may, on your behalf:

- enter into contracts for goods and services
- buy, sell, lease and invest in property
- operate bank accounts and borrow money, and
- commence and defend legal proceedings.

A donee has an absolute and unconditional duty to always **act in your best interests**. As your representative, they should make decisions consistent with your known wishes wherever possible. Other responsibilities include finding out your income, assets and financial obligations, paying from your own money your bills and accounts when they fall due, selling your property if necessary to fund other accommodation such as residential care, and keeping accurate records and accounts of all dealings.

Any interested person can insist on seeing the records. Other people may disagree with what the donee does with their power and challenge their actions. A donee cannot be paid for their work, except for any out-of-pocket expenses directly connected with carrying out the Power of Attorney. They will need to keep receipts to prove these costs.

Similarly, even if they believe they are a beneficiary of your will, having a Power of Attorney does not give them early entitlement to your assets. If they act improperly, they are personally responsible to pay for any losses caused. They may also be guilty of a criminal offence.

If you lose legal capacity, your donee must continue to act for you. If they want to give up the power, they must arrange to have it removed by the Supreme Court or have an administrator appointed by SACAT.

### I have a will, isn’t that enough?

A will has legal force after your death. A Power of Attorney is for your financial affairs while you are alive. When you die, your Power of Attorney (whether General or Enduring) ceases automatically. That is why it is important to have both an Enduring Power of Attorney and a will.

### Advance Care Directives

A Power of Attorney does not give the donee the right to make decisions about your welfare or medical treatment. It only deals with legal and financial matters.

For non-financial matters, you should complete an Advance Care Directive. This allows you to:

- write down your wishes, preferences and instructions for your **future health care**, end of life, living arrangements and personal matters, and
- appoint one or more **Substitute Decision-Makers** to make these decisions on your behalf if you are unable to make them for yourself.

You may have heard of documents such as Enduring Power of Guardianship, Medical Power of Attorney and Anticipatory Direction. If you have completed one or more of these documents in the past they will still be legally effective or you can make an Advance Care Directive to replace them. For more information about how to complete an Advance Care Directive, visit [advancecaredirectives.sa.gov.au](http://advancecaredirectives.sa.gov.au).

By making both an Enduring Power of Attorney, which covers legal and financial affairs, and an Advance Care Directive, you are essentially making a ‘living will’. This can ensure your wishes are known if you become unable to communicate or make decisions for yourself.

