

CHAPTER 9:

ENDURING DOCUMENTS

What are Power of Attorney and Advance Health Directive documents?

Power of Attorney and Advance Health Directive documents involve transferring a person's decision-making powers to somebody else. Such decision-making powers may include financial decisions, decisions about health care, or everyday matters if you were to become incapable of making your own decisions. There are two types of Attorney – a General Power of Attorney and an Enduring Power of Attorney. There are also two types of Advance Health Directive documents – The Advance Health Directive and the Advance Health Directive for Mental Health.



Key Phrases

Principal.	The person signing the document gives others the power to make certain decisions on their behalf. A principal must be 18 years of age or older.
Attorney	The person given the power to make decisions about the principal's personal (including health) or financial matters.
Capacity	The principal's ability to fully understand the nature and practical effect of the document that they are signing and the ability to make decisions freely and voluntarily.
Eligible signer	a person who signs the power of attorney document or the Advance Health Directive on behalf of the principal. This is only relevant if the principal is unable to sign the document themselves (note that there is a difference between not being physically able to sign the document and not having the capacity to sign the document. Refer to the guidance about capacity later in this chapter).
Witness	the person authorised by law to witness a power of attorney document or an Advance Health Directive. See the table later in this chapter as to who can be a witness
General Power of Attorney	(GPA) enables someone to make financial decisions on your behalf when you are absent, for example, if you are going overseas and need someone else to sell your house or pay your bills.
Enduring Power of Attorney	(EPA) is put in place in anticipation of something happening to you - usually illness or accident – that renders you unable to make your own decisions.

Short-form EPA -	A short form of the EPA (form 2) is completed if a person wishes to appoint the same attorney/s for financial matters and personal matters (including health care). You may also use it to appoint an attorney/s for financial matters only or for personal matters (including health care) only .
Long-form EPA	A long-form EPA (form 3) is completed if a person wishes to appoint different attorneys for personal (including health) matters and financial matters.
Advance Health Directive	(AHD) is put in place to make your wishes known if you become seriously ill, unconscious, or are unable to communicate health care wishes in a critical situation. It comes into effect only if you are unable to make your own decisions.
Advance Health Directive for Mental Health.	is put in place to make your wishes known about future healthcare that you would like to receive for a mental illness
Enduring Document	a generic term describing all documents that remain effective after the principal's loss of capacity – e.g., EPAs (long and short form) and AHDs.

The role of the JP



It is the job of a JP or C.dec to witness an Enduring Power of Attorney and an Advance Health Directive, but often a JP will be asked to witness a General Power of Attorney as well. The JP's role as a witness to an enduring document extends to making a reasonable assessment of the principal's capacity to execute the document. These documents can often be the subject of legal challenges, particularly in determining capacity, so the utmost care is required when witnessing.



Handy Tips: General Powers of Attorney

- ✓ A General Power of Attorney must be completed in the approved form.
- ✓ A GPA does not have to be witnessed by a JP or C. Dec unless it is to be registered under the Land Title Act 1994. Otherwise, any independent adult who meets the criteria set out in the Powers of Attorney Act 1998 can witness a general power of attorney.
- ✓ It is recommended that you check with the principal as to when they intend the power to begin. A GPA becomes effective immediately is witnessed unless it otherwise specifies when the power can be executed.



Steps for witnessing a General Power of Attorney

The following is the sequence recommended specifically for witnessing general powers of attorney, along with explanations for each of the steps. It must be remembered that, in addition to the sequence listed, you should always keep in mind all the general tips about witnessing documents discussed in chapter 4. At the end of this chapter, these steps have been outlined in a flowchart, which can be used as a “ready reckoner” when witnessing.

1. Satisfy yourself as to the identity of the principal and check that this is their GPA.	
2. Check that the document is in the approved form.	This is required under section 11 of the <i>Powers of Attorney Act 1998</i> . If it is not, refuse to witness the document and direct the principal to where the correct form can be obtained (see resources and references section at the end of this chapter).
3. Ask the principal whether any other eligible witness has refused to witness the document.	This may help alert you to any potential problems.
4. Read the document with the principal. Clarify any points that have not been clearly outlined.	
5. Check for blank spacing or questions not answered.	These must have lines drawn through them or be completed. Large blank spaces must be Z out and initialled by both the JP and the principal.
6. Check the document for alterations.	Any alterations must be initialled by both the JP/C. Dec and the principal.
7. Ask the principal if they understand the contents and practical effect of the document being signed.	This includes clarifying with the principal when the power begins.
8. Ensure that the GPA is signed in front of you.	
9. Make sure that the date shown on the document is the date of signing.	Recording the correct date is critical, as any disputes about the operation of the document will refer to the date it was signed.
10. Sign as the witness (in blue or black) and apply your seal of office.	
11. Note the details of the document and any action taken in your logbook.	



Background Information – General Powers of Attorney

When the document ends

A General Power of Attorney ceases to have effect:

- ✓ at a time specified in the document for revocation.
- ✓ when the principal revokes the power.
- ✓ if the principal loses the capacity to manage their own affairs; or
- ✓ when the attorney resigns, loses capacity, dies, or becomes insolvent or bankrupt.

Revocation (cessation) of Powers of Attorney

Power of attorney documents can be revoked. The *Powers of Attorney Act 1998* outlines a range of situations where this can happen. You do not need to know all the situations where the power is revoked however, you will need to understand how **voluntary revocation** can take place, as

- ✓ this may need to be pointed out when the principal is making a GPA; or
- ✓ you may be presented with a revocation form to witness (form 5 for a GPA).



Handy Tips: Enduring Powers of Attorney

- ✓ An Enduring Power of Attorney must be completed in the approved form. Note that the forms for Enduring Powers of Attorney changed on November 30th, 2020. The left-hand margin of the form provides some useful guidance about how the form should be completed.
- ✓ You should always check that you do not meet an excluded witness's definition when witnessing an EPA (see step 1 on the next page).
- ✓ It is essential that the principal's capacity be established before witnessing the document (see Background Information – Enduring Powers of Attorney later in this chapter). Use the resources in this chapter to assist with satisfying yourself as to the capacity of the principal.



Steps for witnessing Enduring Powers of Attorney

The following is the recommended sequence for witnessing Enduring Powers of Attorney, along with explanations for each of the steps. It must be remembered that, in addition to the sequence listed, you should always keep in mind all the general tips about witnessing documents discussed in chapter 4. At the end of this chapter, these steps have been outlined in a flowchart, which can be used as a “ready reckoner” when witnessing. Also, an EPA checklist developed by the QJA has been included.

<p>1. Ensure that you are not excluded as an eligible witness – see the table later in this chapter.</p>	<p>If a Justice of the Peace or C.dec. is witnessing the document, they must not be the eligible signer, an attorney of the principal, a relation of the principal, or a relation of an attorney of the principal. If the document gives power for a personal / health matter, they cannot be a principal's paid carer or health provider.</p>
<p>2. Satisfy yourself as to the identity of the principal and check that this is their EPA.</p>	
<p>3. Check that the document is in the approved form.</p>	<p>This is required under section 44(1) of the <i>Powers of Attorney Act 1998</i>. If it is not, refuse to witness the document and direct the principal to where the correct form can be obtained (see resources and references section at the end of this chapter).</p>
<p>4. Ask the principal whether any other eligible witness has refused to witness the document.</p>	<p>This may help alert you to any potential problems.</p>
<p>5. Read through the document with the principal. Clarify any points that have not been clearly outlined.</p>	
<p>6. Check for blank spacing and questions not answered.</p>	<p>These must have lines drawn through them or be completed. Large blank spaces must be Z out and initialled by both the JP and the principal.</p>
<p>7. Check the document for alterations.</p>	<p>Alterations must be initialled by both the JP and the principal.</p>
<p>8. Establish that the principal has the capacity to sign the document.</p>	<p>This is more than just asking if the person understands the contents of the document. This means interviewing the principal. This can be done by asking ‘open-ended’ questions covering the definition of capacity mentioned in section 41 of the <i>Powers of Attorney Act</i>. (see the advice in the background information section later in this chapter). To do this, you should explain to the principal that:</p> <ol style="list-style-type: none"> a) You must be satisfied that the adult has the capacity necessary to make the document. b) To establish capacity, as the witness, you must be satisfied that the nature and effect of the document being made is understood and that the document is being made freely and voluntarily.

	<p>c) They are encouraged to participate in the process, and that notes will be taken.</p> <p>d) A decision will be made about their capacity at the end of the process. If you are satisfied that capacity exists, explain that you will witness the document, and if capacity does not exist, you will not witness the document.</p> <p>e) If they disagree with your assessment, they may seek a second opinion from a medical professional or seek a finding from a tribunal that they do have capacity to make an enduring document.</p>
9. Make sure that the date shown on the document is the date of signing.	Recording the correct date is critical, as any disputes about the operation of the document will refer to the date it was signed.
10. Witness the principal's signature on the statement of understanding (on page 9 of the short-form document or page 11 of the long-form document) and sign the Witness Certificate (at the end of page 10 on the short-form document or page 12 on the long-form document), in blue or black. Affix your seal of office and insert your registration number.	The seal can be used in more than one place on the document, e.g., where the principal's signature is witnessed and below the witness certificate. Do not place the seal over your signature or sign over your seal.
11. Above your signature on the witness certificate, insert the total number of pages in the document (including any added forms, e.g., form 8).	
12. Note the document's details, including all the questions asked and all action taken in your logbook.	

Background Information – Enduring Powers of Attorney



Capacity

The ***Powers of Attorney Act 1998 (Qld)*** places far more responsibility on you when witnessing an Enduring Power of Attorney compared to many other documents. This is because there is a need to establish that the principal has the **capacity** to sign the document.

The *Powers of Attorney Act 1998* section 41 defines capacity as being capable of making the enduring power of attorney freely and voluntarily and understanding the nature and effect of the enduring power of attorney. All these aspects must be satisfied for an adult to have the capacity to make an enduring document.

The Act goes on to state six matters that the principal must understand to establish that capacity exists. These are:

- (a) that the principal may, in the power of attorney, specify or limit the power to be given to an attorney and instruct an attorney about the exercise of the power.
- (b) that the principal understands when the power begins.
- (c) that once the power for a matter begins, the attorney/s have the power to make and will have full control over the matter subject to terms or information about exercising the power included in the Enduring Power of Attorney;
- (d) that the principal may revoke the Enduring Power of Attorney at any time the principal can make an Enduring Power of Attorney;
- (e) that the power given by the principal to the attorney/s continues even if the principal develops impaired capacity; and
- (f) that at any time, if the principal is not capable of revoking the Enduring Power of Attorney, the principal is unable to oversee the use of the power effectively.

It follows that when making a capacity assessment, the adult being assessed must be able to communicate all the above points to you. Under the general principles outlined in section 6C of the *Powers of Attorney Act 1998*, an adult is presumed to have capacity unless there is evidence to the contrary, but it is still necessary to ask a series of questions to determine capacity to cover your responsibilities under the Act. The questions asked should be open-ended questions that require more than a yes/no response. Generally, the more complex that adult's personal and financial affairs are, the greater their understanding must be.

Some examples of questions are:

Good Questions	Poor questions
Explain in your own words what an Enduring Power of Attorney is.	You understand what an Enduring Power of Attorney is, don't you?
Why do you want to make an Enduring Power of Attorney?	You want an Enduring Power of Attorney for _____ reason. Is that Correct?
What sort of decisions will your attorney be making for you?	Will your attorney be making decisions about _____?
Who have you chosen to be your attorneys?	X and Y will be your attorneys. Is that correct?
Why have you selected this person to be your Attorney, and how long have you known them?	Is this person the one that you want to be your attorney?
When will the attorney's power for personal or financial matters begin?	Are you aware that the power begins now?
How long does the attorney's power last?	The attorney's power lasts for x amount of time. Do you understand this?
How can you change/revoke the Enduring Power of Attorney?	Are you aware that you can change/revoke the Enduring Power of Attorney?
Who did you consult to help you complete this form?	Nobody has pressured you into completing this form – correct?
What is it you hope to achieve in making this document?	So, this sets out precisely what you want, right?

This is not an exhaustive list of questions to ask, and in any case, the JP questions should incorporate the six points (a-f) mentioned above, and the answers to these questions should be recorded in your logbook. Be wary of family members who try and answer questions for the principal. Capacity is not established when family members intervene in the questioning process because the adult would not be seen to be making the document freely and voluntarily. It is better, if possible, to meet with the principal alone.

The Department of Justice and Attorney General has published a guide to assist with determining capacity. The *Queensland Capacity Assessment Guidelines 2020* can be downloaded from both the Department and the QJA web sites. Of particular importance for JP's in these guidelines is section 6. Pages 48 and 49 of the guidelines also list good questions that the Principal can ask (like those listed above). Remember also that capacity is a point in time issue. It is being assessed at the time of witnessing. While capacity may not exist now, it may exist at another point in time.

When an EPA ends

An Enduring Power of Attorney ceases to have effect:

- ✓ when the principal dies; or
- ✓ when the principal revokes the power.

NOTE – unlike a GPA, an EPA continues to be effective after the principal loses capacity.

Revocation (cessation) of powers of attorney

Power of attorney documents can be revoked. The *Powers of Attorney Act 1998* outlines a range of situations where this can happen. You do not need to know all the situations where the power is revoked, however, you will need to understand how **voluntary revocation** can take place, as

- ✓ this may need to be pointed out when the principal is making an EPA; or
- ✓ you may be presented with a revocation form to witness (form 6 for an EPA).

In witnessing a revocation of an Enduring Power of Attorney, you need to follow most of the same steps as when witnessing an Enduring Power of Attorney. **This means that, again, you must establish whether the principal has the capacity to sign the revocation document.** It is also recommended that you remind the principal that they take reasonable steps to inform every attorney affected by the revocation that their appointment is being terminated.

Certifying true copies of an Enduring Power of Attorney

The wording for certifying true copies of an Enduring Power of Attorney is slightly different from certifying a true copy of any other document type. For details, refer to chapter 10.

Handy Tips: Advance Health Directives



- ✓ An Advance Health Directive should be completed in the approved form.
- ✓ You should always check that you do not meet the definition of an excluded witness when witnessing an AHD (see step 1 below)
- ✓ It is essential that the principal's capacity be established before witnessing the document (see background information late in this chapter).
- ✓ The JP should witness the document as soon as possible after the principal has had their capacity certified by a doctor. This helps to assess capacity. There is no time limit legislated for the gap between the doctor signing the AHD and the document being witnessed by a JP or C.dec.



Steps for Witnessing - Advance Health Directives

The following is the sequence recommended specifically for witnessing Advance Health Directives, along with explanations for each of the steps. It must be remembered that, in addition to the sequence listed, you should always keep in mind all the general tips about witnessing documents discussed in chapter 4. At the end of this chapter, these steps have been outlined in a flowchart, which can be used as a “ready reckoner” when witnessing. Also, an AHD checklist developed by the QJA has been included.

1. Ensure that you are not excluded as an eligible witness.	The witnessing exclusions are as for an Enduring Power of Attorney and not a beneficiary under the principal’s will. See the table later in this chapter.
2. Satisfy yourself as to the identity of the principal and check that this is their AHD.	
3. Check that the document is in the approved form.	
4. Ask the principal whether any other eligible witness has refused to witness the document.	This may help alert you to any potential problems.
5. Before you go through the entire AHD with the principal, check that section 5 has been completed, signed, and dated by a doctor.	If this has not been done, advise the principal that you cannot witness the AHD until this has taken place.
6. Read the document with the principal. Clarify any points that have not been clearly outlined.	The principal should have completed sections 1 to 4 (and section 6 if an attorney has not already been appointed for personal/health matters).
7. Check for blank spacing and questions not answered.	These must have lines drawn through them or be completed. Large blank spaces must be Z out and initialled by both you (the JP) and the principal
8. Check the document for alterations.	These must be initialled by both the JP/C. Dec and the principal.

<p>9. Establish that the principal has the capacity to sign the document.</p>	<p>This is more than just asking if the person understands the contents of the document. This means interviewing the principal. This can be done by asking ‘open-ended’ questions covering the definition of capacity mentioned in section 41 of the <i>Powers of Attorney Act</i>. (see the advice in the Background Information section on the next page). To do this, you should explain to the principal that:</p> <p>(a) You must be satisfied that they have the capacity necessary to make the document.</p> <p>(b) To establish capacity, you, as the witness, must be satisfied that the nature and effect of the document being made is understood and that the document is being made freely and voluntarily</p> <p>(c) They are encouraged to participate in the process, and that notes will be taken.</p> <p>(d) A decision will be made about capacity at the end of the process, and if you are satisfied that capacity exists, you will witness the signing of the document. If you are not satisfied, you will not witness the document.</p> <p>(e) If they disagree with the outcome, they may seek a second opinion from a medical professional or seek a finding from a tribunal that they do have capacity to make an Advance Health Directive.</p>
<p>10. Ensure that the AHD is signed in front of you (section 7, page 11). If it has already been signed, get the principal to sign it again. Make sure that the date shown on the document is the date of signing.</p>	<p>Recording the correct date is critical, as any disputes about the operation of the document will refer to the date it was signed.</p>
<p>11. Complete and sign the Witness Certificate (section 7, page 12) by placing your signature in the appropriate place. Use a blue or black pen, affix your seal of office and insert your registration number. The seal can be used where the principal’s signature is witnessed and on the Witness Certificate.</p>	<p>Do not place the seal over your signature or sign over your seal.</p>
<p>12. Above your signature on the witness certificate, insert the total number of pages in the document, including any added pages (form 8).</p>	
<p>13. Note in your logbook the document’s details, including all the questions asked and all action taken.</p>	



Background Information – Advance Health Directives

As stated earlier in this chapter, an Advance Health Directive (AHD) is made to make your wishes known if you become seriously ill, unconscious, or unable to communicate health

care wishes in a critical health situation. The AHD comes into effect only if you are unable to make your own decisions. An Advance Health Directive for Mental Health is put in place to make your wishes known about future healthcare you would like to receive for a mental illness.

An Advance Health Directive is the recommended way for all persons to communicate their wishes about health matters in impaired capacity situations. Section 66 of the *Guardianship and Administration Act 2000* (Qld) recognises an Advance Health Directive as the most important document relating to decision making regarding health matters.

If an AHD has not been completed, or if an Enduring Power of Attorney has not been appointed for personal/health matters or if a guardian has not previously been appointed by the Office of the Public Guardian, then the statutory health attorney provisions of the *Powers of Attorney Act 1998* apply. These provisions allocate decision making powers in the following order:

1. A spouse of the adult if the relationship between the adult and the spouse is close and continuing.
2. A person who is 18 years or more and who has the care of the adult and is not a paid carer for the adult.
3. A person who is 18 years or more and is a close friend or relative of the adult and is not a paid carer for the adult.
4. The Public Guardian.

Relying on these statutory health attorney provisions can be problematic, mainly when there are family disputes about whether relationships are “close and continuing” or about who has “care of the adult.” Also, some decisions cannot be made by a statutory health attorney and require the appointment of a guardian and/or approval by the Public Guardian, for example, tissue donation, sterilisation, pregnancy termination, the use of some restrictive practices. As such, an Advance Health Directive can eliminate a lot of this confusion.

Advance Health Directives are witnessed in much the same way as Enduring Powers of Attorney, except with the following differences:

- ✓ there are additional restrictions as to who can be a witness. All the eligibility criteria that apply to an EPA apply to an AHD, however additionally, the witness cannot be a beneficiary under the principal’s will; and
- ✓ as required by section 44(6) of the *Powers of Attorney Act 1998*, a medical practitioner must have signed and dated the doctor’s certificate (found in section 5 of the AHD or section 7 of the AHD for Mental Health) stating that at the time of making the AHD, the principal appeared to have the necessary capacity to understand and make the directive.

It is important to understand that the onus on the doctor to certify capacity does not replace the onus on you to ask all the questions that should be asked to establish capacity at the time of witnessing. As with an Enduring Power of Attorney, all JPs and C. Dec should ask a range of questions to determine the existence of capacity. If any doubt exists, the doctor who has signed the document should be contacted as part of the process used in reaching your decision regarding the principal’s capacity.

The time that elapses between the certificate having been signed by the doctor and the AHD being witnessed by the JP should ideally be short. The reason for this is that capacity can change quickly. If the time between obtaining the medical practitioner's signatures and the JP is a short one, then the chance that the principal’s capacity will be challenged in a court will be reduced.

Revocation of an Advance Health Directive

Unlike a GPA or an EPA, an Advance Health Directive does not require a specific revocation form. In Queensland, making a new Advance Health Directive revokes the previous one.

Certifying true copies of an Advance Health Directive

The wording for certifying true copies of these documents is different from certifying a true copy of any other document type. For details, refer to chapter 10.

Frequently Asked Questions



What if extra information is required to be included and that information cannot fit on the form?

Any additional information should be completed on a form 8 and attached to the EPA or AHD's back. Each page must be numbered, as per the top of the form.

How many attorneys can be appointed?

For an EPA, the maximum number of attorneys appointed to act jointly in decision making is four. Other than that, there is no limit.

When should the attorney sign the acceptance?

As outlined in section 5 on the EPA and section 8 on the AHD, this must occur after the document has been witnessed.

Should the attorney be present?

It is not compulsory for the attorney to be present when the document is being witnessed.

What if the principal is accompanied by companions who try to pressure you?

If the principal has somebody with them who tries to answer questions on their behalf (particularly when that "somebody" is the attorney), you should explain that you have an obligation under the *Powers of Attorney Act 1998* to ask questions of the principal to determine their capacity. If this does not resolve the situation, it is recommended that you speak to the principal alone.

If there are still problems, you should refuse to witness the document. The basis for this is that you, as the witness, cannot be satisfied as to capacity of the principal if you feel that that the person is being exploited or placed under some form of pressure or duress. If you sense any exploitation or duress, you should report the matter to the Office of the Public Guardian.

How often should Power of Attorney and Advance Health Directive documents be reviewed?

It is strongly recommended that the principal regularly reviews all GPA, EPA, and AHD documents, as wishes may change, the state of a person's health may change, or there may be advances in medical technology. If the principal's wishes have changed significantly, it is recommended that they complete a new document.

Should a Power of Attorney document be registered?

Sections 25 and 60 of the *Powers of Attorney Act 1998* state that powers of attorney and revocations may be registered with the Office of the Public Guardian. This is not a requirement, but it may be useful if any disputes arise in the future. However, if your attorney buys or sells land on your behalf, the Enduring Power of Attorney must first be registered with the Land Titles Office.

Do health professionals take any notice of Advance Health Directives?

The medical profession will do their best to honour an AHD but also have a duty of care to the patient, so in some circumstances where it is not medically feasible, the AHD may be disregarded, e.g., if the principal wanted scented candles to be lit in an intensive care unit.

Is it ok to ask questions about the principal's background, financial affairs, and medical issues?

Yes, if they are broad, they may help to determine capacity.

Is a Queensland EPA valid in other states of Australia?

EPA's is governed by State legislation, and if the principal has assets held in another State (such as real property), they will require an EPA to be prepared for the other jurisdiction. It is recommended that this be discussed with a lawyer if needed. The adult must be a resident in Queensland or hold assets in Queensland to complete a Queensland Enduring Power of Attorney document.

Should I note in my logbook that the GPA/EPA/AHD document was in the approved form?

Yes, you should always do this.

Should the doctor signing the AHD be the doctor who regularly treats the principal?

It may be worth questioning the principal if the doctor who has signed is the regular treating doctor. A doctor who is not the regular treating doctor may be used in situations of elder abuse.

What differences does an Advance Health Directive for Mental Health have to a regular Advance Health Directive?

The AHD for Mental Health has a different standard form. Some of the form's questions relate to the use of physical restraint and authority to remain in an inpatient unit. All witnessing processes are the same as for the usual Advance Health Directive.

What happens if an interpreter or translator is present when the document is witnessed, or an interpreter/translator assists in the preparation of the document?

A Form 7 Version 2 should be completed by an interpreter or translator who interprets or translates an enduring power of attorney or advance health directive. This must then form part of the complete document being witnessed.

Are interstate EPA's recognised in Queensland?

Under section 34 of the *Powers of Attorney Act 1998*, in addition to recognising interstate enduring powers of attorney, New Zealand enduring powers of attorney may also be recognised as valid under Queensland law (to the extent the powers they give could have been validly given by an enduring power of attorney made in Queensland).



Resources and Reference Materials

Differentiating between the three documents

The main differences between the GPA, EPA, and AHD documents can be summarized in the table below:

Type of Document	Purpose	Who can witness the document?	When the document is effective / ceases to be effective
General Power of Attorney (GPA)	Is granted to someone to make decisions about financial matters while a person is absent for any reason	Any independent adult who meets the criteria set out in the <i>Powers of Attorney Act 1998</i> , i.e., does not have to be witnessed by a JP or C. Dec unless it is to be registered under the <i>Land Title Act 1994</i> .	The document is effective once the GPA is witnessed unless it otherwise specifies when the power can be executed. It ceases to have effect: <ul style="list-style-type: none"> ✓ at a day/time specified in the document for revocation. ✓ when the principal revokes the power. ✓ if the principal loses capacity to manage their own affairs; or ✓ when the attorney resigns, loses capacity, dies, or becomes insolvent or bankrupt.
Enduring Power of Attorney (EPA)	Is granted to someone to make decisions about personal and/or health and/or financial matters.	A Justice of the Peace, C. Dec, Lawyer or Notary Public who <ul style="list-style-type: none"> • is not the eligible signer; and • is not an attorney of the principal; and • is not a relative of the principal or a relation of an attorney of the principal; and • if the document gives power for a personal/health matter— is not a paid carer* or health provider of the principal. 	For financial matters, the power becomes effective immediately unless otherwise specified. For personal / health matters, the power becomes effective when the principal is incapable of understanding the nature, and foreseeing the effects of a decision, and of communicating that decision. An EPA can be revoked: <ul style="list-style-type: none"> ✓ at a day/time specified in the document. ✓ when the principal revokes it, or ✓ when the attorney resigns, loses capacity, dies, or becomes insolvent or bankrupt.
Advance Health Directive (AHD)	Is granted to someone to make future decisions about a person's health care if/when they unable to speak for themselves	As for an Enduring Power of Attorney, plus the witness must not be a beneficiary under the principal's will.	The AHD only operates while the principal has impaired capacity to decide the matters covered by the AHD.

* A paid carer is defined as somebody who is **not** paid a carer's pension.

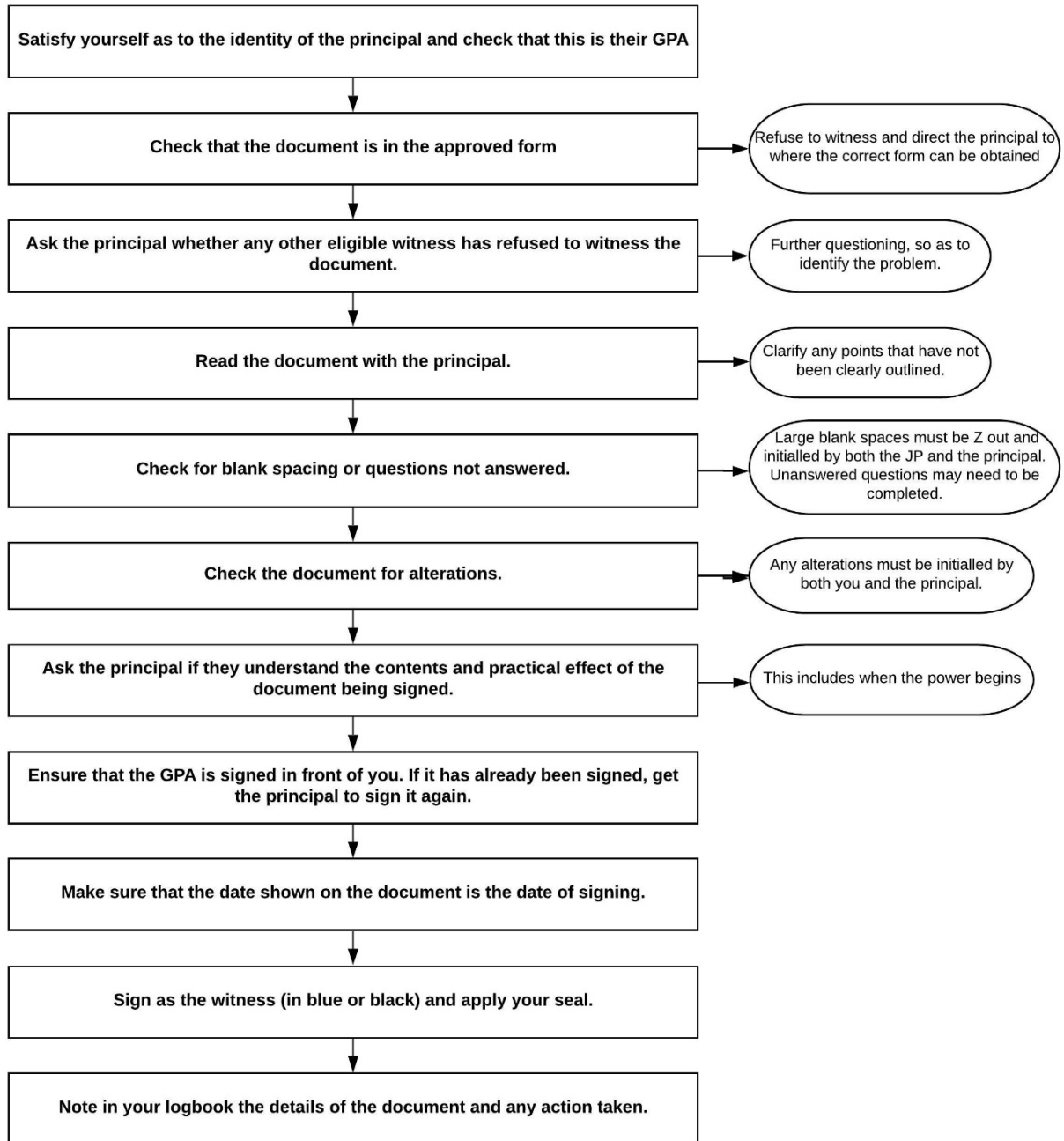
Websites

The Office of the Public Guardian has published a guide for witnesses of Enduring Powers of Attorney about assessing capacity. It is freely available from their website www.publicguardian.qld.gov.au. The guidelines supplied on the website suggest a variety of questions, like those in this chapter, that you should ask the principal to determine capacity.

Checklists

Following is a checklist that can be used to guide you when witnessing GPA documents. It must be remembered that, in addition to the sequence listed, you should always keep in mind all the general tips about witnessing documents discussed in chapter 4.

General Power of Attorney



Enduring Power of Attorney



Some Justices of the Peace and Commissioners for Declarations find that it is useful to have a pro forma sheet with the questions asked to determine capacity. The QJA has developed a checklist for doing this (see next page).



Enduring Power of Attorney Witness Checklist Guide

1. Check you are qualified to witness

- Be a Justice of the Peace/Commissioner of Declarations/Notary Public/Lawyer with a current practicing certificate and,
- NOT be the person signing the document for the principal and,
- NOT be an attorney of the principal and,
- NOT be a relation of the principal (Note: relation means a person who is related by blood, marriage, adoption or because of a de facto relationship or relationship arising because of a legal arrangement) and,
- NOT be a relation of an attorney (Note: relation means a person who is related by blood, marriage, adoption or because of a de facto relationship or relationship arising because of a legal arrangement) and,
- NOT be a paid carer or healthcare provider for the principal (where appointed for personal matters).

2. Explanation Explain to the Principal the following:

Financial Power of Attorney:

- that the principal is appointing someone to act on his/her behalf
- that the attorney will be able to assume authority to the extent indicated over the principal's financial affairs (such as selling his/ her house)
- that the authority for the attorney begins once the document is completed (unless otherwise specified)
- that the attorney will be able to do anything with the principal's personal property (money etc.) and real property (real estate) that the principal could do
- that the authority will continue should the principal have impaired capacity, and
- that if the principal should lose capacity, the power will be irrevocable.

Personal/Health Matters:

- that the attorney's power for financial matters can start when the principal wishes but the attorney for personal/health matters starts only after the principal has lost capacity for decision making
- that the attorney will be able to assume authority to the extent indicated over the principal's personal affairs (such as health care, where the adult lives and with whom, and day-to-day issues)
- that the attorney will be able to do anything that the principal can do, and
- that if the principal loses decision-making ability, the power to the attorney will be irrevocable.

3. Check the Document Prior to Assessing Capacity

- | | |
|---|--|
| <input type="checkbox"/> Section 2: Completed and/or zed blank spaces.
<input type="checkbox"/> Section 3: No blank attorney spaces
<input type="checkbox"/> Section 3: One box ticked for financial, personal/health or both.
<input type="checkbox"/> Section 3: Financial matters and when comes into effect. | <input type="checkbox"/> Section 3: – how decisions made.
<input type="checkbox"/> Section 3: Terms and instructions – completed and/or zed blank spaces.
<input type="checkbox"/> Section 3: Whom to notify – completed or zed out.
<input type="checkbox"/> Section 5: Attorney has not accepted prior to principal signature |
|---|--|

4. Capacity assessment

The Powers of Attorney Act 1998 [Sch 3] defines 'capacity' for an adult for a matter, as meaning the person is capable of—

- understanding the nature and effect of decisions about the matter; and
- freely and voluntarily making decisions about the matter; and
- communicating the decisions in some way

Name of Client

ID Sighted

Date of birth

Are there any indicators that cast doubt on the client's capacity? (for example, if the client is forgetful and unable to recall matters discussed throughout the meeting or if the client seems to be confused about the questions you are asking or the purpose of the discussion)

If yes, list indicators:

Sample Questions to Ask the Principal

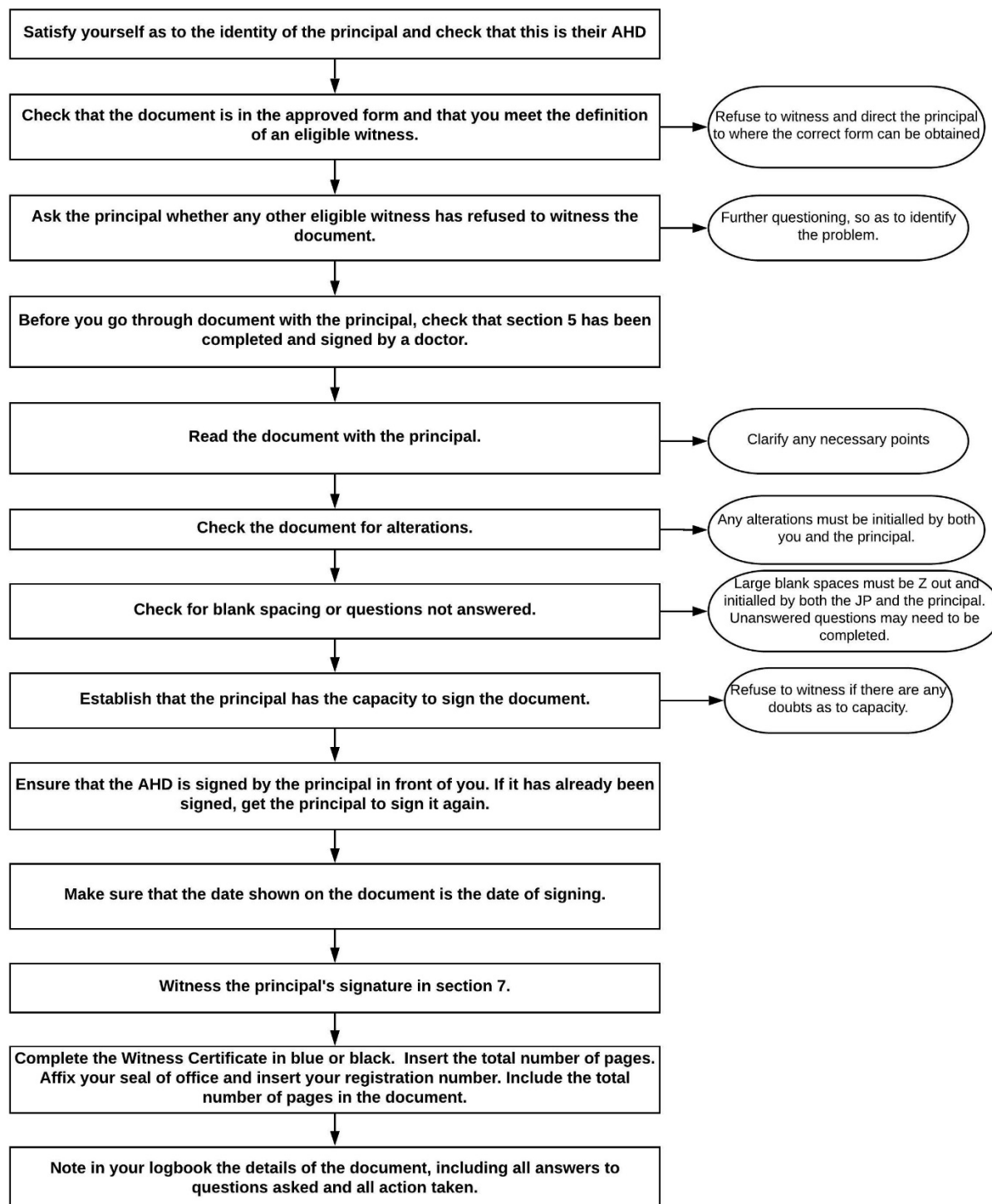
When interviewing the principal, keep your questions 'open ended', not closed, record answers. Choose from the following suggested Questions: -

<ol style="list-style-type: none"> 1. What is an Enduring Power of Attorney? 2. Why do you want an Enduring Power of Attorney? 3. What sort of decisions will your attorney be making for you? 4. Can you limit the attorney's powers if you want to? 5. Are you able to give specific instructions to your attorney about decisions to be made? 6. What is the extent of the assets over which the attorney will have control? 7. Can you have more than one attorney? 8. Why have you selected this person to be your attorney? 	<ol style="list-style-type: none"> 9. If you have more than one attorney, who will make decisions concerning you or your finances? 10. When will the attorney's power for financial matters begin? 11. When will the attorney's power for personal matters begin? 12. How long does the attorney's power last? 13. Can you change or revoke the Enduring Power of Attorney? 14. Is there anything else that will end the attorney's power? 15. What would you do if you did not agree with the attorney's decision?
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Write Answers here:

5. Your Assessment of Clients Capacity -Are you satisfied the principal understands:	Yes	No
Purpose and function of EPA		
Does medical certificate need to be obtained?		
The nature and effect of the EPA		
That they may limit the power and instruct an attorney about the exercise of the power		
When the power begins		
The attorney will have full control over matters to which the EPA relates		
They may revoke the EPA at any time (if they have capacity)		
The powers continue once they lose capacity		
They will be unable to oversee the use of the power once they have lost capacity		
Has revocation of earlier EPA been signed and served on previous attorneys?		
Check documents properly signed.		
<input type="checkbox"/> Page 9 Principal signature and witnessed by JP or C. Dec and sealed if will fit <input type="checkbox"/> Page 10 Witnessed by JP or C. Dec and sealed		
Witness Name		
Location:	Date	

Advance Health Directives



Some Justices of the Peace and Commissioners for Declarations find that it is useful to have a pro forma sheet with the questions asked to witness an Advance Health Directive. The QJA has developed a checklist for doing this (see over page).



Advance Health Directive Witness Checklist Guide

VERSION 4: JAN 2021

1. Check you are qualified to witness

- Be a Justice of the Peace/Commissioner of Declarations/Notary Public/Lawyer with a current practicing certificate and,
- NOT be.
 - the person signing the document for the principal and,
 - an attorney of the principal and,
 - a relation of the principal (Note: relation means a person who is related by blood, marriage, adoption or because of a de facto relationship or relationship arising because of a legal arrangement) and,
 - a relation of an attorney (Note: relation means a person who is related by blood, marriage, adoption or because of a de facto relationship or relationship arising because of a legal arrangement) and,
 - a paid carer or healthcare provider for the principal (where appointed for personal matters)
 - a beneficiary under the principal's will

2. Explanation Explain to the Principal the following:

- that the attorney's power starts only after the principal has lost capacity for decision making
- that the attorney will be able to assume authority to the extent indicated over the principal's health affairs (such as health care, where the adult lives and with whom, and day-to-day issues)
- that the attorney will be able to do anything that the principal can do, and
- that if the principal loses decision-making ability, the power to the attorney will be irrevocable.

3. Check the Document Prior to Assessing Capacity

- | | |
|--|--|
| <input type="checkbox"/> Section 2 Completed and/or zed out blank spaces. | <input type="checkbox"/> Section 5 Doctor certificate current |
| <input type="checkbox"/> Section 3 Completed and/or zed out blank spaces. | <input type="checkbox"/> Section 6 Appoint attorney or crossed out. |
| <input type="checkbox"/> Section 4 Directions page 5-6, a box ticked. | <input type="checkbox"/> Section 6 Decision making, terms completed and/or zed out blank spaces. |
| <input type="checkbox"/> Section 4: Directions page 6 a box ticked each section and/or zed out blank spaces. | <input type="checkbox"/> Section 7: complete or zed out person acting. |
| <input type="checkbox"/> Blood Transfusions box selected | <input type="checkbox"/> Section 8 not pre-signed by attorney |

4. Capacity assessment

The Powers of Attorney Act 1998 [Sch 3] defines 'capacity' for an adult for a matter, as meaning the person is capable of—

- a) understanding the nature and effect of decisions about the matter; and
- b) freely and voluntarily making decisions about the matter; and
- c) communicating the decisions in some way

Name of Client

ID Sighted

Date of birth

Are there any indicators that cast doubt on the client's capacity? (for example, if the client is forgetful and unable to recall matters discussed throughout the meeting or if the client seems to be confused about the questions you are asking or the purpose of the discussion)

If yes, list indicators:

Sample Questions to Ask the Principal

When interviewing the principal, keep your questions ‘open-ended’, not closed, record answers. Choose from the following suggested Questions: -

- | | |
|--|---|
| 1. What is an Advance Health Directive (AHD)? | 8. Why can you have more than one attorney? |
| 2. Why do you want an AHD now? | 9. Why have you selected this person to be your attorney? |
| 3. Have you discussed this AHD with your doctor? | 10. When will the attorney’s power for personal matters begins? |
| 4. Have you discussed this AHD with your family? | 11. How long does the attorney’s power last? |
| 5. Can you cover all possible healthcare decisions on this form? | 12. What should you do with the completed document? |
| 6. Is it possible to give specific instructions to the Attorney(s) about decisions to be made? | 13. How often should you update the AHD? |
| 7. Who can change or revoke the AHD? | |

Write Answers here:

5. Your Assessment of Clients Capacity -Are you satisfied the principal understands:

Yes No

Purpose and function of AHD?		
Has the Doctor signed Section 5?		
The nature and effect of the AHD		
That they may limit the power and instruct an attorney about the exercise of the power		
When the power begins		
The attorney will have full control over matters to which the AHD relates		
They may revoke the AHD at any time (if they have capacity)		
The powers continue once they lose capacity		
They will be unable to oversee the use of the power once they have lost capacity		
Has revocation of earlier AHD been signed and served on previous attorneys?		
Check documents properly signed. <input type="checkbox"/> Section 7 (signed by the principal) and witnessed – seal if will fit. <input type="checkbox"/> Witness certificate (signed and sealed by JP or C. Dec)		

Witness Name

Location:

Date