



# Public Trustee

## Enduring Power of Attorney (“EPA”)

### Information for EPAs prepared by the Public Trustee

#### What is an Enduring Power of Attorney?

An Enduring Power of Attorney (“EPA”) is a document in which you appoint one or more attorneys to make property and financial decisions on your behalf (eg operating bank accounts, buying shares, selling real estate). The attorney doesn’t have to be a lawyer.

The law on EPAs is not the same throughout Australia. This information sheet talks about EPAs in WA.

An EPA doesn’t cover personal and lifestyle decisions (eg consenting to medical treatment). Those sorts of decisions can be covered in WA by Enduring Powers of Guardianship and/or Advance Health Directives. More information about these other options is available on-line at [www.publicadvocate.wa.gov.au](http://www.publicadvocate.wa.gov.au).

#### When does an EPA take effect?

You have two choices.

1. *Make an Immediate EPA*. It can take effect immediately, and then can endure, even after you lose legal capacity. This doesn’t mean that your attorney has to take over and start making your property and financial decisions straightaway. You may continue to manage your financial affairs, but know that if you lose capacity, your attorney is able to start making these decisions for you.
2. *Make a Dormant EPA*. It only takes effect when the State Administrative Tribunal (“SAT”) declares that you don’t have legal capacity. The attorney needs to apply to SAT.

#### Can anyone make a valid EPA?

No. You have to be over 18 and have “full legal capacity”.

There are different views on what “full legal capacity” means.

It may mean that you can understand:

- the nature and extent of what you own;
- that the attorney will in general be able to do anything with your property which you yourself could do;
- that while you are mentally capable, you may direct the attorney to act in a particular way and may revoke the EPA;
- that if you become mentally incapable, the EPA will continue and can only be revoked in limited circumstances; and
- that the attorney won’t be monitored or audited as a matter of course, so you are placing a very high level of trust in that person or organisation.

## **What happens if the Public Trustee has good reason to doubt whether a person has the capacity to make an EPA?**

The Public Trustee may:

- try to talk the person out of making one;
- insist that the person gets medical evidence; and/or
- decline to prepare the EPA.

## **Who can be appointed?**

- A person, such as a family member, friend or accountant.
- The Public Trustee.
- A trustee company.

## **Does the person or organisation have to agree?**

Yes.

## **Can you appoint more than one attorney?**

Yes.

You can appoint:

- a sole attorney: a single person or organisation;
- joint attorneys: two people who must act together and agree on all decisions that are made; or
- joint and several attorneys: two people who can make decisions together and/or independently.

You can also appoint substitute attorneys, though there are limits on this.

## **What types of EPAs does the Public Trustee prepare?**

- *An Immediate EPA* appointing either your spouse or de facto partner or, in some cases, the Public Trustee.
- *A Dormant EPA* solely appointing a spouse or de facto partner.

## **When will the Public Trustee agree to act as attorney?**

The Public Trustee will consider acting if:

- it is an Immediate EPA;
- it only appoints the Public Trustee; and
- you are happy to pay the Public Trustee's fees.

The Public Trustee will look at your financial and personal situation and make a decision. If the Public Trustee is preparing your will, the Public Trustee can consider the information that you provide on the Will Application Form. The Public Trustee may need more information at your will appointment. Someone from the Public Trustee may speak to you, either before, after or during your will appointment.

Examples of when the Public Trustee may not act include if you:

- cannot afford the Public Trustee's fees;
- are involved in a legal dispute of a significant nature;
- have a Self-Managed Superannuation Fund, family trust, discretionary trust, unit trust, partnership, company and/or business;
- do not live in WA;
- have a binding financial agreement (eg a pre-nuptial agreement); and/or
- have interstate or overseas assets.

### **Does an EPA have to be registered?**

It must be registered at Landgate if the attorney wants to use it to deal with real estate in WA on your behalf. Extra fees, procedures and time limits may apply.

Apart from that, there's no central registry for EPAs in WA.

### **Can I limit the EPA only to cover parts of my estate (eg by limiting it to operating a bank account, or excluding the family home)?**

There are different views on this. The Public Trustee considers that the law is unclear. If you do limit it, there's a risk that the document is invalid. In particular, Landgate may refuse to register it. Your needs might also change over time. For that reason, the Public Trustee recommends that the EPA not be limited to parts of your estate.

### **Can I place conditions or restrictions in my EPA?**

Yes, but there's a limit to the sorts of conditions or restrictions that may be acceptable.

Landgate may refuse to register an EPA if it:

- specifies powers that the attorney is authorised to exercise (including conflict of interest clauses that grant transactions between you and the attorney); and/or
- places too much of an obligation on Landgate.

The person or organisation you want as your attorney might not want to accept the conditions or restrictions.

A condition that could be imposed is:

“Every year my attorney is to take the financial records to an accountant to check and sign off on them. My children are each to be given a copy of the signed records.”

### **Can my attorney make gifts on my behalf?**

Currently, there is no statute that specifically forbids this, but case law does place restrictions on when this is allowed. As EPAs are not supervised or monitored as a matter of course, your attorney might end up doing it, even if the attorney is not allowed to.

There are differing views about whether you can mention gifts in an EPA. The Public Trustee considers that if you do, there's a risk that the document is invalid. The Public Trustee therefore considers that it's safer not to do so.

## Can EPAs be abused?

Sadly, yes.

Attorneys, generally speaking, are required to protect your interests, but there's no guarantee that they'll do so.

They're not required to have training before or during their appointment. They're not supervised as a matter of course. You're placing a very high level of trust in the person or organisation you choose.

For example, some attorneys can:

- treat the person's assets as their own, and give those assets to themselves or others;
- make poor investments; and/or
- fail to pay bills on time.

If, for instance, assets are given away, Centrelink may apply deeming rules that reduce a person's pension, or stop the person being able to get one altogether, even if the person has no money left.

If an EPA is abused, it can cause a lot of ill-feeling in families. The government might become involved. SAT might appoint the Public Trustee to try to recover the money that's been lost. Sometimes, it might be too difficult to get much, if anything, back.

## Is there information available about what an attorney should and shouldn't do?

Yes. The Office of the Public Advocate produces *A Guide to Enduring Power of Attorney in Western Australia*. It's available on-line at [www.publicadvocate.wa.gov.au](http://www.publicadvocate.wa.gov.au). The Public Trustee can also give a copy for you to pass on to your attorney.

## How can an EPA end?

- You can revoke it if you still have the capacity to do so.
- It's automatically revoked if you die.
- SAT can revoke it.
- The Supreme Court might also revoke it, although that would be rare.
- An administrator appointed by SAT might revoke it.
- Your attorney can resign if you still have legal capacity. If you don't, your attorney would have to apply to SAT to have the EPA revoked.
- Bankruptcy might also end an EPA.

## What are some things that don't automatically end an EPA?

- Marriage
- Divorce
- Separation
- Starting or ending a de facto relationship
- Losing legal capacity
- Making a new EPA

### **Does my EPA apply to things I own outside WA?**

This is a complicated area. If you do have substantial assets outside WA, you may wish to consider getting legal advice on whether you should get a separate document to cover them.

### **What if I have a power of attorney created under the laws of another state, territory or country?**

SAT can, in some cases, recognise it as an EPA under WA law, but it may be prudent and easier to have a separate EPA for assets in WA.

### **What happens if I don't make an EPA and lose the capacity to make property and financial decisions?**

A person can apply to SAT for an administration order. SAT may appoint an administrator to make these decisions.

## What are some of the differences between an Immediate EPA and an administration order?

	<b>Immediate EPA</b>	<b>Administration order</b>
Is an application to SAT needed?	No.	Yes.
Will my close family members know about it?	Not necessarily.	Generally yes.
Can the power be limited only to parts of my estate?	May be a problem.	Yes.
How long does it take to get the authority to use it?	As long as it takes to prepare the document and have it executed.	An application needs to be made and heard. This normally takes a few months, but the time can vary substantially.
Who will act as attorney or administrator?	The person or organisation you choose who agrees to do it.	The person or organisation appointed by SAT. SAT may take your wishes into account, but is not bound by them.
Is education for the attorney or administrator compulsory?	No.	No.
Can the validity of the appointment be questioned or challenged?	Yes.	SAT decisions can be the subject of review or appeal, but the appointment is still valid until an order is made to the contrary.
Is there a register of appointments?	No compulsory universal central register, but EPAs can be lodged at Landgate.	SAT and the Public Trustee keep records, but there are limits on what can be revealed publicly. The administration order may come up on some Landgate documents.
Are the responsibilities of the attorney or administrator set out in legislation?	Some are, but not all.	Some are, but not all.
Can the attorney or administrator validly make gifts?	Yes, in limited circumstances.	Yes, but only with the permission of SAT.
Can the attorney or administrator apply to SAT for directions?	Yes, though SAT doesn't have to give them and generally won't.	Yes, though SAT doesn't have to give them and generally won't.
Can I still deal with my estate?	Yes, if I have capacity.	Generally not.
Is the attorney or administrator supervised as a matter of course?	Generally not.	Administrators (other than the Public Trustee) usually have to submit accounts to the Public Trustee, though can be exempted.
Does SAT conduct reviews?	Only if it's brought to SAT's attention.	Yes, at least every five years.

## What services does the Public Trustee offer?

If you appoint the Public Trustee as attorney under your EPA, the Public Trustee may perform the following tasks on your behalf:

- *Collect income.* As required, the Public Trustee will collect and account for income, including dividends from shares, rents, pensions, entitlements and interest from bonds, debentures and investments.
- *Pay accounts and bills.* The Public Trustee methodically attends to the payment of bills, including: accommodation, rents, rates, and repairs to properties, gas, phone, electricity, medical, hospital, nursing home charges as well as any other accounts.
- *Manage real estate.* The Public Trustee can arrange a complete property management service when real estate is placed in our care. This may include rent collection, regular property inspection, body corporate representation, attending to local authorities' requirements as well as repairs and maintenance. Valuations and sales are arranged as required.
- *Prepare taxation documents.* The administration of financial affairs requires a specialised knowledge of accounting, especially as it relates to taxation. The Public Trustee's qualified staff can arrange the necessary taxation documents, including income tax returns and capital gains tax registers as required.
- *Provide legal services.* You will have access to the Public Trustee's in-house legal services concerning your estate, subject to the approval of the Public Trustee. Generally, however, the Public Trustee does not accept appointments as attorney when are involved in a legal dispute of a significant nature.
- *Investment management.* The Public Trustee may arrange suitable financial planning advice and will purchase and sell investments on your behalf, depending on the size of your estate and your future needs.

These services may be provided by the Public Trustee's in-house specialist staff or external service providers.

## Why appoint the Public Trustee?

The Public Trustee has extensive experience in managing complex financial matters and is always impartial and objective when acting in the role of attorney. Our trust managers maintain close contact with organisations such as banks, government departments, financial institutions and other commercial organisations that may impact on your affairs. Our permanence ensures the continuity of our services.

The Public Trustee has a direct reporting relationship to Government, through the Department of the Attorney General, and may be required to explain matters to the Attorney General. The Public Trustee is also subject to the scrutiny of the Ombudsman, who has the power to investigate certain matters and report adverse findings to the Parliament of Western Australia, as well as the Auditor General.

## What fees does the Public Trustee charge?

The standard fee preparing the EPA in the 2021-22 financial year is \$118.

The fee for some concession holders is \$50.

This is in addition to any fees for preparing your Will. Other fees and charges, such as for doing Landgate searches, might also apply.

Three standard annual fees currently may apply if the Public Trustee is acting as your attorney:

- *A personal financial administration fee* based on the amount of contact with the Public Trustee, in what type of accommodation you live, where your main source of income is paid to, and who manages or assists to manage your day to day finances.
- *An asset management fee*, based on the value of your assets, such as cash, bank accounts, share portfolios and superannuation [but not including real estate, retirement village units, relocatable or mobile homes, caravans (permanently located in a caravan park), motor vehicles, household furniture, effects and chattels and personal jewellery].
- *A residence and real property fee*) for each piece of real estate, retirement village unit, relocatable or mobile home or caravan (permanently located in a caravan park). This does not include your principal place of residence or that of your spouse, de facto partner and/or minor child. The Public Trustee will continue to consider a home as your principal place of residence for 12 months after you leave it as long as it isn't rented to a third party.

Other fees and charges may also apply, such as investment, taxation and other legal fees.

The Public Trustee's fees and fee structure may change over time.

### Example 1: Julie's estate

Julie lives in her own house. Apart from furniture and effects, her estate, with a total value of \$850,000, consists of:

- savings account - \$300,000
- superannuation fund - \$100,000
- car - \$20,000
- house in which she lives - \$430,000

Her main source of income is paid to the Public Trustee. The Public Trustee manages her finances on a day to day basis. She typically has contact with the Public Trustee less than once per fortnight.

Fees for the 2021-22 financial year are expected to be:

- the annual Asset Management Fee - \$3,060; and
- the annual Personal Financial Administration Fee - \$9,180.

As Julie is living in her home, the Residence and Real Property Fee is fully remitted.

### **Example 2: Andrew's estate**

Andrew lives in a nursing home. Apart from furniture and effects, his estate, with a total value of \$1,250,000, consists of:

- investment property - \$400,000
- Refundable Accommodation Deposit - \$500,000
- share portfolio - \$250,000
- bank account - \$100,000

His main source of income is paid to the Public Trustee. The Public Trustee manages his finances on a day to day basis. He typically has contact with the Public Trustee less than once per fortnight.

Fees for the 2021-22 financial year are expected to be:

- the annual Asset Management Fee - \$6,732;
- the annual Personal Financial Administration Fee - \$6,120; and
- the annual Residence and Real Property Fee - \$3,060.

As Andrew is required to lodge an income tax return, a fee is also payable, which typically may be \$306, although this can vary.

### **For further information:**

Public Trustee Wills Reception, Ground Floor, 553 Hay Street, Perth

(Open 8:30am – 4:30pm, Mon – Fri)

Telephone 1300 746 116

[www.publictrustee.wa.gov.au](http://www.publictrustee.wa.gov.au)