

## **CAPACITY TO SIGN AN ENDURING POWER OF ATTORNEY**

We are frequently asked by family members to assist in the preparation of Enduring Powers of Attorney for their parents in circumstances where the parent is elderly or even frail and the question of capacity to sign such documents becomes relevant. The *Powers of Attorney Act* prescribes the phrases '*decision making capacity*' and '*impaired decision making capacity*'. The latter concept is defined as: 'the person cannot make decisions in relation to the person's affairs or does not understand the nature or effect of the decision the person makes in relation to the person's affairs'. As the range of functions covered by an Enduring Power of Attorney is very broad, the law has prescribed certain conditions on how an Enduring Power of Attorney should be witnessed, including:

- a) Only one witness to the Power of Attorney can be a relative of the donor; and
- b) The witnesses must sign a certificate stating that the donor signed the Power of Attorney voluntarily in the presence of the witness and that at the time of signing, the donor appeared to the witness to understand the nature and effect of making a Power of Attorney.

This imposes an obligation on the witnesses to make enquiries, usually by reference to the donor's general medical practitioner as to the capacity of the donor to sign the document.

Unfortunately, there are many instances where Enduring Powers of Attorney are challenged in the Courts. The outcome of such challenges may involve the Public Advocate of the ACT being appointed by the Court to take responsibility for financial and guardianship matters.

It is important therefore to discuss the issue of capacity with the donor and the medical practitioners in order to provide the effective transfer of authority under an Enduring Power of Attorney in accordance with the wishes of the donor.

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