



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.