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# ELDER AND SUCCESSION LAW AFTERNOON

**WEDNESDAY 18 MARCH 2026**

ACT LAW SOCIETY



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# Enduring Powers of Attorney

*What attorneys can and cannot do*



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18 March 2026  
ACT Law Society

# Anything an attorney can lawfully do...

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- Section 13 POA Act states that the principal may, by a power of attorney, appoint 1 or more people to do anything for the principal that the principal can lawfully do by an attorney.
- The following words appear in the EPOA prescribed form:
  - “I authorise my attorneys to do, on my behalf, anything that I can lawfully do in relation to the matters specified below...”
- It sounds simple, but what can be lawfully done by an attorney?
- In the interests of time, we’ll be focusing on the financial functions of ACT Enduring Powers of Attorney.

# Sources of law

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- Powers of Attorney Act 2006 (ACT)
  - Or other equivalent legislation in relevant jurisdiction
- EPOA document
  - Prescribed form
  - Terms of the signed document
- Common law & equity
  - Law of Agency
  - Fiduciary obligations
- Caselaw

# Things an attorney cannot do (the Hard Nos)

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- Section 35 – Attorney cannot exercise power in relation to “special personal matters” and “special health care matters”.
- Special personal matters includes:
  - Making or revoking principal’s Will (including codicil)
  - Making or revoking principal’s power of attorney
  - Voting on behalf of principal
  - Consenting to adoption of child of principal or principal’s marriage.

# Things an attorney cannot do – unless expressly authorised

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- Delegation

- S33 – Enduring Power of Attorney does not authorise an attorney to authorise anyone else to exercise the powers of attorney while principal has impaired decision-making capacity, unless:
  - expressly authorised; and
  - delegate could be appointed as attorney and is known to the principal.
- Note: Under a General power of attorney, attorney is authorised to delegate powers regardless of express authorisation.

- Power to benefit attorneys

- S34 – A power of attorney (either general or enduring) does not authorise an attorney to execute an assurance or document, or do anything else, that would result in a benefit being given to the attorney, unless the power of attorney document expressly authorises the giving of a benefit of that kind to the attorney.

- Gifts

- S38 – EPOA does not authorise an attorney to make a gift of all or any of the principal's property to anyone else unless expressly authorised.
- S39 – A general authorisation to make gifts means gift made to a relative or close friend of the principal for a celebration or special event. Examples include:
  - birthday, Easter, marriage, graduation; or
  - a donation of a kind that the principal made when the principal had decision-making capacity or might reasonably be expected to make.
- S39(3)(4) - Value of the gift must be reasonable with regard to principal's financial circumstances and size of estate.

# Things an attorney cannot do – unless expressly authorised

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- Pay reasonable living expenses of others
  - S40 – EPOA may expressly authorise the payment of reasonable living expenses of a named person.
  - S40 – unless expressly authorised, reasonable costs are limited to housing, food, education, transportation and medical care and medication.
  - Amount of reasonable costs must take into account the principal's financial circumstances and size of principal's estate.
- Enter into conflict transactions
  - Attorneys have an obligation to avoid conflict transactions.
  - S42 – An attorney may only enter into a conflict transaction if the POA authorises the specific transaction, conflict transactions of that kind or generally.
  - A conflict transaction is one that results, or may result, in a conflict between the duty of an attorney towards the principal and either the interests of the attorney (or a relative or associate of the attorney) or another duty of the attorney.
  - A transaction is not a conflict only if the attorney deals with an interest, acquires an interest or obtains a loan in relation to property which is jointly owned (either as joint tenants or tenants in common) by the attorney and principal.

# Other considerations

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## Things an attorney may do (but proceed with caution)

- Power to maintain principal's dependants
  - S41 - An attorney is authorised to provide from the principal's estate for the needs of a dependant of the principal.
  - Unless there is a contrary intention in the EPOA, what is provided must be reasonable considering all the circumstances and principal's financial circumstances.

## Other obligations

- S44 - Attorneys must follow General Principles in Schedule 1 of the Act
- S47 – Attorneys must keep accurate records and accounts of all dealings and transactions made under the power.
- S48 – Attorneys must keep attorney's property separate from the principal's property (including money and financial assets).

# Failure to comply with attorney obligations

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## What happens in the case of breach?

- S50 & 50A – Supreme Court and ACAT empowered to order that attorney pays compensation to principal or principal's estate for:
  - a loss caused by the attorney's failure to comply with the Act in the exercise or purported exercise of a power; or
  - account for any profits the attorney has accrued as a result of the attorney's failure to comply with the Act.
- Beware the potential liability of lawyers who have acted in a transaction in breach of the attorney's obligations.
- Equitable remedies for breach of fiduciary obligations may include:
  - Equitable compensation
  - Account for profits
  - Constructive trusts

# Caselaw

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## Council of the Law Society of the ACT v Legal Practitioner 20215 [2002] ACAT 34

- Mr and Mrs Smith sought advice from a legal practitioner about borrowing funds from Mrs Smith's mother.
- The mother made an EPOA appointing Mrs Smith as her attorney and subsequently lost capacity. Mrs Smith, as attorney, sold her mother's property to pay a RAD, after which there was \$400,000 remaining. Mrs Smith initially invested the funds in a term deposit, but then sought advice from the practitioner as to whether Mrs Smith and her husband could borrow \$400,000 from her mother to pay down the principal on their home loan.
- The practitioner provided written advice to Mrs Smith that the loan was permissible, interest should be chargeable at a rate between Mrs Smith's mortgage interest rate and what her mother would earn from the term deposit and that the loan could be secured by a caveat. Practitioner prepared a Deed of Loan.
- After the mother's death, Mrs Smith's sister brought proceedings about the loan that resulted in a significant sum being paid by Mrs Smith to her mother's estate for breach of her fiduciary obligations and legal costs.
- ACAT commented that even a cursory review of the POA Act would or should have made it clear that the proposed loan was legally impermissible because:
  - s34 – Attorney cannot receive a benefit unless authorised;
  - S42(1) – No conflict transactions unless authorised; and
  - S48 – Obligation to keep attorney's property separate.
- ACAT made a finding of unsatisfactory professional conduct on the following grounds:
  1. Practitioner failed to advise Mrs Smith in her capacity as attorney (i.e. the lender) to obtain independent legal advice in relation to the proposed loan. Failed to advise Mrs Smith in her capacity as attorney (i.e. the lender) about the commercial risks and disadvantages of the proposed transaction and preparing a Deed with inadequate provisions.
  2. Failed to advise Mrs Smith that POA Act did not permit transaction.
  3. Practitioner acted for more than one party to the transaction (i.e. Mrs Smith as attorney/lender and Mrs and Mr Smith as borrowers) where their interests were in conflict.

# Caselaw

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## Council of the Law Society of the ACT v Legal Practitioner LP082024 [2025] ACAT 58

- Practitioner prepared Wills and Enduring Powers of Attorney for Mr & Mrs X. Mrs X appointed her sons, N and G as her attorneys, with immediate commencement. No express authorisation to benefit the attorneys.
- A few months later, practitioner asked to act for N in the purchase of a Unit. N told the practitioner the Unit was intended to be his main residence following a separation, and his parents had agreed to assist him with the purchase.
- X Corp Pty Limited was set up, with Mr & Mrs X and N as directors and shareholders. N told the practitioner that he had arranged a loan to consolidate debts for himself and his parents and his parents were assisting N with the deposit on the Unit. N incorrectly told the practitioner that his parents were aware of the loan but were going overseas and therefore loan documents needed to be signed by N under EPOA.
- Loan Agreement for \$250,000 by which X Corp Pty Limited borrowed from a third party family trust, secured by mortgage over Mr & Mrs X's home and with personal guarantees given by N and Mr & Mrs X. N signed all documents on behalf of Mr & Mrs X as their attorneys. Practitioner witnessed N's signature on all documents and signed Acknowledgement of Legal Advice to Guarantor. The practitioner never met with Mr & Mrs X or sought their instructions regarding the Loan and guarantee documents.
- N advanced funds from Company to himself. Company did not repay the loan and in December 2022, Mrs X received a demand for \$174,173.
- Practitioner admitted that he had been unaware of section 34 and 42 of the POA Act and mistakenly understood that N (acting as attorney) was entitled to do anything that Mr and Mrs X were able to do by a Power of Attorney.
- Finding of unsatisfactory professional conduct on the following grounds:
  - Failed to advise N in his capacity as attorney that he could not execute loan documents for Mr & Mrs X in light of ss34 & 42 of the POA Act (cannot receive a benefit and cannot enter into conflict transactions).
  - Failed to act in the best interests of his clients, Mr & Mrs X by not speaking with them to confirm instructions and by signing guarantee acknowledgements that he had advised and sought confirmation from Mr & Mrs X.
  - Failed to avoid conflict of interest between duties owed to two or more clients where he acted for guarantors and the borrower (company).

# Practice tips – yellow flags when acting for attorneys

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- Be cautious if:
  - The attorney is acting on both sides of a transaction, in their capacity as attorney and personally (e.g. loans or buying property from the principal).
  - The attorney receives any form of financial benefit as a result of the transaction (even if it might also be beneficial to the principal).
  - Ensure all payments/sale proceeds are paid to an account in the principal's name, not the attorney's name.
- Be clear about who your client is and in which capacity.
  - Are you acting for principal (via instructions from their attorney) or are you acting for the attorney in their personal capacity?
  - Don't act for both.
- S71 provides protection to attorneys who act in accordance with an order or direction by the Court or ACAT about the exercise of a power.
  - Consider an application to ACAT if circumstances warrant.
  - E.g. if house needs to be sold to pay for principal's aged care, but dependant requires financial support for housing.
- If unsure, seek advice and guidance:
  - Experienced colleague
  - Law Society Ethics Advice
  - Lawcover /Professional indemnity insurer

# Practice tips – drafting EPOAs

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- **Delegation**
  - Need to take specific instructions as it is an option required in the prescribed form. Particularly consider delegation if there are no substitute attorneys, if attorney lives overseas or is expected to be uncontactable for periods of time.
- **Gifts**
  - Does the principal regularly support charities or have a practice of regularly giving to relatives for special events that they wish to continue?
- **Authorisation to receive benefits**
  - Particularly consider between spouses, especially if assets held in one spouse's name for asset protection or tax purposes.
  - Can unlimited benefits be given or is it limited as to value, particular asset or purpose?
- **Reasonable living expenses of named persons**
  - Is anyone living with and caring for the principal? E.g. spouse or adult child.
  - Consider whether a right to reside is needed for partner or other dependent family members to remain in the home if the principal enters residential aged care?
  - Are there any young children or not-yet-independent children (such as uni students) with ongoing expenses?
  - Does the principal provide support to disabled or vulnerable family members?
- **Conflict transactions**
  - Consider whether the principal and attorney have any shared assets and whether express authorisation should be provided to ensure no complications.
  - E.g. interest in a business or investment property together, common interest in a family trust, SMSF or loans.
  - Is an express power to make or renew Binding Death Benefit Nominations required?



Questions?



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