



Estate Planning and Powers of Attorney

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Any Estate Plan should cover Power's of Attorney. A Power of Attorney is a legal document made by one person, who is called the 'Principal' that allows another person (the attorney under power) to act on behalf of the Principal's financial assets including, bank accounts, shares and real estate. This can include spending and managing the Principal's assets, buying or selling shares for the Principal or buying, selling, leasing or mortgaging the Principal's house or other real estate. A Principal is sometimes called the 'Donor' and an Attorney is sometimes called 'the Donee'.

The word 'Attorney', when used in the expression 'Power of Attorney', does not mean that the person appointed has to be a solicitor. The person appointed as Attorney can be any person over the age of 18 years who is able to assist the principal with money or property can be a relative, friend or professional adviser.

A power of attorney only authorizes an Attorney to act in relation to financial matters. It does not allow the Attorney to make personal including medical decisions for the Principal. Anyone who wants another person to make personal medical decisions on their behalf should appoint an Enduring Guardian.

What follows is an overview of Powers of Attorney

Types of Power of Attorney

Depending upon the law prevailing in a particular state or territory, there are generally three types of Power of Attorney:

- 1) General Power of Attorney
- 2) Enduring Power of Attorney (financial)
- 3) Enduring Power of Guardianship

Not all Australian Jurisdictions make provision for the preparation of all types of Enduring Powers of Attorney. The relevant law for each jurisdiction should therefore be referred to. The legal requirements for the preparation of a Power of Attorney are embodied in Statute. Each state and territory of Australia has its own Acts of parliament that regulate the preparation of a Power of Attorney. As such, the requirements vary considerably from one jurisdiction to another.

However, the two main types of Powers of Attorney in NSW are:

- 1) General Power of Attorney (also called an Ordinary Power of Attorney); and
- 2) Enduring Power of Attorney.

The same form can be used to create both. The *Powers of Attorney Act 2003*, which commenced on 16 February 2004, makes changes to the law governing Powers of Attorney in New South Wales, especially Enduring Powers of Attorney.



General (or Ordinary) Power of Attorney

A General (or ordinary) Power of Attorney will terminate if the Principal loses mental capacity.

It can be useful for a short term appointment, for example if the Principal is going overseas for a short period. To make General Power of Attorney the, Principal's signature need only be witnessed by, a person over the age of 18 (other than the, attorney being appointed).

Enduring Power of Attorney

An Enduring Power of Attorney is one which continues to operate after the Principal has lost mental capacity. An Enduring Power of Attorney can be made on the same form as a General Power of Attorney.

However, an Enduring Power of Attorney has some additional requirements.

- It must say that the Principal wants it to continue after they have lost mental capacity. The Attorney has to sign the form to show that they consent to act. This can occur at the same time as the Principal signs or at a later time. However, the Enduring Power of Attorney will not begin to operate until the Attorney has signed. This is not required for a General Power of Attorney.
- The Principal's signature must be witnessed by a special witness called a 'Prescribed Witness'.
- The Prescribed Witness must sign a certificate on the form stating that they explained the Enduring Power of Attorney to the Principal and that the Principal appeared to understand it.

A 'Prescribed Witness' is:

- A solicitor, barrister, Registrar of a Local Court or
- A licensed conveyancer, employee of the Public Trustee or employee of a trustee company who has completed an approved course of study.

Enduring Power of Attorney (Financial)

The distinguishing feature between a General Power of Attorney and an Enduring Power of Attorney is that the authority given by the Donor to the Attorney pursuant to an Enduring Power of Attorney continues beyond the Donor's own incapacity. This would allow the Attorney to continue acting notwithstanding that the Donor has lost his/her Mental Capacity. An Enduring Power of Attorney is an essential document, particularly for older people who are finding it increasingly difficult to attend to their personal affairs.

When should a Client make a Power of Attorney?

A Power of Attorney can help if a client cannot look after their finances for themselves. For example, if the Client becomes ill, are confined to hospital, go overseas, or become unable to go to banks, government offices or real estate agencies, then may need someone else. By appointing an Attorney, there will be someone who is legally authorized to do transactions when the need arises. It is possible that a bank might simply accept a letter of authority from the client, but Bank's practices needed to be checked. If a letter of authority is not sufficient then a Power of Attorney will be necessary. If a Client wants someone else to be able to execute documents on your behalf buying, selling or dealing with real estate, then



a Power of Attorney is essential.

Should a Client make an Enduring Power of Attorney?

An Enduring Power of Attorney can be useful because a Client may become unable to look after their financial affairs at some stage in the future. This could be due to physical problems, loss of mental capacity or something unforeseen such as an accident. Making an Enduring Power of Attorney is a cheap, easy and practical step to prepare for the future. Once a Client has lost their mental capacity to understand what they are doing, it is not possible to make a Power of Attorney.

By making an Enduring Power of Attorney, another person can quickly and easily look after a Client's financial affairs if a Client is unable to do so. Another advantage of making an Enduring Power of Attorney is that a Client can choose the person who they want as their Attorney.

Also an Attorney can make special directions in their Power of Attorney document about what they want their Attorney to be able to do or impose limits on what can be done. Making someone an Attorney does not mean that a Client loses their right to operate their bank account, deal with their real estate or affect any other rights that they have. A Client can continue to look after their money and property while they still have mental capacity to do so.

When should a Client make a Power of Attorney?

It is important to make a Power of Attorney before it is needed. This is particularly true for Enduring Power of Attorney. Once a Client has

lost their mental capacity, a Client cannot make a power of attorney because for a Power of Attorney to be effective, they must be able to fully understand what they are executing.

A Power of Attorney usually starts as soon as it is executed and given to the attorney. If, however, a Client does not want their attorney to start using the Power of Attorney straight away, they can state on the Power of Attorney form when they wish it to start.

If this is done, then making a power of attorney early does not mean that a Client is handing over control to their Attorney straight away.

Who can be appointed as an Attorney?

Any person over the age of 18 can act as your Attorney. It can be a close family member or a friend who is trusted. A Client should ask the person they want as their Attorney to agree to be their Attorney.

If a Client does not wish to appoint a relative or friend, they can appoint the Public Trustee, a Trustee Company or a professional such as a solicitor or accountant, but they will be entitled to charge a fee for acting as the Client's Attorney.

If a Client appoints more than one Attorney they need to indicate on the form whether they want their Attorneys to act jointly (that is, only when they all agree, in which case they all must sign any document) or jointly and severally (that is, any one Attorney will be able to act independently of the others).

Prescribed Form

The Powers of Attorney Act 2003 introduced a new prescribed



form for Powers of Attorney. It can be used to make either General Power of Attorney or an Enduring Power of Attorney.

The form contains information for both Principals and Attorneys, particularly about the duties of an Attorney. Also, by requiring the Principal to make choices about such things as when the Power of Attorney is to start operating and what Powers the Attorney is to have, the form helps to clarify the authority being given to the Attorney.

The old prescribed form cannot be used to create a Power of Attorney after the commencement of the *Powers of Attorney Act 2003* on 16 February 2004. However, Powers of Attorney on the old form dated before that date remain valid and may be registered.

What can the attorney do?

With some exceptions, and depending on what limits are imposed, an Attorney can do all the things that a Client can do with the Client's money and assets. For example, an Attorney can sell, lease or mortgage a house, sell personal belongings, take money out of bank accounts and sell shares. The prescribed form allows a Client to impose limits or conditions on the Attorney's authority. However an Attorney cannot carry out a Principals duties as Trustee for someone else.

Attorney's authority to use Principal's money for gifts

One area that has caused confusion was whether an Attorney could utilise the principal's money to give gifts. The *Powers of Attorney Act 2003* aims to clarify this issue. An Attorney cannot make any gift of the Principal's money or property unless the Power of Attorney specifically

expresses and gives the Attorney authority to do so.

The prescribed form contains a clause (Clause 5) authorizing an Attorney to give reasonable gifts. If that clause is not crossed out, the Attorney will be able to use the Principal's money to make only certain types of gifts. Allowable gifts are gifts to a relative or close friend of the Principal of a seasonal nature (for example, birthday, Christmas or other religious occasion) or because of a special event for example, birth or marriage. Also permitted are donations of the kind that the Principal made or might reasonably be expected to make for example, to a favourite charity. However, the value of the gift or donation must be reasonable having regard to the Principal's financial circumstances and the size of the Principal's estate.

If a Client does not want an Attorney to have the power to make such gifts, the Client should cross out Clause 5 on the form. Attorney's authority to use the Principal's money for their own benefit or the benefit of others as with gifts, an Attorney cannot use the Principal's money for the Attorney's benefit, or the benefit of any other person, unless the Power of Attorney form specifically allows the Attorney to do so. There are clauses in the form (Clauses 6 and 7) which, if not crossed out, will allow an Attorney to use the Principal's money for housing, food, education, transportation and medical care for the Attorney or a person nominated in the Power of Attorney for example, the Principal's children. Again, the amount of the benefit must be reasonable having regard to the principal's financial circumstances and the size of



the Principal's estate. If a Client does not want your Attorney to have these powers they should cross out the relevant clause on the form.

The Attorney's obligations

An Attorney is under a duty to act in the best interests of the Principal, except as specifically authorized in the Power of Attorney document for example, if clauses 5, 6 or 7 on the prescribed form are not crossed out.

An attorney must:

- Keep the Attorney's money and assets separate from the Principal's money and assets unless they are joint owners or operate joint bank accounts.
- Keep proper accounts and records of how the Attorney handles the Principal's money and assets. The Public Trustee, or anyone interested in the Principal's welfare, can require the Attorney to produce these accounts and records.

If the Attorney does not carry out the obligations properly, they may have to compensate the donor. It is also possible that a transaction by the Attorney may be cancelled, or that the Power of Attorney will be terminated or the Attorney replaced.

Except where the Power of Attorney document says otherwise, the Attorney cannot be paid for his or her work as attorney, although they can claim any out-of-pocket expenses directly connected with carrying out the Power of Attorney duties. The Attorney should keep receipts to prove these costs. If a solicitor, the Public Trustee or a Trustee Company is appointed as Attorney, the Power of Attorney document will usually contain a

clause allowing them to charge a fee for acting.

Revoking a Power of Attorney

A Power of Attorney can be revoked (that is, cancelled) at any time as long as the Principal still has mental capacity. There is no set or prescribed form for revoking a Power of Attorney; a letter will do.

Whether a form or just a letter is used a copy to the Attorney should be given to ensure that they know that the Power of Attorney has been revoked. There is no obligation to register the revocation, but if the Power of Attorney has been registered it is advisable to register the revocation. A Client should also inform the bank and anyone else who might be expected to act on the faith of the Power of Attorney, that it has been revoked.

What about medical decisions?

In NSW, a Power of Attorney only authorizes an Attorney to act in connection with financial matters such as bank accounts, shares or property. It cannot be used to make medical or lifestyle decisions. If it is desired to have someone make medical, treatment and other personal or lifestyle decisions for a Client, an Enduring Guardian should be appointed. There is a separate form for appointment of an Enduring Guardian.

Disputes and Powers of Attorney

If there is a dispute involving a Power of Attorney and the people involved cannot settle it, they may have to go to either the Guardianship Tribunal or the Supreme Court. Under the *Powers of Attorney Act 2003* both the Supreme Court and the Guardianship Tribunal have the power to review Enduring Powers of Attorney. The Guardianship Tribunal may



in certain circumstances provide a faster and cheaper alternative to the Supreme Court for resolving disputes.

The Supreme Court retains the sole right to review certain types of Ordinary Powers of Attorney. Anyone seeking to review a Power of Attorney or challenge an Attorney's authority should seek legal advice.

Registering a Power of Attorney

A Power of Attorney should be registered if an attorney if your attorney is going to sell, mortgage, lease or otherwise deal with your real estate. Otherwise, it is not necessary to register it. However, by registering power of attorney it will be:

- On record as a public document,
- Safe from loss or destruction, and
- More easily accepted as evidence that the attorney is allowed to deal with money and assets on behalf of a Client.

Powers of attorney are registered at the Sydney office of the Department of Lands. Anyone can lodge for registration a Power of Attorney. You cannot post or fax it. The original Power of Attorney and a photocopy of it should be taken to Department of Lands Land and Property Information Division Sydney office. A Client will also need to pay the current registration fee. At the Department of Lands, the staff will stamp a number on the original Power of Attorney and return it to you. This number is evidence that the Power of Attorney has been registered. The Attorney should use this number when they sign a document on your behalf. The Power of Attorney will be

digitally scanned and placed on public record, for anyone to see.

Stamp duty

In NSW, it is not necessary to pay stamp duty on General or Enduring Powers of Attorney.

General Power of Attorney and Other Jurisdictions

As a general rule, it is possible to use a General Power of Attorney in NSW even if it was made interstate or overseas. The Power of Attorney must, however, have certain basic features.

It must:

- Be in English, or translated into English by a qualified translator,
- Show the date that it was made, the name of the principal and the name of the attorney,
- Have a statement that gives the attorney the power to act for the principal,
- Be signed by the principal, and
- Be witnessed by any adult person.

Enduring Powers of Attorney and Other Jurisdictions

Each state and territory of Australia has different requirements for making Enduring Powers of Attorney. Previously, if a person made an Enduring Power of Attorney in another state, it could not be used in NSW if it did not comply with NSW requirements. Under the *Powers of Attorney Act 2003*, enduring powers of attorney made in another state or territory of Australia will be recognized as valid in NSW.

However, in order to be registered in NSW an interstate Enduring power of Attorney must be accompanied by a certificate



from a solicitor from the state or territory where it was made stipulating that it was made in accordance with the laws of that state or territory.

Can a NSW Power of Attorney be used outside NSW?

If a Client wants to use a NSW Power of Attorney outside NSW, the Client should check what the requirements are in the place when they want to use it. This applies to both ordinary and Enduring Powers of Attorney. Some Australian states and foreign countries

have different requirements. The Client should also check whether they have such a thing as an Enduring Power of Attorney and what their requirements are for making and registering one.

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