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WILLPOWER PLUS

Powers of Attorney

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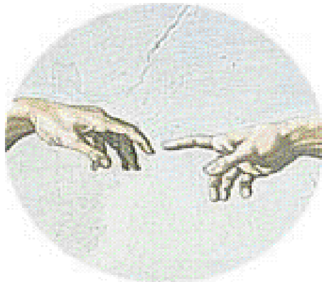
Powers of Attorney



(1) What is a Power of Attorney?

A Power of Attorney is a document whereby one person (called "the principal") authorises another ("the attorney") to make decisions about legal and financial issues (which are often called "affairs") for the principal.

(2) Why make a Power of Attorney?

There is always a risk that a person may become unable to manage his or her own affairs. For that reason it is prudent for a person to make a Power of Attorney authorising an attorney to manage the person's affairs if the person loses capacity.

A Power of Attorney is also useful whenever a principal may need another person to make legal and financial decisions for the principal. For instance, overseas travel was once the main reason a person made a Power of Attorney.

(3) Who should be appointed as the Attorney?

An attorney may need to act when the principal is incapacitated. As a result it is important to trust both the attorney's personality (i.e. that he/she is trustworthy, diligent and responsible) and judgment (i.e. that he/she is wise, prudent, just and decisive), and sometimes experience (such as financial acumen).

The attorney will often have many responsibilities (called "duties"). (Some of these are set out in this InfoSheet.) It is important that the attorney be competent to perform those duties.

(4) How many people should be appointed as an Attorney?

If one person has the judgement and personality to be an attorney, should more than one person be appointed as the attorney? There may be problems if more than one person is appointed at any one time. For instance, if two persons are appointed, must they act concurrently or may they act independently?

If they act concurrently, unless there is agreement, no decision will be made. Also if one of the joint attorneys is unable to act (such as through death, bankruptcy or incapacity) the remaining attorney cannot act unless the Power of Attorney expressly allows this. If the attorneys can act independently then one of the attorneys may undo something that the other attorney has done – in other words, there may be inconsistent decisions.

An alternative is for only one attorney to act while that person is able and willing to do so, but have a "backup" if the first choice is unable or unwilling to act.

An attorney is a fiduciary like an executor. So the comments in the newsletter *How many executors does it take to change a light bulb?* are relevant to this issue.

(5) When should a Power of Attorney be made?

As the Power of Attorney must be made before the person looses capacity, like a Will and Enduring Guardian Appointment, it is an important document to prepare in advance of that possible event.

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(6) What type of Power of Attorney is most suitable?

As expected of a document designed to be flexible enough to cater for different circumstances, there are different types of Powers of Attorney. For many, the best combination will be a revocable, enduring Power. Whether the attorney should be given limited or unlimited power will depend on the circumstances. (See also 14 and 15 below.)

(7) When will the Power of Attorney commence to operate?

The Power of Attorney states when it will operate. For an Enduring Power of Attorney, the standard options are:

- when the attorney accepts the appointment
- when the attorney considers that the principal needs assistance to manage his/her affairs (or a variation of this)
- When a medical practitioner certifies that the principal needs such assistance
- a specified date or event (such as being overseas).

(8) What are an Attorney's responsibilities?

An attorney's responsibilities will vary depending on the type and terms of the Power of Attorney, but, unless excused from doing so, the attorney must:

- follow the principal's instructions
- act with due care and skill
- keep accurate records of the principal's money and other assets with which the attorney deals
- act without payment (unless payment is authorised, which is usual if the attorney practises a profession). *For more information see the article "When is a professional executor and fiduciary entitled to remuneration? (Not as often as you think!)" or if you prefer a slightly less legalistic version: "A fiduciary's entitlement to payout")*
- keep the principal's assets separate from the attorney's

Unless it is an irrevocable Power of Attorney, the attorney must always act in the principal's best interest.

(9) Must the Attorney consent to the appointment?

Yes. The person appointed as the attorney is not compelled to act as attorney – the attorney must agree to do so. With an Enduring Power of Attorney the attorney must *sign* the Power indicating his or her acceptance, before the Power can operate.

To avoid problems with the appointment, it is preferable for the attorney to accept the position at about the time the principal makes the Power of Attorney.

(10) Can the Attorney benefit from the appointment?

No, unless the Power of Attorney expressly authorises the Attorney to benefit. In many instances it will be important to allow the attorney to benefit. An example is where the attorney is the principal's life partner and they have mixed assets. There are other similar examples.

(11) Can the Attorney give away the principal's assets?

No, unless that power is expressly included in the Power of Attorney.

(12) Can the Attorney's actions affect gifts in the principal's will?

Yes. There is some protection for some beneficiaries, but the best arrangement is to ensure that the attorney knows about the gifts and avoids acting in a way which is inconsistent with the will. *For more information see article: "Ademption exemptions had gone to far"*

(13) Can the attorney delegate?

No, unless this is expressly authorised in the Power of Attorney. Sometimes this is advisable.

(14) Are there limits on the attorney's power?

Yes. The Power of Attorney can limit the attorney's authority. If it is an unlimited Power, an attorney can generally act in relation to the principal's affairs in the same way that the principal can act. However, this does not allow the attorney to make decisions requiring the personal skill or discretion of the principal (such as swearing an Affidavit, making a Will, acting as trustee, revoking a Power of Attorney, acting as director and the like.)

(15) Can the attorney be given directions?

Yes. The attorney can be given either an authority to act (which means that the attorney can decide not to act) or a direction to act (which compels the attorney to do the thing directed). Care must be taken in choosing between these options. They most commonly arise in relation to issues such as:

- superannuation death benefits
- conducting a business
- dealing with specific property, like a home
- paying debts
- caring for pets

as well as those issues mentioned at (10) to (13) above.

(16) How should an Attorney sign on behalf of the principal?

There is no set formula for how an attorney should sign a document on behalf of the maker of the Power of Attorney. Each of the following may be used:

- "A as attorney for P"
- "P by his/her attorney A"

If the Power of Attorney has been registered, reference should be made to the registration; for instance, by adding "pursuant to Power of Attorney Book 0001 No. 1".

(17) Can an attorney be personally liable?

Yes. An attorney can be personally liable if the attorney acts fraudulently, negligently or contrary to the principal's instructions. The attorney may also be liable in other circumstances, such as if the attorney's personal interests conflict with the principal's interests, and this results in the principal suffering loss. Or the attorney does not act in the principal's best interests or mingles the principals property with his/her own.

(18) How is the Power of Attorney revoked?

The Power of Attorney is revoked in many circumstances. These can include:

- if it is a general power of attorney, when the principal loses mental capacity
- upon the mental incapacity of an attorney
- upon the death of the principal (unless it is an irrevocable power of attorney)
- upon the death of an attorney (but not if another attorney can act independently of the deceased's attorney or where an alternate attorney has been appointed)

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- by an order of the Supreme Court or Guardianship Division of NCAT
- upon the bankruptcy of an attorney
- if an attorney resigns (renounces the power)
- upon a mentally capable principal deciding to revoke the power of attorney (unless it is an irrevocable Power of Attorney). Strictly, this decision need not be recorded in writing or even uttered in words – it may be implied from the principal's actions. However, it is prudent to record the revocation in writing, collect the original Power of Attorney that is being revoked, write the words "Revoked" on the original and sign and date it. This is important as the making of a later Power of Attorney does not revoke an earlier Power of Attorney: two or more Powers of Attorney exist at any one time, each of which may be perfectly valid and effective. This is usually undesirable. The attorney appointed under the revoked Power of Attorney must be notified of the revocation.

(19) What role does a lawyer play in preparing a Power of Attorney?

Because of the issues raised above (eg when will the power operate? (ie 7), can the attorney benefit from the appointment? (ie 10), can the attorney give away the principal's assets? (ie 11), can the attorney's actions affect gifts in the principal's will? (ie 12), can the attorney delegate? (ie 13)) as well as other relevant issues (for instance with redemption of superannuation to avoid a "death tax" or remaking lapsing binding death nominations) and the general importance of giving another person authority over one's legal and financial affairs, great care should be taken in preparing a Power of Attorney. This requires good professional advice from a legal practitioner who is knowledgeable about this area of law.

Also, with an Enduring Power of Attorney (see 6 above), a certificate of explanation is required from a prescribed person (who is mostly a legal practitioner) to make the document legally effective.

(20) Who makes decisions about legal and financial affairs if there is no Power of Attorney?

No-one, unless the Guardianship Division or Supreme Court appoints a financial manager. *Additional information about that process is available at the Guardianship Division's website, www.ncat.nsw.gov.au*

WARNING!

It is important to be aware that:

- depending on the powers given to the attorney, the attorney may be able to assume complete authority over the principal's financial and legal affairs, and therefore do almost anything with the principal's assets which the principal could have done; and
- if an enduring power of attorney is chosen, the attorney's authority will continue after the principal has become mentally incapable. This means that, whilst the principal lacks mental capacity to revoke the Power of Attorney, the Power of Attorney will be irrevocable without an order of the Court or Guardianship Division of NCAT.

However the Supreme Court may remove or monitor an attorney. In some cases it can re-write the Power of Attorney. Also the Guardianship Division may suspend or revoke the operation of a Power of Attorney.

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