

POWERS OF ATTORNEY

What is a Power of Attorney?

A Power of Attorney is a legal document in which one person (the principal) gives to another person (the attorney) the right and authority to act on behalf of the principal in relation to their property and financial affairs. There are some things that an attorney cannot do for the principal such as: making a will; swearing an Affidavit on their behalf; or acting in their place as trustee of a trust.

The power can be either:

- a general power to act on the principal's behalf; or
- a specific power to act in relation to a particular transaction or to operate for a particular period of time.

A person who wishes to appoint an attorney must be capable of understanding the nature and effect of the document that he or she is signing. Where a power of attorney has been signed by someone who did not have the required mental capacity at the time it was signed the power of attorney is void and of no effect.

There are two types of powers of attorney. An **ordinary** power of attorney will cease to have effect if the principal loses mental capacity after the power of attorney was signed. However, an **enduring** power of attorney will continue to have effect even if the principal suffers a loss of mental capacity. In order for the power of attorney to be an enduring power of attorney the signature of the principal must be witnessed by a Solicitor, Barrister or Clerk of the Local Court.

Where a person loses capacity (for example as a result of dementia, a stroke or a car accident) and they do not have an enduring power of attorney, it may be necessary for the next-of-kin to obtain a financial management order from the Guardianship Tribunal. This can be a stressful and time consuming exercise.

Under changes to the law which came into effect on 16 February 2004, the principal must specify whether the power of attorney commences:

- immediately;
- when the attorney accepts the appointment;
- on and from a specified date up to and including a specified date; or
- when the principal needs assistance in managing their affairs.

Another important change in the law is that the principal must indicate whether or not the attorney is to have the power to use the principal's assets:

- for the attorney's benefit;
- for the benefit of nominated third parties; or
- to give reasonable gifts.

Duties of the Attorney

An attorney acting under a power of attorney is basically acting as an agent of the principal and as such owes certain duties to the principal. These duties include:

- not exceeding the authority conferred by the power of attorney;
- acting in good faith;
- avoiding any conflict of interest; and
- keeping the principal's affairs confidential.

When an attorney executes a document on behalf of the principal, the attorney should sign using the following words:

[Principal's name] by his or her attorney [attorney's name] pursuant to power of attorney
[registered book number]

Registration of a Power of Attorney

If a power of attorney will be used for any dealing in real estate, it must be registered with the Land and Property Information Service. In addition, some banks and financial institutions require registration before accepting the power of attorney. Registration can be done at any time after the power of attorney is signed.

Cancelling a Power of Attorney

Generally speaking, a power of attorney may be cancelled at any time by the principal giving written notice to the attorney. The power will also cease if either the principal or the attorney becomes bankrupt or dies.

Important note: This information sheet is not intended to be comprehensive and professional advice should be obtained before taking any course of action.