

InfoSheet: Powers of Attorney

A Power of Attorney is a legal document allowing you to appoint and authorise someone to lawfully deal with your money, bank accounts and all of your assets.

It is a fundamental document when a person cannot look after his or her money and property and requires someone else to do these things on their behalf (e.g. when a person is travelling overseas or is physically or mentally unfit to deal with their financial and property affairs).

Sally and Hugh were settled in their family life together. Hugh was on a good income ... Sally was expecting their first child. Their mortgage appeared daunting, but they were confident they could manage. When Hugh had a car accident his specialists could not agree when he would come out of his coma. Sally decided to downsize to a house with lower repayments. Sally is thankful their lawyers had recommended Powers of Attorney which enabled her to carry out all the sale and purchase transactions without an expensive court order, delay or dispute.

Enduring Power of Attorney

An Enduring Power of Attorney continues to have effect even if you lose mental capacity and is essential if you become incapacitated (e.g. due to a serious accident, stroke or dementia).

When you make a Power of Attorney you must sign it in the presence of your lawyer who is required by law to certify that you have capacity and fully understand the effect of the document.

It is too late to make a Power of Attorney once you lose mental capacity (e.g. if you are diagnosed with dementia or become severely affected by an accident). What the future holds is unpredictable and therefore planning in advance is vital.

If you lose mental capacity without having made a Power of Attorney your family/friend may need to go to the Supreme Court or the Guardianship Tribunal to be appointed to manage your affairs or your assets may be managed by a government department. These options are more costly, time consuming and can be stressful for your family and friends.

Jean's husband Bob is incapacitated and cared for in an aged care facility. Bob received an inheritance under an estate which required him to sign legal documents. Jean had to apply to the Court for guardianship over Bob's financial affairs to enable her to sign those documents. This was expensive and time-consuming and could have been avoided if Bob had made a Power of Attorney when he still had capacity.

Appointing more than one attorney

You can appoint more than one attorney and authorise them to sign documents:

- jointly – all attorneys must sign
- jointly and severally – any one of your attorneys can sign with or without the other/s

The best person to appoint as your attorney is someone you trust

Because your attorney has your full authority to deal with your money and assets you must only appoint someone you trust (a family member, friend or professional advisor). Your attorney must also be someone with the ability to deal competently with your finances and property.

Attorney's duties

Your attorney must:

- obey your instructions
- make decisions and act in your best interests
- keep your money separate from other money, in particular his/her own money
- not give unauthorised gifts or donations
- keep a complete and accurate record of all transactions done on your behalf
- not make a profit from you and avoid transactions that create a conflict between his or her own interests and your interests.

Your attorney can only take a personal benefit, or give a benefit to another person, if you have specifically authorised this in your Power of Attorney.

Can my attorney sign as a director of my company?

No. If you are a director of a company, your attorney does not have the authority to sign in your place as director or secretary. A company must appoint its own attorney to sign company documents.

Cancelling a Power of Attorney

An Enduring Power of Attorney continues until:

- you cancel (revoke) it – this must be done by way of a legal document
- your death
- the attorney no longer wants to act
- the attorney becomes bankrupt or loses mental capacity.

You must revoke the Power of Attorney if you lose trust in your attorney.

What can you do if you don't have a Power of Attorney

If you require financial management over a person's affairs and that person does not have the capacity to appoint an attorney, the Guardianship Tribunal or the Supreme Court of NSW may grant financial guardianship to a family member. This can be a very slow and relatively expensive procedure and there is no guarantee that the application will be successful.

Registering your Power of Attorney

It is not necessary to register your Power of Attorney unless your attorney needs to sign documents to deal with real estate. A Power of Attorney can be registered with the Department of Lands for this reason at any time.

Contact Kells the Lawyers Estate Planning Team

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