

Enduring Power of Attorney

Introduction

It is no light matter to hand over complete control of your financial affairs to someone who's exercise of that power you will be incapable of understanding and therefore reviewing at the very time when you are most dependent on them.

As such there are only a small hand full of professions that can witness an Enduring Power of Attorney, all of which are either legal professionals, or qualified by special training, *and* the witness is required to certify that they explained and you appeared understand the effect of the Power of Attorney document.

Properly witnessing an Enduring Power of Attorney will entail the following:

1. Confirm the person giving the power's identity from their driver's licence or other such identifying document;
2. Check that they understand the nature, significance, and effect of an Enduring Power of Attorney;
3. Answer any questions and explain anything that needs to be explained;
4. Confirm that the "7 elements" necessary to validly grant an enduring power of attorney are met; and
5. Walk them through the document, and confirm their understanding, prior to signing.

This will need to be done privately with the person giving the power, (i.e. separately from the person receiving the power or any other person potentially capable of exerting any undue influence).

The formal requirements must be observed in order to validly grant the power, and duly discharge the responsibility entrusted to the witness.

The main purpose of the process will be to ensure proper understanding of the nature, significance, and effect of the document as drafted, prior to signing.

Lastly, it is worth noting, the more fully the person giving the power understands what they are doing, (and the more fully considered the decisions effected by the granting of the power of attorney), the more likely the transition to management under the power will be smoother, easier to accept, and less frightening, for the person who is losing the ability to manage their own affairs.

The Powers of Attorney Act

Whilst an attorney may still be appointed at common law, powers of attorney are commonly given under the *Powers of Attorney Act 2003* (NSW).

Under that act:

1. Subject to the limitations in the act, attorneys are able to deal with property and assets, and enter into financial transactions and agreements on behalf of the person who appointed them.

2. Conditions or limitations can be placed on the attorney's power by specifying those conditions or limitations in the power of attorney document.
3. Powers can be extended (as well as restricted) by specifically stating so in the power of attorney document.
4. Unless the power of attorney document establishes that the power is an enduring power of attorney, the authority of an attorney is limited to acts that are within the appointer's capacity to understand at the time the act is done. In other words, the attorney is, at law, an *identical copy* of the person who appointed them at all times, and accordingly subject to any limitations in capacity that the person who appointed them suffers at any particular time.
5. If the power of attorney document establishes that the power is an enduring power of attorney, the power of attorney continues to operate even when the person who appointed the attorney does not have the ability to understand what the attorney is doing. In other words, the attorney is, at law, a *complete substitute* for the person who appointed them at all times, and accordingly is only subject to any limitations in capacity that *the attorney* suffers at any particular time.

For more information see the *Powers of Attorney Act 2003 (NSW)* or the **enclosed** summary of the Powers of Attorney Act "Powers of Attorney".

The 7 Elements

The "7 elements" that must be understood in order to validly grant an enduring power of attorney are:

1. How to "set the boundaries" of the power granted;
2. When the power begins;
3. The extent of the power;
4. The authority given;
5. When the power can and cannot be cancelled;
6. The nature and meaning of an *enduring* Power of Attorney; and
7. The limits to overseeing the exercise of the power.

Further explanation of the above elements is provided below.

1. How to “set the boundaries” of the power granted

You have the ability to specify:

1. what your attorney(s) **can** and **can’t** do;
2. **how** they must do anything they are empowered to do; and
3. any **conditions** that must be met (either before a power is granted or in the exercise of a power);

by stating so in the power of attorney document, a separate document, or orally, at any time that you have sufficient capacity to do so.

For reasons of evidence and to avoid any question of incapacity, it is advisable to give those instructions in writing at the same time that the Power of Attorney is created.

2. When the power begins

The power will **not** be operational unless and until it is **accepted** by the relevant attorney(s), and if jointly appointed, **all attorneys**, by signing the power of attorney document.

You can direct your lawyer, or any other person, not to provide a copy of the power to your attorney(s) until such time or event as is specified by you.

You can also specify **when** the power **will** and **will not** be operational, including such things as:

1. only if you lose mental capacity;
2. only on your request or if you lose mental capacity;
3. only for a certain period or period(s); or
4. only upon the occurrence of some other event (such as the inability or unwillingness of another person to act as your Attorney);

by stating so in the power of attorney document, a separate document, or orally, at any time that you have sufficient capacity to do so.

3. The extent of the power

Unless you **state** otherwise (esp. in the power of attorney document), your attorney(s) will be able to do **anything** with your **property** that you could have done.

4. The authority given

Without checking with you or having to tell you or any other person before or after acting, unless you **state** otherwise (esp. in the power of attorney document), your attorney(s) will be able to:

1. Withdraw money from your bank account(s);
2. Draw cheques on your bank account(s);
3. Use your credit card;

4. Take out a loan in your name;
5. Lend your money to others;
6. Enter into a lease or any other agreement (such as for the ongoing payment of nursing home fees) in your name;
7. Pay your bills or other debts (including such amounts that you would have otherwise disputed);
8. Commence, defend, or settle court proceedings in your name;
9. Cash cheques made out to you;
10. Sell your property (including personal goods, real estate, and shares);
11. Purchase other property (including personal goods, real estate, and shares);
12. Do any other thing or take any other actions with any of your property that you would have been able to do, but not, unless you **state** otherwise (esp. in the power of attorney document):
 - a. use your property to give gifts to any person;
 - b. be paid or obtain any other benefit from your property; or
 - c. pay, or give any other benefit to, any other person (other than as a result of a commercial transaction entered into for your benefit).

If you have any functions as a trustee, an attorney is not authorised to act in your place for any of those functions.

Your attorney will **not** be able to do anything that you specifically **state** (esp. in the power of attorney document) your attorney is **not** authorised to do;

5. When the power can and cannot be cancelled

You can cancel the power of attorney at any time provided you have sufficient “**mental capacity**”. This means you must be able to **understand** what you are doing and appreciate the **nature** of what you are doing and the **significance** and **effect** of cancelling the appointment.

This means that you may **not** be able to cancel the power at the time when you are most **reliant** on the person you have appointed.

6. The nature and meaning of an enduring Power of Attorney

The person(s) you appoint as your attorney(s) will (continue to) be your attorney(s) whenever you are incapable of understanding and/or managing your property and financial affairs.

Anything done by an enduring attorney will be valid even if it is beyond your ability to understand or comprehend.

Rather than being a mere **extension** of your person, limited in action by your personal capacity to understand the nature, significance, and effect of any act, an enduring attorney is a complete **legal alternative** decision maker for you.

7. *The limits to overseeing the exercise of the power*

If you have lost your ability to understand the nature, significance, or effect of any particular decision or action:

1. you will not be able to fully **assess** the appropriateness of that decision or action;
2. you will not be able to **change** the decision or action; and
3. you may not be able to **cancel**, limit or restrict your attorney's power;

even if you **disagree** with the attorney's exercise of the power.

Some specific things to think about

Why do you want/need a power of attorney?

What do you want/need your attorney(s) to be able to do?

What *don't* you want/need your attorney(s) to be able to do?

How and in what areas are your views different to or likely to be different to those of your attorney(s)?

How will you ensure that your attorney(s) put your interests (and preferences) first?