



ADLV LAW
FIERCELY ON YOUR SIDE

SOLUTION BRIEF

Powers of Attorney (NSW)



Try changing your phone company when your spouse is in a coma - or even getting a current balance on your electricity bill. If your spouse's name is on the title to the property, and you do not have an Enduring Power of Attorney - your first stop is the Guardianship Tribunal. Not a pleasant experience...

What is a Power of Attorney?

A Power of Attorney is a legal document which appoints one person (the 'Attorney') to act on your behalf (as 'Donor') in respect of your property and financial affairs.

An 'Attorney' in this sense does not necessarily mean your lawyer. The Attorney is usually a family member or close friend.

What your Attorney cannot decide

A Power of Attorney does not enable your Attorney to make medical or lifestyle decisions on your behalf. The person to make these decisions is your Enduring Guardian (appointed in a separate document).

Ordinary vs Enduring Power of Attorney

You can make either an ordinary 'Power of Attorney' or an 'Enduring Power of Attorney'. The difference is that an ordinary Power of Attorney ceases to have effect when you lose mental capacity, but an Enduring Power of Attorney continues in force after that time.

Who needs one, and when?

Anyone can develop conditions like dementia or suffer a stroke or be injured in a car accident, so that they are unable to manage their financial affairs. Making an Enduring Power of Attorney is a practical step you can take while you still have mental capacity. It means that essential financial matters will be attended to by someone you choose on your behalf.

Any adult can appoint a Power of Attorney. If a person has a mild intellectual disability or is in the early stages of dementia, they may still be able to make a Power of Attorney. This will depend on their understanding of the nature and effect of the document. If their capacity is in doubt, then an assessment of the person's understanding should be made by a medical practitioner.

As long as you retain mental capacity you retain full authority to deal with your property and money, even if a Power of Attorney is in place. Also, you can state in the Power of Attorney that it is not to come into effect unless you become of unsound mind or are incapable of making your own decisions. Your Attorney can be required to obtain a doctor's certificate which says this.

You can only appoint a Power of Attorney while you are of sound mind. It is too late if you become of unsound mind.

If you become of unsound mind and have not made an Enduring Power of Attorney then you lose the ability to appoint someone to manage your property and finances. Someone will need to apply to the Guardianship Board or the Supreme Court to have a manager appointed. This means a government official could be making decisions on your behalf. Regular fees are charged for this service. Having a caring friend or relative acting as your Attorney is usually a much cheaper and better alternative.

An Enduring Power of Attorney is a safe way of preparing for your future. It allows you to choose who you want to manage your affairs.

Choosing your Attorney

Your Attorney will be able to do anything you legally could do. Therefore, you need to choose a person who is trustworthy and responsible enough to manage your property and finances. Before you appoint someone, you should be sure the he or she will in fact do all the things that you want. Your attorney is legally bound to carry out the written instructions in the document.

If your Attorney acts dishonestly or improperly, it may be possible to have the Court intervene to protect your interests. Dishonesty or impropriety can be hard to prove so be careful about who you choose.

You can appoint more than one Attorney, and this is often a good idea. You should choose people who are able to coordinate well with each other. You will need to decide whether you want your Attorneys to act jointly (together) or severally (individually). The benefit of having two attorneys acting jointly is that there is less chance of both attorneys acting contrary to your interests.

The scope of an Attorney's powers

A Power of Attorney can be completely general in the powers and authority that it gives to your Attorney. This is what most people choose to do. However, you can also limit the power as you like. You might want to limit the Attorney to do something specific such as paying bills or selling your house. You can also place limits on the time over which the power will operate by, say, granting it only while you are away on a holiday.

When does it come into effect?

You can state in your Power of Attorney that you do not want it to come into effect unless you lose your mental capacity, otherwise a Power of Attorney starts as soon as it is signed. As noted above,

an ordinary Power of Attorney ceases to operate when you lose your mental capacity, but an Enduring Power of Attorney will continue until you die.

How does it end?

Any power of attorney automatically ceases to operate if your Attorney notifies you that he or she will no longer act under the power, or when you notify your Attorney that the power has ceased. It also ceases if you become bankrupt or die.

The Supreme Court can also revoke a Power of Attorney. This may occur if, for example, someone proves that the Attorney is acting dishonestly. Also, if either the Supreme Court or the Guardianship Tribunal (NCAT) appoints a financial manager, the operation of the Power of Attorney is suspended. This could happen if it can be shown the Attorney is unsuitable or if it is in your best interests for a management order to be made.

You can cancel your Power of Attorney at any time, as long as you are of sound mind. You must make sure that your Attorney knows that you are cancelling the Power of Attorney.



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TALK TO US

What next?

If you would like to speak to someone about putting in place a Power of Attorney, call us on 1300 654 590 or email us at wehelp@adlvlaw.com.au.

Further information can also be found on our website at www.adlvlaw.com.au.

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