

## **POWERS OF ATTORNEY**

The *Powers of Attorney Act 2003* ('the Act') introduced new changes to the laws relating to Powers of Attorney and in particular to Enduring Powers of Attorney.

The Act applies to any Power of Attorney executed on or after **16 February 2004**. Any Powers of Attorney created prior to this date continue to be governed by the relevant provisions of the *Conveyancing Act 1900* (with some exceptions).

### **What is a Power of Attorney?**

A Power of Attorney is a document conferring a power on the "Donee" (Attorney) by the "Donor" (Principal), authorising the Donee to deal with the Donor's *financial affairs*.

It is a wide and general power and covers such things as buying or selling real estate, drawing funds from bank accounts, buying and selling shares etc., but not the delegation of authority for company directors' and trustee's duties.

### **Why have a Power of Attorney?**

A Power of Attorney is useful when the Donor will not be able to deal with their own affairs and requires someone to do so on their behalf.

There are two types:

- A General Power of Attorney, which ceases to have effect when the Donor becomes of unsound mind;
- an Enduring Power of Attorney, which continues to have effect once the Donor is unable to deal with their own affairs, say due to loss of mental capacity.

### **Enduring Powers of Attorney**

The new Act makes additional requirements for making an Enduring Power of Attorney:

- The Donee must consent to the authority by signing the form;
- The Donor's signature must be witnessed by either a solicitor, barrister, Registrar of a Local Court, Licensed Conveyancer or employee of the Public Trustee having completed an approved course;
- The witness must sign a Certificate to the effect that they have explained the effect of the Power to the Donor and that the Donor understood its effect.

### **Benefits to the Attorney and others**

The Act has clarified the area of whether an Attorney can use the Donor's funds to confer benefits on themselves or others. Under the new Act, specific clauses on the new prescribed form can be included, allowing the Donee to:

- give gifts from the Donor's funds to close friends and relatives;
- draw from the Donor's funds to benefit the Donee's reasonable living and medical expenses;
- draw from the Donor's funds to benefit others' reasonable living and medical expenses.

## **Case studies**

1. A young woman is travelling overseas and wishes to authorise her partner to deal with selling a property on her behalf whilst she is away. She can make a Power of Attorney with a limitation, expressing the power only applies between specified dates and only for signing documents in relation to the sale of that property.
2. A retired man wishes to authorise his son to deal with his financial affairs on a permanent basis. He makes an Enduring Power of Attorney and is subsequently diagnosed with a debilitating mental illness. His son will be able to continue to make decisions in relation to his financial affairs.

### **What about Lifestyle Decisions?**

A Power of Attorney only applies to financial affairs. For decisions regarding lifestyle affairs, such as where a person is to live or what medical treatment he or she is to receive, you should consider appointing an *Enduring Guardian*.

For further information please don't hesitate to contact;

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## ENDURING GUARDIANSHIP

In 1997 the *Guardianship Act 1987* (“the Act”) was amended, allowing persons to appoint an Enduring Guardian of their choice. The Act provides a framework for the powers and functions of Guardians and the powers of review and intervention of the Guardianship Tribunal and the Supreme Court.

### What is an Enduring Guardian?

An Enduring Guardian is a person appointed by an adult with capacity (the Appointor) to make lifestyle decisions on the Appointor’s behalf.

The Enduring Guardian can make the following decisions on the Appointor’s behalf:

- Decide the place in which the Appointor is to live;
- Decide the health care the Appointor is to receive;
- Give consent to carrying out certain medical or dental treatment on the Appointor;
- Any other function relating to the Appointor’s person as specified.

### How do I appoint an Enduring Guardian?

Firstly, consider who it is you should appoint as your Enduring Guardian, as this person will have a wide discretion in making decisions affecting your health and lifestyle. You should preferably appoint someone who you trust and who will take into account any views you may have on your lifestyle.

An eligible Guardian must:

- Be over the age of 18 years;

- Not be involved in a professional or administrative way in providing services for you for a fee or payment eg. a doctor, nurse, psychiatrist etc.

To appoint an Enduring Guardian:

1. Complete and sign a “Form of Appointment”. The Act prescribes a form of appointment to which you may add any conditions or limitations;
2. The Guardian must also sign the form consenting to their appointment;
3. An *Eligible Witness* must witness all signatures on the form. This can be a Solicitor, Barrister or Clerk of the Local Court and must not be an appointed guardian;
4. The witness must sign an acknowledgement that both the Appointor and Guardian signed the form voluntarily and appeared to understand its effect.

### Can I appoint more than one Guardian?

Yes. You can appoint 2 or more Guardians *jointly, severally or jointly and severally*. Depending on their appointment, the Guardians may or may not be required to agree on decisions to be made on your behalf.

You can also appoint 2 or more Guardians separately (i.e. on different forms). For example, you may appoint one Guardian to make decisions in relation to your medical and dental treatment and appoint a second Guardian to make decisions in relation to where you will live.

### When does the Enduring Guardianship begin?

Unlike an Attorney, an Enduring Guardian can only begin to make decisions on your behalf once you have *lost capacity* to do so.

If you marry or remarry, the appointment of the Enduring Guardian is revoked. A new appointment will have to be made.

**Example:** say in Case Study 2 above, the retired man also appoints his son as Enduring Guardian at the same time as an Attorney under Power of Attorney. His son would be able to deal with his father’s financial affairs before he contracted the mental illness, and his appointment as Guardian would then take place after he contracted the mental illness, to fully care for his father’s lifestyle needs.

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