



## Financial Counselling Tidbit

January 2012

### **Powers of Attorney and Enduring Powers of Attorney**

#### What is a Power of Attorney?

When a person makes a Power of Attorney, they give another person (known as their attorney) the power to make financial and some legal decisions on their behalf. The person making the Power of Attorney is known as the principal. The power the principal gives to the attorney can be broad (giving the attorney power over all the person's financial affairs) or specific (for example, limiting the attorney's power to operating a particular bank account or to sell the person's house).

A Power of Attorney can be useful where a person travels regularly, is incapacitated or otherwise needs someone to look after their finances. The principal is still able to make decisions and take action in relation to their affairs if they choose or are able to. A Power of Attorney ceases to operate if the principal loses the ability to make decisions or dies.

A Power of Attorney that gives the attorney power to act after the principal loses mental capacity is called an "Enduring Power of Attorney". One of the most common reasons for setting up an Enduring Power of Attorney is so the principal can choose who will manage their finances when they can no longer make decisions for themselves (for example due to dementia or other degenerative illness).

#### Who can make a Power of Attorney?

Anyone over the age of 16 with the capacity to understand the nature and effect of the document can make a Power of Attorney.

If your client needs assistance managing their finances but has not already made an Enduring Power of Attorney and does not have mental capacity to do so, anyone concerned with their welfare (probably including the person's financial counsellor) may apply to The Guardianship Tribunal to seek a financial management order.

You don't need a lawyer to make a Power of Attorney, but given the importance of the Power of Attorney it is a good idea to seek legal advice.

#### Who can be an attorney and what can the attorney do?

The principal can appoint anyone over the age of 18 or a trustee company as their attorney. They can appoint more than one attorney.

The attorney can only exercise the powers given to him or her in the Power of Attorney and must only use the principal's money for the principal's benefit unless the Power of Attorney says the principal's money can be used to benefit someone else.

While the principal has mental capacity, they can, of course, continue to make their own decisions and manage their own finances even after they have appointed an attorney.

In order for an attorney to have the power to deal with real property on behalf of the principal, the Enduring Power of Attorney may need to be registered with Land and Property Information NSW.

### When does the Power of Attorney start and end?

A Power of Attorney commences when the Power of Attorney says it commences. That might be when the principal signs the document, or it may be, in the case of an Enduring Power of Attorney, when the principal no longer has mental capacity to make his or her own decisions.

A Power of Attorney generally ends when the principal revokes it or when that person dies.

You revoke a Power of Attorney or an Enduring Power of Attorney by telling the attorney you are revoking their power. If a person is revoking their Power of Attorney it is best to do so in writing and keep a record of it, for example, by sending a letter revoking the Power of Attorney to their attorney by registered mail or by fax and keeping a copy of the letter and the receipt. You can revoke your enduring power of attorney any time so long as you still have mental capacity to understand what you are doing at the time you revoke it. If the Enduring Power of Attorney is registered at Land and Property Information NSW, you should notify them that you have revoked it. It is a good idea to destroy the original Power of Attorney and any copies once you have revoked it.

### How is an Enduring Power of Attorney different from an Appointment of Enduring Guardian?

An attorney only has the power to make financial decisions on a person's behalf.

A person can also give another the power to make health, accommodation and lifestyle decisions on their behalf. The person who is appointed to make those non-financial decisions is called a guardian. You appoint a guardian through an Appointment of Enduring Guardian.

A guardian can only make decisions when the person who appointed them can no longer make decisions for themselves. A guardian cannot make financial decisions for someone else.

The principal can appoint their attorney as their guardian or appoint someone else.

### What should I consider when I am working with an attorney?

If an attorney comes to your service wanting assistance to manage the affairs of the principal you should:

- Ask to see the original Power of Attorney or a certified copy
- Satisfy yourself that the person you are dealing with is the attorney
- Make sure the Power of Attorney is signed by the principal and by the attorney

- Make sure the Power of Attorney has commenced (for example, if the Power of Attorney does not start until the principal loses mental capacity, do you have proof the principal no longer has capacity?)
- Check with Land and Property Services NSW to see if the Power of Attorney is registered and if it has been revoked. A Power of Attorney only has to be registered if the attorney is given power to deal with land
- Consider whether the Power of Attorney allows the attorney to do what is proposed. Are there any limits on the attorney's power in the Power of Attorney?
- Consider whether or not your advice, and any action the attorney proposed to take, is in the best interests of the principal

### What can my client do if an attorney has acted improperly?

If an attorney misuses the principal's finances or does not manage the principal's money prudently, the principal can sue the attorney to recover their loss. The principal will only get their money back, though, if the attorney has sufficient income or assets to repay the principal. This is why the choice of attorney is so important.

For further information on Powers of Attorney and Appointments of Enduring Guardian see <http://www.gt.nsw.gov.au/plan/>

For further information: you can contact Michelle or Ingrid on 9698 7277 or [michelle@rlc.org.au](mailto:michelle@rlc.org.au) or [Ingrid@rlc.org.au](mailto:Ingrid@rlc.org.au).

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Please note this information is not a substitute for legal advice in relation to individual circumstances.

If you would like to be added to or to be taken off the mailing list then please email [Elizabeth@rlc.org.au](mailto:Elizabeth@rlc.org.au).

If you know of other financial counsellors we might have missed on the mail out, please encourage them to contact us for future editions.