



Power of Attorney

1. What is a Power of Attorney?

A Power of Attorney is a legal document in which you appoint the person of your choice to manage your assets and financial affairs while you are alive. You may, for instance, be travelling overseas and want to give your Attorney access to your bank accounts to pay your bills or manage your finances. Alternatively, it can be useful to have a Power of Attorney if you become unwell and are no longer able to manage your financial affairs. You can make an Enduring Power of Attorney which will continue to have effect after you have lost your capacity to self-manage.

Making a Power of Attorney does not mean that you will lose control over your financial affairs. It simply gives your Attorney formal authority to manage your financial affairs according to your instructions. Your Power of Attorney can be revoked at any time provided you have the capacity to do so.

A Power of Attorney only deals with property and financial matters, and enables your Attorney to sign legally binding documents on your behalf. It does not give someone the right to make decisions about your lifestyle, where you live, medical treatment or welfare. These decisions are covered by **Enduring Guardianship** which is a separate appointment that you can make.

A Power of Attorney ceases when you die. The executor named in your Will then takes over the responsibility of administering your estate. Your Will ensures that your assets will be distributed according to your wishes after your death. A Power of Attorney lets you appoint someone who can manage your financial affairs on your behalf while you are alive. It is therefore important that you have both a Power of Attorney and a Will

2. What is an Enduring Power of Attorney?

An ordinary Power of Attorney cannot continue to be used by your Attorney after you have lost capacity to deal with your financial affairs. An Enduring Power of Attorney continues after you have lost capacity. This is important for everyone, but particularly for elderly people.

3. Why have a Power of Attorney?

A Power of Attorney enables your financial affairs to be managed according to your wishes when you are unable or do not want to conduct them personally – such as when you are ill, travelling or simply do not wish to be burdened with the day to day management of your financial affairs.

You can use a Power of Attorney for almost any financial purpose: for example, you can authorise your Attorney to collect debts, vote at meetings, operate your bank account, manage your investments or carry out any other function which can be lawfully delegated.



Should you no longer be able to manage your financial affairs and you don't have an Enduring Power of Attorney, NSW Civil & Administrative Tribunal (formerly the Guardianship Tribunal) may have to appoint a financial manager to make these decisions for you. This involves a formal hearing where evidence will be heard to assess if you have lost legal capacity and whether you need to have someone appointed to make decisions on your behalf. If NSW Civil & Administrative Tribunal decides that you need someone to make decisions about your finances and legal affairs, they will appoint a financial manager. While they have an obligation to take your views into account, the ultimate decision rests with the Tribunal.

The person or organisation appointed as your financial manager will not necessarily be whom you would have chosen. This may be stressful for those involved and can cause considerable conflict and anguish among family and friends concerning who is appointed to make decisions on your behalf. By making an Enduring Power of Attorney, you are ensuring that the person you nominate to manage your financial affairs is what you want.

Example:

Your partner gets Alzheimer's disease and you decide that you want to sell the family home and buy a smaller home closer to amenities. The family home is in both your names. Since your spouse no longer has the mental capacity to sign documents and you do not have their Power of Attorney, your only option is to apply to the NSW Civil and Administrative Tribunal (NCAT) to appoint you as your spouse's financial manager in order to sell your home. You may then sell your home and purchase the smaller home closer to amenities after obtaining the consent of the NSW Trustee & Guardian. NSW Trustee & Guardian will supervise your role as your partner's financial manager and must consent to all important decisions. It would have been far simpler if your partner had made an Enduring Power of Attorney appointing you as your partner's Attorney.

4. Who can make a Power of Attorney?

In order to make a valid Power of Attorney you must be 18 years or over and have sufficient capacity to understand the nature and effect of the appointment. This means that at the time of making your Power of Attorney you understand:

- (a) The authority your Power of Attorney will have and what sort of decisions they will be empowered to make;
- (b) When and how your Attorney will have the authority to exercise their power;
- (c) The effect that your Attorney's actions could have on you, and;
- (d) What options are open to you to cancel or change your Attorney appointment in the future.

5. Who should I appoint as my Attorney?

It is important to choose your Attorney carefully as they will be responsible for making legal and financial decisions on your behalf. You need to be able to trust that they do not have conflicts of interest, that they can be impartial and will act in your best interests. You should feel confident that your Attorney will competently make any decisions that may need to be made. Being an Attorney is a responsible job. Your Attorney should have the business and financial skills to manage your affairs properly and be capable of keeping accurate records of all dealings and transactions they undertake on your behalf.

Your Attorney must agree to take on the role. Therefore, make sure you discuss your intentions to appoint them as your Attorney and what it is likely to involve before making the appointment. Even though they may be someone you know well and who cares about you, they may find the role too daunting or may feel that they cannot carry it out as objectively as they should. Once you place control of your affairs into the hands of a private Attorney, they have no legal obligation to report to any other person about the management of your affairs. This can leave you vulnerable to mismanagement of your affairs.



In many instances, it is likely that, should a person be called on to act as your Attorney, it will not be until sometime in the future. Therefore, a friend or relative who is much older may not be appropriate to appoint under a Power of Attorney as they may not survive you or be able to take on the role when required.

6. Can I appoint more than one Attorney?

You can appoint more than one Attorney. When appointing more than one Attorney, you should choose people who can cooperate with each other and who you trust to work together in your best interests. If more than one is to be appointed, you need to specify whether the Attorneys are to act:

(a) **Jointly:**

This means that your Attorneys have the same functions or decision-making areas. In making decisions on your behalf they must always agree and act together.

It is important to think about what you would like to happen if one of the joint Attorneys dies, resigns or becomes incapacitated.

If you want the other Attorney to continue to have their decision-making authority, then you must state this on the form. If you do not specify this, then the appointment of the remaining Attorney ends.

(b) **Severally:**

Appointing severally means that your Attorneys can act separately or independently and can make decisions without needing to agree and act together.

(c) **Jointly and Severally:**

This means the Attorneys have the same functions or decision-making areas and can act either together or independently in making decisions on your behalf.

7. Can I appoint a Substitute Attorney if something happens to the Attorney I appointed?

You are able to appoint one or more substitute Attorneys who can act as your Attorney in the event that your originally appointed Attorney is unable to act. This could be because your originally appointed Attorney resigns, dies, is made bankrupt, suffers mental incapacity or you revoke their appointment.

If you wish to appoint a substitute Attorney, you can make the appointment at the same time as the appointment of the originally appointed Attorney in the same document. You can appoint more than one substitute Attorney, and if you do so, you will need to consider whether you appoint them jointly, severally or jointly and severally.

If your Attorney ceases to be your Attorney, you can appoint a new Attorney by making a new Power of Attorney document. If you have not appointed a Substitute Attorney or new Attorney, the Guardianship Division, NSW Civil & Administrative Tribunal may, upon application, appoint a person to be your Financial Manager. A person who can be considered as financial manager under the Guardianship Act 1987 (NSW) is the NSW Trustee & Guardian or someone who, in the opinion of the Tribunal, has a genuine concern for your welfare. The Tribunal may make a financial management order if the Tribunal considers that you are not capable of managing your affairs, and there is a need for another person to manage those affairs, and it is in your best interests that the order be made.



8. What powers can I give my Attorney?

You are able to give your Attorney the power to make any decisions relating to your finances or property which you could do yourself. A Power of Attorney can be completely general in the powers and authority it gives or it can specify things such as paying certain kinds of bills or selling your house.

If you wish, you can give your Attorney the authority to give reasonably sized gifts, for example, to close friends or family on special occasions, or make donations to your favorite charities.

You can also authorise your Attorney to meet the reasonable living and medical expenses of the Attorney himself or herself, or nominated other people. Your Attorney should therefore be a person in whom you can place your trust.

9. What are the duties and responsibilities of my Attorney?

Your Attorney is in an important position of trust, and has a responsibility to always act only in your best interests. They therefore must:

- (a) Avoid doing anything as an Attorney which would mean that their interests conflict with your interests;
- (b) Obey your instructions while you are mentally capable and any directions you make in the Enduring Power of Attorney;
- (c) Act according to any limits or conditions placed on their authority;
- (d) Not give gifts, or give themselves or others a benefit using your finances unless you specifically authorise this. The gift given must be seen as reasonable given the circumstance;
- (e) Keep their finances and money separate from yours;
- (f) Keep accurate and proper records of their dealings with your finances or property.

Your Attorney must also recognise your right to confidentiality, and respect your views and wishes, taking into account your existing relationships, values and culture.

A Power of Attorney can only be used in the manner granted. If your Attorney exceeds their authority, legal action can be taken to protect your interests and your Attorney is liable to pay compensation to you if you suffer loss as a consequence.

10. Does anyone supervise my Attorney?

Your Attorney, and his or her decision making role is not subject to supervision, and there is no requirement that the Attorney report on his or her role in making decisions on your behalf.

However, at any time, any of you, your Attorney, a Guardian appointed for you under the Guardianship Act 1987 (NSW) or a person who has a genuine concern for your welfare can apply to the Supreme Court or the NSW Civil and Administrative Tribunal to have the Power of Attorney revoked, to appoint a financial manager in place of your Attorney, or otherwise vary the Attorney's powers, or approve or disapprove of anything proposed to be done by your Attorney.

11. Is my Power of Attorney revoked (cancelled) in any circumstances?

Your Power of Attorney is revoked in each of the following circumstances:

- (a) If you are made bankrupt;



- (b) If you die;
- (c) If you lose mental capacity, unless you have made an Enduring Power of Attorney;

The person that you have appointed as your Attorney can no longer act as your Attorney:

- (a) If you revoke the appointment; or
- (b) If the Attorney renounces the power, or
- (c) If the Attorney dies, or
- (d) If the Attorney, by reason of any physical or mental incapacity, ceases to have the capacity to continue to act as an Attorney.

12. How do I revoke (cancel) a Power of Attorney?

There are many reasons you may wish to revoke a Power of Attorney. Your relationship with the Attorney may have changed, or your circumstances are different and the person whom you appointed is no longer appropriate for the role. You can revoke or cancel a Power of Attorney at any time providing you are capable of understanding what you are doing.

To revoke a Power of Attorney you must inform your Attorney in writing that you are bringing their appointment to an end. Should you fail to inform your Attorney of the revocation your Attorney can legally continue to make decisions on your behalf. Your bank and any other relevant groups or businesses with which your Attorney may have been dealing should be notified of the revocation. If your Power of Attorney is registered you should also register the revocation. After revoking the Power of Attorney you should destroy the original and any copies of the Attorney document you may have.

13. Do I need to register my Power of Attorney?

If you want your Attorney to deal with any real estate you own in NSW, then the Power of Attorney document must be registered with Land and Property Information Division of the NSW Department of Lands. Otherwise, there is no requirement for your Power of Attorney to be registered. If you choose to register your Power of Attorney it:

- (a) Will be on record as a public document;
- (b) May be more easily accepted as evidence that your Attorney has authority to deal with your property or financial affairs;
- (c) After registration, your original document will be returned to you with a registration number stamped on it. Your Attorney should use this number when signing any documents on your behalf. There is a fee charged by Land and Property Information NSW for registering your Power of Attorney;
- (d) If your Power of Attorney is registered and you later revoke it (cancel it), you should register the revocation.

14. Where should I keep my Power of Attorney?

It is important to store your Power of Attorney in a safe place and provide your Attorney with a copy. You should also provide a copy to anyone else who needs to know its contents, such as your solicitor or accountant.

If you wish to discuss any of the matters addressed above, or require more information, please feel free to contact us on (02) 4731 5899 or email us at willsestates@batemanbattersby.com.au.