



## Being an Attorney is not risk free!

***A Power of Attorney is an important legal document. It allows a person (the principal) to authorise one or more persons (attorneys) to act on their behalf in relation to the management of their personal, financial and legal affairs. Accepting an appointment as an attorney for another person however is not risk free.***

### Attorney's position of risk

Under the provisions of the NSW Powers of Attorney Act (the Act) the Power of Attorney document can be limited to authorise specific actions, or it can have no limitations, authorising the attorney to do anything the principal may legally do.

An attorney appointed under a Power of Attorney has a position of great responsibility. They are the trusted agent of the principal and have fiduciary duties and obligations to them which they must adhere to or risk being liable for any breaches they commit.

An attorney's responsibility extends not only to the principal that appointed them, but can also extend to the people that rely on the principal during the lifetime of the principal, and the beneficiaries of the principal after the death of the principal.

The actions of the attorney will open to scrutiny by these people, especially in cases where there has been an actual or anticipated financial loss to the principal, or the estate of the principal, due to the attorney's actions.

Some of these people will also have the legal standing to apply to the Court or the NSW Civil and Administrative Tribunal (NCAT) for a review of the operation of a Power of Attorney of the principal which can lead to an order for it being revoked. These include the principal themselves (if they have mental capacity), any person who is a guardian or enduring guardian of the principal, as well as any other person who, in the opinion of the Court or NCAT, has "a proper interest in the proceedings or a genuine concern for the welfare of the principal".

Current case law and the increased efficiency and focus of the Courts and NCAT, all suggest a willingness for aggrieved parties to pursue attorneys for their actions including for financial loss to the principal resulting from imprudent action and investments or inaction by the attorney.

### Tips and Traps

Attorneys should therefore think carefully before they sign their acceptance as attorney on the Power of Attorney document. The attorney needs to firstly consider whether they have the time and skills to diligently manage another person's financial and legal affairs.



If more than one attorney is appointed, the attorney also needs to keep in mind the need to work with the other attorney who they may not know. Differences of opinion about what decisions should be made for the principal may become time consuming and stressful if there is no deadlock breaking mechanism in the Power of Attorney document. While an attorney may resign from their role in these or other circumstances, under an Enduring Power of Attorney they cannot do so after the principal loses mental capacity without an order from the Court or NCAT.

An attorney is required to exercise their powers according to the terms, conditions and limitations of the Power of Attorney document. They should also read through the document carefully and understand when it becomes operative and what conditions and limitations to the attorney's actions are contained in the document. The Power of Attorney document will also set out the attorney's duties and responsibilities which includes acting honestly and in the best interests of the principal. The attorney is also required to keep the principal's money and property separately from the attorney's money and property and to keep reasonable accounts and records of their dealings with the principal's money and property.

If the Power of Attorney becomes operative on the principal losing mental capacity, a prudent attorney should obtain a letter from the principal's doctor or an appropriate specialist confirming that the principal has lost mental capacity and is unable to manage their own financial and legal affairs.

## Advice to protect the attorney

Attorneys may, through no fault of their own, be placed in a difficult and uncertain position when needing to act in the principal's interest. If in doubt about what they should do for the principal, an attorney should obtain legal advice as to the appropriate course of action. Attorneys also have the right under section 38 of the Act to apply to the Court or NCAT for advice or direction "on any matter relating to the scope of the attorney's appointment or the exercise of any function by the attorney".

***If you need advice about the role and responsibilities of an Attorney or about appointing someone as your Attorney under a Power of Attorney document please contact [John Bateman](#) or [Lisa Delalis](#) at our office on 02 4731 5899 or email [wilsestates@batemanbattersby.com.au](mailto:wilsestates@batemanbattersby.com.au).***