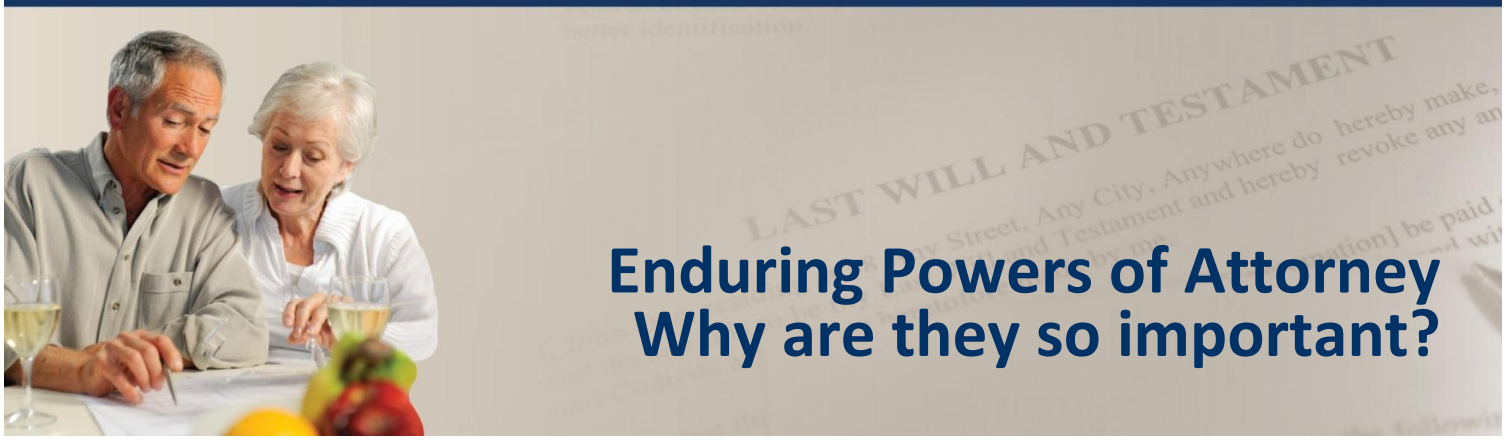
Bateman Battersby
LAWYERS



Enduring Powers of Attorney
Why are they so important?

Case Study 1 – Brad & Lisa

Brad and Lisa is a young couple in their thirties, with two young children, a home and a mortgage to go with it.

Brad and Lisa have made Wills, but they do not have Enduring Powers of Attorney. In fact, they are not even really sure about what an Enduring Power of Attorney is. In any case, they think they are far too young to have to worry about things like that, especially as they own most assets jointly.

The main 'bread-winner' for the family, Lisa, was driving home from work one night and was hit by an on-coming car. The accident left Lisa with traumatic injuries and partly brain damaged, after she eventually came out of a coma.

Needless to say, Brad and the children were left completely shell-shocked, with Brad trying to figure out how to handle things. It was firstly necessary to sell the house and buy another house that was amenable to Lisa's injuries for when she returned home from hospital. There was just one problem. Brad needed Lisa's signature on the Contract to sell the house. Lisa could not sign the Contract whilst she was incapacitated.

Not only did Brad have the task of looking after the children, running the household, struggling to find cash to pay the build-up of expenses, he had the time consuming and stressful task of making an application to the Guardianship Tribunal to be appointed as Lisa's Financial Manager so that he could get consent to sign the house Contract on Lisa's behalf. This was the last thing he needed. Not only did it take several months to finalise, but Brad missed out on purchasing the perfect house because another buyer beat him to it before he obtained consent to sell the current home. This compounded to a financial and emotional disaster for the family.

If Lisa had a properly drawn Enduring Power of Attorney prior to her accident, Brad would have been able to sign a Contract for the sale of the current home as soon as a purchaser was found (and attend to Lisa's other financial matters, such as superannuation). This would have prevented a great deal of stress.

Many couples think that if they own assets jointly, they do not need an Enduring Power of Attorney. This is simply not true. Whether a property is owned as 'joint tenants' (i.e., no separate shares, and there is a right of survivorship) or 'tenants in common' (i.e., separate shares), signatures of all owners (or their Attorney) are always required on dealings with the property.

Case Study 2 – George & Irene

George and Irene is a couple in their late sixties. They have led a most modest lifestyle, after falling in love and commencing a de facto relationship 10 years ago. They are enjoying their retirement years, which consist largely of spending time with their respective children from previous marriages, and grandchildren. George owns the home and most of the assets. All is well, until George is struck down with a massive stroke. George's eldest daughter, Samantha,

immediately made an application to the Guardianship Tribunal to be appointed as her father's Financial Manager. Samantha knew the ins and outs of her father's financial affairs, because at the end of the day, she was the one George trusted more so than Irene with financial matters. This was due to Irene's tendencies to spend money like water, eating out often with other, younger men and having the 'occasional' flutter which was becoming rather frequent.

Samantha's application to be appointed Financial Manager does not go down too well with Irene. In fact, it is all out war, and Irene commences her own application to be appointed Financial Manager. (Of course, poor old George is still battling through the stroke).

The end result is that Irene is appointed Financial Manager, after a long bitter dispute, breakdowns in family relationships and bickering over George's affairs. As much as George loved Irene, this is certainly a result he would not have intended.

If George had a properly drawn Enduring Power of Attorney prior to his stroke, Samantha could have immediately commenced handling his financial affairs. Irene still may have been disappointed, but at least Irene would have an awareness of George's wishes at the time he was capable of appointing an Enduring Power of Attorney, before his stroke.

The importance

Situations such as the above can be avoided by putting Enduring Powers of Attorney in place as soon as possible. In some cases it is also recommended that an alternate attorney be appointed in the event that the first choice attorney cannot fulfil their role as attorney, for example, due to bankruptcy, incapacity, death, inconvenience, or straight-out unwillingness.

If there is no Enduring Power of Attorney in place, and a person's affairs are placed under the control of the Guardianship Tribunal, the New South Wales Trustee and Guardian has the discretion to either manage the person's estate itself, or appoint a family member or some other person it deems appropriate. There is no 'automatic' right for a willing family member to be appointed. Once appointed the Financial Manager must still seek consent of the New South Wales Trustee and Guardian to decisions made by the Financial Manager. The Financial Manager is also required to present and audit accounts, and comply with various other rules. This is usually a burdensome experience for the Financial Manager.

One feature of the Powers of Attorney Act 2003 is the ability for a person to give their attorney particular powers in relation to managing their assets (for example, conferring reasonable benefits on dependents). This is just one of the important issues that require consideration when making an Enduring Power of Attorney, which we are more than happy to discuss with you or your clients.