

Powers of attorney

"A formal instrument by which one person empowers another to represent him, or act in his stead, for certain purposes."

Osborne's Concise Law Dictionary.

As expressed above, a grant of power of attorney may be for a specified purpose, a limited power, for example, to carry out a particular transaction such as a sale or purchase of a house; or the grant may be of a general power which allows the person with the power of attorney to carry out any business, act, matter or thing or deal with any affairs or assets of the person that has granted such a power. The person granting the power of attorney is called the donor, principal or grantor. The person receiving the power of attorney is called the donee, the attorney or grantee.

In New South Wales, the grant of power of attorney is regulated by the Conveyancing Act, 1919 (NSW). Power of attorney may only be granted by someone who is over the age of 18 and who is of sound mind at the time of the grant and capable of fully understanding the nature and purpose of the document that they are signing. The attorney must also be at least 18 years of age and of sound mind. Subject to the manner of grant of the power of attorney, the attorney may act individually or jointly with another. Unless specifically provided for in the grant, the attorney is not entitled to exercise his powers for his own benefit or advantage.

Enduring power of attorney

Where it is intended that the power of attorney is to continue operation even after the grantor has lost capacity through unsoundness of mind, the original grant of power of attorney must be witnessed in the relevant prescribed form. Usually this requires the witness(s) to endorse on the power of attorney a certificate stating that they had explained the effect of the power to the grantor before it was signed. The prescribed form differs for each state. In New South Wales it can be signed before a Clerk of Petty Sessions, Barrister or Solicitor. The power of attorney prepared in this manner is known as an enduring power of attorney. Where it is intended that the power of attorney be used in the sale, purchase or other transfer of real estate, it is a usual requirement that the power of attorney be capable of registration.

Power of attorney - cancellation

Except in certain circumstances, the death of the grantor immediately cancels any grant of power of attorney. Where a person becomes of unsound mind, in New South Wales, the Protected Estates Act (NSW) suspends operation of the power of attorney whilst the grantor is of unsound mind. Their estate becomes subject to management under that Act. The New South Wales Supreme Court may restore the power of attorney, subject to such conditions as it sees fit. A power of attorney may be revoked by the person who first granted it simply communicating to the attorney that the power has been revoked. This may be as simple as tearing the original power of attorney in half, however, it is advisable also that the original attorney is told that they no longer have power to act.

Source: Peter Bobbin