

Why Do I need a Power of Attorney?

The power to appoint someone as your Attorney has been with us for sometime and is a legal power which is often used to facilitate commercial transactions.

The granting of a Power of Attorney gives to the recipient the power to do all actions and things and to bind third parties just as if the original grantor of the Power of Attorney had entered into the Contract themselves.

There are many different forms of Power of Attorney however these fit into three (3) main categories:-

Limited Powers of Attorney

These are granted by a person to their Attorney to allow them to undertake some limited transaction. Limited Powers of Attorney for instance may be limited to the dealing with Real Estate or even a particular piece of Real Estate. They may be limited to the dealing with Bank Accounts or they may be limited to the carrying out of a specific and particular transaction. These Powers of Attorney will only allow the Attorney to undertake those actions stipulated and none others.

Normal Powers of Attorney

The granting of a Power of Attorney allows the Attorney to carry out any transaction that the grantor of the power would be capable of carrying out themselves. This would include the buying, selling, mortgaging of any of the grantor's property or assets.

N.B. It should be noted that whilst the granting of a Power of Attorney will allow the Attorney to bind its principal it will not allow the Attorney to assume any office or appointment.

An Attorney for instance does not have the power to represent its principal as a Director at a meeting of Directors of a company. Should you wish to allow somebody to represent you at a Director's Meeting or as an officer of a company the correct method is to have that person appointed as an alternate Director. Alternate Directors are only capable of acting when you are not present yourself.

A Power of Attorney similarly will not allow the Attorney to assume the role of Trustee or Executor of anyone's Will.

One of the short comings of a Power of Attorney is that the Attorney is only capable of doing what the grantor of the Power is capable of doing in their own right. If the grantor of the Power of Attorney suffers some legal infirmity (such as Alzheimers disease or dementure), then that legal incapacity is transferred to the Attorney and any signing of documents by the Attorney would not be binding and valid. This often used to cause problems when elderly people would sign a Power of Attorney in favour of their children to allow them to deal with Bank Accounts and their affairs generally as they grew older.

Enduring Powers of Attorney

To circumvent this problem a "new" style of Power of Attorney was introduced in 1994. This is called an Enduring Power of Attorney and briefly states that the grantor being of sound mind appoints the Attorney to act on its behalf even though the grantor may subsequently become incapable of entering into binding legal transactions. This would allow a situation where family members can act on behalf of their aged relatives even though the aged relatives may be incapable of entering into binding transactions on their own behalf.

A Power of Attorney is extinguished upon the death of the grantor. Obviously in that situation the grantor is incapable of entering into Contracts and legal binding obligations and so thus the Attorney is also incapable.

In 1998 The Powers of Attorney Act amended the law again to provide for the automatic repudiation of a grant in other situations such as divorce. If you are in any doubt at all about and power that you may have granted please ask.

Conflict of Interest

Many people do not realise that the Power of Attorney takes effect immediately upon execution. For this reason there is a duty to act in good faith.

There are sometimes situations that arise where the Attorney may wish to purchase some asset or deal in some way with an asset that would ultimately give them benefit.

Depending upon the situation it is questionable whether a Power of Attorney would extend so far as to allow such a transaction. To circumvent this it is our practice to add an additional clause to the Power of Attorney specifically allowing the Attorney to deal with the assets and estate of the grantor even though the Attorney might be receiving a benefit. This would allow children (who were an Attorney) to perhaps purchase their parents' interest in a family home thus keeping it within the family.

Whilst our Enduring Power of Attorney does allow for this style of transaction it should be remembered that all transactions should ideally be supported by independent valuations and sufficient documentation.



Back up Powers

The normal scenario is that spouses or partners will grant reciprocal powers to each other. In this way each is covered should the other suffer some infirmity or be involved in an accident in which they may suffer head injuries.

This of course does not cover the situation where both people are in the same accident and one is killed outright and thus is incapable of acting as the Attorney for the other who may have survived but suffered serious injury.

Our recommendation is that one should not only have a power of attorney but should also have a second or "Back up" power in favour of a trusted friend or adviser who is not likely to be involved in "Family" accidents.

Advance Health Directives

Introduced in 1998 an Advance Health Directive is a method of stating what level and type of medical care and support you will require in specific situations. (See our brochure specifically on this subject.)

Finally I would like to remind you of the corollary to Murphy's law:

The very time you will need the power will be the day after you didn't sign it



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