



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: JD:gl:Property: 674649
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10 December 2012

Mr Robert Goncalves
Senior Lawyer
LPI Legal Services
Level 3
1 Prince Albert Road
Queens Square
Sydney NSW 2000

Email: legalservices@lpi.nsw.gov.au

Dear Mr Goncalves,

Proposed new Power of Attorney forms

I am writing to you at the request of the Law Society's Property Law Committee (Committee). The Committee recently considered the revised draft prescribed general and enduring Power of Attorney forms, issued by Land and Property Information (LPI) for public comment.

The Committee appreciates the opportunity to comment on the draft forms and notes that LPI has already consulted extensively with the Law Society's Elder Law & Succession Committee.

General Comments

It is the Committee's view that the proposed forms are a substantial improvement on the current prescribed form. The Committee supports separating the current single prescribed form into a General Power of Attorney form and an Enduring Power of Attorney form. The Committee considers this will highlight the important distinction between a general and enduring power of attorney. It is also likely to assist with the proper completion of the documents and compliance with the additional requirements for an enduring power of attorney.

The Committee supports the new user friendly layout adopted in the forms. The Committee anticipates that LPI will host an interactive version of the forms on its website and encourages LPI to "road test" the forms prior to adoption to ensure ease of use.

Some suggestions for very minor amendments are set out on the attached marked up copies of the draft General Power of Attorney and Enduring Power of Attorney forms. The Committee also suggests that the Notes for Completion appearing at the foot of the last page of each form might be better located as margin notes next to the relevant parts of the forms dealing with joint attorneys and substitute attorneys respectively.

Particular Issues

Surviving joint attorney: The Committee notes that clause 1 of both the general and enduring Power of Attorney forms allows a donor appointing joint attorneys to specify whether the death, resignation or incapacity of a joint attorney terminates the appointment of other joint attorneys. The Committee welcomes the inclusion of this option and expects that section 46(1) of the *Powers of Attorneys Act 2003* (Act) will be amended accordingly.

Nomination of substitute attorney(s): The Committee notes that clause 1 of both the general and enduring Power of Attorney forms allows the nomination of substitute attorney(s). The Committee welcomes this change as it will reduce the need to create multiple documents and will also remind donors to consider appointing a substitute attorney.

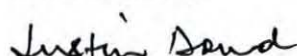
Access to the donor's documents: The Committee supports the amendment suggested by the Law Society's Elder Law & Succession Committee that both forms set out a default position on whether the donor authorises the attorney to access the donor's documents, particularly the donor's will. The issue of access can be problematic and where possible instructions on this point should expressly be obtained. The inclusion of such an option will encourage donors and solicitors to consider the issue.

Remuneration of attorney

The Committee notes that section 12(2) of the Act and clause 2 of the draft forms authorise the conferring of benefits on the attorney to meet the attorney's reasonable living and medical expenses, but there is no provision for payment of professional fees. There are many instances where an attorney will be appointed (including trustee company, accountant, solicitor etc) for whom a charging arrangement may be appropriate. Accordingly, there is support for the Act to be amended so that a donor may authorise the attorney to confer benefits to meet the attorney's reasonable professional fees, such that the forms can similarly provide for this authorisation.

Any queries in relation to this letter may be directed to Gabrielle Lea, Policy Lawyer for the Property Law Committee by telephone (02) 9926 0375 or by email to gabrielle.lea@lawsociety.com.au.

Yours sincerely,



Justin Dowd
President

General Power of Attorney

Complete this form by writing your responses on the lines and crossing out the appropriate options.

These margin notes are not part of the prescribed form and can be removed.

Principal -

The person who appoints the attorney is known as the Principal.

The Attorney -

The person you nominate to look after your legal and financial affairs. You can appoint more than one attorney.

If you appoint more than one attorney, please name every attorney and complete the relevant section below.

A general power of attorney is a legal document that allows you to nominate one or more attorneys to act on your behalf. The power of attorney ceases if you lose capacity. If you wish the power of attorney not to cease if you lose capacity, use the Enduring Power of Attorney prescribed form.

A general power of attorney gives the attorney the authority, if you choose, to manage ~~your~~ the principal's legal and financial affairs, including buying and selling real estate, shares and other assets ~~for the principal,~~ operating the principal's bank accounts, spending the principal's money on behalf of the principal. An attorney under an ~~enduring-general~~ power of attorney cannot make personal or health decisions for the principal.

You may set whatever limitations, restrictions or conditions on your attorney. An attorney must always act in your best interest. If your attorney does not follow your directions, or does not act in your best interest, you should consider revoking the power of attorney by informing the attorney preferably in writing that they are ~~he or she is~~ no longer ~~the~~ your attorney and to cease acting immediately.

The Important Information set out at the end of this document includes notes to assist in completing this document, more fully explain the role and responsibilities of an attorney, and explain other aspects of the application of the power of attorney.

1. Appointment of attorney by the Principal

I
.....
.....

[insert name, address and occupation],

appoint
.....
.....

appoint
.....
.....

appoint
.....
.....

[insert name, address and occupation of each proposed attorney]

Only complete this section if more than one attorney is appointed.

Tick the option that applies.

Cross out the option that does not apply.

If your attorney/s vacates office (e.g. dies), you can nominate someone else to take their place.

You may choose to allow your attorney to use your money and assets to pay for those things listed here in (a)-(d). Only tick those boxes which you wish to apply.

to be my attorney/(s).

My attorneys are appointed:

- Jointly (*your attorneys must decide together*)*
- Severally (*any one of your attorneys may decide*).
- Jointly and severally (*all attorneys, or any one of them decide*).

*The death, resignation or incapacity of any of my joint attorneys **does/does not** terminate the appointment of each of my other joint attorneys.

If no option is selected or the option chosen is unclear or inconsistent, I intend my attorneys to act jointly and severally.

Nomination of substitute attorney/s (optional)

.....
.....
.....

[insert name, address and occupation]

2. Powers

My attorney/s may exercise the authority conferred on my attorney/s by Part 2 of the *Powers of Attorney Act 2003* to do anything on my behalf I may lawfully authorise an attorney to do.

- a) I authorise my attorney to give reasonable gifts as provided by section 11(2) of the *Powers of Attorney Act 2003*.
- b) I authorise my attorney to confer benefits on the attorney to meet his/her reasonable living and medical expenses as provided by section 12(2) and section 13(2) of the *Powers of Attorney Act 2003*.
- c) I authorise my attorney to confer benefits on the attorney to meet his/her reasonable living and medical expenses

~~as provided by section 12 (2) and section 13(2) of the Powers of Attorney Act 2003.~~

If you have ticked **box (dc)**, please complete this section.

~~d)~~c) I authorise my attorney to confer benefits on the following:

.....
.....
[insert name and address]

and (delete if not required)

.....
.....
[insert name and address]

to meet their reasonable living and medical expenses as provided by section 13 (2) of the Powers of Attorney Act 2003.

You can place whatever limits, conditions or restrictions on your attorney.

For example, the attorney may only act to sell a house; or the attorney can only act whilst you are overseas; or that the attorney must submit accounts to a nominated accountant every year for audit.

3. Conditions or Limitations

I place the following limits and/or conditions on the authority of my attorney/s:

.....
.....
.....
.....
.....
[insert any limits, conditions or restrictions]

4. Commencement

This power of attorney operates:

- a) Immediately
- b) On and from: _____ / _____ / _____ up to and including: _____ / _____ / _____ (specify dates)
- c) Other:.....

If no option is selected or the options chosen are unclear or inconsistent, I intend that the power of attorney will operate immediately.

Tick the option that applies.

The principal must sign.

5. Your signature to make the appointment

Signature: Date: ____ / ____ / ____

Name:

Signature of Witness:

Name of Witness:

Address of Witness:

IMPORTANT INFORMATION

- ◆ A power of attorney is an important and powerful legal document. You should get legal advice before you sign it. It is important that you trust the person that you are appointing as attorney to make financial decisions on your behalf if you lose capacity.
- ◆ A power of attorney cannot be used for health or lifestyle decisions. The principal should appoint an enduring guardian under the *Guardianship Act 1987* if the principal wants a particular person to make these decisions. For further information, contact the Guardianship Tribunal or NSW Trustee and Guardian.
- ◆ Clause 2 of the power of attorney contain powers which will permit the attorney to use the principal's money and assets for the attorney or anyone else as provided. The principal should only tick those boxes in clause 2 if the principal chooses that the attorney is to have that power/s.
- ◆ This power of attorney is for use in New South Wales only. If you need a power of attorney for interstate or overseas, you may need to make a power of attorney under their laws. The laws of some other States and Territories in Australia may give effect to this power of attorney. However, you should not assume this will be the case. You should confirm whether the laws of the State or Territory concerned will in fact recognise this power of attorney.
- ◆ An attorney should keep the attorney's own money and property separate from the principal's money and property,

unless they are joint owners, or operate joint bank accounts. An attorney should keep reasonable accounts and records about the principal's money and property.

- ◆ If the attorney is signing certain documents that affect real estate, the power of attorney must be registered at Land and Property Information NSW.
- ◆ The principal can terminate ('revoke') the power of attorney by simply telling the attorney that the power is revoked, or serve a notice of revocation, which is simply a notice in writing that the power of attorney is revoked. Once informed of the revocation, the attorney cannot continue to act. **If the attorney continues to act with knowledge that the power of attorney is revoked, criminal penalties apply.**
- ◆ **An attorney must always act in the best interests of the principal. Unless the attorney is expressly authorised, the attorney cannot gain a benefit from being an attorney.**

For information on powers of attorney, the attorney's duties and registration, contact the Land and Property Information or a solicitor, a trustee company or the NSW Trustee and Guardian.

Notes for completion

Joint attorneys

If you appoint more than one attorney, you should indicate whether the attorneys are to act jointly, severally or jointly and severally. Attorneys who are appointed jointly are only able to make decisions if they all agree about the decision.

Attorneys who are appointed severally or jointly and severally are able to make decisions independently of each other.

Substitute attorney/s

If you appoint a substitute attorney, they will only have authority to act as your attorney if the first appointed attorney dies, resigns or becomes incapacitated.

Enduring Power of Attorney

Complete this form by writing your responses on the lines and crossing out the appropriate options. The form must be signed and your signature witnessed by a prescribed witness.

These margin notes are not part of the prescribed form and can be removed.

Principal -

The person who appoints the attorney is known as the Principal.

The Attorney -

The person you nominate to look after your legal and financial affairs. You can appoint more than one attorney.

If you appoint more than one attorney, please name every attorney and complete the relevant section below.

An enduring power of attorney is a legal document that allows you to nominate one or more attorneys to act on your behalf. The attorney's power continues even if for any reason you lose the capacity to manage your own affairs.

An enduring power of attorney gives the attorney the authority to manage ~~your~~ the principal's legal and financial affairs, including buying and selling real estate, shares and other assets ~~for the principal~~, operating the principal's bank accounts, spending the principal's money on behalf of the principal. An attorney under an enduring power of attorney cannot make personal or health decisions for the principal.

The Prescribed Witness ~~The Certificate at the end of this document~~ must be completed and the attorney(s) must sign the acceptance section ~~document before acting as your attorney(s).~~

The Important Information set out at the end of this document includes notes to assist in completing this document, more fully explain the role and responsibilities of an attorney, and explain other aspects of the application of the power of attorney.

1. Appointment of attorney by the Principal

I

.....

.....

[insert name, address and occupation],

appoint

.....

.....

.....

appoint

.....

.....

.....

appoint

.....

.....

.....

[insert name, address and occupation of each proposed attorney]

to be my attorney/(s).

Only complete this section if more than one attorney is appointed.

Tick the option that applies.

Cross out the option that does not apply.

If your attorney/s vacates office, you can nominate someone to take their place.

Tick the boxes that apply. You may choose to allow your attorney to use your money and assets to pay for those things listed here in (a)-(c). Only tick those boxes which you wish to apply.

My attorneys are appointed:

- Jointly (*your attorneys must decide together*)*
- Severally (*any one of your attorneys may decide*).
- Jointly and severally (*all attorneys, or any one of them decide*).

*The death, resignation or incapacity of any of my joint attorneys **does/does not** terminate the appointment of each of my other joint attorneys.

If no option is selected or the option chosen is unclear or inconsistent, I intend my attorneys to act jointly and severally.

Nomination of substitute attorney/s (optional)

.....
.....
.....

[insert name, address and occupation]

2. Powers

My attorney/s may exercise the authority conferred on my attorney/s by Part 2 of the *Powers of Attorney Act 2003* to do anything on my behalf I may lawfully authorise an attorney to do.

I give this power of attorney with the intention that it will continue to be effective if I lack the capacity through loss of mental capacity after its execution.

- a) I authorise my attorney to give reasonable gifts as provided by section 11(2) of the *Powers of Attorney Act 2003*.
- b) I authorise my attorney to confer benefits on the attorney to meet his/her reasonable living and medical expenses as provided by section 12(2) and section 13(2) of the *Powers of Attorney Act 2003*.

e) ~~I authorise my attorney to confer benefits on the attorney to meet his/her reasonable living and medical expenses as provided by section 12 (2) and section 13(2) of the Powers of Attorney Act 2003.~~

d)c) I authorise my attorney to confer benefits on the following:

.....
.....
[insert name and address]

and (delete if not required)

.....
.....
[insert name and address]

and (delete if not required)

.....
.....
[insert name and address]

and (delete if not required)

.....
.....
[insert name and address]

to meet their reasonable living and medical expenses as provided by section 13 (2) of the Powers of Attorney Act 2003.

3. Conditions or Limitations

I place the following limits and/or conditions on the authority of my attorney/s:

.....
.....
.....
.....
.....

[insert any limits, conditions or restrictions]

If you have ticked **box (dc)**, please complete this section.

You can place whatever limits, conditions or restrictions on your attorney.

4. Commencement

This power of attorney operates:

- a) Once the attorney/s have accepted his/her appointment by signing this document.
- b) On and from: ____ / ____ / ____ up to and including: ____ / ____ / ____ (specify dates)
- c) Other:.....

If no option is selected or the options chosen are unclear or inconsistent, I intend that the power of attorney will operate once my attorney/s have accepted their appointment by signing this document.

5. Your signature to make the appointment

The principal must sign.

Signature: Date: ____ / ____ / ____

Name:

6. Acceptance by attorney

The Power of Attorney does not start until the attorney/s sign their appointment.

IMPORTANT: By accepting this power, you as the attorney must always act in accordance with the principals instructions of the principal. Failure to do so may incur civil and/or criminal penalties.

I accept my appointment as attorney.

Signature: Date: ____ / ____ / ____

Name:

Add pages if there are more than one attorney.

A prescribed witness must complete this certificate.

A prescribed witness is a Solicitor, Barrister, Registrar of a Local Court, Licensed Conveyancer, NSW Trustee and Guardian employee or Trustee company employee.

7. Certificate under section 19 of the Powers of Attorney Act 2003

I

.....

.....

[insert name, address and occupation]

certify the following:

- a) I explained the effect of this power of attorney to the principal before it was signed.
- b) The principal appeared to understand the effect of this power of attorney.
- c) I am a prescribed witness.
- d) I have witnessed the signature of this power of attorney by the principal.

Signature: Date: ____ / ____ / ____

- Solicitor/barrister,
 - Registrar of the Local Court
 - Licensed Conveyancer,
 - NSW Trustee and Guardian employee,
 - Trustee company employee,
 - Other (*specify:*)
- [Delete inappropriate categories.]*

IMPORTANT INFORMATION

- ♦ A power of attorney is an important and powerful legal document. You should get legal advice before you sign it. It is important that you trust the person that you are appointing as attorney to make financial decisions on your behalf if you lose capacity.
- ♦ A power of attorney cannot be used for health or lifestyle decisions. The principal should appoint an enduring guardian under the *Guardianship Act 1987* if the principal wants a particular person to make these decisions. For further information, contact the Guardianship Tribunal or NSW Trustee and Guardian.
- ♦ Clause 2 of the power of attorney contain powers which will permit the attorney to use the principal's money and assets for the attorney or anyone else as provided. The principal should

only tick those boxes in clause 2 if the principal chooses that the attorney is to have that power/s.

- ◆ This power of attorney is for use in New South Wales only. If you need a power of attorney for interstate or overseas, you may need to make a power of attorney under their laws. The laws of some other States and Territories in Australia may give effect to this power of attorney. However, you should not assume this will be the case. You should confirm whether the laws of the State or Territory concerned will in fact recognise this power of attorney.
- ◆ An attorney should keep the attorney's own money and property separate from the principal's money and property, unless they are joint owners, or operate joint bank accounts. An attorney should keep reasonable accounts and records about the principal's money and property.
- ◆ If the attorney is signing certain documents that affect real estate, the power of attorney must be registered at Land and Property Information NSW.
- ◆ The principal can terminate ('revoke') the power of attorney by simply telling the attorney that the power is revoked, or serve a notice of revocation, which is simply a notice in writing that the power of attorney is revoked. Once informed of the revocation, the attorney cannot continue to act. **If the attorney continues to act with knowledge that the power of attorney is revoked, criminal penalties apply.**
- ◆ **An attorney must always act in the best interests of the principal. Unless the attorney is expressly authorised, the attorney cannot gain a benefit from being an attorney.**

For information on powers of attorney, the attorney's duties and registration, contact the Land and Property Information or a solicitor, a trustee company or the NSW Trustee and Guardian.

Notes for completion

Joint attorneys

If you appoint more than one attorney, you should indicate whether the attorneys are to act jointly, severally or jointly and severally. Attorneys who are appointed jointly are only able to make decisions if they all agree about the decision.

Attorneys who are appointed severally or jointly and severally are able to make decisions independently of each other.

Substitute attorney/s

If you appoint a substitute attorney, they will only have authority to act as your attorney if the first appointed attorney dies, resigns or becomes incapacitated.

Each attorney (including any substitutes) must sign their acceptance on the appointment for it to become effective.