

Aspects of Financial Planning

Powers of attorney

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Powers of attorney are an important consideration when organising your financial affairs. Unlike a Will that provides instructions on how your assets are to be distributed on death, a power of attorney enables you to make provision for your financial affairs during your lifetime.

Background

Many people carefully consider the implications of their passing on their dependants and other beneficiaries and address this by drafting an effective Will. However, many may not have thought about the benefits of securing their finances in life. One of the most important tools to ensure peace of mind and security is a power of attorney.

A power of attorney is a document by which a person or company confers authority to another person to act on their behalf in situations when they are unable to act for themselves. A power of attorney specifies what may and may not be done by the appointed person. The person who gives the power of attorney is called the donor, while the person to whom the power is given is called the donee, the attorney under power, or sometimes just the attorney.

Why a power of attorney?

In the absence of proper planning, the management of your financial affairs would fall on a person appointed by a government body. The benefit of a power of attorney is that it allows you to nominate a trusted person to take on this role before anything happens.

A common example of the use of the power of attorney is where the donor is soon to go overseas and wants to appoint someone to manage his or her financial affairs in Australia whilst they are absent. Another example is that of older people/retirees or others who are aware that they may at some stage become incapable of managing their affairs and who want to





appoint someone to act on their behalf, perhaps to pay bills and manage an investment portfolio, if this should occur.

Setting up a power of attorney

Powers of attorney are most often used in the management of one's financial assets so although they transfer certain powers to the donee, they do not operate to enable the donee to make decisions about the daily care and activities of the donor. The level of authority you grant is determined when setting up a power of attorney.

Powers of attorney can be general, allowing the donee to do anything that the donor is legally able to authorise. That is, your attorney may have unlimited authority with respect of your affairs. On the other hand, powers of attorney can be restricted by the donor authorising the donee to perform only a specific, narrow function. For example, the power of attorney can be limited to specific assets or investments and/or for a specific period of time (eg while overseas on holidays).

In some states (eg NSW and VIC) there is a statutory form of general power in which the donee is simply authorised to undertake anything that the donor can lawfully undertake.

While the power of attorney is in force, the person you choose has your authority to sign documents, buy and sell assets, transact on investments and create obligations on your behalf and you are bound by all acts of your donee.

The legislation seeks to protect the interests of a spouse and beneficiaries by clarifying the role of the donee. For instance it disallows a donee to benefit personally from the assets of the donor unless the power of attorney specifically allows this to occur.

Who to choose?

A donee can be any person over the age of 18 who is of sound mind. Although, because of the responsibility this role entails, you would normally decide on your own additional criteria for determining your donee. You would generally choose a friend, close relative, a statutory trustee company or Public Trustee, or a solicitor or accountant. The choice is made bearing in mind the nature of the problem sought to be dealt with and factors like the maturity, experience and trustworthiness of the donee. In order to be effective, the donor must understand the nature and effect of the power when executed.

The relationship between the donor and donee of a power of attorney is that of principal and agent. At common law, there is a rule that when a principal becomes incapable of





understanding the nature of his/her actions, then the agency is terminated. The effect of this rule is that persons who wanted to give a power of attorney that would be operative beyond their entry into mental incapability has no means of achieving that result.

How to go about it?

It is important to note that the requirements of the statutes as to witnessing must be followed. In NSW for example, one witness is adequate, but that witness must be a prescribed person (a Clerk of Petty Sessions or a barrister or solicitor instructed and employed independently of any solicitor appointed as attorney by the power of attorney). The prescribed person must explain the effect of the power of attorney to the donor prior to execution.

Certain procedures must be complied with to ensure the power of attorney is valid. These include:

- Correct witnessing procedures
- Registration of the power of attorney in some situations; and
- Registration of any revocation.

There are also intricate legal questions that may arise where powers of attorney are created in one state of Australia for use in another state or created outside of Australia for use within Australia. Legal advice should be sought in these instances.

Revocation

In the same way a power of attorney can be created, it can also be revoked. The donor of the power signs a document called a revocation of power of attorney. The donee should be given a copy of the revocation, which would operate as notice to the donee that he/she can no longer use the power of attorney. It would be desirable for the donor of the power to retrieve the actual power of attorney document from the donee, since if the donee continued to use it, it would be fully effective unless the person dealing with the donee had notice of the revocation. In addition, a copy of the revocation should be sent to each company or bank or other institution to whom the power has been provided.

The power of attorney also ceases to be effective upon the death of the donor or the donee, although the power may continue to be validly exercised by the donee until he/she has notice of the death of the donor. Similarly, a power of attorney ceases to be effective upon the bankruptcy of the donor or donee.





Notice of death is notice of revocation, and notice of mental incapability is notice of revocation, except where the power is an enduring power.

Enduring power of attorney

An enduring power of attorney enables a donor of a power of attorney to have their appointed attorney continue to act on his/her behalf during mental incapability. An ordinary power of attorney as described above would cease when the donor became incapable of managing his or her own affairs.

In cases where a person becomes unable to control their own finances because they are of 'unsound mind' due to an accident, illness or disability and they have not set up an enduring power of attorney, control of their assets comes under the power of a government body.

Centric Wealth recommends that all investors have an enduring power of attorney as part of their estate plan.





Centric Wealth Advisers Ltd may be able to be of assistance

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