

POWERS OF ATTORNEY

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POWERS OF ATTORNEY

- DEFINITIONS:
- DONOR: person who signs or “gives” a Power of Attorney to someone else
- ATTORNEY: person who acts for the donor pursuant to the Power of Attorney (not necessarily a lawyer)

POWERS OF ATTORNEY

- Definitions cont'd
- POWER OF ATTORNEY: a document signed by a donor (must be COMPETENT) giving authority (POWERS) to manage some or all of the donor's financial affairs- but the donor still OWNS the assets.

TYPES OF PoAs

- Most common:
- ENDURING
- SPRINGING
- GENERAL

ALL PoAS

- Valid during the lifetime of donor (UNLESS revoked in writing)
- Valid only if Donor is COMPETENT to give a Power of Attorney at the time document is signed

GENERAL POWER OF ATTORNEY

- Usually used for commercial purposes only
- Ceases when the donor becomes incompetent

SPRINGING POWER OF ATTORNEY

- The document is not effective until
 - Certain date

Or

- Certain event occurs.... (e.g) Donor has been declared incompetent by two medical doctors

ENDURING POWER OF ATTORNEY

- Can look like a “General” Power of Attorney but has a clause in which it states that the Powers granted will survive the donor’s incompetency
- This is the most common form for individuals

ENDURING PoA

- Contains a clause that the authority (“power”) will continue after the donor is incompetent (a.k.a. the “enduring” clause)
- Must be executed in accordance with *The Powers of Attorney Act*
- Only certain people can witness an Enduring power of Attorney

The Power of Attorney Act

- In writing
- Donor must be competent
- Signed by Donor or by another person acknowledged to be designated by Donor and in presence of Donor
- Signed by witness in presence of Donor
- Enduring PoAs can only be witnessed by certain occupational witnesses

AN ENDURING PoA can

- allow named attorney to manage donor's financial affairs
- name the (one or more) Attorney to act
- outline the duties & “powers” of the Attorney
- allow the Attorney to continue to act even if the Donor loses mental capacity/ competence
- give the Attorney the right to compensation from the Donor's assets if clause included

AN ENDURING PoA does not...

- Give the Attorney power to make medical or personal decisions
- Does not give the Attorney power to act after the death of the Donor
- Does not allow for the use of the Donor's assets for anyone other than the Donor unless specified otherwise in the document

A POA IS NOT...

- A will
- Valid –unless person signing is competent and it is witnessed in accordance with *the Powers of Attorney Act*
- Enduring- unless it contains a specific clause
- A Health Care Directive- which deals with the person's medical decision making

PoA vs. Will

- Attorney power is during Donor lifetime- ceases at death
- Attorney is named in PoA document
- Executor authority begins at death
- Executor is named in the Will

WHY HAVE AN ENDURING PoA?

- Protects the Donor
 - Donor chooses the person to act as Attorney.
 - Can choose a person who is most suitable and understands Donor's needs;
 - Can choose a person that the Donor trusts.
 - Donor chooses powers
 - Donor can limit powers to their own situation

WHAT IF NO POWER OF ATTORNEY

- If person is unable to make a Power of Attorney because they are no longer competent and circumstances require someone to be appointed to manage their affairs, then a committee may be appointed under *The Mental Health Act*.

Committee

- The committee may be:
 - A private committee; or
 - The Public Trustee.

PoA vs Committee

PoA

- Voluntary
- No personal care
- Power of Attorney Act

Committee

- Involuntary
- Personal care
- Mental Health Act

IMPORTANT CONSIDERATIONS

- Mental capacity of the Donor determined
- Trustworthiness of Attorney
- Proper Drafting
- Independent Legal Advice
- Reporting clause

ATTORNEY DUTIES

- Attorney is a fiduciary to the donor: must always act in the best interests of the Donor
- Attorney must never be in position of conflict with Donor-
- Attorney is always accountable – either by a reporting paragraph in the document itself or, to the nearest relative, on request

Holding the Attorney Accountable

- If Attorney refuses to account to anyone then the *Powers of Attorney Act* allows for an Application to be brought to Court
- Must be someone who has an interest in the affairs of the Donor (relative, close friend)
- Court will decide if actions of Attorney are acceptable

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