

Making enduring powers of attorney: practical tips

By Jen McMillan



Jen McMillan,
Legal Practice
Consultant, Lawcover,
Wills & Estates
Accredited Specialist.



With our aging population, more and more clients are encouraged to make enduring powers of attorney, appointing someone they trust to look after their financial affairs if the need arises. However preparing an enduring power of attorney presents challenges and risks, and the consequences that may arise from issues such as doubtful capacity to make a power of attorney, failure to keep accounts, or unauthorised transactions by the attorney can have long lasting implications for both practitioners and clients. As a practitioner, developing a checklist of practical issues to consider or raise with your client can be an effective way to manage risks and protect yourself and your clients.

Snapshot

- Ensure clients understand the real life impact and full scope of enduring powers of attorney.
- It is preferable not to make an enduring power of attorney than to make one appointing someone unsuitable.
- Use a checklist when making enduring powers of attorney to help manage risk and protect your client.

with no duty to seek my permission in advance or to tell me after the event, so that they can, if they so decide, do things in my affairs that I would myself wish to do (such as pay my bills and make sure that cheques arriving in the post are put safely into the bank) and also things that I would not choose to do and would not wish to see done – sell my treasured stamp collection; stop the monthly allowance I pay to my grandson; exercise my power as appointor under the family trust and thereby change the children and grandchildren who are to be income beneficiaries; instruct my financial adviser to sell all my blue chip shares

and to buy instead collateralised debt obligations in New York; have my dog put down; sell my house; buy a place for me in a nursing home?

Second, is it to my benefit and in my interests that all these things – indeed, everything that I can myself lawfully do – can be done by the particular person who is to be my attorney? Is that person someone who is trustworthy and sufficiently responsible and wise to deal prudently with my affairs and to judge when to seek assistance and advice? The decision is one in which considerations of surrender of personal independence and considerations of trust and confidence play an overwhelmingly predominant role: am I satisfied that I want someone else to be in a position to dictate what happens at all levels of my affairs and in relation to each and every item of my property and that the particular person concerned will act justly and wisely in making decisions?

Section 5.3 of the Attorney-General's Capacity Toolkit contains a good plain English explanation of an enduring power of attorney and examples of open-ended questions to test your client's understanding (see justice.nsw.gov.au/diversityservices/Documents/capacity_toolkit0609.pdf).

The Law Society's publication *'When a client's mental capacity is in doubt: A practical guide for solicitors'*, is another important resource (see lawsociety.com.au/cs/groups/public/documents/internetcontent/1191977.pdf). It has been referred to with approval by the NSW Civil and Administrative Tribunal in proceedings where the solicitor who gave a s 19 certificate has been cross-examined (*HZC* [2016] NSWCATGD 61 at [57]–[66]).

If you have doubts about whether your client understands the effect of the enduring power of attorney you should not give the s 19 certificate. It may be more appropriate for an application to be made for a financial management order.

Tip 1: Identify your client

We have become used to verifying the identity of clients in property transactions; making a power of attorney should be no different, particularly if the client is not already well known to you. Practitioners should confirm their client's identity by performing the requisite checks.

Tip 2: See your client alone

If your client has come to your office with a family member or someone else, make a point of seeing them alone to take instructions – just yourself and the client.

If you and your client do not speak the same language, use an independent qualified interpreter rather than a friend or family member to interpret.

Tip 3: Test your client's capacity to make an enduring power of attorney

An enduring power of attorney must be witnessed by a prescribed witness (defined to include a solicitor), and the prescribed witness must certify under s 19 of the *Powers of Attorney Act 2003* that he or she explained the effect of the enduring power of attorney to the principal before it was signed and that the principal appeared to understand the effect of the power of attorney.

In *Szozda v Szozda* [2010] NSWSC 804, Barrett J explained (at [34]) two fundamental questions that clients should ask themselves when making an enduring power of attorney:

'First, is it to my benefit and in my interests to allow another person to have control over the whole of my affairs so that they can act in those affairs in any way in which I could myself act – but

Tip 4: Discuss your client's choice of attorney

Some clients will have a choice of suitable attorneys; others may have difficulty finding someone they can trust. It is better *not* to make an enduring power of attorney than to make one appointing someone unsuitable.

If your client wishes to appoint two or more attorneys, the advantages and disadvantages of appointing them to act jointly or jointly and severally should be discussed. Note that it is now possible with a joint appointment to specify that the power of attorney will not be terminated if one of the attorneys dies, resigns or otherwise vacates office.

Tip 5: Explain the optional additional powers

The prescribed form includes optional powers to give gifts and to confer benefits on the attorney and/or other persons to meet their reasonable living and medical expenses. The prescribed form does not fully explain these powers so it is useful to have a printed copy of Schedule 3 of the *Powers of Attorney Act 2003* on hand.

Be aware that what is an acceptable power for one attorney may not be acceptable for another. For example, if your client is appointing their spouse in the first instance and one of their children as substitute attorney, it may be necessary to modify the prescribed form if your client does not wish the substitute attorney to have the same optional powers as the spouse.

Tip 6: Discuss conditions, limitations & commencement

Check whether your client wants the attorney's power to be unlimited, or whether conditions are to be imposed. Does your client want the power of attorney to be operative as soon as the attorney accepts the appointment or only if your client needs assistance in the future?

Is your client happy for the attorney to decide when assistance is needed, or should a medical practitioner make that decision?

Tip 7: Discuss any previous powers of attorney your client has made

The prescribed form of enduring power of attorney does not revoke previous powers of attorney made by the principal. It is possible to have several powers of attorney operating concurrently.

If your client wishes to revoke previous powers of attorney it is prudent to do so in writing and, if the power of attorney has been registered, to register the revocation. There is no prescribed form for revoking a power of attorney, but a suggested form of revocation is published by Land and Property Information (see lpi.nsw.gov.au/__data/assets/pdf_file/0005/25367/Revocation_of_POA_Form_FINAL.pdf).

Notice of the revocation must be given to the attorney, and should also be given to banks or other institutions that have been provided with the previous power of attorney. **LSJ**



EXPERT EXPERTS
TESTAMENTARY CAPACITY ASSESSMENTS

**Banks
v
Goodfellow**

Testamentary Capacity Assessments in anticipation of a Will

Protect your Client
Protect your Firm



CONTACT US NOW

1300 72 66 55

www.expertexperts.com.au