

POWERS OF ATTORNEY GUIDELINES



These Guidelines have been published to assist practitioners in dealing with common requests by attorneys.

The Guidelines apply to powers of attorney in general but it is noted that since 2004, statutory powers of attorney created in Victoria come under one of four headings:¹

1. General Power of Attorney
2. Enduring Power of Attorney (Financial)
3. Enduring Power of Attorney (Medical Treatment)
4. Enduring Power of Guardianship

Role of attorney as representative

“A person appointed pursuant to an Enduring Power of Attorney has wide powers, but only as a representative. The donor remains the lawyer's client and whilst the Attorney assumes a representative role, the Attorney does not replace the donor as the lawyer's client. Despite wide powers, an Attorney remains subject to fiduciary duties and a lawyer acting on behalf of the donor has a duty to the donor to ensure that those fiduciary duties are being observed. For so long as the lawyer has a relationship with the donor, such as holding a file or documents on behalf of the donor, the lawyer has an obligation to protect the interests of the donor in respect of those documents²”

1. Whether a practitioner should or should not hand over a donor's original will on the request of an attorney

Practitioners who have been requested by the donor to hold his or her will for safe custody are sometimes requested by an attorney to hand over the original will to the attorney. Upon receiving such a request, the practitioner should confirm that it is the wish of the donor to hand over the will to the attorney. If the donor lacks capacity to instruct the practitioner, then, as a general principle, the practitioner should not hand over the original will to the attorney. However, where the practitioner considers that an attorney has made a *bona fide* request for a certified copy of the will, the practitioner should provide the attorney with either a certified copy of the will or relevant part of the will, or advice as to the content of the relevant part of the will.

For example: the sale by an attorney of a donor's property which has been specifically devised under a will raises the question of whether or not *ademption*³ applies should the property be sold during the lifetime of the donor. For this reason, a request by an attorney for a copy of the donor's will may be legitimate.

2. When can an attorney sell or mortgage property?

Subject to its terms, an Enduring Power of Attorney (Financial) includes the power to sell and mortgage a property. However practitioners should be mindful that the authority of an attorney under an Enduring Power survives the incapacity of the donor, whereas the authority of the attorney under a General Power of Attorney ceases upon the incapacity of the donor and all Powers of Attorney cease to have effect upon the death of the donor.

¹ *Taking Control*, Victoria Legal Aid & Office of the Public Advocate, February 2010

² Cocks, Russell, *Ethics Handbook*, (1st Ed, Law Institute of Victoria, 2004) p 26

³ “Ademption” refers to the failure of a specific gift under a Will because at the date of death, the Deceased no longer owns the subject matter of the gift

3. Duty to consult

If a donor has capacity, it is prudent for a practitioner to consult the donor. But an attorney has no obligation to do so:

“As a general principle, an attorney owes no duty to the principal to consult the principal, or other persons, in the exercise of the attorney’s authority under the power. Provided that the attorney acts within the scope of the power, and not otherwise in fiduciary breach or in a fashion that fails to meet the applicable standard of care, there are few grounds, if any, to substantiate a challenge to the exercise of that authority”.⁴

4. What should a practitioner do when an attorney is acting beyond power?

An attorney’s responsibilities are dependent on which power is conferred upon the attorney (i.e. General Power of Attorney, Enduring Power of Attorney (Financial), Enduring Power of Attorney (Medical) and Enduring Power of Guardianship).

Generally the responsibilities of the attorney under all powers include:

- obeying the donor’s instructions;
- protecting the interests of the donor; and
- avoiding any abuse of their power or conferring any benefit on themselves or others which the attorney is not authorised to do⁵.

For further information regarding the responsibilities of an attorney under each specific power please refer to the Victoria Legal Aid & Office of Public Advocate, ‘Taking Control,’ booklet⁶.

The following comments apply when a practitioner has acted for the donor.

“A prudent solicitor, when he or she sees the red light, makes enquiries.”⁷

In the event that a practitioner believes that the attorney is acting beyond power or not in the best interests of the donor, then it is the duty of the practitioner to make further enquiries in order to protect the interests of the donor and to ensure that the proposed exercise of the power is lawful. In case of doubt, it may be appropriate to apply to the Victorian Civil and Administrative Tribunal (VCAT) under the Guardianship List for guidance⁸. VCAT can revoke or suspend the appointment of the attorney.

Practitioners must be diligent in protecting the interests of the donor⁹. Practitioners may be personally liable in damages in circumstances when the attorney’s use of the power appeared to be suspicious,¹⁰ and outside the scope of the attorney’s authority.

⁴ G E Dal Pont, Powers of Attorney, 2011, LexisNexis Butterworths p220

⁵ Law Society of New South Wales, ‘Guidelines for Practitioners Preparing an Enduring Power of Attorney,’ December 2003 p 6

⁶ Victoria Legal Aid & Office of Public Advocate, ‘Taking Control,’ February 2010

⁷ Per *Young CJ Yaktine v Perpetual Trustees Victoria Ltd* [2004] NSWSC 1078; Whitehead, Peter, “A Review of the Response of the Courts and NSW Guardianship Tribunal to cases of Financial Abuse” [2008] ElderLawRw 6; (2008) 5 Elder Law Review – Article 6 p9

⁸ Section 125V Instruments Act 1958

⁹ *Yaktine v Perpetual Trustees Victoria Ltd* [2004] NSWSC 1078; Whitehead, Peter, “A Review of the Response of the Courts and NSW Guardianship Tribunal to cases of Financial Abuse” [2008] ElderLawRw 6; (2008) 5 Elder Law Review – Article 6 p9

¹⁰ *Yaktine v Perpetual Trustees Victoria Ltd* [2004] NSWSC 1078; Whitehead, Peter, “A Review of the Response of the Courts and NSW Guardianship Tribunal to cases of Financial Abuse” [2008] ElderLawRw 6; (2008) 5 Elder Law Review – Article 6 p9

5. Powers of Attorney executed in Australian States or Territories for use in Australia

The following quote from G E Dal Pont is self-explanatory:

“The power of attorney legislation in most jurisdictions makes provision for the recognition of a power of attorney executed under the law in another Australian jurisdiction. As regards enduring powers of attorney, the statutes in the territories, New South Wales and Victoria deem the power of attorney to be made under, and in compliance with, the relevant state or territory Act to the extent that the powers it gives could validly have been given by a power of attorney made under the local Act.”¹¹

Section 116 of the Instruments Act 1958 (Vic.) states:

“If an enduring power of attorney is made in another State or Territory and complies with the requirements of that other State or Territory, then, to the extent the powers it gives could validly have been given by an enduring power of attorney made under this Part, the enduring power of attorney is to be taken to be an enduring power of attorney made under, and in compliance with, this Part.”

6. Powers of Attorney executed in Victoria for use overseas

A power of attorney can be used overseas when it complies with the host country's requirements. Information about a country's requirements can be obtained from that country's Consulate or High Commission or Embassy. In most countries, documents must be witnessed by a Notary Public and stamped by the Department of Foreign Affairs. For some countries, the power of attorney may also need to be stamped by the foreign country's Embassy or Consulate. Therefore, prior to witnessing the execution of any power of attorney for use overseas, a practitioner should recommend that enquiries be made, or make such enquiries, as to whether the executed power of attorney will be acceptable in the receiving overseas jurisdiction.

7. Can powers of attorney executed overseas be used in Victoria?

The Victorian Office of the Public Advocate advises:

“A person living overseas can make an Enduring Power of Attorney (financial) (EPA – financial) so long as that person (the donor) has financial or legal matters and is competent.

When making an EPA – financial overseas it is important to ensure that the people who are witnessing it can be found in the future so that, if required, they can give evidence that it was actually signed by the donor of the power.

Under the Evidence Act it is required that it be witnessed by:

- an Australian consular officer acting in that country
- an ambassador, envoy, Minister, charge d'affaires, secretary of embassy or legation, consul-general, consul, vice-consul, acting consul, pro-consul, or consular agent of any part of her Majesty's dominions who is acting in that role in that country, or
- any person who has the power in that country to take an oath in that country; or
- a public notary (or notary public as known in some countries).¹²

¹¹ G E Dal Pont, 'Powers of Attorney,' 2011, LexisNexis Butterworths p108

¹² www.publicadvocate.vic.gov.au/powers-of-attorney/496/

8. When are gifts to an attorney valid?

An attorney has a fiduciary duty to act in the best interest of the donor and to use the power in accordance with the donor's interests, regardless of how broadly worded.¹³ An attorney or a family member or associate of the attorney cannot benefit from the power unless the benefit has been expressly stated to be within the terms of the power.¹⁴

The general principle is:

“[w]here a broadly worded power of attorney arguably authorizes acts that may be inconsistent with the principal's interests or intent, the instrument should not be interpreted as allowing the agent to undertake such acts in the absence of specific authority”.¹⁵

How can we help you?

These are guidelines only and do not have the force of law. A practitioner must comply with the Professional Conduct & Practice Rules 2005 and the Legal Profession Act 2004. To discuss concerns about powers of attorney, contact the Legal Ethics Manager on (03) 9607 9336.

¹³ G E Dal Pont, 'Powers of Attorney,' 2011, LexisNexis Butterworths p162

¹⁴ G E Dal Pont, 'Powers of Attorney,' 2011, LexisNexis Butterworths p181

¹⁵ Matter of Trust of Franzen (1998) 955 P 2nd 1018 at 1021; G E Dal Pont, 'Powers of Attorney,' 2011, LexisNexis Butterworths p 163