

Circular

Division: Land and Property Information
No: 2004/01
Date: February 2004

Changes to Powers of Attorney Law - Powers of Attorney Act 2003

The Powers of Attorney Act 2003, which will commence on 16 February 2004, makes some important changes to the law governing Powers of Attorney in NSW. Previously, the statutory provisions relating to Powers of Attorney were contained in Part 16 of the Conveyancing Act 1919. The Powers of Attorney Act 2003 ("the Act") re-enacts those provisions, with amendments, in a separate Act.

The main changes are:

- There is a new prescribed form. The old prescribed form cannot be used to make a Power of Attorney after 16 February 2004. However, Powers of Attorney on the old form and dated before 16 February 2004 remain valid and will be accepted for registration. The new prescribed form should not be used until after 16 February 2004. As is the case now, it will not be compulsory to use the prescribed form. Many solicitors prefer to draft their own form and this will continue to be allowed.
- For Enduring Powers of Attorney, the attorney will have to sign the form to show he or she consents to act. This can be done at the same time as the principal signs or at a later date, but an Enduring Power of Attorney will not commence to operate until the attorney signs. The attorney's signature does not have to be witnessed.
- The new Act prohibits an attorney from using the principal's money for gifts or benefits to the attorney or to third parties unless specifically authorised in the Power of Attorney. If Clause 5 of the new form is not crossed out, the attorney will be authorised by the Act to use the principal's money to give only certain types of gifts. These are gifts to a relative or close friend of the principal of a seasonal nature (for example, birthday, Christmas or other religious holiday) or because of a special event (for example, birth or marriage). Also permitted are donations of the kind that the principal made when the principal had capacity or might reasonably be expected to make (for example, to a favourite charity). However, the value of the gift or donation must be reasonable having regard to the principal's financial circumstances and the size of the principal's estate. If the principal does not want the attorney to have the power to make such gifts, that clause should be crossed out.

- Clauses 6 and 7 of the new form will allow an attorney to use the principal's money for housing, food, education, transportation and medical care for the attorney or persons nominated in the Power of Attorney (for example, the principal's children). Again, the amount of the benefit must be reasonable having regard to the principal's financial circumstances and the size of the principal's estate. If the principal does not want the attorney to have these powers then the relevant clause on the form should be crossed out.
- An Enduring Power of Attorney made in another State or Territory of Australia will be recognised as valid in NSW. However, in order to be registered in NSW it will have to be accompanied by a certificate from a legal practitioner from the State or Territory in which it was made saying that it was made in accordance with the formal requirements of the law of that State or Territory, and stating that he or she:
 - has been admitted in that State or Territory, and
 - holds a practising certificate in that State or Territory, and
 - practices in that State or Territory (see S.25 of the Act).
- In addition to the Supreme Court, which currently has sole jurisdiction, the Guardianship Tribunal will now have jurisdiction to review Enduring Powers of Attorney.
- Currently, only solicitors, barristers or Registrars (formerly Clerks) of a Local Court are "prescribed witnesses", enabling them to explain an Enduring Power of Attorney and witness the principal's signature. The Act expands this list to include licensed conveyancers, employees of the Public Trustee or employees of trustee companies who have completed a course of study approved by the Minister.
- The full text of the Powers of Attorney Act 2003 may be obtained at www.legislation.nsw.gov.au.

See our website www.lpi.nsw.gov.au for:

- Power of Attorney form
- Revocation of Power of Attorney form
- Information Kit No 8 "Powers of Attorney in NSW"

For more information contact Department of Lands, Legal Services Branch T:9228 6726.

Des Mooney
Deputy Director General, Department of Lands and
General Manager, Land and Property Information