

Can I use a Power of Attorney after the Principal's death?

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A Power of Attorney in NSW (sometimes referred to as a Financial Power of Attorney in other states), is a document which enables someone (the Principal) to appoint another person or persons (the Attorney) to manage their financial and legal affairs. A Power of Attorney can only be used while the Principal is alive. Once the Principal dies, the Power of Attorney will no longer be valid.

When can an Attorney start acting

The Power of Attorney will specify when the Attorney can commence acting on behalf of the Principal.

The typical options for commencement of a Power of Attorney are for the document to commence:

1. immediately; or
2. only when the Attorney considers the Principal requires assistance in managing their legal and financial affairs; or
3. only when a doctor considers that the Principal requires assistance in managing their legal and financial affairs and provides evidence of their opinion in writing.

If the Principal were to have lost capacity to make decisions for themselves, the Attorney, under an Enduring Power of Attorney could be managing the affairs of the Principal for a long period of time prior to the Principal's passing. For this reason, the Attorney is often the person or persons most familiar with the Principal's finances and the person who has had access to the Principal's bank accounts prior to their death.

Can the Power of Attorney continue to be used after death?

No, a Power of Attorney automatically ceases immediately on the death of the Principal and can no longer be validly used by the Attorney.

If the Attorney continues to rely upon the Power of Attorney to access the Principal's bank accounts or assets, or if the Attorney signs any legal documents on behalf of the Principal after their death, then the Attorney could expose themselves to legal claims that they have acted inappropriately and without proper authorisation.

A Power of Attorney cannot be made to extend after death, even where wording is included in the Power of Attorney that purports to do so.

Upon the death of the Principal, the Principal's Will is the relevant document that appoints the Executor and details how the assets are to be distributed. The Executor appointed under the Will is the appropriate decision maker on behalf of the estate.

Can the Power of Attorney continue to be used if the Principal loses capacity?

An Enduring Power of Attorney is particularly useful to allow the Attorney to manage the financial and legal affairs of the Principal as an Enduring Power of Attorney will continue even if the Principal loses the capacity to make those decisions for themselves.

A General Power of Attorney will cease to operate if the Principal loses capacity to make decisions for themselves.

What happens to the bank accounts previously operated under a Power of Attorney?

Once any banks are made aware of the death of the Principal, they will freeze the Principal's bank accounts. Money and payments will still be able to be received into those bank accounts, but funds will not be able to be removed from the account, except to pay for the Principal's funeral expenses.

If a bank account is jointly held in the name of two people, then upon the death of one person, the bank account will usually automatically pass to the survivor.

How can the Principal's bank accounts etc be accessed after death?

The Principal's executor will need to apply for a Grant of Probate. Only once a Grant of Probate has been obtained will the executor be able to administer the Principal's bank accounts and redeem the proceeds. Until that point, the bank accounts of the Principal will remain frozen and funds may only be used for funeral expenses.

If expenses were incurred prior to the Principal's passing, then payment of those expenses cannot occur from the Principal's funds until after a Grant of Probate has been obtained. The executor or other family members may elect to pay those expenses themselves (only if they agree to do so) with the expectation to be then reimbursed when funds become available after the Grant of Probate is received.

What if the Attorney is the sole Attorney, child, executor and beneficiary of the Principal?

There are no exceptions to the above. Once a Principal dies, the Power of Attorney ceases to operate and cannot be used to legally access or manage the Principal's bank accounts or assets.

Get help from a Wills and Estates lawyer

The Attorney appointed under a Power of Attorney needs to take care not to use the Power of Attorney after they are no longer legally entitled to do so. If the Principal passes away, the Attorney must cease using the Power of Attorney immediately.

Contacting E&A Lawyers

For more information or to arrange a consultation with a lawyer, you can call or email us.

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