



Duties of an Attorney under a Power of Attorney in NSW

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A Power of Attorney is a powerful document which, in essence, delegates to someone (the Attorney) the right to deal with the legal and financial affairs of a person (the Principal). They need to be carefully considered by the Principal but can be very beneficial in allowing trusted people to look after those affairs, particularly if the Principal is elderly, frail or is [losing their capacity](#) to manage those matters.

For more detailed information about Powers of Attorney, you can read our blog, [“Power of Attorney NSW – your complete guide”](#).

If you have been made an Attorney for someone, you need to be very aware that you are taking on significant responsibilities and you have important obligations to act appropriately.

What is the role of the Attorney named in a Power of Attorney?

There are a number of obligations which are set out in the form of Power of Attorney as part of accepting appointment as an Attorney. These obligations are included in the prescribed form of Power of Attorney going back to the early 2000's but the same obligations still apply at law to older Powers of Attorney even where they do not specifically express those obligations in the document.

The main obligations of the Attorney are to:

- always act in the best interests of the Principal;

- keep their money and property separate from that of the Principal;
- keep records of the money and property of the Principal;
- not take any benefit from being an Attorney unless the Power of Attorney provides otherwise; and
- always act honestly in dealing with the legal and financial affairs of the Principal.

When do Attorney duties commence in a Power of Attorney?

This depends upon what is stated in the Power of Attorney. It will either be immediately upon you accepting appointment as the Attorney or it could be deferred until the Principal loses their ability or capacity to manage their affairs.

What is “acting in the best interests of the Principal” in a Power of Attorney?

From a legal perspective, the Principal and the Attorney for a Power of Attorney are in a fiduciary relationship. That is a relationship of trust and confidence in which the Attorney must put the interests of the Principal before their own personal interests.

An example of this is that the Attorney should expend money to look after the Principal, such as paying for accommodation, paying for medical and dental treatments and so on, from the Principal's own funds.

It would not be in the Principal's interest for the Attorney to avoid spending money believing that it preserves the money for later on, particularly when, say, the Attorney will inherit from the Principal's estate upon their death. It would also not be acceptable for the Attorney to use the Principal's money to invest in some project specifically of interest to the Attorney.

Attorney and Principal money and property must be kept separately

Attorneys must always keep their own property and money separate from the Principal's money and property. This is to ensure that if any person was aggrieved by the actions of the Attorney and how the money had been spent, then there are clear, concise and accessible records.

Even if the Principal does not, at the relevant time, have a bank account, then the Attorney needs to set up a bank account in the name of the Principal. Income and expenses should all flow through the Principal's bank account and be recorded. Although this may cause further work for the Attorney, it is imperative that there is a separate account kept.

What is meant by “not taking a benefit” in a Power of Attorney?

This certainly turns on the earlier issue of acting in the Principal's best interest.

An Attorney should not be able to “profit” from helping manage the Principal's affairs. But that does not stop the Principal specifically allowing for the Attorney to be paid for their services in managing the Principal's legal and financial affairs. This is

common where the Attorney is not a family member and may be a professional such as an accountant or other financial adviser.

What is “acting honestly” in dealing with the Principal’s affairs?

This is another element of the fiduciary relationship. The Attorney’s personal interests should never cloud their decision-making when acting under a Power of Attorney. The Attorney’s actions should always be for the benefit of the Principal.

It is also an Attorney’s obligation to be honest when dealing with others, such as the Principal’s financial advisers, banks, lawyers etc., in providing all the relevant information for tax and investment purposes.

Who can challenge an Attorney’s actions when acting under a Power of Attorney?

The issue of when an Attorney might be challenged can arise in a number of ways.

If the Attorney is considered by an interested party, such as a family member, as acting other than in the interest of the Principal, they may challenge the appointment or actions of the Attorney. The appointment of the Attorney may be referred for decision by a Tribunal or a Court having the authority to revoke the Power of Attorney and the authority to appoint someone else in the role.

There has also been an increased interest in this area where an Attorney acted for the Principal before their death. The Executor certainly has an authority, and an obligation, to consider any transactions carried out by the Attorney whilst they were managing the affairs of the deceased Principal.

Where the Attorney is also the Executor of [the deceased estate](#), beneficiaries of the estate may also call into question transactions carried out by the Attorney. Where the Attorney has acted in their own self-interest (as opposed to acting in the best interests of the Principal), then there is always the possibility of the Attorney having to account to the deceased estate for the benefits that the Attorney has gained in breach of their duty.

Get help from a Wills and Estates lawyer

Being appointed as an Attorney is commonly seen as an acknowledgement of trust and confidence by the Principal. It is then on the Attorney to respect that fact and to be mindful that the management of the legal and financial affairs are solely to be for the Principal and not the self-interest of the Attorney.

Contacting a family lawyer

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

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