

Risks of choosing the wrong attorney for Your Power of Attorney

Author: Chris Alfonso
Email: chris@ealawyers.com.au
Date: Monday October 14, 2024

Choosing the right attorney under a Power of Attorney (POA) is one of the most important decisions you'll make for your financial and legal well-being. In some ways, this can be more important than choosing an executor under your Will, as the role of an attorney can extend for a far longer period of time, and it can directly impact your quality of life.

If you select the wrong person to act as attorney under your POA, there can be significant consequences, both financially and emotionally, for both you and the family.

You can read more about appointing an attorney in our earlier blogs,

- "Who should you appoint as your Attorney in a Power of Attorney?"
- "Duties of an Attorney under a Power of Attorney in NSW"

9 things that can go wrong when choosing an attorney for your POA

Understanding the risks can help you make a more informed decision and avoid potentially devastating outcomes. In this blog, we look at nine things that could go wrong if you select the wrong attorney for your Power of Attorney. We also look at how to avoid the potential pitfalls of appointing the wrong attorney.

1.Financial mismanagement

One of the most common issues that can arise from appointing the wrong attorney is financial mismanagement. Your attorney will have the authority to manage your bank accounts, pay bills, and even sell property on your behalf.

If the attorney lacks the necessary financial acumen or is careless with your money (whether intentionally or unintentionally), they may make poor investment choices, fail to meet legal or financial obligations or spend your money recklessly.

Example: An attorney might invest your money in a speculative investment that does not perform well, or they may fail to manage your debts properly, leaving you in a worse financial situation.

1.Fraud or theft

If the person you appoint as attorney is not trustworthy, there is a risk they could use your money or assets for their personal gain. While attorneys have a legal duty to act in your best interests, and a failure to do so could lead to civil or criminal claims against the attorney, unscrupulous individuals may breach this duty, leading to fraud or theft.

Example: A dishonest attorney might transfer funds from your bank account to their own or use your assets to secure loans for themselves. These actions can go unnoticed until significant damage is done, and then legal proceedings and expenses will be incurred in trying to pursue the dishonest attorney.

1.Conflict of interest

An attorney should always act in your best interests, but if there is a conflict of interest, this may not happen. A conflict of interest arises when the attorney has competing personal, financial, or familial interests that could influence their decisions.

A common situation is where a single adult child is an attorney and likely beneficiary under a Will. The adult child could make decisions that benefit themselves to the exclusion of their siblings or decisions that benefit themselves as a potential beneficiary under a Will, rather than decisions that are in your best interests.

Example: If you appoint a close family member with financial difficulties, they may be tempted to prioritise their financial gain over your welfare, even if this leads to poor decision-making or self-dealing (acting in their own interests for financial gain). The close family member may reduce the amounts they are paying for your living and medical expenses to increase the value of your estate and the potential gift they may receive under your Will if you were to pass away.

1.Neglect of duties

Your attorney will have a wide range of responsibilities, and if they are not up to the task or do not have the time and availability necessary to attend to your needs, they may neglect those duties. This could happen if they are overwhelmed, disorganised, or simply don’t have the time to manage your affairs properly.

Example: An attorney might fail to pay your bills on time, resulting in penalties, or they might not keep proper financial records (which they are required to do in their role as attorney), which could lead to legal issues or disputes down the road.

1.Disputes between family members

Appointing an attorney can sometimes lead to tension or disputes within families, particularly if other family members believe the appointed attorney is not acting in your best interests. These disputes can be emotionally draining and could even lead to legal battles, particularly among family members. These disputes can be exacerbated if the attorney is not keeping you or other family members informed of some of the decisions they are making.

Example: A family member who feels excluded or believes the attorney is mishandling your affairs might take legal action to challenge the attorney’s decisions, leading to court costs and family rifts.

1.Delays in decision-making

If your attorney is unavailable, unresponsive, or indecisive, this can cause delays in managing your affairs, which can have serious consequences, particularly in time-sensitive matters. If the attorney lives overseas or far away, then some of the delays in decision-making may be unavoidable.

Example: If your attorney does not act quickly to sell a property or secure an investment, you could miss out on important financial opportunities or face legal penalties for failing to meet deadlines.

1.Inability to manage complex finances

If your financial affairs are complex, choosing an attorney who doesn’t have the necessary skills or experience could lead to poor management. If the attorney is not aware of the types of decisions that may be required of them, then deadlines could be missed, or additional costs incurred. This is especially important if your estate involves large investments, businesses, or properties.

Introducing your attorney to your advisors (accountants, financial advisors, lawyers, etc.) may help to ensure that your advisors can guide the attorney as to what they need to be aware of, but if the attorney does not take their advice or act upon their advice then the same issues can persist.

Example: If you are a sole trader and an attorney without business experience is appointed, the attorney might have limited knowledge of how your business operates, leading them to mismanage your business, resulting in a loss of revenue and damage to your business reputation.

1.Difficulty revoking the Power of Attorney

You can revoke a Power of Attorney at any point that you have the capacity to do so.

If you appoint someone as your attorney and your mental capacity to revoke the attorney is diminished. If your family later realise that the attorney is not fulfilling their role properly, it can be challenging for them to seek to have the Power of Attorney varied or revoked. The process may require legal intervention, including an application to the NSW Civil and Administrative Tribunal (NCAT), which can be costly and time-consuming.

Example: If you lose mental capacity and your attorney starts making poor decisions, it may require another family member or interested party to apply to NCAT to have the Power of Attorney varied or have the attorney removed, which can be a lengthy, costly and stressful process.

1.Emotional and psychological stress

Choosing the wrong attorney can not only have financial implications but also lead to emotional and psychological stress for you and your family. If your attorney is not acting in your best interests, it can cause feelings of betrayal and distress.

Example: You may feel vulnerable and anxious if you know your finances are not being handled correctly, or family members may feel helpless if they suspect wrongdoing but are unable to intervene immediately.

How to avoid appointing the wrong attorney for your Power of Attorney

To avoid the potential pitfalls of appointing the wrong attorney, consider the following steps:

1. **Consider who you appoint carefully**: Ensure the person you appoint is trustworthy and has a strong track record of handling responsibilities. Consider the items discussed in our blog on "Who Should You Appoint as Your Attorney in a Power of Attorney."
2. **Appoint multiple attorneys**: You can appoint more than one attorney to act jointly, which adds a layer of accountability. However, it is important to ensure they can work together effectively.
3. **Include oversight measures**: Limitations can be placed on the exercise of powers under a Power of Attorney. There is no one-size fits all approach, but limitations can include:

1. that the Power of Attorney only commence after a particular time or after a particular event;

2. a requirement for your attorney to report to a third party, such as a family member or legal professional, to ensure your affairs are managed properly; and
3. restraints on certain types of transactions, such as selling real estate or transactions over a particular limit.

There are pros and cons in having too many limitations in a Power of Attorney, and advice should be sought to consider whether these limitations are suitable for your circumstances.

1. **Seek legal advice from an estate planning lawyer**: Before appointing an attorney, seek professional legal advice to ensure the person you choose is right for the role. A solicitor can help draft the Power of Attorney and advise on safeguards to protect your interests.

Conclusion

When considering a Power of Attorney, choosing the right attorney can help you maintain peace of mind and protect your financial future.

We are highly experienced in Wills &Estate Planning. We can advise you on your estate plan including your Will, Enduring Power of Attorney and Appointment of Enduring Guardian.

If you have any concerns or would like to discuss your options, please don't hesitate to contact us.

Contacting E&A Lawyers

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

02 9997 2111

info@ealawyers.com.au

This article is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact E&A Lawyers.