Who should you appoint as your Attorney in a Power of Attorney?

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When preparing a Power of Attorney (POA) in New South Wales, one of the most important decisions you will make is choosing the person or persons to act as your attorney. The attorney named in a Power of Attorney will have significant control over your financial affairs if you become unable to manage them yourself. It's a decision that should be made with careful consideration.

At E&A Lawyers, we often guide our clients through this process and help them weigh the various factors to ensure they select the most appropriate person for this important role.

What is a Power of Attorney?

A Power of Attorney is a legal document that authorises someone to make decisions about your financial and legal affairs on your behalf. This could include paying bills, managing bank accounts, buying or selling property, and other financial transactions. It's important to note that a Power of Attorney in NSW does not cover personal or health decisions — those are managed through an Appointment of Enduring Guardian (often referred to as an Enduring Guardianship).

There are two types of Power of Attorney in NSW:

1. General Power of Attorney

This is effective only while you have mental capacity, and ceases to operate if you were to lose capacity. It is often used for temporary purposes, such as if you're travelling overseas. You can read more about mental capacity in our earlier blog, "Assessing legal capacity in estate planning matters”.

1. Enduring Power of Attorney

This remains effective even if you lose mental capacity due to illness, injury, or other reasons. For estate planning purposes, often the Powers of Attorney we prepare are Enduring Powers of Attorney.

You can read more detail about Powers of Attorney in our earlier blog, “Power of Attorney NSW – your complete guide”.

Who should you appoint as your attorney in your Power of Attorney?

Your attorney will have significant control over your finances, so it’s crucial to choose wisely. Here are some key considerations.

1. Trustworthiness

The most important factor when choosing an attorney is trust. You should only appoint someone who has proven to be responsible, honest, and capable of handling financial matters. This is particularly important if you are creating an Enduring Power of Attorney, as the person will be managing your affairs if you're unable to oversee them.

If there is any doubt as to the trustworthiness of a potential attorney, then strategies should be considered to introduce additional checks and balances to limit the potential for the appointment to be used inappropriately.

1. Financial acumen

Ideally, your attorney should have some financial literacy. They will be responsible for handling a range of financial tasks, from managing bank accounts to selling property. While they don’t need to be a financial expert, it’s helpful if they are comfortable and competent in managing money.

The complexity of your finances will often determine how financially literate your attorney needs to be. The more complex your finances are, the greater expertise your attorney may need in order to manage your finances adequately.

1. Availability

The person you choose should be readily available when needed. Appointing someone who lives far away, in another country or is otherwise difficult to reach may complicate matters. It can limit their awareness of your needs or create challenges for them when trying to act on your behalf.

They should also be willing to take on the role, as it can be time-consuming. They should be consulted before preparing a Power of Attorney to ensure they are willing to act.

1. Ability to handle stress and pressure

Acting as an attorney, especially under an Enduring Power of Attorney, can be stressful. Your attorney may have to make difficult decisions under pressure. Choosing someone who can remain calm and act in your best interests, even in challenging situations, is essential.

1. Your relationship with the person

It's important that your attorney can make impartial decisions based on your best interests, even if those decisions may be difficult or unpopular with family members. It is equally important that your attorney be aware of your particular needs, as an attorney that has a limited relationship with you may not be appropriately positioned to consider what your particular needs are at any given time.

1. Does the attorney have a potential conflict

Similar to the above, an attorney who has ‘skin in the game’ may be more motivated to consider how their decisions benefit themselves rather than what is in your best interests. For example, an adult child acting as an attorney may make decisions that benefit themselves to the exclusion of their siblings, or with the knowledge that they may be a beneficiary under your Will, they may start acting as though your money had already been gifted to them.

When appointing an attorney where their best interests may conflict with your best interests, additional checks and balances on their appointment may need to be considered.

1. Consider appointing joint attorneys

If you’re unsure about appointing one person to manage your affairs, you can appoint multiple attorneys. Multiple attorneys can be appointed to act either jointly or jointly and severally (meaning that they can act either together or alone).

This can add a layer of oversight, ensuring that decisions are made collectively. However, this arrangement can sometimes lead to delays if disagreements arise.

1. Professional attorneys

If you do not have someone suitable to appoint as your attorney, you may consider appointing a professional attorney, such as a solicitor or a trustee company. A solicitor or trustee company would often be impartial. However, this option typically comes with additional associated costs, and the solicitor or trustee company may not have a very close personal relationship with you.

Concerned about the actions of an attorney appointed in your Power of Attorney?

It’s important to remember that your attorney must act in your best interests. In NSW, attorneys are required to keep records of their actions and may be held accountable if they breach their duties. You read more about attorney duties in our earlier blog, “Duties of an Attorney under a Power of Attorney in NSW”.

If you become concerned about the actions of your attorney, or if you no longer trust them, you can revoke a general Power of Attorney at any time while you still have mental capacity to do so. For an Enduring Power of Attorney, revoking it requires you to have mental capacity and take certain legal steps. It is important to retain evidence of the revocation of a Power of Attorney.

Seek legal advice from an estate planning lawyer

When considering a Power of Attorney, appointing the right attorney is a crucial step in safeguarding 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.

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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