



What are the limitations of a power of attorney?

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A Power of Attorney (whether Enduring or otherwise) states that the Attorney can do anything that the Donor "can lawfully do by an Attorney".

However, the common law recognises that there are certain matters that by their very nature must be performed personally and cannot be performed by an Attorney.

These acts include:

1. getting married;
2. getting divorced;
3. exercising a right to vote (in a federal, state or council election, but in a corporate meeting that may be done either by the Attorney or proxy if allowed by the corporate constitution);
4. swearing an affidavit (where the deponent is required to turn their mind to matters within his or her own knowledge);
5. health, well-being or personal matters (which are covered by an Advance Care Directive in SA but this differs in other states);
6. matters where a statute requires an individual to act personally, especially in signature matters;
7. being a director of a company or a committee member of an association (although there may be provision in the constitution for an alternate director to act if the principal is not available);
8. contractual acts where the contract provides that an act must be performed personally; and
9. performing a criminal or illegal act.

Further, an attorney has a general obligation to act in the best interests of the Donor and owes a fiduciary duty to the Donor.

Can an attorney make decisions for a trustee?

In the case of trusts, where a person is a trustee, a different common law rule prevails.

A trustee's decision making is personal in nature. A trustee must act personally and cannot delegate their decision making to an attorney. It is the decision making which is critical, but the trustee may delegate the implementation of the decision to another person.

The trust deed may permit a delegation to an attorney.

In SA, Section 17 of the Trustee Act 1936 allows delegation by a trustee.

Notwithstanding any rule of law or equity to the contrary, a trustee may, if not expressly prohibited by the instrument creating the trust, by power of attorney created by deed, delegate to any person or persons residing in the State all or any of the powers, authorities and discretions vested in him as trustee either alone or jointly with any other person or persons.

There are provisions limiting the operation of the power which must come into operation within 6 months of being granted and, unless sooner terminated, terminate at the expiration of 12 months from coming into operation. Notice, specifying prescribed matters, must be given within 7 days, to any person who under the instrument of trust has power to appoint a new trustee.

Superannuation: attorneys and self-managed super funds (SMSFs)

Superannuation Industry (Supervision) Act 1993 (Cth) has provisions permitting an attorney to act for a trustee of a self-managed superannuation fund where a trustee has lost capacity.

Generally, in the case of an SMSF, a member must be a trustee (or director of a corporate trustee) and a trustee (or director of a corporate trustee) must be a member. A problem arises when a member/trustee loses legal capacity.

By Section 17A (3) (b) permits a "legal personal representative" (a person holding an enduring power of attorney for a trustee of the fund) to act as trustee of the fund or director of a body corporate which is trustee of the fund when the member/trustee is under "a legal disability" (which includes losing legal capacity).

Can an attorney renew a binding death benefit nomination?

In the case of retail or industry funds, a Binding Death Benefit Nomination (unless it is non-lapsing) must be renewed or reconfirmed in writing every three years. Some of these public funds have rules which permit an attorney to exercise the right to renew or confirm. But there are funds which do not have such provisions in their rules. A member of such a fund should check the rules to see if an attorney can sign the renewal or confirmation of the BDBN.

As the attorney is under a fiduciary obligation to the donor, the attorney should not alter the BDBN to favour him or herself but could obviously confirm an existing BDBN which granted the whole or portion of the death benefit to him or herself.

Need advice about your power of attorney?

If you're setting up a power of attorney, or you're already acting as someone's attorney and want to check what you can and can't do, our Adelaide team at Daenke Lawyers can help. Contact us to arrange a consultation.

Contact Daenke Lawyers

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