

1989
THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

Presented, 28 September 1989

(Attorney-General)

**Powers of Attorney (Amendment) Bill
1989**

A BILL

FOR

An Act to amend the *Powers of Attorney Act 1956*

The Legislative Assembly for the Australian Capital Territory enacts as follows:

Short title

- 5 1. This Act may be cited as the *Powers of Attorney (Amendment) Act 1989*.

Principal Act

2. In this Act, "Principal Act" means the *Powers of Attorney Act 1956*.¹

Interpretation

- 10 3. Section 2 of the Principal Act is amended by inserting the following definitions in subsection (1):

 " 'Court' means the Magistrates Court or the Supreme Court;

15359/89—(T38/89)—Cat. No. 89 5152 8

320/29.9.1989

'enduring power of attorney' means an instrument created in accordance with subsection 12 (1);

'relative', in relation to a person, means—

(a) a person related by blood, adoption or marriage to the first-mentioned person; or

(b) a person of the opposite sex to the first-mentioned person who lives with that person as his or her spouse on a *bona fide* domestic basis, although not legally married to him or her;

'trustee company' means a trustee company within the meaning of the *Trustee Companies Act 1947*."

Insertion

4. After section 3 of the Principal Act the following section is inserted:

Capacity to execute power of attorney

"3A. A power of attorney is not invalid on the ground of the donor's incapacity when the power was created if, when the power was created, the donor was able to understand the nature and effect of the power."

Addition

5. The Principal Act is amended by adding at the end the following sections and Schedule:

Enduring powers of attorney

"12. (1) Where—

(a) Part A of an instrument in the form of enduring power of attorney in the Schedule is completed, and signed, as indicated in the form;

(b) that signature is witnessed by 2 persons, neither of whom is the donee of the power or a relative of the donee or the donor;

(c) the donee signs Part D of the instrument to indicate acceptance; and

(d) the donee has attained the age of 18 years;

the instrument creates a power of attorney which is an enduring power of attorney.

"(2) An enduring power of attorney does not lapse by reason only of the incapacity of the donor.

Guardianship and consent to medical treatment under enduring powers of attorney

"13. (1) The powers conferred on the donee by an enduring power of attorney may, if the instrument creating the power of attorney expressly provides, include the power—

(a) to make decisions and arrangements, subject to the instrument, on behalf of the donor in relation to the donor's day-to-day affairs

other than those relating to the management of the donor's property and money; or

(b) to give consent, subject to the instrument, on behalf of the donor, to—

- 5 (i) medical treatment which is necessary for the well-being of the donor; or
- (ii) the donation of a body part, blood or tissue of the donor to another person in accordance with the *Transplantation and Anatomy Act 1978*.

10 “(2) Subsection (1) only applies—

- (a) while the donor is incapacitated;
- (b) in the case of the power referred to in paragraph (1) (a)—if the donor has signed Part B of the instrument;
- 15 (c) in the case of the power referred to in paragraph (1) (b)—if the donor has signed Part C of the instrument; and
- (d) the relevant signature is witnessed by 2 persons, neither of whom is the donee of the power or a relative of the donee or the donor.

Exercise of powers under enduring powers of attorney

20 “14. (1) In exercising powers under an enduring power of attorney while the donor is incapacitated, the donee shall act, so far as possible, as the donor would have acted if the donor were not incapacitated.

“(2) In doing so, the donee shall take into account—

- (a) the need to prevent the donor from becoming destitute; and
- 25 (b) the desirability of maintaining, so far as possible, the donor's style of life as it was before the incapacity.

“(3) Without affecting any other obligation imposed by law, in exercising powers under an enduring power of attorney—

- 30 (a) the donee shall not, unless the power of attorney expressly authorises it, enter into a transaction if the donee's interests and duty in relation to the transaction could conflict with the donor's interests and duty in relation to the transaction;
- (b) the donee shall keep the donee's property and money separate from the donor's; and
- (c) the donee shall keep proper accounts.

35 “(4) The obligation of a donee under an enduring power of attorney to keep the donee's property and money separate from the donor's property and money does not apply in relation to property and money owned jointly by the donor and donee.

Relief for breach of duty—enduring powers of attorney

40 “15. (1) The Public Trustee or, with the leave of the Court of competent jurisdiction, some other person, may commence and maintain a proceeding in that Court in the name and for the benefit of the donor of an enduring

power of attorney for relief against the donee (including the payment of compensation) because of a breach of the donee's duty as attorney occurring while the donor was incapacitated.

"(2) Subsection (1) does not affect a right of a person to commence and maintain a proceeding.

5

"(3) If the Court gives judgment for the donor, it shall make such order as is just with respect to the payment of any money ordered to be paid.

"(4) The Court shall excuse a donee's breach of obligation if—

(a) the breach was due to an honest mistake; and

(b) the donee ought fairly to be excused.

10

Production of accounts—enduring powers of attorney

"16. The Public Trustee may, by writing given to the donee under an enduring power of attorney, require the donee to produce to the Public Trustee specified books, accounts or other records of transactions carried out by the donee for the donor pursuant to the power.

15

Other powers of Court—enduring powers of attorney

"17. (1) On application by the Public Trustee or, with leave of the Court, some other person, the Court may, by order—

(a) give a direction, not inconsistent with this Act or the power of attorney, that the donee under an enduring power of attorney do or refrain from doing a specified act;

20

(b) direct the donee under an enduring power of attorney to produce specified books, accounts or other records of transactions carried out by the donee for the donor;

(c) terminate an enduring power of attorney; or

25

(d) make a declaration as to the interpretation or effect of an enduring power of attorney.

"(2) If the Court terminates an enduring power of attorney, or if the donee under such a power resigns or dies, on application by the Public Trustee the Court may appoint the Public Trustee, or a trustee company nominated by the Public Trustee, to be the manager of the donor's property, or the guardian of the donor, for a specified time and with powers specified in the order.

30

"SCHEDULE

Section 12

ENDURING POWER OF ATTORNEY

IMPORTANT NOTICES

TO THE PERSON GIVING THIS POWER OF ATTORNEY:

This document will allow your chosen attorney (who must be over 18) to make decisions and do things for you.

If you become unable to manage your affairs, your attorney will be able to make decisions which you cannot supervise or control. For example, the attorney could, in that event, sell your home if he or she thought it was what you would have done yourself, or if he or she thought it was necessary to stop you going bankrupt.

You can, however, specify limits to your attorney's power by setting them out in the document.

To create an enduring power of attorney, you must sign where indicated at the end of PART A, and that signature must be witnessed.

You may wish to give your attorney some additional powers to take care of your personal affairs while you are unable to manage them. If so, you should sign PART B. That signature must be witnessed.

You may also wish to give your attorney the power to consent to medical treatment, or to medical donations, on your behalf while you are incapacitated. If so, you should sign PART C. That signature, too, must be witnessed.

In addition, the document must be signed by your attorney where indicated at the end of PART D.

Finally, before signing any Part of this document, you should carefully read each paragraph and any explanatory notes which follow.

WHERE TO SEEK ADVICE:

The Public Trustee, or a solicitor, can advise you about this enduring power of attorney or about the attorney's responsibilities under such powers.

PART A—POWER OF ATTORNEY

Appointment of attorney

1. I, [print your full name here]
of [print your address here]
appoint [print your attorney's full name
here] of
[print your attorney's address here] to be my attorney.

Powers of attorney

2. I authorise my attorney to do on my behalf anything that I can lawfully do by an attorney.

[By this paragraph, your attorney is given the power to take care of all of your property and financial affairs (subject to paragraph 4)]

SCHEDULE—continued

Specific powers

3. In addition to any other rights or powers my attorney may have under paragraph 2, my attorney may do the following things in relation to my property or financial affairs:

[Set out here anything that you particularly wish your attorney to be able to do with your property or money, for example "My attorney may use the following assets of mine for his/her own personal use: (list the assets)".

If you do not wish to specify anything here, cross out paragraph 3.]

Limits on powers

4. My attorney shall only exercise powers under paragraphs 2 and 3 subject to the following limits:

[Set out here any limits to be placed on the attorney's powers, for example "The attorney shall not sell my shares in XYZ Company Pty. Ltd."

If you do not wish to specify any limits here, cross out paragraph 4.]

Nature of power of attorney

5. This is an enduring power of attorney.

Commencement

6. My attorney's power to manage my property and money comes into effect—

- * immediately
- * from [specify date]
- * only while I am incapacitated

[Cross out what does not apply. Set out here when you want your attorney to start managing your property and money.]*

SCHEDULE—continued

Payment of attorney

7. My attorney may draw from my money or income payment for services as attorney on the following terms:

[You do not need to pay your attorney for the power to be effective. If you do not wish to pay him or her, you should cross out paragraph 7.]

If you do wish to pay your attorney, set out the exact terms of payment here, including the method of payment (that is, from which bank account or other financial source).]

Statement of understanding

8. I fully understand that by signing this document, I authorise my attorney to act on my behalf in accordance with the terms set out in this document.

.....
Signature of person giving the power

.....
Signature of witness [not related to the person giving the power, or his or her attorney]

.....
Signature of witness [not related to the person giving the power, or his or her attorney]

PART B—POWER TO MAKE PERSONAL DECISIONS

IMPORTANT NOTICE:

By signing this Part, you can authorise your attorney to make personal decisions for you while you are unable to manage your affairs.

These could be decisions about where you will live, what food you will eat, or whether you will go on a holiday. In fact, you must understand that if you sign this Part, your attorney will (subject to any limits you set) have almost complete control over your life while you are unable to manage your affairs.

You need not do this if you do not want to. If you do not want your attorney to have such power, you should cross out Part B entirely.

SCHEDULE—continued**Authority to make personal decisions**

9. I authorise my attorney to make personal decisions and arrangements for me (other than those dealing with my money and property) while I am incapacitated.

Limits on authority

10. My attorney shall only exercise authority under paragraph 9 subject to the following limits:

[Set out here any limits to be placed on the attorney's powers, for example: "The attorney shall not require me to move away from my home."]

If you do not wish to specify any limits here, cross out paragraph 10.]

.....
Signature of person giving the power

.....
Signature of witness [not related to the person giving the power, or his or her attorney]

.....
Signature of witness [not related to the person giving the power, or his or her attorney]

PART C—POWER TO CONSENT TO MEDICAL TREATMENT AND MEDICAL DONATION

IMPORTANT NOTICE:

By signing this Part, you can authorise your attorney to consent to medical treatment on your behalf while you are unable to manage your affairs. You can also authorise your attorney to consent on your behalf to the donation of a part of your body, blood or tissue to another person while you are unable to manage your affairs.

You can only authorise your attorney to give consent to medical treatment that is essential for your well-being.

You need not give your attorney any power to consent to medical treatment, or medical donation, on your behalf. If you do not want your attorney to have either of these powers, you should cross out this Part entirely.

SCHEDULE—continued

Authority to consent to medical treatment

11. I authorise my attorney to give consent to medical treatment on my behalf while I am incapacitated. I understand that my attorney may only consent to lawful treatment which is essential for my well-being.

[If you do not wish to authorise your attorney to consent to any medical treatment on your behalf, cross out paragraph 11.]

Specific treatment authorised

12. The treatment to which my attorney may consent on my behalf includes:

[Set out here any particular treatment to which your attorney may consent on your behalf, for example an organ transplant.

If you do not wish to specify any treatment here, cross out paragraph 12.]

Limits on power

13. My attorney shall not consent on my behalf to the following treatment:

[Set out here any medical treatment to which you do not want your attorney to consent, for example, a blood transfusion, or "any treatment not specified under paragraph 12".

If you do not wish to specify any treatment here, cross out paragraph 13.]

Authority to consent to medical donation

14. I authorise my attorney to consent on my behalf to the lawful donation of parts of my body, blood or tissue to another person while I am incapacitated.

[If you do not wish to authorise your attorney to consent to any medical donation on your behalf, cross out paragraph 14.]

SCHEDULE—continued

Limits on power—medical donation

15. My attorney shall not consent on my behalf to the following medical donations:

[Set out here any medical donation to which you do not want your attorney to consent.

If you do not wish to specify any medical donation here, cross out paragraph 15.]

.....
Signature of person giving the power

.....
Signature of witness [not related to
the person giving the power, or his or
her attorney]

.....
Signature of witness [not related to
the person giving the power, or his or
her attorney]

PART D—ATTORNEY'S ACCEPTANCE**IMPORTANT NOTICE TO ATTORNEY:**

If you accept this power of attorney, you will be taking on serious responsibilities. You should take particular note of sections 12-17 of the Powers of Attorney Act 1956.

Here is a summary of those provisions:

1. What you do on behalf of the person giving you the power of attorney (called the "donor") while he or she is incapacitated must be, as near as possible, what he or she would have done. You may, however, do whatever is necessary on behalf of the donor (while he or she is incapacitated) to prevent his or her becoming destitute.

2. You should not enter into transactions for the donor which may involve a conflict between your interests and those of the donor, unless the transaction is explicitly authorised by the donor in this document. For example, if it is necessary to sell some of the donor's property, it may be a breach of your obligation to sell it to your own relative.

3. You must keep your money and property separate from the donor's money and property, unless you are joint owners, or operate joint bank (or similar) accounts.

SCHEDULE—continued

4. You must keep proper accounts and records of how you handle the donor's money and property. The Public Trustee, or anyone interested in the donor's welfare, can require you to produce these accounts and records.

5. If you do not carry out your duties properly, you may have to compensate the donor. It is also possible that a transaction will be cancelled if you did not carry it out properly. In an extreme case, your power of attorney may be terminated.

6. If, after the donor becomes incapacitated, you want to stop being the donor's attorney, you should see the Public Trustee or a solicitor.

You may wish to seek the advice of the Public Trustee or a solicitor about your rights and obligations under this power of attorney.

Statement of understanding

16. I have read this enduring power of attorney. I understand that by signing this document, I take on the responsibility of exercising the powers which I have been given by the document. I also understand that I must exercise these powers in accordance with the *Powers of Attorney Act 1956*.

.....
Signature of attorney

PART E—COPIES OF POWER

17. Copies of this enduring power of attorney are held by the following people:

Name	Address
------	---------

[The attorney should hold the original of this document. The person who is giving the power should retain a copy of the document.]”

NOTE

1. Ordinance No. 17, 1956, as amended by No. 15, 1957 and Nos. 21 and 38, 1989.