

1991
THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

(As presented)

(Attorney-General)

Powers of Attorney (Amendment) Bill 1991

**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 1991*.

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—

(a) by inserting in subsection (1) the following definition:

“ ‘general power of attorney’ includes an instrument created in accordance with section 3AA;”

8100 Job No: 1991/1830 (T100/91)

- (b) by inserting in the definition of "power of attorney" in subsection (1) "means a general power of attorney or an enduring power of attorney and" before "includes"; and
- (c) by omitting subsection (2) and substituting the following subsections:

"(2) In this Act, a reference to the donee under a power of attorney shall, in relation to a power of attorney by which 2 or more donees are appointed, be read as a reference to each of those donees.

"(3) A reference in a power of attorney, whether created before or after the commencement of this subsection, to property shall, unless the contrary intention appears in the instrument creating the power, be read as a reference to real and personal property."

15 Insertion

4. (1) After section 3 of the Principal Act the following sections are inserted:

General powers of attorney

"3AA. A general power of attorney may be created by instrument in or to the effect of Form 1 in the Schedule.

Several donees

"3AB. A donor under a power of attorney may appoint 2 or more donees in any one or more of the following ways:

- (a) by appointing the donees jointly or severally, or both jointly and severally;
- (b) by appointing 2 or more of the donees (being a number less than the total number of donees) to act jointly or severally, or both jointly and severally; and
- (c) by appointing different donees to act in different circumstances, upon the occurrence of different events or in respect of different property.

Scope of authority of attorney

"3AC. (1) Subject to this section, a power of attorney confers on—

- (a) the donee; or
- (b) if there are 2 or more donees—on the donees acting jointly or severally, as the case requires;

authority to do on behalf of the donor anything the donor may lawfully do by an attorney.

“(2) A power of attorney does not operate to confer—

- 5
- (a) authority to exercise any power or to perform any duty or function conferred or imposed on the donor as a trustee or personal representative; or
 - (b) unless the instrument creating it expressly so provides—power to execute a conveyance or other instrument, or to do any other act, by which a benefit would be conferred on the donee.

10 “(3) The donee under a power of attorney may appoint a substitute, delegate or sub-attorney unless the instrument creating the power expressly prohibits the donee from doing so, but a donee may not make such an appointment irrevocably unless expressly authorised by the instrument to do so.

15 “(4) A power of attorney may specify conditions or limitations to which the authority conferred by it is to be subject, and such a power of attorney has effect accordingly.

Operation as deed

20 “3AD. An instrument in or to the effect of Form 1 or 2 in the Schedule, notwithstanding that it is not expressed to be executed under seal, shall for all purposes be taken to be, and have effect as, a deed.”

(2) Section 3AA of the Principal Act as amended by this Act shall be deemed to have commenced on 24 December 1956.

Enduring powers of attorney

25 5. Section 12 of the Principal Act is amended—

(a) by omitting paragraph (1) (a) and substituting the following paragraph:

30 “(a) Part A of an instrument in or to the effect of the form of enduring power of attorney in Form 2 of the Schedule is completed and is signed by the donor or by another person in the presence of and by the direction of the donor, as indicated in the form;” and

(b) by inserting after subsection (1) the following subsection:

35 “(1A) An instrument does not fail to create an enduring power of attorney by reason only that Parts B and C of the form in the Schedule are not reproduced in that instrument, so long as the instrument bears a notation that those parts have been omitted with the consent of both donor and donee.”

Guardianship and consent to medical treatment under enduring power of attorney

6. Section 13 of the Principal Act is amended—

- 5
- (a) by inserting in subparagraph (1) (b) (i) “lawful” before “medical”;
and
 - (b) by inserting in paragraph (2) (d) “if” before “the relevant signature”.

Insertion

10 7. After section 13 of the Principal Act the following section is inserted:

Medical certificate as to incapacity

15 “13A. In any proceedings in which the question of whether, on a particular day or during a particular period, the donor under an enduring power of attorney was incapacitated is in issue, a certificate under the hand of a medical practitioner to the effect that the donor was, on that day or during that period, incapacitated is evidence of that fact.”.

Relief for breach of duty—enduring powers of attorney

20 8. Section 15 of the Principal Act is amended by omitting from subsection (1) “or, with the leave of the Court of competent jurisdiction” and substituting “, a trustee company or, with the leave of the Court”.

Other powers of court—enduring powers of attorney

25 9. Section 17 of the Principal Act is amended by omitting from subsection (2) “, or if the donee under such a power resigns or dies,” and substituting “or if there is no longer a donee or donees capable of exercising powers under it,”.

Substitution

10. The Schedule to the Principal Act is repealed and the following Schedule substituted:

SCHEDULE

Form 1

Section 3AA

GENERAL POWER OF ATTORNEY

This GENERAL POWER OF ATTORNEY is made pursuant to section 3AA of the Powers of Attorney Act 1956 on the _____ day of _____ 19 ____ by (name) of (address).

- 1. I appoint (name) of (address) [or (name) of (address) and (name) of (address) jointly [or jointly and severally]] to be my attorney[s].
- 2. I authorise my attorney or attorneys, subject to paragraph 4, to do on my behalf anything that I may lawfully do by an attorney.
- 3. My attorney or attorneys may draw from my money or income payment for services as attorney on the following terms:
- 4. The authority of my attorney or attorneys is subject to the following conditions and limitations:

DATED:
Signature of person giving the power (or of another person signing in the presence of and by the direction of the person giving the power)

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

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

SCHEDULE—continued

Form 2

Section 12

**ENDURING POWER OF ATTORNEY
PURSUANT TO SECTION 12
OF POWERS OF ATTORNEY ACT 1956****THIS INSTRUMENT HAS EFFECT AS A DEED****IMPORTANT NOTICES****TO THE PERSON GIVING THIS POWER OF ATTORNEY:**

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

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

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

You may appoint alternate or successive attorneys.

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

You may wish to give your attorney or attorneys 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 and dated.

You may also wish to give your attorney or attorneys 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 and dated.

In addition, the document must be signed and dated by your attorney or attorneys 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.

SCHEDULE—continued

REGISTRATION:

If your attorney exercises, or your attorneys exercise, a power to execute a deed or to transfer an interest in land, (other than a lease or an agreement for a lease for not more than 3 years), this document must be registered in the office of the Registrar of Titles.

WHERE TO SEEK ADVICE:

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

PLEASE NOTE:

All signatures must be witnessed and dated by 2 persons who are not related to the donor or attorney or attorneys.

PART A—POWER OF ATTORNEY

Appointment of attorney

This ENDURING POWER OF ATTORNEY is made pursuant to section 12 of the Powers of Attorney Act 1956 on the _____ day of _____ 19____
by _____ (name) of _____ (address)

1. I appoint (name) of (address) [or (name) of (address) and (name) of (address) jointly [or jointly and severally]] to be my attorney[s].

Power of attorney

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

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

Specific powers

3. Without limiting the generality of paragraph 2, my attorney or attorneys may do the following things in relation to my property or financial affairs:

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

.....(list the assets)".

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

SCHEDULE—continued

Limits on powers

4. My attorney[s] 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 or attorneys' powers, for example "The attorney or attorneys 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 or attorneys' 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 or attorneys to start managing your property and money.]*

Payment of attorney

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

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

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

SCHEDULE—continued

Statement of understanding

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

DATED:

.....

Signature of person giving the power
(or of another person signing in the
presence of and by the direction of
the person giving the power)

DATED:

.....

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

DATED:

.....

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

PART B—POWER TO MAKE PERSONAL DECISIONS

IMPORTANT NOTICE:

By signing this Part, you can authorise your attorney or attorneys 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 or attorneys 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 or attorneys to have such power, you should cross out Part B entirely.

SCHEDULE—continued

Authority to make personal decisions

9. I authorise my attorney or attorneys 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 or attorneys shall only exercise authority under paragraph 9 subject to the following limits:

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

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

DATED:

.....
Signature of person giving the power
(or of another person signing in the
presence of and by the direction of
the person giving the power)

DATED:

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

DATED:

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

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

SCHEDULE—continued

IMPORTANT NOTICE:

By signing this Part, you can authorise your attorney or attorneys to consent to medical treatment on your behalf while you are unable to manage your affairs. You can also authorise your attorney or attorneys 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 or attorneys to give consent to lawful medical treatment that is essential for your well-being.

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

Authority to consent to medical treatment

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

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

Specific treatment authorised

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

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

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

SCHEDULE—continued

Limits on power

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

[Set out here any medical treatment to which you do not want your attorney or attorneys 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 or attorneys 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 or attorneys to consent to any medical donation on your behalf, cross out paragraph 14.]

Limits on power—medical donation

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

[Set out any medical donation to which you do not want your attorney or attorneys to consent. If you do not wish to specify any medical donation here, cross out paragraph 15.]

DATED:

.....
Signature of person giving the power
(or of another person signing in the
presence of and by the direction of
the person giving the power)

SCHEDULE—continued

DATED:

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

DATED:

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

PART D—ATTORNEY’S OR ATTORNEYS’ ACCEPTANCE

IMPORTANT NOTICE TO ATTORNEY OR ATTORNEYS:

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 him 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.*
- 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.

SCHEDULE—continued

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*.

DATED:

.....
Signature[s] of attorney[s]

[The attorney or one of the attorneys should hold the original of this document.

The person who is giving the power and any other attorney should retain a copy of the document.]

Saving

5 11. (1) An instrument purporting to create a power of attorney, being an instrument having effect immediately before the commencement of this Act, shall be taken to be as valid and effectual as if the amendments of the Principal Act effected by this Act had been in operation when that instrument was executed.

10 (2) Without limiting the generality of subsection (1), an instrument in or to the effect of the form in the Schedule to the Principal Act, being an instrument having effect immediately before the commencement of this Act, has effect, on and after the commencement of this Act, as if the instrument was in or to the effect of Form 2 in the Schedule to the Principal Act as amended by this Act.

15 (3) Nothing in this Act shall be taken to affect the validity and effectuality of an instrument purporting to create a power of attorney, whether executed before or after the commencement of this Act, by reason only that the instrument is not in or to the effect of a form in the Schedule to the Principal Act as amended by this Act.

NOTE

1. Ordinance No. 17, 1956 as amended by No. 15, 1957; No. 21, 1989; Act No. 15, 1989.

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