Enduring Powers of Attorney

Donee’s Duties and Obligations

The Australasian Lawyers Group Pty Ltd trading as Butlers, Barristers & Solicitors

Scope of Donee’s Powers

Under an Enduring Power of Attorney ("EPA") the person giving the power of attorney, the Donor, authorises the Donee, the person who accepts the power, to do on behalf of the Donor anything which the Donor can lawfully do by his attorney.

This means that the Donee does not have the authority to:

a) Do any act which requires the Donor’s personal skill or discretion. For example, making a Will.
b) Make guardianship or lifestyle decisions on behalf of the Donor.
c) Do any illegal or unlawful act.
d) Deal with any property which is held on trust by the Donor.
e) Perform the duties of a director or secretary of a company on behalf of a Donor unless authorised by the Memorandum and Articles of Association of the company.
f) Vote on the Donor’s behalf at elections.
g) Appoint a substitute or alternative Donee.

Donee’s Obligations

The Donee’s obligations are governed by the Guardianship and Administration Act 1990 ("Act"). The Act specifically states that with respect to the Donor’s Estate in Western Australia, the Donee must:

a) Exercise his/her power with reasonable diligence to protect the interests of the Donor. The Donee shall be liable to the Donor for any loss resulting from his/her failure to exercise his/her power accordingly.
b) Keep accurate records and accounts of all dealings and transactions made under the power. Failure to do so could result in a maximum penalty of $2,000.00 imposed upon the Donee.
c) Not renounce the power during any period of legal incapacity of the Donor, except by order of the State Administrative Tribunal.
In addition, it is a breach of a Donee’s obligations to:

a) Make a gift of the Donor’s money or assets to another.
b) Dispose of the Donor’s assets where full market value has not been paid to the Donor.
c) Forgive a loan owing to the Donor by a third party or the Donee.

**Management of the Donor’s Estate**

The Donee should ascertain the nature and extent of the Donor’s Estate as soon as the EPA comes into operation.

Subject to any conditions or restrictions contained in the EPA, the Donee is required to make decisions on behalf of, and in the best interests of, the Donor. Some of these decisions may be with respect to:

a) Payment of debts;
b) Purchase, sale, lease or maintenance of property;
c) Investments;
d) Operation of bank accounts. A separate bank account should be opened on behalf of the Donor. It is imperative that funds of the Donee are not mixed with those of the Donor;
e) Management of the Donor’s business interests;
f) Taxation; and
g) Social Security entitlements.

The Donee should also strive to maximise the Donor’s quality of life and in doing so, the Donee will have to consider the following factors in making decisions:

a) The Donor’s immediate and long term needs.
b) The views of the Donor, family members and other interested parties.
c) The Donor’s current financial situation.
d) Lifestyle choices made by the Donor such as religion and customs.
e) Arrangement made by the Donor prior to the loss of capacity.

Whenever possible, it is important that the Donee consult the Donor as to all decisions made.
Donee’s Fees
The Act is silent as to the payment of fees and expenses of a Donee, unless the Donee is the Public Trustee or a trustee company. Otherwise, a Donee is only entitled to receive remuneration for his/her services where there is a contract, express or implied, to this effect. A Donee is entitled to reimbursement of expenses incurred by him/her provided he/she acts within the scope of the authority given under the EPA.

Renunciation of Power
The Donee may renounce the authority given to him/her by advising the Donor and all relevant parties in writing, before the Donor becomes legally incapacitated.

Choice of Donee
We recommend that you choose whomever you feel you can trust to look after your affairs. You should feel confident that the individual you choose is competent to deal with the management decisions that may arise and is capable of keeping accurate records of all transactions. This may be your spouse or partner, another family member, trusted friend, accountant, lawyer or a trustee company. Equally important, the person(s) you appoint must be willing to take on the responsibility on your behalf.

Butlers
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