

GUIDE TO POWERS OF ATTORNEY IN BERMUDA

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PREFACE

This Guide has been produced as an aid to those seeking general information with respect to Powers of Attorney in Bermuda.

We recognise that this Guide will not completely answer detailed questions which clients and their advisers may have; it is not intended to be comprehensive. If any such questions arise in relation to the contents, they may be addressed to any member of the team, using the [contact information](#) provided at the end of this Guide.

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1. WHAT IS A POWER OF ATTORNEY?

A Power of Attorney (**Power**) is a deed by which a person confers power on another to act on behalf of the person granting the Power. The person granting the Power is usually called the **Donor** and the person, on whom the Power is conferred, is usually called the **Donee** or the **Attorney**. In this guide we purposely use the term **Donee** to prevent any confusion with the term **Attorney**, which when used informally or colloquially refers to lawyers. After granting a Power, the Donor can continue to act on his or her own affairs without restriction and the Donee may act when requested to do so or when required, due to the Donor's inability to act.

A Power can be general or limited. If it is general, the Donee will be authorised to do anything which the Donor could have lawfully done himself or herself. If the Power is limited, the Donee will be given limited authority to deal with only one particular transaction or a series of particular transactions, for example, the sale of a house, the sale of shares or banking transactions.

A Power may be limited in time where it will remain in force for a specified period; for example, one year or for such time as the Donor is abroad from Bermuda. In each case, the Power will expire on the Donor's return to Bermuda or the expiry date stated in the Power. If a Power is an enduring Power and is not limited in time, then it will continue until the death of the Donor or until the Donor revokes the Power, which again is required to be done by deed.

2. TYPICAL USES OF A POWER OF ATTORNEY

Powers are frequently granted when a person is going abroad for a long period of time or, may be difficult to contact while abroad or, for a short period of time when an important transaction is due to close while the Donor is abroad or when undergoing a medical operation or is otherwise unavailable.

3. ORDINARY AND ENDURING POWERS

The difference between an ordinary Power (**Ordinary Power**) and an enduring Power (**Enduring Power**) is that an Ordinary Power will become invalid and ineffectual during any subsequent legal incapacity of the Donor, whereas an Enduring Power will remain valid and effectual during any subsequent legal incapacity of the Donor.

Since Ordinary Powers terminate upon the Donor becoming incapacitated, they should not be used except in limited circumstances such as where the Donor is travelling abroad for a specified period of time or the Power is limited to a specified transaction, such as selling or buying land.

Everybody should, as a matter of good estate planning, make an Enduring Power to appoint a Donee to act for them in their personal and business affairs to provide for the eventuality that he or she may be incapacitated and unable to act in his or her own affairs, for example, due to a stroke or an accident. It is important that you plan for the future, not only the present.

Enduring Powers are an essential estate planning tool for elderly persons in particular, but persons generally should provide for the possibility that they may become incapacitated accidentally or by disease. An Enduring Power will ensure that the Donee can, on behalf of the Donor, do such things and take necessary actions such as access to bank accounts, pay bills, collect or pay rents and make court applications that the Donor can no longer do for him or herself.

4. CAPACITY

The Powers of Attorney Act 1944 (**Powers of Attorney Act**) defines **legal incapacity** to mean mental infirmity of such a nature as would, but for this Act, invalidate or terminate an Ordinary Power and **legal capacity** is to be construed accordingly.

Legal capacity is a complex subject upon which legal scholars have written whole books about. Simply, without going into the complexities, a person should be regarded as unable to make a legal decision if at the material time he or she is:

- unable by reason of mental disability to make a decision on the matter in question; or
- unable to communicate a decision on that matter because he or she is unconscious for any other reason.

An **inability to make a decision** means (i) an inability to understand or retain the information relevant to the decision or (ii) an inability to make a decision based on that information. The term **mental disability** means a disability or disorder of the mind or brain, whether permanent or temporary, which results in an impairment or disturbance of mental function.

5. RECEIVERSHIP

An Enduring Power will avoid a court application for Receivership, which is an expensive process and usually involves a lot of aggravation for both the applicant and the patient who has to be medically examined by two physicians who have to then set out the results of their medical examination in affidavit form. Also a complete accounting of the Patient's financial affairs must be prepared and presented to the court with the application for Receivership. An application for Receivership will be necessary should a person lose their legal capacity (i.e. become incapacitated) when holding assets in his or her sole name. Without an Enduring Power, the spouse or family members of the incapacitated person will not be able to act on such person's behalf and be left with no alternative but to apply to the Supreme Court of Bermuda to be appointed as the Receiver of the incapacitated person.

The Mental Health Act 1968 (**Mental Health Act**) describes the incapacitated person as a **Patient**. Receivership is simply the appointment of a suitable person by the Supreme Court to authorise that person to do all such things in relation to the property and affairs of the Patient as the court directs the Receiver to do or authorises him to do. However, the responsibilities and restrictions on a Receiver are onerous. When applying for an appointment as Receiver, the applicant must prepare initial accounts for the Patient by ascertaining all assets and liabilities (including income and expenses) and present these accounts to the court as part of the application in a document called an Affidavit of Kindred and Fortune. After appointment, the Receiver must prepare and file with the court the Patient's accounts, at least on an annual basis. Also the Receiver cannot transfer any significant assets of the Patient (for example an interest in land) without the court's permission. Basically the Receiver is the person appointed to receive any rents or other income of the Patient and to get in and collect the Patient's assets and to have control over the Patient's property, because the Patient is incompetent to do so himself. The object of the appointment of a Receiver is to protect the Patient's property during the Patient's incapacity.

6. TYPES OF ENDURING POWERS OF ATTORNEY

There are basically two types of Enduring Powers used in Bermuda. The first is the usual Enduring Power, which comes into full effect on the date it is signed by the Donor in favour of the Donee. This type of Enduring Power will remain in force until such time as the Donor revokes the Enduring Power or until the death of the Donor.

The second type is an Enduring Power subject to the issuance of a medical certificate. This type of Enduring Power is immediately valid, but does not become effective until such time as the Donor's physician certifies that the Donor is not capable of managing his or her own affairs. This type of Enduring Power will become fully effective upon the issue of the medical certificate and will remain effective until such time as the Donor's physician certifies that the Donor is once again capable of looking after his own affairs. Accordingly, this type of Enduring Power can come into and go out of effect, from time to time, during the lifetime of the Donor, but is only fully effective during such time or times as he is certified by his physician as being incapable of looking after his own affairs.

7. **JOINT, JOINT AND SEVERAL POWERS AND POWERS WITH A SUBSTITUTE**

Typically a Donor will appoint one person to act as Donee; however, a Donor may appoint two or more persons. If two or more persons are appointed, they will either have a joint Power or a joint and several Powers.

Where there is more than one Donee appointed under a Power, the instrument creating the Power should state what type of Power is being created. If it is a joint Power, all of the Donees appointed must join in making any decision so that one joint Donee cannot bind the others or the Donor, as any such decision must be made by all of the Donees. If one joint Donee dies, the Power immediately terminates.

On the other hand, if it is a joint and several Powers, all of the Donees do not have to join in making decisions and one can bind the others or the Power can require that the Donees, if more than two, must act by majority. If one of the joint and several Donees should die, the other Donee(s) can continue to act as the Power does not terminate on the death of one of the Donees.

Provision can also be made in a Power to provide for a substitute should the Donee become unable, unfit, unwilling to act or die. The appointment of a substitute(s) Donee will prevent a Power with a single Donee or a joint Power with two or more Donees from terminating on the death of the sole Donee or on the death of one of the joint Donees.

8. **WHO SHOULD BE APPOINTED AS A DONEE**

A Donor of a Power should always appoint a person he or she can fully trust. However, there may be situations where it will cause offence if a person to whom the Donor is related is not appointed as the Donee or one of them. For example, if there are children living in Bermuda, it may cause offence to them if one or more of them are not appointed as the Donees and the parent appoints the child who is not living in Bermuda or a non-related person. One way around this is for the parent to appoint the children acting as joint Donees so that they can act as a check and balance on each other. One joint Donee will not be able to deal with the property of the Donor without the consent of the other(s). Of course, the disadvantage of appointing joint Donees is that if one dies, then the Power automatically terminates. A further possible disadvantage is that joint Donees always have to obtain the agreement of the other Donee or Donees, but this can be useful if one of the persons appointed is impetuous or not fully trustworthy.

Joint and several Powers are used when it is expected that one or more of the Donees may be unable to act due to absence, ill health or death. For example, when a Donee frequently travels abroad or one of the joint and several Donees is elderly and may become unable to act because of ill health or may likely predecease the Donor; in such case, the death of the elderly Donee will not cause the Power to terminate if there is a surviving Donee remaining.

The Donor and Donee are often related persons, usually spouses or parent and child. The first choice of a Donor will usually be to appoint a spouse, child or close friend of the family as the Donee of the Power. In

these situations, the Donee will frequently not expect to be paid for the work that he or she does in pursuance of the Power on behalf of the Donor; however, if there is no suitable relative or friend, a professional person may be appointed but they will expect to be paid for the work they do as the Donee of the Power.

In all cases, no matter who is appointed, the Donor should be satisfied that the person he or she is appointing as the Donee of the Power can be fully trusted. There is no warranty that a professional person will be trustworthy and care should be taken whom you select to act for you as the Donee of your Power, both from amongst professionals and members of your family and friends. There is always the risk that professionals, relatives and friends may abuse the Power to benefit themselves rather than the Donor of the Power, and although they can be brought to account for any misuse of money or property belonging to the Donor, such right is of little use if the Donee has little or no assets.

9. **IS A POWER OF ATTORNEY NECESSARY?**

If a husband and wife or parent and child have all of the assets of one in joint names with the other, then it is probably not necessary to have a Power. The reason for this is that the husband and wife or the parent and child will have access to the assets and, on the incapacity of the spouse or parent, then the other spouse or the child may continue to access the bank accounts to pay all household bills, medical expenses, etc.

However, if the Donor has bank accounts or assets in his or her sole name, it would be prudent to appoint the spouse or child, as the case may be, as the Donee of the Power. Otherwise, should the Donor become incapacitated, the spouse or child would not have access to the bank accounts of the incapacitated Donor and will not be in a position to carry on managing the affairs of the incapacitated Donor. In such case, an application for Receivership under the Mental Health Act would be necessary with the disadvantage being that such applications are complex, require the services of legal and medical professionals, attracts court fees and the Receiver will have onerous and on-going duties and obligations to the court (see paragraph 5 above).

10. **TRANSACTIONS WHICH REQUIRE A DEED**

Certain transactions require a deed for their validity. For example, transactions requiring deeds are conveyances of land and leases for more than 21 years duration.

A contract for the sale or other disposition of an interest in land can only be made in writing and a contract must be signed by or on behalf of each party to the contract. Although there is no requirement of writing for the appointment of an agent to sign such a contract, it would be unwise to execute any document for the sale or lease of land without it being specifically authorised by a Power on behalf of a party who is the owner of the land. Also, if the other party is legally represented, he will most likely be advised not to enter into any deed or contract signed by a person who is not the owner of the land unless there is a Power in place.

11. **TRANSACTIONS WHICH DO NOT REQUIRE A POWER**

A Power would not be required if the only assets of the prospective Donor are monies in a bank. The Donee can be authorised in writing by the Donor to operate the account (i.e. an authorised signatory) at the bank using the standard form of authority provided by the bank for this purpose.

However, such a bank authority will be revoked by the subsequent legal incapacity of the Donor, although most banks do not make enquiry about the legal capacity of the Donor when acting upon a bank authority.

Nevertheless, as a matter of law, any transaction after the Donor has become legally incapacitated may be set aside once it can be demonstrated that the transaction took place while the account-holder was incompetent. Additionally, on the death of the account-holder, the bank will freeze the account until probate has been obtained, unless the account is held in joint tenancy.

12. FORMALITIES FOR IMPLEMENTING OR TERMINATING POWERS

An Enduring Power must be executed in the presence of a witness (preferably two witnesses) who is not the Donee or Donee's spouse and it is accepted practice in Bermuda that a Power is executed or signed as a Deed.

In certain circumstances where the Donor is physically incapacitated (not mentally incapacitated), it is possible for another person to execute the Power on behalf of the Donor, but it must be done at the Donor's direction, in the Donor's presence and in the presence of the witnesses attesting the signature of the person acting on behalf of the Donor. If the Donor is mentally competent, but unable to sign his usual signature because of physical incapacity such as stroke; then, as long as the Donor can make his mark in the presence of the witnesses, **signing** the Power by making a mark is legally acceptable. A **mark** includes initials, a stamped name, a partial signature, thumbprint or a cross or other type of mark, as long as the witnesses see and attest to the fact that the Donor voluntarily made his mark on the Power.

Whether or not the Donor has granted a Power on behalf of the Donee, any subsequent application to the Supreme Court of Bermuda under the Mental Health Act for a Receivership Order will terminate the Power immediately when the Supreme Court grants the Order appointing a Receiver. This is a very unusual occurrence, however, it is possible that a member of the family may apply to the Supreme Court for a Receivership Order because the appointed Donee is abroad, unwilling or unable to act or is untrustworthy.

A Donor may terminate a Power at any time by way of a Deed of Revocation as long as he or she has sufficient legal capacity at the time to do so.

13. PASSING OF ACCOUNTS

Where a Power is an Enduring Power and the Donor at any time subsequent to granting the Power is without legal capacity (i.e. becomes incapable of managing his or her own affairs) and it appears to any person having an interest in the real or personal property of the Donor in the event of the death of a Donor, such person may apply to the Supreme Court for an Order that the Donee render accounts to the court for transactions involving the exercise of the Power during the incapacity of the Donor.

This is a difficult application to make as the applicant must produce evidence to persuade the court why it is necessary to order the Donee to provide accounts. This is the reason why some applicants simply prefer to apply for a Receivership Order, which will automatically invalidate the Power.

14. ACTS WHICH A DONOR CANNOT DELEGATE BY A POWER

A Donor cannot delegate his or her personal status by granting a Power. For example, those attributes which give the Donor special rights and responsibilities such as a ship's captain in piloting a ship or marrying passengers, a priest, a lawyer, an accountant, a husband or a candidate for an examination; nor can the Donor delegate to any person by way of a Power the authority to execute a Will.

Although, under the law of Wills, it is possible for a physically incapacitated person to direct another to execute his Will on his behalf; however, the Will (in order to be valid) has to be specifically approved by

the physically incapacitated person; it must be signed at his specific direction, in his presence and in the presence of two independent witnesses.

15. **REGISTRATION OF POWERS**

Although it is not legally necessary to register a Power in order for it to be effective, unlimited Ordinary and Enduring Powers are commonly registered because the act of registration serves as public notice that the Power exists and is effective. A registered Power is stamped by the office of the Registrar General stating the date of registration, the Book of Deeds number and the page numbers where it is recorded in the Book of Deeds. Any member of the public may obtain a copy of a registered Power or any other registered deed.

A Deed of Revocation by the Donor revoking a Power should also be registered with the office of the Registrar General, when the revoked Power is so marked. Limited Powers are usually not registered as the original is kept with the transaction documents for which the limited Power was granted, for example the conveyance recording the sale of land by way of a Power granted by the landowner.

When the Power is used by the Donee, it is normally presented to the official of the institution with whom the Donee is dealing to prove that he has authority to act on behalf of the Donor and the official will usually note on the document being signed by the Donee, the date of Registration of the Power, where it is registered in the Book of Deeds and the page numbers where it is recorded. This information will usually be noted under the name of the Donor and the signature of the Donee, on whose behalf he is acting.

16. **CAPACITY OF THE DONOR**

The rules for determining whether a Donor has the legal capacity to grant a Power are similar to those for determining whether a person has sufficient capacity to enter into important legal documents such as a Will or a Conveyance for the sale of land.

Persons under the age of 18 years cannot grant a Power.

A person suffering from a mental disorder cannot grant a Power. Should there be any doubt as to the legal capacity of a person to grant a Power, his or her physician should be asked to confirm in writing whether the person has sufficient mental capacity to sign an important legal document and the medical certificate should be attached.

Powers may be set aside under certain circumstances. For example, if a Donor, when granting a Power, is so drunk as not to know what he is doing, the Grant of the Power is at least voidable and may be void from the beginning. On sobering up, however, the Donor can ratify the Power. Also a Power signed under duress is void. If a Power is signed under undue influence, it can be set aside and any transaction by the Donee under a Power signed while under undue influence is also liable to be set aside. Unless it can be shown that the execution of the Power was the independent act of the Donor or, in other words, was the free and unfettered exercise of the Donor's will, then the court may hold that it was signed under undue influence and set the Power aside. If it can be shown that the relationship between the Donor and the Donee, shortly before the execution of the Power, was such as to raise the presumption that the Donee had undue influence over the Donor, then again the court may set aside the Power on the basis it was not the free exercise of the Donor's will.

17. **SUMMARY**

- 17.1 A Power is recommended for everyone, but particularly if a person is about to go abroad is ill or elderly.
- 17.2 A Power can be general or limited both in time and to a particular transaction.

- 17.3 If a Donor of a Power is elderly or ill, he or she should grant an Enduring Power, which will not be revoked by the subsequent legal incapacity of the Donor.
- 17.4 More than one person can be appointed the Donee of a Power, and the authority conferred by the Donor can be either joint (where Donees must act jointly i.e. together) or joint and several (where Donees can act either jointly or separately). A joint Power will terminate on the death of one of the joint Donees, whereas, a joint and several Power will not terminate when there is a Donee surviving.
- 17.5 A Power may be fully effective when executed or subject to the issuance of a medical certificate that the Donor is unable to look after his or her own affairs.
- 17.6 A Donor cannot delegate his personal **status** such as a priest, lawyer or husband.
- 17.7 A Power may not be necessary in certain circumstances as an agent can be otherwise authorised to carry out some transactions, such as banking.
- 17.8 A general Power should be registered with the Registrar General.
- 17.9 The appointment of a Receiver under the Mental Health Act will automatically render a Power invalid.
18. **ACKNOWLEDGMENT**

In preparing this guide, we wish to acknowledge the useful assistance of A Practitioner's Guide to Powers of Attorney, 5th Edition, by John Thurston LLB, Solicitor.

For more specific advice on powers of attorney in Bermuda, we invite you to contact:

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