THE UNIVERSITY of ADELAIDE

South Australian Law Reform Institute

Powers of Attorney

Fact Sheet 2 – Use of Powers of Attorney in South Australia and Guiding Law

The use of Powers of Attorney in South Australia

Australia has an ageing population and advances in medicine and public health mean that Australians are living longer than previous generations. Currently one in every six Australians are aged 65 years and over and these older Australians are expected to have a long period of declining health with increasing dependence whether through illness or physical and/or cognitive deterioration.

Powers of Attorney (POAs) are designed to place a measure of autonomy back into the hands of individuals suffering from deteriorating health, particularly cognitive decline, by allowing them to appoint a trusted individual (attorney) to make financial decisions in their best interests. If an individual does not have a person they wish to appoint as their attorney, the Public Trustee can be appointed in this role.

It is difficult to ascertain an accurate picture of the use of POAs in South Australia since they are not formally registered or recorded, except where the Public Trustee has been appointed.

Guiding Law

In South Australia, POAs are governed by the *Powers of Attorney and Agency Act 1984* (SA) (*POA Act*). The *POA Act* governs how a General Power of Attorney and Enduring Power of Attorney may be created, the general duties of an attorney and the powers of the Supreme Court. among others.

The *POA Act* consists predominantly of provisions which are quite general in nature. For example, the *POA Act* does not prescribe the attorney's role or the scope of their powers, stating only that the attorney is to perform his or her duties 'with reasonable diligence to protect the interests of the principal'.

Whilst this generality is, in part, due to the unique nature of each POA and the conditions that can be attached to POAs by individual principals, this can create uncertainty for both principals and attorneys as to their legal obligations.

Interstate laws governing POAs are often more comprehensive than the law in South Australia, detailing specific obligations, restrictions and administrative requirements for POAs, including registration.

For example, the witnessing requirements for POAs are more relaxed in South Australia than in most other states and territories. To create a POA in South Australia, the principal's signature need only be witnessed by one witness who must be a person authorised by law to take affidavits. The purpose of witnessing is to provide evidence that the document was signed voluntarily, and that the nature of the agreement was understood.

Victoria, Queensland, Tasmania and the ACT require two persons to witness the creation of a POA and in Victoria, Queensland, and the ACT, witnesses must explicitly attest to the principal's capacity, in addition to the voluntary signing of the document.

Discussion Questions

1. How widely are POAs used?
2. How can the use of POAs be promoted?
3. What are the barriers to making POAs?
4. How does the *POA Act* compare to other Powers of Attorneys laws in Australia? What are its benefits/disadvantages?
5. Should guiding principles be introduced in the *POA Act*?
6. How can the *POA Act* be simplified?
7. What are the issues with POA forms?
8. Should it be mandatory to use the standard POA forms?
9. Are the formal requirements for creating POAs suitable?
10. How many witnesses should be required to witness a POA document?
11. Should witnesses have to explicitly attest to the principal's capacity?
12. What qualifications (if any) should a witness hold?
13. Who should be disqualified from being a witness?
14. How can witnesses be supported in their role?

***Please note*: SALRI does not, and cannot, provide legal advice to individuals. If you are in need of legal advice we encourage you to speak to a lawyer and/or contact a community legal service.**

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