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LawTalk Blog



When should I make my Power of Attorney effective from?

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[Powers of Attorney](#) are important documents. A Power of Attorney, sometimes called a living [Will](#), gives another person the legal right to manage your legal and financial affairs for you.

A Power of Attorney can commence at any one of two stages. It depends on which one you choose. They are:

1. Straight away; or
2. Only if you can no longer manage your own affairs, due to a mental incapacity. That might include being unconscious, in a coma, mentally ill or suffering an incapacity such as dementia or Alzheimer's disease.

Many people are reluctant to make their Powers of Attorney commence straight away. They feel like they are giving the power to manage their own affairs to someone else and are thereby diluting their rights to make choices for themselves.

Given that most people appoint their spouse as their Attorney under a Power of Attorney, they often also think that, given all assets are jointly owned, there is no need to make the Power of Attorney commence straight away.

Both views are often wrong.

A lawfully appointed Attorney under a Power of Attorney is acting as a trustee. That means that such an Attorney may only conduct themselves in the best interests of the person for whom they are acting. The Attorney must keep a record of all dealings they undertake on behalf of that person and there are significant penalties that apply for Attorneys who misuse their power. The Attorney is also liable to make good any damage caused from their own personal assets.

Making the Power of Attorney come into effect only if you can no longer manage your own affairs means that in reality, the Power of Attorney is a form of insurance for the day on which capacity is lost, and nothing more. It is still extremely valuable to have, but the document is essentially useless until that day comes.

By making the Power of Attorney effective immediately, if you are travelling (or suffer a physical injury that makes movement difficult) then your Attorney can attend to your financial and legal affairs for you locally in your absence or recovery. The Power of Attorney is not limited to use for only when you can no longer mentally manage your own affairs.

So, for instance, a Power of Attorney which is effective immediately can be used by your Attorney to attend to opening and closing bank accounts or dealing with government departments in the event that you suffer a theft or other incident overseas. If the Power of Attorney were effective only in the event of incapacity, then that would not be the case.

The fact that assets are jointly owned does not mean that both owners do not need to be available and able to exercise control over them. It is well and good to suggest that a Power of Attorney is not needed because you "jointly own the house with your spouse" but the reality is that if the house needs to be remortgaged, transferred or sold, both you and your spouse will need to sign off on that. If your spouse is unavailable (and you have their Power of Attorney, effective immediately) or mentally unwell (and you have their Power of Attorney, either effective immediately or only on incapacity) then you are able to sign those documents on your spouse's behalf.

In the absence of a Power of Attorney, an application to the [Guardianship Board](#) and possibly the Court is required before a person's assets can be dealt with by an "administrator". It may well be the case that Public Trustee needs to be involved in order to monitor any dealings and to report to the Guardianship Board. In any event, it is a much more time consuming and costly way of controlling someone's assets in the event of their absence or incapacity.

A Power of Attorney is a simple but powerful document which every adult, regardless of age should have in order to ensure that a person they trust is able to manage their legal and financial affairs in a quick and tidy manner.

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