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Law Reform Committee

VICTORIAN PARLIAMENT LAW REFORM COMMITTEE

INQUIRY INTO POWERS OF ATTORNEY

SUBMISSION BY

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POWERS OF ATTORNEY

INTRODUCTION

As a Justice of the Peace over the last six years I have witnessed the signing of many Power of Attorney documents and in some of these cases have been requested to accompany staff of State Trustees to witness their clients documents.

During the time that I have been a Justice of the Peace I have attended training courses specifically orientated to Powers of Attorney, conducted by the training wing of the Royal Victorian Association of Honorary Justices so believe that I am qualified to comment on this matter.

One of the main misgivings or ignorance in understanding, because of the lack of education, advertising, and general promotion, are that many people don't understand that there are four types of Power of Attorney,

Enduring Power of Attorney [Financial]
Enduring Power of Attorney [Medical Treatment]
General Power of Attorney,
Enduring Power of Guardianship,

POWER OF ATTORNEY [MEDICAL] & [FINANCIAL]

The State and Federal Governments tell us it is an ageing population, therefore it would be logical to think that the use of these document would become more popular for several reasons.

1. Travel intrastate, interstate, and overseas,
2. Accidents, to all ages causing the loss of capacity,
3. Sickness, strokes, and brain damage,
4. General aging process, dementia etc.

With these possibilities in mind, Enduring Power of Attorney Medical, and Enduring Power of Attorney Financial, could be condensed and combined to form one document and remove the confusion and any misunderstanding.

Under the Medical Treatment Act 1988 Power of Attorney [Medical Treatment] the Donor may appoint up to three Attorney's, however only the primary Attorney may act, with the other two being held in reserve. In this document there is no jointly or severally clause.

Now looking at the Instruments 1958 the legislation relating to Enduring Power of Attorney [Financial] the donor can again appoint three Attorney's and only the first mentioned may act unless the terms jointly, or jointly and severally are used.

The difference in these two important documents causes confusion and unrest in many people, especially the older person who understands the necessity of such a document, but not the difference in who can act and who can't.

Therefore if the two sections were conjoined using say two attorney's, and when a decision could not be reached, an appeal to a negotiator at VCAT (Victorian Civil and Administrative Tribunal) could be organized to settle the depute, this would safeguard both financial and medical arrangements that are being decided on the Donors behalf assisting in protecting the dignity and family connections of the Attorney's.

With this situation it would be of importance for the Act to record that the witness to the Donor's signing be neither a medical professional, a banker,a relative by birth or marriage, or would be someone who could benefit is some way from the document, such as a benefactor in a will. This would inhibit a so called conflict of interest.

GENERAL POWER OF ATTORNEY

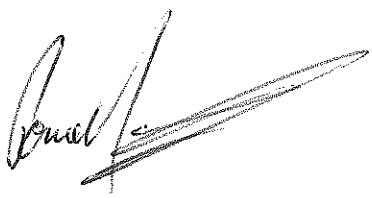
This Document is used as stated, mainly in the case of a specific function and has a set time, usually much shorter than the intended time of the Enduring Power of Attorney, and would end when the stated specific task was completed, say when the house is sold.

ENDURING POWER OF GARDIANSHIP

This document is looking at the lifestyle assurance, after capacity has been lost due to a stroke, dementia or the likes. In the event that a person lost capacity with out prior writing a Power of Attorney Medical or Financial then Guardianship list of VCAT could direct one of these be put in place.

The related application for parents of children or adult children with a decision making disability, then one would be required to ask , if this diagnosed client would have the legal capacity to make such a decision without the assistance of VCAT Guardianship list.

Whilst a person could set this document up well prior to losing capacity, it is of no use untill the Donor has lost capacity, so would be no use if the Donor wanted to go on holidays overseas, the Attorney could not manage the Donors estate while they were away as the Donor would still have capacity.



CONCLUSION

With Power of Attorney one of the major dissatisfactions is the possibility for a single [one] Attorney to make decisions that may or could be of self interest, a decision to advance his/her finances or status.

As in my travels the discussion of Powers of Attorney is raised I hear stories where Attorney's have taken advantage of the position, I have not tried to verify the truth of these tales.

I believe that all powers of Attorney should be registered with VCAT, and Attorney's notified that their records could be called in for a random audit. This may help to keep honesty at the forefront.

Another method could be that Attorney's should keep records such as a club treasurer and these could be audited say every three years or so by a public auditor, costs to be recovered from the donors estate.

The future is an unknown product, so it is a necessity for all persons to have a more simplified and combined document of Power of Attorney Medical/ Financial completed and held by their Attorneys in case of mishap or to take care of the estate in the case of travel.