

Enduring Power of Attorney

All superannuation members should consider having in place an enduring power of attorney that empowers a trusted person or persons to care for and manage their superannuation, when circumstances are such that they cannot do it themselves. Disability is a fact and risk of modern life, and its prevalence grows with the age of a superannuation fund member.

Where there is no enduring power of attorney and disability is found to exist, the most common result is that a State or Territory Trustee Company will be the only legally recognised party who can care for and manage another's superannuation. It is also common for the State or Territory to have laws to enable a person to seek to be appointed as the financial guardian of the disabled member, but this can be a costly and cause long time delays to settlement.

We at SuperGuardian feel that it is good planning for every superannuation member to have a current valid and operative enduring power of attorney in favour of a person or persons of their choosing.

Below we raise some important principles to keep in mind when it comes to enduring powers of attorney and superannuation.

What law applies?

Like superannuation funds, the laws surrounding enduring powers of attorney are found in Australia's States and Territories. But which one applies? The best answer is to have an enduring power of attorney that is most closely associated to the jurisdiction in which the member lives.

Can an attorney deal with or create another person's death benefit nomination?

There are a number of layers to this question.

The first layer is found in the trust deed to the relevant superannuation fund. A trust deed can expressly empower the chosen attorney to deal with, create or revoke a person's death benefit nomination. It is good to clearly identify whether such a trust deed empowering clause exists.

But where the trust deed is silent on this, it is probable that the chosen attorney can still deal with, create or revoke the nomination, but the state of the law on this in Australia is not certain and it needs to be considered according to the most closely relevant State or Territory laws.

The second layer, assuming that the ability to impact the nomination is found to exist, is whether or not the terms of the power of attorney are sufficient for this purpose. This relies on the specific wording of the terms of the power granted to the attorney, some of which is found in the document itself, and the rest of the power is found in the State or Territory laws of powers of attorney.

The third layer of review relies on the relationship between the attorney and the principal or member. Where the relationship is close, as it often is, any action by the attorney must not breach or give rise to a personal benefit to the attorney. At least it should not, unless the action is specifically allowed by the terms of appointment of the attorney and the law that supports it. An action by an attorney that is found to be in breach of or in conflict with the attorney's duty to the disabled person, will mean that the action undertaken by the attorney is invalid and therefore is ineffective.

So, what is the answer? Can an attorney deal with or create another's death benefit nomination? The answer is possibly, and it depends. Each layer expressed above needs careful consideration. Seeking legal advice on this is a must, if confidence and certainty is desired.

What are some must haves for such a power of attorney?

The first starting point is not the attorney appointing document, it is the superannuation trust deed. It is necessary to start with an understanding of what this may allow and to have the power of attorney document crafted in a manner that recognises this.

The wording of the power of attorney document can be helpful. The more express it is, the easier it is to draw from it that which the attorney will be empowered to act.

Express releases of the attorney from acting in what may appear to be conflict of interest situations can be very useful, especially for death benefit nominations in favour of the attorney.

It can also be important to look at the whole power of attorney situation to see if there are other conflict problems. It is not uncommon for the attorney to also be acting in the stead of the disabled superannuation member, as trustee or director of the trustee company. The fact of this dual role raises the potential complexity.

A special situation requires specialty support

At SuperGuardian we understand the importance of having in place a good competent power of attorney document. We know that the law in this area is specific to a person's circumstances and where they live.

We cannot give advice in this area; we can only recommend that a person seeks the guidance of a lawyer who understands the laws of powers of attorney that are relevant to them and who knows how this can interact with a person's superannuation.

Need assistance? Call us **1300 787 576** or email us at info@superguardian.com.au, or call your Client Manager.



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