

Who can obtain a copy of a Power of Attorney?

An attorney under a power of attorney (even an enduring power of attorney) does not automatically have a right to obtain the original power of attorney and can normally only obtain it if the donor consents or has lost capacity.

A power of attorney is a document which one person signs (“the donor”) giving another person the power to deal with their assets and sign documents on their behalf. As part of a good estate planning structure, many people will sign an “enduring power of attorney” which entitles their attorney to manage their finances and assets even if the donor suffers a stroke or is incapacitated in some way and unable to act for themselves. This can be of great benefit to the donor should they lose their capacity to act.

Usually, the donor will tell their attorney that they have appointed them as an attorney for this purpose. However, donors often expect that attorneys will not act under a power of attorney unless the donor actually becomes incapacitated. One way to make sure this does not happen is to leave the original power of attorney in the hands of the donor’s solicitor, with written instructions not to release the document unless the donor expressly agrees or unless something happens which causes the donor to lose their capacity to act.

Sometimes, donors state in their power of attorney that it will only take effect if they lose capacity and this has been certified by medical evidence. In that case, the attorney may only be able to obtain the power of attorney from the solicitor who holds it if the solicitor is satisfied with the medical evidence about the donor’s lack of capacity.

Powers of attorney can be registered in some cases. This normally happens where the power of attorney is to be used to sign documents relating to a property transaction. In New South Wales, powers of attorney are registered at the Department of Lands and, once registered, are public records which can be searched. Most powers of attorney, however, do not need to be registered, at least until they actually need to be used by the attorney.

If you are going to sign a power of attorney, you should think about the circumstances in which you would like the power of attorney to be used and any limits you would like to place on its use and make sure that you give your solicitor clear instructions about when they can give the document to your attorney.

A power of attorney only operates during the donor’s lifetime. It cannot be used after the donor has died. However, if someone has been appointed as an attorney under an enduring power of attorney, they are entitled (in NSW and Qld) to ask for a copy of the donor’s will, after the donor dies. For more information about this, see our article on obtaining a copy of a will.

If you would like more information about powers of attorney, contact one of our wills and estates specialists.