

POWERS OF ATTORNEY AMENDMENT ACT 1987

No. 87 of 1987

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FORM OF ACCEPTANCE OF
ENDURING POWER OF
ATTORNEY



POWERS OF ATTORNEY AMENDMENT ACT 1987

No. 87 of 1987

AN ACT to amend the Powers of Attorney Act 1934.

[Royal Assent 8 December 1987]

BE it enacted by His Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:—

1—This Act may be cited as the *Powers of Attorney Amendment Act 1987*. Short title.

2—(1) This section and section 1 shall commence on the day on which this Act receives the Royal assent. Commencement.

(2) Except as provided in subsection (1), this Act shall commence on such day as may be fixed by proclamation.

Principal Act. **3**—In this Act, the *Powers of Attorney Act 1934** is referred to as the Principal Act.

Repeal of sections 1, 3, 4, 6, and 7 and substitution of new Part I, headings to Part II, new sections 6 and 7 and heading to Division 2 of Part II of Principal Act.

4—Sections 1, 3, 4, 6, and 7 of the Principal Act are repealed and the following Part, headings, and sections are substituted:—

PART I

PRELIMINARY

Short title.

1—This Act may be cited as the *Powers of Attorney Act 1934*.

Interpretation.

2—In this Act, unless the contrary intention appears—

“ the Court ” means the Supreme Court;

“ enduring power of attorney ” means an enduring power of attorney created pursuant to section 11A.

PART II

POWERS OF ATTORNEY

Division 1—Registration of powers of attorney, &c.

Acts under power invalid until power registered.

6—An act, deed, or instrument done, executed, or signed under a power of attorney by the donee of the power is not valid unless—

(a) that power of attorney is first registered under the *Registration of Deeds Act 1935* as an instrument; or

(b) in the case of an enduring power of attorney that is subject to an order of the Court made under section 11E (3), a copy of that order under the seal of the Court is so registered.

Death, &c., of donor of power may be registered.

7—(1) Where a power of attorney has been registered as mentioned in section 6, the death, bankruptcy, or insolvency of the donor or the revocation of the power of attorney by the donor shall be registered as provided by subsection (2).

* 25 Geo. V No. 33. For this Act, as amended to 1959, see the Reprint of Statutes (1826-1959), Vol. 4, p. 747. Subsequently amended by No. 55 of 1965 and No. 57 of 1975.

(2) For the purposes of subsection (1), there shall be registered under the *Registration of Deeds Act 1935* as an instrument—

- (a) a declaration made by a person of the fact of the death, bankruptcy, or insolvency of the donor of a power of attorney made before a person having authority to administer an oath in the place, whether in Tasmania or elsewhere, where the declaration is made;
- (b) an instrument of revocation of a power of attorney;
- (c) a notice of revocation under the hand of the donor of a power of attorney; or
- (d) in the case of an enduring power of attorney that is revoked, or of which the terms are varied, by an order of the Court under section 11E (3), a copy of that order under the seal of the Court.

Division 2—Effect of powers of attorney

5—Section 10 of the Principal Act is amended by omitting “lunacy, unsoundness of mind,” wherever occurring, and substituting “mental incapacity,”.

Amendment of section 10 of Principal Act (Effect of power of attorney for value made absolutely irrevocable).

6—Section 11 of the Principal Act is amended by omitting “lunacy, unsoundness of mind,” wherever occurring, and substituting “mental incapacity,”.

Amendment of section 11 of Principal Act (Effect of power of attorney).

7—After section 11 of the Principal Act, the following Part, heading, and section are inserted:—

Insertion of new Part III, heading to Part IV, and new section 11H in Principal Act.

PART III

ENDURING POWERS OF ATTORNEY

11A—(1) A power of attorney is an enduring power of attorney for the purposes of this Act if it is created by deed containing words indicating an intention that the authority conferred is to be exercisable notwithstanding the donor’s subsequent mental incapacity or in the event of the donor’s subsequent mental incapacity.

Creation and effect of enduring powers of attorney.

(2) A deed is not effective to create an enduring power of attorney unless—

(a) there are at least 2 attesting witnesses to the deed neither of whom is a party to the deed nor a relation of a party to the deed and who have witnessed the deed in the presence of the donor and each other; and

(b) the deed has endorsed on it, or annexed to it, a statement of acceptance in the form set out in Schedule 1, or in a form to the same effect, executed by the person appointed to be the donee of the power.

(3) An act done by the donee of an enduring power of attorney in pursuance of the power during a period of mental incapacity of the donor of the power is as effective as if the donor were competent and not mentally incapacitated.

Scope of
authority, &c.,
of donee under
enduring power
of attorney.

11B—(1) An enduring power of attorney—

(a) may confer general authority in accordance with subsection (2) on the donee to act on the donor's behalf in relation to all or a specified part of the property and affairs of the donor or may confer on him authority to do specified acts on the donor's behalf; and

(b) may be expressed to operate only during such period as may be specified in the deed,

and, in any such case, the authority may be conferred subject to conditions and restrictions.

(2) Where an instrument is expressed to confer general authority on the donee, it operates to confer, subject to any conditions or restrictions contained in the deed, authority to do on behalf of the donor any act which the donor can lawfully do by an attorney.

11C—(1) A donee of an enduring power of attorney shall, during any period of mental incapacity of the donor—

Duties of donee of enduring power of attorney.

(a) be deemed to be a trustee of the property and affairs of the donor according to the tenor of the power; and

(b) exercise his powers as attorney to protect the interests of the donor,

and, if he fails to do so, is liable to compensate the donor for loss occasioned by the failure.

(2) A donee of an enduring power of attorney is not competent to appoint another person to perform any of his functions or exercise any of his powers in his capacity as such.

11D—(1) Notwithstanding anything contained in the *Mental Health Act* 1963, an enduring power of attorney is not revoked on the donor of the power becoming subject to Part VI of that Act and the powers and duties of a committee appointed under that Part in relation to the estates of patients do not apply to, or in relation to, the estate of the donor so long as the enduring power of attorney is in force.

Effect of committee proceedings on enduring power of attorney.

(2) Notwithstanding subsection (1), any action taken by a committee pursuant to Part VI of the *Mental Health Act* 1963 before he has notice of an enduring power of attorney is valid and effectual.

11E—(1) The Public Trustee or a person who has, in the opinion of the Court, a proper interest in the matter may at any time during a period of mental incapacity of the donor of an enduring power of attorney, apply to the Court for an order—

Power of Supreme Court to revoke enduring power of attorney.

(a) requiring the donee of the power to file in the Court and serve on the applicant a copy of all records and accounts kept by the donee of dealings and transactions made by him in pursuance of the power;

(b) requiring those records and accounts to be audited by an auditor appointed by the Court and requiring a copy of the report of the auditor to be furnished to the Court and the applicant; or

(c) revoking or varying the terms of the power or appointing a substitute donee of the power.

(2) The donee of an enduring power of attorney may, at any time during a period of mental incapacity of the donor of the power, apply to the Court—

(a) for an order referred to in subsection (1) (c); or

(b) for advice and direction as to matters connected with the exercise of the power or the construction of its terms.

(3) The Court may, on an application under this section—

(a) make an order referred to in subsection (1) (c); or

(b) make such other order (declaratory or otherwise) as to the exercise of the power, or the construction of its terms, as the Court thinks fit.

(4) An order under this section may be made subject to such terms and conditions as the Court thinks fit.

Contracting out prohibited.

11F—The provisions of this Part apply and have effect to, and in relation to, an enduring power of attorney notwithstanding any contract or arrangement made by the donor and the donee of the power to the contrary.

Saving provision.

11G—Except as expressly provided by this Part, nothing in this Part shall be construed so as to derogate from the law relating to powers of attorney.

PART IV

MISCELLANEOUS AND SUPPLEMENTAL

Execution of power of attorney by direction of donor.

11H—(1) Where an instrument creating a power of attorney is not executed personally by the donor, the instrument shall be taken to be validly executed if—

- (a) it is executed by some other person in the presence of, and by the direction of, the donor;
 - (b) the signature of that other person is made or acknowledged by the donor in the presence of 2 or more witnesses present at the same time; and
 - (c) those witnesses attest and subscribe the power of attorney in the presence of the donor,
- but no form of attestation is necessary for that purpose.

(2) Subsection (1) does not apply to, or in relation to, an enduring power of attorney.

8—Section 12 of the Principal Act is amended by omitting “lunatic, of unsound mind,” and “lunacy, unsoundness of mind,” and substituting “mentally incapable,” and “mental incapacity,” respectively.

Amendment of section 12 of Principal Act (Validity of acts, &c., of donee without notice of death, &c.).

9—Section 18 of the Principal Act is amended as follows:—

- (a) by omitting “The ” and substituting “ (1)—The ”;
- (b) by adding at the end the following subsection:—

Amendment of section 18 of Principal Act (Regulations).

(2) The regulations may require that an enduring power of attorney incorporate such information explaining the general effect of creating or accepting the power as may be specified in the regulations.

10—The first Schedule to the Principal Act is repealed and the following Schedule is substituted:—

Repeal of first Schedule and substitution of Schedule 1 to Principal Act.

SCHEDULE 1

Section 11A (2) (b)

FORM OF ACCEPTANCE OF ENDURING POWER OF ATTORNEY

I, _____, the person appointed to be the donee of the power of attorney created by the instrument on which this acceptance is endorsed [or to which this acceptance is annexed] accept the appointment and acknowledge—

- (a) that the power of attorney is an enduring power of attorney and as such may be exercised by me notwithstanding any subsequent mental incapacity of the donor; and
- (b) that I will, by accepting this power of attorney, be subject to the requirements of the *Powers of Attorney Act 1934*.

Signed.....
(*Donee of the Power of Attorney*)