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THE MARK OF EXPERTISE

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# **POWERS OF ATTORNEY**

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# Power of Attorney Act 2003



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- Prescribed attorney confers on attorney authority to do anything that principal may lawfully authorise an attorney to do on behalf of principal – s 9
- Subject to limitations and conditions
  - No authority make gifts unless specified – s 11
  - No authority confer benefits unless specified – s 12, 13
  - Fiduciary duties – common law and equity apply – s7
- Prescribed form – Schedule 2
  
- May be registered – s 51
- Conveyance or other deed affecting land has no effect unless registered – s 52

# enduring power of attorney



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- Ordinary power terminates when principal loses capacity
- Enduring continues after loses capacity – s21
  
- Prescribed witness
- Certificate annexed on instrument that witness explained effect and principal appeared to understand – s19
  
- immediately effective
- if one / two medical practitioners confirm lost capacity
- *Caution* –certification used for testamentary capacity
- **Power v Power [2011] NSWSC 288**
- “strict compliance – adds protection not used prematurely”

# termination



- **irrevocable** power of attorney – no fiduciary duty
- Valuable consideration – s 15
- may act independently of principal, contrary to principal
- terminate on completion of act
  - express term
  - Supreme Court terminate if object carried out or incapable of being carried out – s 28
  
- **joint attorneys**
- terminate if one vacate / die unless provide otherwise-s46
  
- **revocable** attorney
- Need to notify – attorney can act and 3<sup>rd</sup> parties entitled to rely on attorney if no notice to attorney – s 47, 48
- Attorney acting with knowledge up to 5 years jail – s49

- Jointly
  - All
  - majority
- Jointly and severally
  
- Physical availability
  
- Ensure consistent with bank account signatories
  
- Joint terminate if vacate/die unless express – s 46

# approval of third party



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- Appoint attorneys severally *but* require 3<sup>rd</sup> party approval
  - sell more than specified percentage of total assets
  - sell specific asset/s (eg shares; business; family home)
  - Lease / sharefarm family farm
- Commercial - broker / financial planner / accountant
- Legal - legal adviser / tax adviser
- firm / nominated individuals *not* one individual
- ademption – if attorney sell/mortgage/charge/deal with property that is specifically devised, then beneficiary entitled to proceeds / property arising – s 22

# challenge attorney – during life

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- Supreme Court; Guardianship Tribunal
- making, revocation or the operation and effect – s36
  
- “Interested person” – s35
  - Attorney (*incl* previous attorney)
  - Principal
  - Person with a proper interest
  
- Vary
- Remove attorney / reinstate attorney
- Direct furnish accounts
- Direct accounts audited
- Prepare plan of financial management

# challenging POA during life



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- **Re R [2000] NSWC 886**
- Use attorney to implement tax planning
- “danger of exploitation”  
“even though authorised, may breach fiduciary duties”
- **Mary Alice Hughes bht NSW TG v Hughes [2011] NSWSC 729**
- failure to account for proceeds of sale
- **[Spina v Conran Associates Pty Ltd;](#)  
[Spina v M & V Endurance Pty Ltd](#) [2008] NSWSC 326**
- Mortgages executed by attorney over principal property not valid
- “Prima facie, a power, however widely its general words may be expressed, should not be construed as authorizing the attorney to deal with the property of his principal for the attorney's own benefit.”
- **Ward v Ward [2011] NSWSC 107 – entered into loan agreement**



# challenge attorney – after death



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- all real and personal estate vest in executor – s 44 PAA
- *includes* claim against attorney
  
- If executor is the attorney
  - Beneficiaries
  - UCPR 7.10 – appointed as representatives of Deceased
  
- Beneficiaries claim against executor – waste/devastavit
- *Bird v Bird* [2013] NSWCA 262

# restrictions

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- Principal cannot delegate personal roles
  - Trustee – Robson v Flight (1865) 4 De GJ & S 608
  - Director – Mancini v Mancini [1999] NSWSC 799
  
- Attorney cannot execute principal's will
  
- Attorney cannot sub-delegate unless specified – s45
  
- Statutory exception for self managed super funds
- s17A(3)(b) SIS Act



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