

South Australia

Powers of Attorney and Agency Act 1984

An Act to provide for general powers of attorney and enduring powers of attorney; and to make other provision relating to powers of attorney and agency.

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Legislative history

The Parliament of South Australia enacts as follows:

1—Short title

This Act may be cited as the *Powers of Attorney and Agency Act 1984*.

3—Interpretation

In this Act—

enduring power of attorney means an enduring power of attorney created pursuant to section 6.

4—Application of this Act

Subject to section 14, this Act applies in relation to a power of attorney, or any other power to act as an agent, of which the law of this State is the proper law, or which arises by virtue of a transaction of which the law of this State is the proper law.

5—General power of attorney

- (1) A general power of attorney may be created by deed in the form set out in Schedule 1 or in a form to the same effect but expressed to be made in pursuance of this section.
- (2) The authority conferred by a general power of attorney may be expressed to be subject to specified conditions, limitations or exclusions.
- (3) Subject to subsection (4) and any conditions, limitations or exclusions to which it is expressed to be subject, a general power of attorney operates to confer—
 - (a) on the donee of the power; or
 - (b) where there is more than one donee, on the donees acting jointly or severally, as the case may be,

authority to do on behalf of the donor anything that he can lawfully do by an attorney.

- (4) A general power of attorney does not operate to confer authority to perform functions that the donor has as a trustee or personal representative.

6—Enduring powers of attorney

- (1) An enduring power of attorney may be created—
 - (a) by deed expressed to be made in pursuance of this section; or
 - (b) by deed containing words indicating an intention that the authority conferred is to be exercised—
 - (i) notwithstanding the donor's subsequent legal incapacity; or
 - (ii) in the event of the donor's subsequent legal incapacity.
- (2) A deed is not effective to create an enduring power of attorney unless—
 - (a) the attesting witness to the deed, or, where there is more than one attesting witness, at least one of them, is a person authorised by law to take affidavits; and
 - (b) the deed has endorsed on it, or annexed to it, a statement of acceptance in the form set out in Schedule 2, 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 legal incapacity of the donor of the power is as effective as if the donor were competent and not incapacitated.

7—General duty of donee of an enduring power

The donee of an enduring power of attorney must, during any period of legal incapacity of the donor, exercise his powers as attorney with reasonable diligence to protect the interests of the donor and, if he fails to do so, shall be liable to compensate the donor for loss occasioned by the failure.

8—Offence if donee of enduring power fails to keep and preserve accounts of dealings etc

The donee of an enduring power of attorney shall, if he fails to keep and preserve accurate records and accounts of all dealings and transactions made in pursuance of the power, be guilty of an offence and liable to a penalty (recoverable summarily) of an amount not exceeding one thousand dollars.

9—Donee may not renounce power during incapacity of donor except with permission of Supreme Court

The donee of an enduring power of attorney may not renounce the power during any period of legal incapacity of the donor except with the permission of the Supreme Court.

10—Effect of appointment of committee, administrator or manager of estate of donor of an enduring power

Where the administration of the estate or a part of the estate of the donor of an enduring power of attorney is vested in another person as committee, administrator under the *Mental Health Act 1977* or manager under the *Aged and Infirm Persons' Property Act 1940*—

- (a) the donee of the power is accountable to the other person as if the other person were the donor of the power; and
- (b) the other person has the same power to vary or revoke the power as the donor would have if he were competent and not incapacitated.

11—Powers of Supreme Court in respect of enduring powers

- (1) Any person who has, in the opinion of the Supreme Court, a proper interest in the matter may, at any time, apply to the Supreme Court for an order—
 - (a) requiring the donee (or former donee) of an enduring power of attorney to file in the Supreme 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; or
 - (b) requiring such records and accounts to be audited by an auditor appointed by the Supreme Court and requiring a copy of the report of the auditor to be furnished to the Supreme Court and the applicant for the order; or
 - (c) revoking or varying the terms of an enduring power of attorney or appointing a substitute donee of such a power.
- (2) The donee of an enduring power of attorney may apply to the Supreme 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 Supreme Court has, upon an application under this section, jurisdiction—
 - (a) to make an order referred to in subsection (1); or
 - (b) to 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 Supreme Court thinks fit.

11A—Applications by beneficiaries of the will of a deceased donor

- (1) Where—
- (a) the donor, or former donor, of an enduring power of attorney dies leaving a will; and
 - (b) the donor or former donor had, while the enduring power of attorney was in force, suffered a period of legal incapacity; and
 - (c) it appears at the death of the donor or former donor that, in consequence of any exercise of power by the donee of the enduring power of attorney during that period of incapacity, the share of any beneficiary under the will has been affected,

the Supreme Court may, on application by any person who has, in the opinion of the Supreme Court, a proper interest in the matter, make such orders as it thinks just to ensure that no beneficiary gains a disproportionate advantage, or suffers a disproportionate disadvantage, of a kind not contemplated by the will, in consequence of the exercise of the donee's powers during the period of legal incapacity of the donor or former donor.

- (2) An order made by the Supreme Court under subsection (1) operates and will take effect as if it had been made by a codicil to the will of the donor or former donor executed immediately before his or her death.
- (3) The Supreme Court must, on making an order under subsection (1), direct that a certified copy of the order be attached to the grant of probate of the will, or grant of letters of administration with will annexed, and may, for that purpose, require the production of the relevant grant.
- (4) An application under this section must be made within six months from the date of the grant in this State of probate of the will or letters of administration unless the Supreme Court, after hearing such of the persons affected as the Supreme Court thinks necessary, extends the time for making the application.
- (5) An extension of time granted under subsection (4) may be granted—
- (a) on such conditions as the Supreme Court thinks fit; and
 - (b) whether or not the time for making an application under this section has expired.
- (6) An application for extension of time must be made before the final distribution of the estate.
- (7) A distribution of any part of the estate made before an application for extension of time will not be disturbed by reason of the application or any order made on the application.
- (8) This section does not apply in respect of the will of a deceased person who died before the commencement of this section.

12—Protection for agent and third party in respect of acts done after principal's death or legal incapacity

- (1) A person who acts in good faith in the purported exercise of authority as an agent after termination of the authority by the death or legal incapacity of the principal does not, by reason of the termination, incur any liability in respect of the act if it was done without knowledge of the principal's death or incapacity.
- (2) Where—
 - (a) a person enters into a transaction in the purported exercise of authority as an agent after termination of the authority by the death or legal incapacity of the principal; and
 - (b) the other party to the transaction enters into it in good faith and without knowledge of the principal's death or incapacity,the transaction is, as between the principal and the other party, as effective as if the authority had not been terminated by the principal's death or incapacity.
- (3) Where probate or letters of administration have been granted to a person as attorney for some other person, this section applies in relation to acts done or transactions entered into by the attorney as if the authority conferred by the grant had been conferred by the power of attorney.
- (4) This section applies to an act done or transaction entered into after the commencement of this Act whether the agent's authority was conferred before or after that commencement.
- (5) This section does not affect the operation of—
 - (a) section 160 of the *Real Property Act 1886*; or
 - (b) section 35 of the *Registration of Deeds Act 1935*.

13—Effect of execution of deed by agent in his own name

- (1) Where—
 - (a) an agent executes a deed in his own name; but
 - (b) it is apparent from the deed as executed that the agent was acting on behalf of his principal,the agent is not, by reason only of the manner in which he executed the deed, personally liable upon the deed, and the deed has effect as if the agent had executed it in the name of his principal.
- (2) This section applies in relation to a deed executed after the commencement of this Act whether the agent's authority was conferred before or after that commencement.

14—Recognition of enduring powers of attorney made in other States and Territories

- (1) An interstate enduring power of attorney has effect in this State as if it were an enduring power of attorney made under, and in compliance with, this Act, but only insofar as the powers it gives under the law of the State or Territory in which it was made could validly have been given by an enduring power of attorney made under this Act.

- (2) An interstate enduring power of attorney to which subsection (1) applies—
- (a) has effect in this State subject to any limitations on the power that apply to it under the law of the State or Territory in which it was made; and
 - (b) does not operate to confer any power on an attorney in this State that cannot be conferred on an attorney under an enduring power of attorney made in this State.
- (3) Subsection (1) does not apply to a power of attorney of a kind prescribed by regulation.
- (4) In any proceedings relating to a power of attorney, a document signed by a qualified interstate legal practitioner that certifies that an interstate enduring power of attorney was made in accordance with the formal requirements of the law of the State or Territory in which it was made is admissible in evidence in such proceedings and constitutes, in the absence of proof to the contrary, proof of the matters so certified.
- (5) In this section—

interstate enduring power of attorney means a power of attorney made in another State or a Territory that, under the law of that State or Territory, has effect in that State or Territory as a valid power of attorney even if the donor of the power of attorney loses capacity through mental incapacity after the execution of the instrument creating the power of attorney;

qualified interstate legal practitioner, in relation to an interstate enduring power of attorney, means a person—

- (a) who has been admitted to legal practice in the State or Territory in which the power of attorney was made; and
- (b) who holds a certificate or other form of authorisation that confers an authority to practise in that State or Territory that corresponds to the authority conferred by a practising certificate issued under Part 3 of the *Legal Practitioners Act 1981*; and
- (c) who practises in that State or Territory.

Schedule 1—Form of general power of attorney

THIS GENERAL POWER OF ATTORNEY is made pursuant to section 5 of the *Powers of Attorney and Agency Act 1984* this day of 20 by AB
of

- 1 I appoint CD of [or CD of and EF
of jointly *or* jointly and severally] to be my attorney[s].
- 2 I authorise my attorney[s], subject to clause 3, to do on my behalf anything that I can lawfully do by an attorney.
- 3 The authority of my attorney[s] is subject to the following conditions, limitations or exclusions:

IN WITNESS etc

Schedule 2—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 legal incapacity of the donor [*or* in the event of any subsequent legal 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 and Agency Act 1984*.

Signed.....
(*Donee of the power of attorney*)

Legislative history

Notes

- Please note—References in the legislation to other legislation or instruments or to titles of bodies or offices are not automatically updated as part of the program for the revision and publication of legislation and therefore may be obsolete.
- Earlier versions of this Act (historical versions) are listed at the end of the legislative history.
- For further information relating to the Act and subordinate legislation made under the Act see the Index of South Australian Statutes or www.legislation.sa.gov.au.

Principal Act and amendments

New entries appear in bold.

Year	No	Title	Assent	Commencement
1984	25	<i>Powers of Attorney and Agency Act 1984</i>	10.5.1984	1.6.1984 (<i>Gazette 31.5.1984 p1320</i>)
1988	80	<i>Powers of Attorney and Agency Act Amendment Act 1988</i>	1.12.1988	1.12.1988
2006	17	<i>Statutes Amendment (New Rules of Civil Procedure) Act 2006</i>	6.7.2006	Pt 61 (s 186)—4.9.2006 (<i>Gazette 17.8.2006 p2831</i>)
2013	39	<i>Powers of Attorney and Agency (Interstate Powers of Attorney) Amendment Act 2013</i>	19.9.2013	19.9.2013

Provisions amended

New entries appear in bold.

Entries that relate to provisions that have been deleted appear in italics.

Provision	How varied	Commencement
<i>s 2</i>	<i>omitted under Legislation Revision and Publication Act 2002</i>	<i>4.9.2006</i>
s 4	amended by 39/2013 s 3	19.9.2013
s 6		
s 6(1)	substituted by 80/1988 s 2	1.12.1988
s 9	amended by 17/2006 s 186	4.9.2006
s 11		
s 11(1)	amended by 80/1988 s 3	1.12.1988
s 11A	inserted by 80/1988 s 4	1.12.1988
s 14	inserted by 39/2013 s 4	19.9.2013
Sch 2	amended by 80/1988 s 5	1.12.1988

Historical versions

Reprint No 1—15.11.1991

4.9.2006