

Article Information

Service: Banking & Finance

Sector: Financial Services

Power of Attorney and Reverse Mortgages

In a reverse mortgage transaction, extra care needs to be taken when a Power of Attorney is involved to ensure the transaction is not deemed unconscionable.

This article will provide a brief summary of how and when a Power of Attorney can be used by an individual when entering into a reverse mortgage.

What is a Reverse Mortgage?

With a reverse mortgage, a borrower can take out a loan using their home as equity. Typically, reverse mortgages are taken out by pensioners or retirees as there is no requirement to make repayments until the borrower has either vacated the property or died.

What is a Power of Attorney?

A Power Of Attorney (**POA**) is a formal instrument which grants an attorney authority or power to represent the principal.^[1] In New South Wales powers of attorney generally fall into the following categories:

1. General Power of Attorney - when you (principal) appoint someone (attorney) to manage both your financial and legal matters while you still have mental capacity to make your own decisions. The General Power of Attorney will terminate once you lose mental capacity. Please note that a power of attorney that is not registered is limited to daily dealings with bank accounts, credit cards, among other things and does not extend to entering into a new loan to mortgage the principal's house.^[2] A conveyance or other deed affecting land under a power of attorney will only have effect when the instrument creating the attorney's power to deal with land has been registered with Land and Registry Services.^[3] If there are no conditions or limitations listed in the general power of attorney or by implication (i.e. agreed via a conversation)^[4] that preclude the attorney from entering into a loan agreement, the attorney can generally enter into a loan using the standard form general power of attorney.^[5] However, such unexpressed conditions or limitations creates ambiguities arising from whether your attorney has the power to deal with land. It is best practice for the principal to express all conditions and limitations in the power of attorney and register a specific power of attorney (outlined below).
2. Specific Power of Attorney - a subset of a General Power of Attorney but is limited to specific transactions, usually whether the attorney is unable to physically sign finance documents due to their location. When dealing with land or a reverse mortgage, it is best practice to enter into and register a specific power of attorney with the particulars of the loan specified.
3. Enduring Power of Attorney - when you (principal) appoint someone you trust (attorney) to make decisions during your lifetime while you no longer have the mental capacity to do so. ^[6] For financial matters, you may nominate when your attorney's power is to begin. If you do not name a date or an occasion, it begins immediately. If you lose capacity to make decisions before the date or occasion you name, the power begins at that point.

What powers can my attorney have?

The powers granted to the attorney can include:

- Paying your bills
- Signing legally binding documents
- Managing your investments
- Buying and selling property
- Entering into loan and security documents.

What are the duties and responsibilities of an attorney?

An attorney is legally responsible to you and must (among other things):

- Act in the principal's best interests;
- Not give gifts or give themselves a benefit using the Principal's finances unless specifically authorised by the Principal;
- Keep their finances and money separate from the Principal's;
- Keep a written record of the transactions undertaken by the attorney

In the event that an attorney abuses their position of trust, legal action can be taken to protect the Principal's interests.

Power of Attorney requirements when entering into a reverse mortgage

- the POA must be registered with the relevant title's office e.g. NSW Land Registry Services;
- it is best practice for the POA to expressly describe the full details of the loan and the security that it to be entered into and the mortgage over the specific property i.e. specific transaction Power of Attorney; and
- in the loan documents and on the mortgage the correct POA clause must be used including the registered dealing number in respect of that POA.

Requirements before entering into and signing finance documents

Before your attorney enters into and signs the finance documents facilitating a reverse mortgage:

1. the Principal needs to approve entry into the finance documents; and
2. the Principal needs to instruct the attorney to sign the finance documents.

Benefits to attorneys or third parties

There is a general prohibition on attorneys conferring a benefit on themselves or third parties using the Principal's finances. An attorney or a third party may only receive a benefit if the POA document expressly authorises the conferral of the benefit.^[7] In the case that an attorney has conferred a benefit to themselves without express authorisation, the Court may find that the attorney will not be able to recover the benefit.^[8] Moreover, it is a criminal offence for an attorney to exercise their power of attorney to confer a benefit to themselves or third parties without express authorisation by the principal.^[9]

Can my attorney enter into a reverse mortgage on my behalf if I no longer have capacity?

If you are no longer of sound mind or you are mentally incapacitated, then you will be unable to apply for the loan, consent to the loan or instruct your attorney to sign the loan on your behalf. You will be unable to seek independent legal and financial advice. In addition, there is legislation in place that prohibits your attorney from using their powers for their own benefit.

If the attorney requires financing by mortgaging the Principal's assets, then the attorney must seek an order from the public trustee to consent to such arrangements, provided that the public trustee forms the view that such a loan would be in the best interest of the Principal, for example, the reverse mortgage could be for the benefit of the Principal if the proceeds from the loan were used solely for the purpose of paying for medical care and paying for general care of the Principal.

Do I need to seek independent legal advice if my attorney enters into a reverse mortgage on my behalf?

Yes. Even if your attorney enters into a reverse mortgage on your behalf and has received independent legal advice, the Principal must also receive independent legal advice.

As a case example, an 86 year old lady (Angelina), granted an enduring power of attorney to her son, Michael. Angelina and Michael entered into a \$400,000 loan as co-borrowers and signed a mortgage over Angelina's property. Michael received independent legal advice in his own right, however, Angelina did not obtain independent legal advice. The Court found that if a lender is to rely on independent legal advice being given to Michael, *"the latter herself (Angelina) must receive the independent legal advice"*. ^[10]

It must be noted that obtaining independent legal advice will not always preclude a finding of unconscionability and a lender must make further personal and financial enquiries if there are suspicions of a borrower's or Principal's vulnerability.^[11]

Key Takeaways

- When entering into a reverse mortgage with a power of attorney, the POA must be registered, should specify the full details of the loan and the correct POA clause must be used in loan and mortgage documents;
- If you no longer have capacity, you cannot apply for a loan, consent to the loan or instruct your attorney to sign the loan on your behalf;
- Even if your attorney has received independent legal advice, the Principal must also receive independent legal advice; and
- If the Principal is mentally incapacitated and there is no obvious benefit to the Principal, then the attorney or other carer must seek consent / approval from the Public Trustee and demonstrate that entering into such a loan (reverse mortgage), would be for the benefit and in the best interest of the Principal.

16 September 2022

[1] *Despot v Registrar-General* [2013] NSWCA 13 [48].

[2] *Powers of Attorney Act 2003* (NSW) s 52.

[3] *Ibid.*

[4] *Vickery v JJP Custodians* [2002] NSWSC 782

[5] *Siahos v JP Morgan Trust Australia Ltd* [2009] NSWCA 20.

[6] *Powers of Attorney Act 2003* (NSW) s 19(1).

[7] *Ibid* ss 12 and 13.

[8] *Siahos v JP Morgan Trust Australia Ltd* [2009] NSWCA 20.

[9] *Crimes Act* (NSW) 1990 ss 192E and 117.

[10] *Spina v Permanent Custodians* [2009] NSWCA 206.

[11] *Stubbings v Jams 2 Pty Ltd* [2022] HCA 6.