

## **Chapter 5**

# **Powers of Attorney**

### **Chapter Objectives**

On completion of this chapter you should have a basic knowledge on:

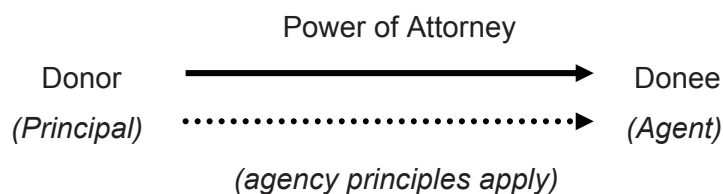
- The Basic Principles and Rules of Powers of Attorney
- Characteristics of Power of Attorney
- The Use of Power of Attorney as an Estate Planning Tool
- The Main Procedural Aspects of Power of Attorney

## Chapter 5

# Powers of Attorney

### Introduction

A Power of Attorney is a legal instrument whereby a person may authorise or empower another to act on his behalf. The person who authorises or delegates his rights is called the donor and the one who agrees to act in his behalf is called the donee or the attorney. The donor may authorise the donee to act on his behalf on all matters i.e. a general power, or for a specific transaction i.e. a specific power. The donee is said to be the agent of the donor and the formal instrument that legitimises this authority by a deed is called a Power of Attorney.



A Power of Attorney (POA) thus operates under **agency principles** and once it is created the relationship of principal and agent takes effect. Therefore, the general principles of law that affect “agency” are applicable to this relationship between the donor and the donee. However, in West Malaysia these legal principles are further expanded and regulated by the **Power of Attorney Act 1949**.

It must be further noted that although a POA is not intended to be exclusively an estate planning tool, it may nevertheless be used as such, in some appropriate circumstances. These we shall see below after having a better understanding of POAs.

### Competency of Donor

The basic question that comes to mind is what circumstances can a person authorise his agent under a POA to act on his behalf?

The general rule is that: whatever a person is legally competent to do himself, he may do so by means of an agent. However, there are two circumstances where this general rule is not applicable.

- They are:
- i) Where the law specifically requires the signature of the principal and
  - ii) Where the competency of the principal arises by virtue of him holding some position of authority, or that he has a special skill or discretion of a personal nature to exercise. For example, a doctor cannot authorise his clerk to issue a medical report on his behalf.

### **How durable is a Power of Attorney?**

Generally the validity of a POA will continue indefinitely unless it is extinguished by one of the following circumstances:

- i) It is revoked by the donor
- ii) It is renounced by the donee
- iii) The death of the donor or the donee
- iv) The donor has become of unsound mind or afflicted with mental illness.
- v) The bankruptcy of the donor.

The above is governed by **Section 5** of the POA 1949. However, they are exceptions to the above whereby the POA will still be valid despite the occurrence of the above circumstances. One of these is stated in **Section 6 of POA**, which for our purposes and understanding, effectively states that, if a POA is given for **valuable consideration** and is expressed to be **irrevocable**, then when dealing with a ("third party") purchaser, the POA shall not be revoked by the death, marriage, mental disorder, unsoundness of mind or bankruptcy of the donor. This section is relevant for estate planning purposes because if circumstances so warrant, such types of POA may be advisable to clients. Such an example may be recommended to plan for individuals who may be alive but become mentally incapacitated, whereby the POA comes in useful in handling the affairs of the individual.

Another example of the durability of a POA is found in **Section 7** of the Act which effectively states that when a POA is declared irrevocable for a **fixed period time**, then it shall not be revoked by the death, marriage, mental disorder, unsoundness of mind or bankruptcy of the donor. Once again this section is applicable when dealing with (third party) purchasers. It is intended to allow the donee the full discretion to deal with assets during the period of time as specified in the POA.

There is also another provision in the law, namely **Section 30(6) of the Trustee Act 1949** which enables the POA to be still valid despite the death of donor. This section declares that any act done by the donee shall be as valid and effective, although the donor has died or become incapacitated, if a third party (who is dealing with the donee) does not have actual notice of the death or his incapacity.

## **Application of POA in Estate Planning**

There are three common circumstances where a POA may be used for estate planning purposes.

- They are:
- i) Partnerships – power to manage partnership business.
  - ii) Transactions of immovable assets – for example, to authorise the donee to execute the necessary transfer documents for the purposes of a sale.
  - iii) Probate and administration – whereby a donor who is an executor or administrator may grant a POA to a donee to deal with assets outside the country. For example, when a person residing outside Malaysia is entitled to a Grant of Probate or Letters of Administration, these Certificates may be granted to his attorney (or donee) for his use and benefit. This procedure shall be subject to any specific requirements as the Registrar of the High Court may direct. Another example maybe seen when a deceased person residing in Malaysia has left behind assets in another Commonwealth Country, for example, Singapore. Once the grant of representation (i.e. the Probate or LA) is obtain issued by the Malaysian High Court, the legal representative should appoint an attorney (using a POA) to “reseat” the grant of representative in the Singapore High Court to enable him to deal with the assets accordingly. For those purpose a POA is a very useful instrument in the administration estate of the estate of the deceased, outside the country.

## **Documents and procedures of POAs**

Thus far, we have become familiar with the main principles on the subject matter of POAs. In the execution of a POA there are several legal rules, practices and procedures that must be complied with, for it to be valid in law. Although these are not essential for the knowledge of a financial planner, it is very useful to have such awareness so that clients may be advised accordingly. These procedures are of course well known to most lawyers, the people whose services we would need to engage, should a POA be necessary.

Most of the rules governing a POA is found in the Act itself. Let us look at some of the important ones.

- i) A POA must be in **writing** and must be **executed** and **authenticated** before individuals who are qualified to do so, for example a Commissioner for Oaths. A full list of these persons are specified in Section 3 of the Act.
- ii) A copy of the POA must be **registered** with the Senior Assistant Registrar of the High Court (see section 4 of the Act for details) who shall maintain a record of all POAs deposited therein.

- iii) A POA may be **revoked** by the donor or **renounced** by the donee. If this is to be done, it must also comply with procedures as stated in Section 5 of the Act.
- iv) Any person wishing to obtain **information** on any POA deposited in the High Court may apply for and obtain such information (Section 12 of the Act).

Judicial precedents (or case law) from the decisions of the courts over the years have also added on to the rules that govern POA. The following are some of the important ones.

- i) The donee of a POA owes the donor fiduciary duties eg. to keep proper accounts of all transactions and be able to produce them, if required to do so. He must disclose any conflict of interest and not receive any secret commission or bribe.
- ii) The intentions of a donor when he executes a POA must be specified in the document itself. Extrinsic (or outside) evidence, as to the intention of the donor is not admissible to interpret the authority given to the donee. The donee's opinion as to the extent of his authority or power is also irrelevant.
- iii) A donee, may in turn delegate his powers to a third person, but he cannot give a greater power than what is conferred to him. The donee cannot thus delegate power which is outside the POA.

## **Conclusion**

The Power of Attorney is a legal instrument that may be used in estate planning purposes for very specific circumstances. There are, of course specific needs of some clients which would warrant its use. We have however, seen POAs being mistakenly used as a convenient manner to avoid writing a Will. This is wrong advice because it must be highlighted that the donee only acts on behalf of the estate and must be accountable for all his dealings of the assets to the beneficiaries of the deceased. In his position as a donee he is not entitled to the beneficial interest of the estate. Financial planners must take note of this, and advise their clients accordingly, if they have been misinformed on the uses of a POA.

*Note* : The appendix to this chapter provides the Power of Attorney Act 1949 and a sample of a Power of Attorney.

## APPENDIX I

# POWER OF ATTORNEY ACT

### LAWS OF MALAYSIA Act 424 POWERS OF ATTORNEY ACT 1949

An Act relating to powers of attorney.

[1 January 1950, L.N. 632/1949]

#### Short title and application

1. (1) This Act may be cited as the Powers of Attorney Act 1949.
- (2) This Act shall apply to the States of \*Peninsular Malaysia only.

#### Interpretation

2. In this Act, unless the context otherwise requires—

“Land Administrator” means a Land Administrator appointed under the National Land Code [Act 56 of 1965], or an equivalent officer, by whatever name called, in a State appointed under the law relating to land in force in that State;

“Registrar” and “Senior Assistant Registrar” mean respectively the Registrar and a Senior Assistant Registrar or Assistant Registrar of the High Court.

#### Authentication of powers of attorney

3. (1) No instrument purporting to create a power of attorney executed after the commencement of this Act shall have any validity to create such power within \*\*Peninsular Malaysia unless—
  - (a) if executed within \*Peninsular Malaysia, the instrument is executed before, and is authenticated in the appropriate form set out in the First Schedule hereto by—
    - (i) a Magistrate;
    - (ii) a Justice of the Peace;
    - (iii) a Land Administrator;
    - (iv) a Notary Public;

- (v) a Commissioner for Oaths;
  - (vi) an advocate and solicitor; or
  - (vii) an officer, acting in the course of his employment, of a company carrying on the business of banking in \*Peninsular Malaysia and incorporated by or under any written law in force in \*Peninsular Malaysia; or
- (b) if executed outside \*Peninsular Malaysia, the execution of such instrument is authenticated, in such form as may be accepted by the Registrar, by—
- (i) a Notary Public;
  - (ii) a Commissioner for Oaths;
  - (iii) any Judge;
  - (iv) a Magistrate;
  - (v) a British Consul or Vice-Consul;
  - (vi) a representative of Her Britannic Majesty;
  - (vii) on and after Merdeka Day, any Consular Officer of Malaysia;
  - (viii) in the case of an instrument executed in the Kingdom of Saudi Arabia, the Malaysian Pilgrimage Commissioner; or
  - (ix) in the case of an instrument executed in the Republic of Singapore, an advocate and solicitor of the Supreme Court of the Republic; or an officer, acting in the course of his employment, of a company carrying on the business of banking in the Republic and incorporated by or under any written law of the Republic.
- (2) Notwithstanding anything to the contrary contained in any written law in force at the commencement of this Act, an instrument purporting to create a power of attorney duly executed and authenticated in accordance with this section shall be deemed to be properly and validly executed and attested for all or any of the purposes for which a power of attorney may be used under any such written law.

**Deposit of power of attorney**

4. (1) Except as hereinafter provided no instrument purporting to create a power of attorney shall, after the commencement of this Act, have any validity to create such power within \*Peninsular Malaysia until—
- (a) a true copy of the said instrument duly compared therewith and marked by the Senior Assistant Registrar with the words “true copy”; or
  - (b) where the original instrument is deposited in the registry of the Supreme Court in Singapore, an office copy of such instrument, has been deposited in the office of a Senior Assistant Registrar.

**Translation**

- (2) If the instrument whereof a true copy or an office copy is so deposited is in any language other than the national language or English there shall also at the same time be deposited a translation into the national language or English thereof certified by an interpreter attached to the Court qualified to interpret in the language in which the instrument is written, or, if there be no such interpreter, a translation into the national language or English verified by a statutory declaration of some person qualified to translate from the language in which the instrument is written into the national language or English to the effect that such translation is to the best of his knowledge and belief a true translation.

**Fees**

- (3) There shall be payable in respect of the deposit of documents under this section such fees as may from time to time be prescribed.

**Exception**

- (4) Subsection (1) shall not apply to instruments executed and used for the sole purpose of carrying out transactions in the office of a Registrar of Titles or a Land Administrator or a Chief Inspector or Senior Inspector of Mines, provided they are attested in accordance with any law for the time being in force regarding the attestation of such instruments.

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### **Revocation**

5. Every instrument purporting to create a power of attorney of which a true copy or an office copy has been deposited in the office of the Registrar or a senior Assistant Registrar in accordance with this Act or any law repealed by this Act whether before or after the commencement of this Act, shall, so far as the said instrument is valid and so far as may be compatible with the terms of the instrument, continue in force until notice in writing of the revocation thereof by the donor, or of the renunciation thereof by the donee, has been deposited in every office in which the office copy or true copy thereof has been so deposited, or either the donor or the donee has died or the donee has become of unsound mind, or the donor has been adjudged to be of unsound mind or a receiving order has been made against him in bankruptcy.

### **Powers of attorney given for valuable consideration**

6. (1) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser—

- (a) the power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power; and
  - (b) any act done at any time by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and
  - (c) neither the donee of the power, nor the purchaser, shall at any time be prejudicially affected by notice of anything done by the donor of the power, without the concurrence of the donee of the power, or of the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power.
- (2) This section applies to powers of attorney created by instruments executed either before or after the commencement of this Act.

#### **Powers of attorney expressed to be irrevocable for a fixed time**

7. If a power of attorney, whether given for valuable consideration or not, is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, then, in favour of a purchaser—
- (a) the power shall not be revoked, for and during that fixed time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power; and
  - (b) any act done within that fixed time, by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and
  - (c) neither the donee of the power, nor the purchaser, shall at any time be prejudicially affected by notice either during or after that fixed time of anything done by the donor of the power during that fixed time, without the concurrence of the donee of the power, or of the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power within that fixed time.

#### **Payment by attorney under power without notice of death, etc., good**

8. (1) Any person making or doing any payment or act in good faith in pursuance of a power of attorney shall not be liable in respect of the payment or act by reason that before the payment or act the donor of the power had died or became mentally disordered or of

unsound mind or bankrupt or had revoked the power if the fact of death, mental disorder, unsoundness of mind, bankruptcy, or revocation was not at the time of the payment or act known to the person making or doing the same.

- (2) This section shall not affect any right against the payee of any person interested in the money so paid and that person shall have the like remedy against the payee as he would have had against the payer if the payment had not been made by him.

### **Register of powers of attorney and inspection of register**

9. A separate file of documents deposited in accordance with section 4 shall be kept by every Senior Assistant Registrar, who shall enter in a register kept for that purpose short particulars of each such document together with any subsequent revocation or other determination thereof of which he shall have had notice, and any person may, during the usual office hours, upon payment of the prescribed fee, search such register and file and inspect any document so deposited, and an office copy of such document shall be delivered out to him on request and on payment of the prescribed fee.

### **Office copies**

10. A copy of any document deposited in accordance with section 4 may be presented at the office at which such document is deposited and may, after verification and on payment of the prescribed fee, be marked by the Senior Assistant Registrar as a certified copy and when so marked shall become and be an office copy of such document.

### **Office copies as evidence**

11. An office copy of any document deposited in accordance with section 4 shall, when marked as provided in the last preceding section, be without further proof sufficient evidence of the contents of such document and of the deposit thereof in the office of the Registrar.

### **Searches**

12. The Registrar and every Senior Assistant Registrar shall, upon application whether made orally or in writing by any person desirous of obtaining information respecting any specified document deposited in the office of the Registrar or Senior Assistant Registrar as to the deposit or otherwise of a document of any specified tenor and on payment of the prescribed fee, furnish, to the best of his ability, to such person the information applied for:

Provided always that any copy of a document supplied for the purpose of furnishing such information shall be paid for separately under section 9.

### **Particulars to be forwarded for record in Kuala Lumpur**

13. (1) Every Senior Assistant Registrar shall, forthwith after making any entry in his register under section 9, transmit to the High Court Registry at Kuala Lumpur a verified copy of such entry.

- (2) The Registrar shall keep at Kuala Lumpur a register of all particulars transmitted to him under subsection (1), and any person may, during the usual office hours and upon payment of the prescribed fee, search such register and take a copy of any particulars recorded therein.

## Rules

- 14.** The Rules Committee established by the Courts of Judicature Act 1964 [Act 91], may from time to time make rules under and in accordance with that Act for—
- (a) prescribing the fees to be charged under this Act; and
  - (b) prescribing the charges to be made for the attestation of an instrument creating a power of attorney under section 3.

## Repeal

- 15.** (1) The Ordinance and Enactments set out in the first and second columns of the Second Schedule are hereby repealed to the extent specified in the third column of the Schedule.
- (2) Such repeal shall not affect the validity of—
- (a) any power of attorney executed before the commencement of this Act under and in accordance with any such law but such power of attorney shall, if registered, be deemed to be registered under this Act or, if not registered before the commencement of this Act, may be registered by deposit with a Senior Assistant Registrar of a true copy or office copy as the case may be under section 4 and the same shall continue in force until revoked or otherwise determined under this Act.
  - (b) any act or payment done or made before the commencement of this Act which was at the time it was so done or made valid under or by virtue of any of such repealed Ordinance or Enactment.
- (3) Where any power of attorney was, before the commencement of this Act, deposited in the office of the Registrar or Senior Assistant Registrar in accordance with the repealed Ordinance or Enactment, sections 10, 11, and 12 shall apply as if such document had been a document deposited in accordance with section 4 and where such document had been deposited in the office of the Registrar, the Registrar shall have the powers of a Senior Assistant Registrar under section 10.

*\*NOTE*—All references to “West Malaysia” shall be construed as reference to “Peninsular Malaysia”

—see the Interpretation (Amendment) Act 1997 [Act A996], subsection 5(2).

## FIRST SCHEDULE

[Section 3]

### FORM I

#### FORM OF AUTHENTICATION IN CASE OF A POWER OF ATTORNEY EXECUTED BY AN INDIVIDUAL

I ..... (Magistrate, Justice of the Peace, Land Administrator, Notary Public, Commissioner for Oaths, Bank Official *or* Advocate and Solicitor of the High Court in Malaya) officiating [*or* practising] at....., hereby certify that the of the donor above named was in my presence on this ..... day of ..... 20 ....., and is, to my own personal knowledge, [*or* according to information given to me by trustworthy and respectable persons, namely ..... of ..... and ..... of ....., which information verily believe,] the true of ..... who has acknowledged to me that he of full age and that he has voluntarily executed this instrument.

Witness my hand .....

### FORM II

#### FORM OF AUTHENTICATION IN CASE OF A POWER OF ATTORNEY EXECUTED BY A COMPANY OR CORPORATION

I ..... (Magistrate, Justice of the Peace, Land Administrator, Notary Public, Commissioner for Oaths, Bank Official *or* Advocate and Solicitor of the High Court in Malaya) officiating [*or* practising] at ....., hereby certify that on this ..... day of ..... 20 ....., the common seal of (*state name of company or corporation*) was duly affixed to the above written instrument in my presence in accordance with the regulations of the said

Witness my hand .....

## APPENDIX II

# SAMPLE POWER OF ATTORNEY

Know all men by these presence that I \_\_\_\_\_ (NRIC No. \_\_\_\_\_)  
\_) of full age and of \_\_\_\_\_

do hereby nominate and appoint:-

\_\_\_\_\_ (NRIC No. \_\_\_\_\_) a person of full age and having  
her address at \_\_\_\_\_ to be my true and lawful  
Attorney for me and in my name or otherwise to do all or any of the following acts and things relating  
to my Property identified as \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

1. To demand, sue for, recover and receive by all lawful ways and means from all and every person whom it may concern all moneys, rents, debts, dues, goods and property whatsoever which now are or may hereafter become due, owing, payable or belonging to me upon or by virtue of any judgement, debt, decree, bill, bond, promissory note, account or upon any instrument and on the receipt and recovery of the same to grant releases and discharges and in case of non-payment or non-delivery to take such action in law or other proceedings as may be necessary for the recovery of the same;
2. To state, settle, adjust, compound and compromise all accounts, claims, demands and difference between myself and any other person and if advisable to refer any such matters to arbitration and for that purpose to sign, seal and execute any agreement or any instrument necessary;
3. To pay and settle all my lawful debts and obtain full and effectual receipts, releases and discharges for the same;
4. To appear before any Judge, Magistrate or any Public Officer in connection with any of the matters herein and to appeal from any order or judgement given against me;
5. To let, lease or sub-lease all or any part of the said Property (to the extent of my interest in the said Property) to such persons and at such rents and other terms as my said Attorney shall think advisable and further, to accept or surrender any lease or sub-lease and for that purpose to sign all necessary leases, tenancies, agreements, surrenders or other instruments;
6. To sell, exchange, dispose off, deal with the said Property or any part thereof either by way of private contract or public auction at such price or consideration as my Attorney shall think fit

and reasonable and subject to such terms, covenants, reservations, and conditions if any, as my Attorneys shall think fit and to give good receipt for the consideration or purchase money payable thereof and to sign, seal, and execute as my act and deed and to deliver any instrument in writing do every other thing whatsoever which may be necessary or proper for the carrying into complete effect so that all my estate, rights, title and interests in or to the said Property may be sufficiently, effectual and absolutely conveyed and transferred to the purchaser or transferee;

7. To use the proceeds of any sale or assignment of the said Property as my Attorney deems fit including but not limited to appropriating such monies for my Attorneys' own behalf;
8. To assign, charge to any person or company the said Property and for that purpose to sign and execute all transfers, assignments, charge and other instruments necessary and also to deal with the said Property for the purpose of paying off, reducing, consolidating or making substitutions for any existing or future charges or mortgages and to make or concur in any transfer of or alteration in the term of any existing for future mortgage, charge, pledge of the same or any part thereof as they shall think fit and as fully and effectively as I could have done, and in connection with any such sale, mortgage, pledge or charge to employ and remunerate any valuer or agent;
9. To request for, deal with or and accept the original title to the said Property from any person, company or authority having custody of the same including the charge of the said Property;
10. To enter into possession of the said Property, to give notices to quit, to increase the rents, to take down, rebuild, alter, improve or repair all or any of such houses or buildings as occasion may require and to do every other act and thing for the improvement of the same;
11. To apply for consent of building, mining, agricultural or other purposes (where applicable) against the said Property and to accept such titles as my Attorney shall think advisable;
12. To pay all taxes, rates, charges, expenses and other outgoings whatsoever payable by me for or on account of the said Property and to insure the same against loss or damage by fire and to pay all premium for such insurance.
13. To make and sign applications to the appropriate authorities, government, departments, local authorities or other competent authority for all and any licenses, permissions and consents required by any Act of Parliament, order, statutory instruments, regulations, bye-law or otherwise in connection with the management and improvement of the said Property including the recovery of compensation where such is recoverable with power to give receipts and full discharge.
14. To warn off and prohibit and if necessary proceed against in due form of all laws all trespass on the said Property and to take appropriate steps whether by action or otherwise to abate all nuisances.
15. To do all such acts, matters and things including the commencing and prosecuting or defending of any proceedings in connection with the Property and in particular any contract for the sale

of the Property or any part thereof or the rescission of any such contract or the recovery of any deposit or other money paid thereunder or any matter or thing incidental to the completion of any such contract.

16. To oppose or otherwise deal with any matters relating to the compulsory acquisition of land or in any other order made or to be made under statutory powers and to take all necessary proceedings arising under the Land Acquisition Act.
17. To surrender the title deed in exchange for others or otherwise as my said Attorney shall think advisable.
18. To deal with the said Property in any manner whatsoever and do all other things as fully and effectually as I could do in connection therewith.
19. To substitute and appoint from time to time one or more attorney or attorneys with the same or more limited powers and such substitute or substitutes may at their pleasure remove and appoint others;
20. Any expenses debt liability incurred as a result of the exercise of the powers granted herein shall be borne by me

And generally to do all acts and things and sign and execute all such documents as may be necessary for effectuating any of the purposes aforesaid as fully and completely as I myself could do if personally present.

And I hereby confirm that the powers given herein are granted for valuable consideration and is irrevocable notwithstanding my death or any other event.

And I hereby agree to ratify and confirm all and whatsoever my said Attorney or his/their substitute or substitutes shall lawfully do in the premises by virtue of this Power of Attorney.

IN WITNESS WHEREOF I have hereunto set my hand and seal this                      day of                      in the year

SIGNED, SEALED AND DELIVERED                      )  
by the said \_\_\_\_\_                      )  
in the presence of :-                      )

I, \_\_\_\_\_ an Advocate and Solicitor of the High Court of Malaya practising at Kuala Lumpur, hereby certify that the signature of the donor abovenamed was written in my presence on this                      day of                      and to my own personal knowledge is the true signature of \_\_\_\_\_ (NRIC No. \_\_\_\_\_) who has acknowledged to me that she is of full age and that she has voluntarily executed this instrument.

Witness my hand,