

# **A Guide to Making a Power of Attorney**

## **(Extracts from the official guide of the Office of the Public Guardian (Scotland))**

### **Introduction**

This guide is for individuals who wish to appoint one or more persons with powers of attorney. It sets out how to create a power of attorney and the requirements to be met before registering the powers of attorney under the Adults with Incapacity (Scotland) Act 2000 (referred to as "the Act"). These requirements provide a safeguard for both you and for anyone you appoint to act for you. For information on the statutory functions and responsibilities of an attorney, please refer to the Codes of Practice for Continuing and Welfare Powers of Attorney issued by Scottish Government.

The Office of the Public Guardian (OPG) is part of the Scottish Court Service and provides relevant free (but non-legal) advice and information. For further details consult the website at [www.publicguardian-scotland.gov.uk](http://www.publicguardian-scotland.gov.uk).

The Public Guardian's responsibilities in relation to powers of attorney are to:

- register continuing and welfare powers of attorney;
- maintain registers of all documents relating to continuing attorneys for inspection by members of the public;
- when instructed by a Sheriff, supervise and investigate the continuing attorney and audit any accounts submitted;
- maintain registers of all documents relating to continuing/welfare attorneys for inspection by members of the public;
- provide advice and guidance to continuing attorneys;
- supervise and investigate the continuing attorney and audit any accounts submitted (when instructed by a Sheriff); and
- liaise with the Mental Welfare Commission and local authority on investigations.

The Public Guardian may also:

- carry out an investigation on receipt of a complaint or concern regarding the exercise of functions relating to the property or financial affairs of a granter in relation to continuing attorneys; and
- take part as a party in any proceedings before a court to initiate such proceedings where he considers it necessary to do so to safeguard the property or financial affairs of an adult who is incapable for the purposes of the Act.

## **What is a Power of Attorney?**

A power of attorney is a written document appointing someone to act on your behalf in respect of decisions that require to be made for you when you are unable to take these decisions for yourself. The person who grants the power is known as the 'granter' and the person appointed is the 'attorney'. If you wish to make plans for the future you should consider making a power of attorney. A power of attorney can be useful for someone anticipating permanent incapacity or it can be used to handle a person's affairs during periods of temporary incapacity. This could be relevant to someone with a fluctuating condition.

Powers of attorney can deal with financial and/or welfare matters.

A continuing power (sometimes referred to as a financial power) of attorney relates to the granter's property or financial affairs. A continuing power of attorney can come into effect whilst the granter still has capacity and will continue, should the granter lose capacity at some future point.

A welfare power of attorney relates to decision making in relation to the granter's personal and health care and can only come into effect on the onset of incapacity in relation to the powers granted.

## **Creating a Power of Attorney**

### **STATUTORY REQUIREMENTS FOR MAKING A VALID POWER OF ATTORNEY**

The following statutory requirements apply to the creation of a power of attorney document:

- a power of attorney must be expressed in a written document;

- the document must be signed by the granter; and state clearly that the powers are continuing or welfare or a combination of both;
- when instructed by a Sheriff, supervise and investigate the continuing attorney and audit any accounts submitted;
- a welfare power of attorney must include a statement which shows that the granter has considered how incapacity is to be determined. Such a statement is also required in a continuing power of attorney, where the powers are only exercisable once the granter has lost capacity; and
- it must incorporate a certificate in the prescribed form by a practising solicitor, a practising member of the Faculty of Advocates or a registered medical practitioner which certifies that he or she:
  - has interviewed the granter immediately before the granter signed the document;
  - is satisfied, either because of their knowledge of the granter or because of consultation with another person who has knowledge of the granter, that at the time of granting the power, the granter understands its nature and extent; and
  - has no reason to believe that the granter is acting under undue influence.

The person being granted power of attorney cannot also be the person who signs the certificate described above. However if the prospective attorney is a solicitor in a firm, another solicitor in the same firm may sign. Where the firm itself is being appointed as the continuing attorney, it is good practice for the certifier to be someone independent of the firm.

Attorneys have no authority to act until the power of attorney document has been registered by the Public Guardian. Whether or not the powers can be exercised thereafter will depend on the terms of the power of attorney i.e. whether the granter has included a statement specifying a date or an event that must happen before the attorney can act. An example of this being when the granter specifies that a continuing attorney can only act in the event that the granter has been deemed incapable of making their own financial decisions.

#### WHO CAN BE AN ATTORNEY?

You are free to choose whomever you want to be your attorney. However, you will wish to bear in mind that an attorney has a position of trust and should be someone

you are confident will act reasonably on your behalf, and who has the necessary skills to carry out the tasks required by an attorney.

The following indicates who you can appoint as an attorney;

- an individual can only be a welfare attorney;
- an individual or a firm e.g. solicitors can be a continuing attorney;
- you can appoint a combination of both individuals and professionals.

An individual cannot act as a continuing attorney if he/she is declared as bankrupt at the time of the appointment or thereafter. However, once a person has been discharged from bankruptcy (after 1 year) they can act as a continuing attorney.

If you become bankrupt, your continuing power of attorney will be terminated until you are discharged from bankruptcy. People who are bankrupt can still act as a welfare attorney. If you become bankrupt, this will not affect your welfare power of attorney.

#### SOLICITORS OR ORGANISATIONS AS ATTORNEYS

A continuing attorney could be a body such as a firm of solicitors or accountants, or a financial institution or a voluntary organisation. Where the continuing attorney is not an individual, it is good practice for an individual to be identified as having particular responsibility for performing the functions of attorney.

#### APPOINTMENT OF JOINT OR SUBSTITUTE ATTORNEYS

You should also consider the question of whether you wish to appoint more than one attorney.

You may appoint:

- separate attorneys to exercise functions in relation to property and financial affairs and in relation to personal welfare;
- joint attorneys with similar or different powers;
- one or more substitute attorneys to take the place of an attorney who dies or resigns.

You cannot give your attorney/s the right to appoint a substitute or a successor.

If you appoint joint attorneys they will have to act together and both be involved in any decision making on your behalf. If you wish them to be able to act together or separately, you should include in the power of attorney that you are appointing them "to act jointly and severally or severally". Inclusion of this statement then allows each attorney to act as an individual or jointly with each other.

#### POSSIBLE POWERS TO BE INCLUDED IN A CONTINUING POWER OF ATTORNEY

You should try to foresee all the property and financial affairs which may need to be managed in the event of your incapacity. You should discuss with the prospective attorney the extent and powers which you wish the attorney to exercise. These could include in particular power to:

- purchase or sell heritable property (land or buildings);
- open, close and operate any account containing your funds;
- claim and receive on your behalf all pensions, benefits, allowances, services, financial contributions, repayments, rebates and the like to which you may be entitled.

The attorney may not need to exercise all the powers that you grant. Either the occasion may not arise to exercise particular powers; or he/she may find that when the principles are applied the exercise of the powers would not be justified. The important point is that you try to foresee the powers which may be required to meet your needs. For further information on powers which may be included, please refer to the Code of Practice for Continuing & Welfare Attorneys.

It is advisable for you to discuss your feelings and wishes regarding the exercise of your powers with your prospective attorney. For example do you have any views about what type of investments you would wish to make or avoid? Do you have views about remaining in your own home as opposed to moving into residential care? Do you wish any particular property to be safeguarded as inheritance for a particular person? Do you attach sentimental value to any particular property?

#### POSSIBLE POWERS THAT MAY BE INCLUDED IN A WELFARE POWER OF ATTORNEY

You should try to foresee all the welfare decisions which may need to be taken in the event of your incapacity and discuss these with the prospective attorney. These could include power to:

- decide where you should live;
- have access to your personal information held by any organisation;

- consent or withhold consent to medical treatment for you, where not specifically disallowed by the Act i.e. your attorney cannot place you in hospital for the treatment of a mental disorder against your will; nor consent on your behalf to certain medical treatments specified in regulations. With regard to other treatments, the doctor responsible must obtain consent from your attorney, where it is reasonable and practicable to do so. Arrangements are set out in the Act for obtaining a second opinion where the attorney and doctor disagree. Even where your attorney and the doctor agree, the Act gives a right to "any person having an interest in the personal welfare of the adult" to appeal to the Court of Session about the medical treatment in question. For full details consult Part 5 of the Code of Practice relative to Continuing and Welfare Powers of Attorney.

Please note that these are only examples of powers that might be included. In any particular case, some powers may be inappropriate and others may need to be added. You may wish to refer to the Code of Practice for Continuing and Welfare Attorneys, for a fuller list of suggested powers.

#### DISCUSSION WITH PROSPECTIVE ATTORNEY

Although there is no requirement for you to gain the agreement of the person you wish to become your attorney, the OPG will have to be satisfied when it comes to register the power of attorney that the person named is prepared to act. Therefore, it is good practice for you to discuss with the person what being an attorney involves. It will be helpful if you keep a note of the matters discussed at this time and for the prospective attorney to have a copy. This is because there may be a long interval of time before the power needs to come into operation (if at all).

The purpose of the discussion is to ensure that:

- you and the prospective attorney have the same understanding about what you want to happen in the event that you become unable to make decisions or act for yourself at some point in the future and how your incapacity is to be determined;
- you offer sufficient powers to ensure that your attorney can do what you would wish;
- you make your wishes and feelings clear;
- you provide the prospective attorney with sufficient information regarding your financial circumstances: income, liabilities and assets; existing arrangements; where certificates, titles, records, papers, etc are kept; particulars of professional advisers, etc; details such as national insurance

number; and the people who should be consulted about the exercise of your powers;

- whether you want a continuing power of attorney to be exercisable immediately (i.e. before incapacity) or only to start at the onset of incapacity;
- if you are appointing a welfare attorney you should ensure that he/she knows your likes and dislikes and personal welfare concerns fairly thoroughly. In the course of your discussions you and the prospective attorney might cover the following issues, preferably not on a single occasion, but in the course of building up your relationship of trust:
  - views as to how you would like to be cared for if the expected arrangements break down, or if you become unwell;
  - hobbies and activities and the places you like to visit and the social groups you enjoy being part of;
  - particular dislikes and activities, places or people you would prefer to avoid.

This list is not comprehensive. It is a guide as to the kind of issues that arise in people's lives at some time and which you may wish to consider in drawing up your power of attorney. The Code of Practice for Continuing and Welfare Attorneys, issued by the Scottish Government offers further guidance on involvement of prospective attorneys at the time of making a power of attorney.

#### SPECIFYING WHO SHOULD RECEIVE A COPY OF THE REGISTERED POWER OF ATTORNEY

You can specify persons you wish to receive a copy of the registered power of attorney document. If you do wish to specify persons to receive a copy, this should be included in the body of the power of attorney document. Up to two people can be specified to receive a copy of the registered power of attorney document.

#### GRANTING YOUR ATTORNEY SUFFICIENT POWERS

You can grant whatever powers you choose, but when it comes to legal interpretation powers are strictly interpreted. Even if you think you meant to give a specific power, unless it is clearly specified in the written document, it cannot be assumed as being given. Therefore you will need to ensure that, while capable, the powers you intend to grant are clearly specified.

If a long interval is likely to elapse between the time you grant the power of attorney, and the time of your incapacity, it will of course be possible to hold further discussions to review the powers granted. It is good practice for you to hold further periodic discussions with the prospective attorney to ensure that the powers granted remain appropriate and sufficient. For example if you acquire significant investments since you granted the power of attorney, you may want to grant a prospective continuing attorney additional powers to maintain or reinvest these investments.

#### COSTS OF ACTING AS AN ATTORNEY

There is no provision in the Act for reimbursement of a welfare or continuing attorney. If you wish to allow your attorney to claim fees and/or out of pocket expenses in relation to their functions as an attorney, you may make provision in the power of attorney for this. In the case of a continuing attorney who is a professional person, such as a solicitor or accountant, the power of attorney is likely to make provision for the deduction of fees and expenses.