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Guide to Powers of Attorney

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Solicitors For Older People Scotland
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LEGAL CAPACITY

In Scotland all persons over the age of 16 are presumed to have “legal capacity”. “Legal capacity” is the ability someone has to make decisions for themselves and to look after their own affairs.

Of course people may lose these abilities - usually as a result of illness. Where someone loses legal capacity the law provides various ways whereby another person may be granted powers act on behalf of the party who has lost capacity.

One of the ways this can be done is for a person himself or herself to anticipate their own future incapacity and to grant powers to a person or persons to act for them when incapacity arises. Powers are granted by signing a document called a “Power of Attorney”. This document spells out who the attorney is and what powers he or she may use.

THE POWER OF ATTORNEY (POA)

The person creating the POA is called the “granter” and the person appointed is called the “attorney”.

There are various types of these documents. You can grant a “Simple” POA – which is an authority to someone generally to do one specific act. For example someone might by a simple POA authorise their lawyer to sign say a house transfer document if they are expected to be abroad when the deed becomes ready to sign. More commonly we have “Continuing” POA’s and “Welfare” POA’s. Continuing POA’s grant a series of financial and legal powers to the attorney such as dealing with property and money. Welfare POA’s grant a series of powers to make decisions on personal day to day living issues such as where to stay, diet, dress and medical treatment. In each case the attorney will only have the powers specifically mentioned in the POA itself.

You can have a combined Continuing and Welfare POA and most POA’s are probably nowadays these joint documents.

All POA’s to be valid must be registered with the Public Guardian. The Public Guardian is an official with various powers to oversee how adults with incapacity are dealt with in Scotland. Most of the law governing this legal area is in the Adults with Incapacity (Scotland) Act 2000. Under that act someone over 16 who has lost legal capacity is called an “Adult”.

The continuing powers under a POA usually come into force and can be used as soon as the POA is registered with the Public Guardian. This means they could be used by an attorney if the granter could not do something for themselves for a reason short of permanently losing capacity. For example if the granter was stuck abroad and could not deal with affairs the attorney could step in.

Welfare powers however can only be used when capacity has been lost and if it is not clear medical opinions may be sought on this.

WHO MAY BE ATTORNEYS?

Being an attorney is a position of absolute trust – so granters should only choose people they trust completely to be their attorney. Also you should choose a person who has the skills to do the job and is willing to take on the role. You don't need to appoint a relative just because they are relatives – they might not be suitable. Choosing carefully is really important – apart from anything else the attorney may have important decisions to take on a regular basis. It is only sensible to discuss with your chosen attorney the role you want them to fulfil. It is also true however that appointing an attorney is a precautionary step and if incapacity does not arise the attorney will not have to do anything.

You can appoint more than one attorney in one POA document. It is possible and sometimes desirable to appoint a different person to be the attorney exercising legal and financial powers from the person exercising welfare powers. You can also appoint joint attorneys or even substitute attorneys. A bankrupt cannot be a continuing attorney. Quite often someone may appoint a solicitor as the "Continuing" attorney to deal with their legal issues, and a spouse or close relative to be a "Welfare" attorney to deal with all personal issues. Attorneys must sign a document effectively confirming they accept the appointment. The granter can later revoke a power of attorney – effectively withdrawing the powers. Also an attorney can resign from acting – again in writing. Revocations and resignations are fairly rare however.

DUTIES AND REGULATION

The powers an attorney has will be listed in a schedule in the POA. The attorney will have an obligation to act using these powers when the need arises. But the attorney's actions must follow five clear principles. These are: -

1. Act only for the benefit of the granter.
2. Use minimum intervention in the adult's affairs.
3. Take account of the last known wishes of the adult.
4. Consult with relevant other parties e.g. carers or close relatives.
5. Encourage the adult to exercise his or her skills – for example in contributing to decisions to be made.

Attorneys should act showing due care and skill and should keep relevant records including financial accounts where appropriate. In dealing with third parties and institutions attorneys will usually be asked for proof of their appointment and powers – a certified copy of the POA generally being enough.

The overwhelming majority of attorneys act sensibly and in accordance with their proper duties. In addition to the five principles mentioned above there is a detailed code of practice which guides attorneys and which the attorney should follow.

There is in place a significant body of regulatory powers which may be used should an attorney act improperly. Various bodies including the Public Guardian, The Local Authority, the Mental Welfare Commission for Scotland, the police and courts have powers in this area. In short improper actions may result in the attorney being removed from office.

THE PROCESS

It is not a particularly difficult, time consuming or expensive process to prepare a POA. Two consultations with a solicitor would generally be enough – the first to consider all the details and for matters to be discussed fully and advice given. Thereafter, a meeting to sign the document is usually all that is required. The POA must then be registered with the Public Guardian who does charge registration fees. Once registered the document may be used if necessary.

Legal Advice and Assistance may be available to pay any legal fees depending on the granter's circumstances. Many pensioners qualify for some legal aid and assessment can quickly be done, at no cost to find this out.

THE BENEFITS OF A POWER OF ATTORNEY

A POA is a bit like an insurance policy. You hope you'll never need it but if something bad happens, you end up glad you had the foresight to take it out.

If incapacity strikes a family member and no POA is in place – that family faces a distressing and possibly expensive process to get powers to act for the person who has lost capacity. Many people think spouses automatically have powers to act for each other if one loses capacity – but that is just not true. The only way to obtain powers over somebody's affairs is to apply to the local sheriff court to become a guardian to that person, or to become an "intervenor". There is a process where you can apply to the Public Guardian to access funds – but that is a limited power to deal with modest issues only, and it will not be sufficient to do the things which need to be done if for example long term illness has struck.

Court actions take time and can be expensive and are the last thing most people would want to be involved in when they are already in distress because of the illness which has hit the family. And of course if you have to go to court there is a period of "limbo" where no one has powers to do anything and that can give rise to all sorts of problems.

The contrast if a POA is in place could not be clearer. The Attorney can step in immediately and make decisions. Necessary things can be done without the stress of waiting till a court order is granted. If the attorney is a close friend or relative there will be no costs involved and of course the attorney if close to the granter will make decisions knowing what the granter would have wanted. That is an important point – when doing a POA you have chosen who will be making decisions for you. You cannot do that where an application to court is involved – and the person who applies may

not be the person you wanted. The simple truth is that families can deal much better with incapacity if a POA is in place.

This document is intended only as an introductory guide and it does not constitute legal advice. All SOPS solicitors are experienced in preparing Powers of Attorney. Call your nearest member or phone 0800 152 2037 for a consultation.