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Guardianships

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We recommend to all clients that they should put in place a Power of Attorney to safeguard against the situation where they can no longer make decisions about their finances or their welfare for themselves. Please ask us for our Power of Attorney Brochure for more information on this subject. However, it must be emphasised that Powers of Attorney can only ever be granted when the granter has full capacity to understand the nature of the powers that he is granting in favour of his Attorney.

Of course, this begs the question of what happens when it is too late for a Power of Attorney to be granted? What if a person has a stroke and he is rendered incapable of looking after his affairs but he has not granted a Power of Attorney? In such cases, it may be that the only option is to proceed with an application to the Court to appoint someone as that person's Financial (and possibly Welfare) Guardian. The person appointed is usually a friend, family member or perhaps a professional person such as a solicitor. It is also possible to appoint one or more people to act together as joint Guardians either with different or identical powers. For the purposes of this brochure the person who has lost capacity and requires a Guardian to look after his or her affairs is referred to as "the adult."

The principle which underpins the relevant legislation is that the least restrictive measure

possible should be applied when dealing with the adult's assets on his behalf. Wherever possible, an adult should be allowed to look after his own affairs and make his own decisions. A Guardianship order is acknowledged to be the most restrictive measure and would only be used in circumstances when there was no other way in which the adult and his assets could be looked after properly.

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An application for the appointment of a Guardian is prepared for presentation in the Sheriff Court and it should contain all of the powers which the proposed Guardian feels are necessary to allow him to deal with the adult's affairs appropriately. Only powers which the Guardian specifically needs should be included in the document as the Sheriff will look for justification as to why each power should be granted. Therefore, it needs to be decided at an early stage whether the application is to be in respect of solely Financial Powers or Financial and Welfare Powers. This has an impact on the reports which need to accompany the application when it is lodged in Court.

The Adults with Incapacity legislation requires the preparation of two medical reports to be completed by duly qualified medical practitioners after having conducted an assessment and examination of the adult. Where the adult's incapacity results from a mental disorder (such as dementia) one of the reports must be prepared by a doctor approved by the Local Health Board in terms of the relevant legislation to diagnose and treat mental disorders.

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The third report differs for Financial and Financial and Welfare Guardianships. In solely Financial applications, the third report needs to be prepared by a third party who is asked to comment on the appropriateness of the application and also if the proposed Guardian is a suitable person to take on this role. The report writer should know both the adult and

the proposed Guardian and needs to meet with them both before preparing the report. In Financial and Welfare applications, the third report needs to be prepared by the Mental Health Officer assigned to the adult. It is vital to note that the reports all need to be based on assessments of the individual which must have been carried out within thirty days of the application being lodged in Court. The timing of the instruction of the three reports is crucial to a successful application.

At the Court appearance the application will be presented by a solicitor to the Sheriff. The application is often heard in the Sheriff's private Chambers so it is more informal than a hearing in open Court. The proposed Guardian is usually also in attendance and the Sheriff may ask him some questions in connection with the application. The Sheriff must be satisfied that the applicant is aware of the adult's circumstances and needs arising from his condition and fully understands the role and responsibilities of a Guardian. Giving regard to the case presented before him or her, the Sheriff will decide whether or not to grant the Guardianship order.





He or she will also decide the period for which the appointment should run (typically three years but it can be for an indefinite period.) If the Sheriff is making any order in relation to Financial matters he or she may require that “caution” (pronounced “kay-shun”) be obtained. This is simply an insurance policy that the proposed Guardian must obtain to “insure” the whole value of the adult’s estate. The thinking behind this is to provide a safeguard for the adult in case the Guardian misappropriates the assets belonging to the adult. The Office of the Public Guardian (the “OPG,” a public body based in Falkirk responsible for overseeing the actions of Attorneys and Guardians) also supervises Guardians on an annual basis and the risk of a Guardian deliberately depleting the adult’s assets is, in practice, low. The Sheriff does have the power to dispense with the need to obtain caution if he or she deems it appropriate to do so.

If the Sheriff has granted the appointment in favour of the Guardian a certified copy of the decision (known as the “Interlocutor”) is issued. If the adult owns heritable property in Scotland the certified copy Interlocutor must be sent to Registers of Scotland to be registered or recorded against the property depending on whether it is in the Land Register or Sasine Register. The endorsed certified copy Interlocutor then has to be sent to the OPG for noting.

The Guardian is then required to prepare a full and accurate Inventory of the adult’s assets and submit this to the OPG for approval within three months of the date of appointment. The OPG will also require investment valuations and bank statements to be produced as supporting evidence. In addition, a Management Plan needs to be prepared and submitted within four months of the appointment. This document sets out the

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long-term plan for looking after the adult’s assets in a manner which is most appropriate to his needs (i.e. to ensure that money is readily available to meet monthly care home fees.) There is also an obligation on the Guardian to seek professional financial advice as how best to deal with the adult’s funds and other assets. Until the OPG has approved the Management Plan (unless the Sheriff has directed otherwise in the Interlocutor) the Guardian has very limited powers to use the adult’s funds to cover his day-to-day needs and expenses and also to ingather his assets.

The OPG will issue the Guardian with a Certificate of Appointment which the Guardian will need to exhibit to the banks or building societies where the adult holds accounts. Each bank will add the details on the Certificate of Appointment to their systems and, once the Management Plan has been approved, the Guardian can deal with the adult's finances as detailed in the plan itself.

It may be necessary to sell the Guardian's home to pay for care costs or perhaps to purchase more suitable accommodation for him. If this course of action was anticipated the necessary power would have been included in the Guardianship application put before the Sheriff. The Guardian must firstly

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apply to the OPG for consent “in principle” to buy or sell heritable property. The OPG will

decide whether or not, in theory, they would consent to this proposal. Secondly, the Guardian must apply again to the OPG for “actual” consent to buy or sell heritable property. The OPG would require evidence of an offer to purchase the adult's property or details of a potential new property that had been found for the adult. They would then assess if it was appropriate for the Guardian to proceed.

If the Guardianship application contained a specific power to make gifts, before the Guardian can exercise this, consent must also be obtained from the OPG.

The OPG will charge a separate fee each for the registration of the Guardianship Order, approving the Inventory and Management Plan (with the cost being dependant upon the value of the estate) and also for consenting to the sale or purchase of heritable property or the making of a gift. The doctors will also charge a fee for preparing their reports and, in solely Financial Guardianship applications, the third report writer may also charge a fee if he has acted in a professional capacity. Any outlays and fees can be reclaimed from the adult's estate.





There is also an on-going obligation to submit accounts to the OPG. The length of the first accounting period is determined by the OPG and will not be longer than eighteen months from the date of the appointment. Thereafter, accounting periods will last for a year at a time.

Proposed Guardians should be aware of the on-going responsibilities involved in acting as a Guardian. The process is consuming (both in terms of time and money) but our particular expertise in this field allows us to guide proposed Guardians through the procedure to ensure that it is as painless as possible. There are a lot of important considerations when applying for a Guardianship order and in advising the Guardian at each stage of the proceedings. Therefore, it is vital to ensure that the adviser is fully up to speed on the intricacies of dealing with the whole process correctly.

Please contact our Wealth Management Department if you require any further information.

Contact us



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Richard has a wide area of expertise which includes the drafting of Wills, Deeds of Trust and Powers of Attorney, Adult Incapacity related issues, Estate Administration including Succession-related issues, and Inheritance Tax planning.



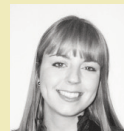
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Liz has been a qualified solicitor since 1983 and joined the firm in 2006. She has a wide variety of legal experience. She advises a range of clients on issues involving Wills and Trusts, Estate Administration and Inheritance Tax Planning. She has a particular interest in Powers of Attorney and is responsible for making sure the firm is kept fully up to date with all the developments in this area.



Sara Smith

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Sara deals with Wills, Powers of Attorney and estate administration on a daily basis having graduated with an LLB (Hons) from the University of Edinburgh in 2004 before spending a year studying the Graduate Diploma in Law at Nottingham Law School. She then completed her Diploma in Legal Practice joining AC&H in 2006.