

ARCHIBALD CAMPBELL & HARLEY

AC&H



Powers of Attorney

...ACHieve peace of mind!

www.achws.co.uk

37 Queen Street,
Edinburgh, EH2 1JX

Tel: 0131 220 3000
Fax: 0131 220 2288



How do you ensure that if you were suddenly taken into hospital because of an accident or a stroke, for example, someone that you trust would make sure all your bills were paid, collect your pension or sort out state benefits for you, deal with your business if you have one and generally look after matters on your behalf? You may already have a Will, but this only comes into effect when you die. Many people are now making sensible provisions to deal with the stage before then, often when they have had personal experience in their own family of the difficulties when no such provision was made.

Even if you have a joint account with your spouse, partner or family member, they are limited in what they can do on their own and this could have very serious consequences – you could lose out on the purchase of a new house, a major business deal or on an investment opportunity. Even more importantly, your spouse, partner or family could have to go to court for permission to act for you as your guardian, which could involve legal costs of thousands of pounds (which you would pay for) and take many months to conclude. Doctors would have to produce medical reports on your condition and outsiders would want to know all about your own private business. After all the hassle of the court action, the guardian then has to answer to a public official about what they do on your behalf throughout their appointment.

You can avoid all of this trouble, expense and heartache by deciding yourself who you want to act for you if you were in the position of not being able to deal with matters yourself at some future time in your life and then giving them Power of Attorney.

“Even if you have a joint account with your spouse, partner or family member, they are limited in what they can do on their own and this could have very serious consequences.”

What is a Power of Attorney?

A Power of Attorney is a legal document by which you give authority to another person (the Attorney) to deal with matters on your behalf. This will cover financial and property matters and/or your personal welfare. In the case of the former, the authority may be given with the intention of taking effect at your request at some time in the future and to continue should you no longer be able to make decisions yourself. Powers concerning your personal welfare can only be used if a doctor confirms you have lost the capacity to make these decisions for yourself, which may never be the case.

There are three types of Powers of Attorney.

(a) A basic Power of Attorney may be useful if you are going abroad for a lengthy period or for a specific event, such as signing an important document when you are on holiday. It is not appropriate for long term use.

(b) A Continuing Power of Attorney is used where you wish another to manage your finances and other business, looking forward to the day when assistance in relation to these matters might be required due to infirmity or illness or simply because you no longer wish to deal with such matters. If the powers start to be used and you then become incapable, the Attorney can continue to act under the Power of Attorney. Such Attorneys are called Continuing Attorneys. The powers given may include power to sell and buy a house, sign cheques, pay bills and deal with investments.

(c) A Welfare Power of Attorney is used to give powers to another person to manage

matters relating to your personal welfare BUT these powers may be used only if you lose capacity to deal with these matters. It is given in case the time comes when you are no longer able to decide on these matters for yourself, for example because you have dementia. These Attorneys are called Welfare Attorneys. Welfare powers include decisions about future care and medical treatment.

“If the powers start to be used and you then become incapable, the Attorney can continue to act under the Power of Attorney. ”

Continuing and Welfare Powers can be contained within the one Power of Attorney document if the same person is to be appointed as both types of Attorney. Separate documents are used if different Attorneys are appointed for the two types of powers or if you wish to keep your specific wishes on welfare matters confidential.





How is incapacity defined?

In terms of the legislation, a person is classed as being “incapable” if he cannot:-

- Act on his own behalf; or
- Make decisions on his own behalf; or
- Communicate decisions; or
- Understand decisions; or
- Retain the memory of decisions

because he suffers from a physical disability , as a result of which he is unable to communicate or a mental disorder or illness. Examples of this would be a person who has dementia or has been permanently and significantly impaired after a stroke. However, it is important to remember that a person who could communicate with the help of a human or medical aid would not be classed for the purposes of the legislation as being “incapable.”

As mentioned above, Welfare powers granted under a Power of Attorney can only be exercised if the granter is unable to make those particular decisions for himself. A suitably qualified medical practitioner who has been treating the person and has sufficient knowledge of his condition would be required to certify in such circumstances that capacity has been lost and that the Welfare Attorney can begin acting.

Who Should be the Attorney?

The role of an Attorney is important and it is best to appoint someone who knows you well, who is an organised person who is happy to deal with doctors and professional people and who can be relied on to deal with matters properly. Often a husband or wife, son or daughter or other close relative, a close friend or a professional person such as a solicitor is chosen to be the Attorney. It is preferable that the Attorney has regular contact with you, but not always that they be geographically close by – however, it is not common to appoint an Attorney living abroad.

“It is preferable that the Attorney has regular contact with you.”

A company (such as our Trustee Company) may be appointed a Continuing Attorney, but only individuals may be appointed Welfare Attorneys, and they must know you very well to be able to make the decisions required.

A couple will usually appoint each other as the main Attorney, but it best to appoint a substitute in case the main Attorney dies or cannot act as such for any reason. Two or more people may be the Attorneys, but you may wish to provide that any one of them can act rather than all of them together for practical reasons.

How is a Power of Attorney created?

You decide whom to appoint as Attorneys and whether they are to be appointed Continuing Attorneys, Welfare Attorneys or both. Please speak to the people you propose to appoint to discuss the issues with them and make sure they are willing to take on this responsible role if required.

You instruct us to prepare the written document which sets out the precise powers which you wish the Attorney to exercise. We may have to check your Will to see if this needs to be changed as well. Often people will make Wills and Powers of Attorney at the same time and it is sensible to look at all the issues at once.

The Power of Attorney document must be signed by you in front of a witness. An important safeguard provides that the document must include a certificate by a practising doctor or solicitor stating:

- that he/she has interviewed you immediately before the signing of the document;



- that he/she is satisfied, because of their consulted other named persons who know you, that you fully understand the nature of the Powers being given and the extent of them; and
- that he/she has no reason to believe that you are acting under any influence or any other reason which should prevent the Powers from being given.

The doctor or solicitor will not sign the certificate unless they are satisfied on all these points. If anyone does not understand what is being done, they cannot grant a Power of Attorney.





What happens next?

Continuing Powers of Attorney and Welfare Powers of Attorney must be registered with The Office of the Public Guardian. The Attorney must sign the registration form to confirm they are willing to act as Attorney and a registration fee of £70 per deed is payable. On registration, the Public Guardian issues a copy of the Power of Attorney together with a Certificate of Registration and where a Welfare Attorney has been appointed, a copy of the document will also be sent to the Mental Welfare Commission.

What Protections are there?

Scottish Law now gives substantial protection for you and your family. When the Attorney starts acting, they must apply the following five principles

- Benefit - no action should be taken unless it will benefit you
- Minimum Intervention - any action should be the least restrictive option available
- Take account of your wishes - both past and present wishes and feelings must be considered



- Consult with others - listen to the views of you, your nearest relative, primary carer and any other Attorneys
- Encourage you to do things yourself - where possible, you should still deal with matters as far as you can or wish.

“Granting a Continuing Attorney is a safeguard for the years ahead; there is a huge piece of mind in knowing that someone can take care of your finances with the minimum amount of stress and expense if you can no longer deal with your affairs yourself .”

An Attorney is in a position of trust and has a duty to take reasonable care when acting on your behalf. They must keep records of how they exercise their powers and keep any financial matters separate from their own.



How does an Attorney operate the powers?

The Attorney will require to show an authentic copy of the Power of Attorney to your Bank and other third parties to show they have been appointed Attorney and have authority to carry out transactions. They can sign on your behalf and may have to set up standing orders and direct debits. We are always available to give them help and advice. A Continuing Attorney can claim fees and expenses from the Granter's funds if the deed allows this, but a Welfare Attorney may only claim their expenses.

When does a Power of Attorney come to an end?

- On your death
- If you recall the Power of Attorney, either to act for yourself again once you have recovered from a temporary illness or to appoint someone else
- Where you and the Attorney are married to each other, upon the granting of a decree of separation or divorce to either party or a declarator of nullity of marriage, unless the document conferring the powers states otherwise.
- On the appointment of a Guardian by a court.



What Duties does an Attorney have to the Public Guardian?

Once the document conferring a Continuing or Welfare Power of Attorney has been registered with the Public Guardian the Attorney is responsible for telling the Public Guardian any of the following:-

- change of address of Attorney;
- change of address for you;
- your death;
- where the Attorney dies, it is the duty of their representative to advise the Public Guardian;
- any other event which would terminate the Power of Attorney.

If you have any particular concerns about these issues, please contact us and we will be pleased to help.





Contact us



Richard Murray

Partner

DL: 0131 270 8013

E: richard.murray@achws.co.uk

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.



Liz MacKay

Associate Solicitor

DL: 0131 270 8041

E: elizabeth.mackay@achws.co.uk

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

Solicitor

DL: 0131 270 8068

E: sara.smith@achws.co.uk

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.