

ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

EXPLANATORY NOTES

THE ACT

Part 2: Continuing Powers of Attorney and Welfare Powers of Attorney

Section 15: Creation of continuing power of attorney

58. This section defines a continuing power of attorney, and describes how a valid power is created. A power of attorney is a power conferred on another person to manage specified affairs of the person granting the power (“the granter”).
59. Subsections (1) and (2) define a “continuing power of attorney” as a power to manage specified aspects of the granter’s property or financial affairs that continues to have effect when the granter loses the capacity to deal with the matters concerned. The person to whom such powers are given is defined as a “continuing attorney”. This creates a distinction between powers of attorney that have effect only when the granter still has capacity, but cannot or does not want to act for some other reason, and those that are intended to continue on incapacity. The Act is only concerned with the latter.
60. Subsection (1) states that a continuing power of attorney will continue to be legally binding after the incapacity of the person granting it.
61. Subsections (3) and (4) stipulate conditions for a continuing power of attorney to be valid. A written document conferring the power and signed by the granter is required, an oral request would not be sufficient. There is no requirement for this to be witnessed, although in practice documents will be attested so that they can be used as evidence in court proceedings if necessary.
62. Subsection (3)(b) requires the power of attorney to state that it is the intention of the person granting the power that it should have effect on their losing capacity. This new process requires a granter to opt-in to continuing powers. The Act repeals section 71 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, which required granters to opt-out if they did not want their power of attorney to be effective on their incapacity. This provides a safeguard against unintentional granting of inappropriate powers.
63. Subsection (3)(c) requires the power of attorney to include a certificate in a prescribed format from the solicitor acting for the granter, or someone in a category of people to be defined in Regulations. This will certify that the solicitor, or other person, interviewed the granter just prior to the granter signing the document. It will also certify that the granter understood what they were signing. In many cases it will be obvious in the solicitor’s opinion that the granter is capable of understanding, and no further evidence would be required; however, if the granter appears to be failing in capacity, recent medical evidence might be required. The solicitor or other person acting must also certify they have no reason to believe that pressure or undue influence has been put upon

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the granter, who, because of failing physical or mental faculties, may be particularly vulnerable to suggestion.

64. Subsection (4) prevents a potential conflict of interests where the solicitor or other person providing the certificate under subsection (3) is also the person to whom the power is being granted.

Section 16: Creation and exercise of welfare power of attorney

65. This section defines a welfare power of attorney, and describes how a valid welfare power of attorney is created. Currently the legal status of attorneys with powers over welfare matters is unclear. This section establishes the right to grant such a power, and establishes various safeguards.
66. Subsections (1) and (2) define a “welfare power of attorney” as referring to a power of attorney granted under this section. A welfare power of attorney confers the authority to make decisions about the personal welfare of the granter, and refers to the individual granted the powers as a “welfare attorney”.
67. Subsection (3) and (4) stipulate conditions for a welfare power of attorney to be valid. The conditions for validity are the same as those set out in subsections (3) and (4) of section 15 apart from subsection (3)(b) which specifies that a welfare power of attorney is being made.
68. Subsection (5)(a) limits those who may be granted a welfare power of attorney. Only individuals can be appointed as welfare attorneys; this excludes the officers of statutory organisations, including local authorities.
69. Subsection (5)(b) provides that welfare powers of attorney can only be used to make decisions on the granter’s behalf after they lose capacity to deal with the matters covered by the power.
70. Subsection (6) restricts the authority of welfare attorneys preventing a welfare attorney from consenting to the granter’s admission to hospital to be treated for mental disorder against their will. Where detention is necessary, the granter can be detained under the provisions of the Mental Health (Scotland) Act 1984. It also prohibits a welfare attorney from consenting to any of the treatments excepted from the general authority to treat, as provided in section 48.
71. Subsection (7) is necessary because powers of attorney generally terminate on the granter or attorney’s bankruptcy. Under the Bankruptcy (Scotland) Act 1985, a trustee assumes control of the bankrupt's estate and their authority must supersede that of an attorney with financial powers. The authority of welfare attorneys need not be affected by the granter’s bankruptcy. Nor need a welfare attorney who becomes bankrupt lose their powers.
72. Subsection (8) provides that a welfare attorney appointed under the law of another country to act for someone who lives in Scotland may not exercise their powers until the granter loses capacity. It also provides that no foreign welfare attorney may have the granter admitted to hospital in Scotland to be treated for mental disorder against their will, or consent to any of the treatments excepted from the general authority to treat, as provided in section 48.

Section 17: Attorney not obliged to act in certain circumstances

73. There is no statutory duty for an attorney to use their powers, but this section specifically provides continuing or welfare attorneys with the power to omit actions that are included in their authority, if they consider them to be unreasonable, either on grounds of effort or expense, compared to the value of the action. This protects attorneys from carrying out duties that would be very onerous to them and would confer little benefit to the granter.

Section 18: Power of attorney not granted in accordance with this Act

74. This section provides that after commencement of the Act, a power of attorney that is a continuing or welfare power of attorney intended to have effect during the granter's incapacity must be a validly granted continuing or welfare power of attorney according to this Act. This ensures that powers that continue on the granter's incapacity can only be granted by opting into the provisions in the Act.

Section 19: Registration of continuing or welfare power of attorney

75. This section provides for a new statutory process under which continuing and welfare powers of attorney are to be recorded in public registers by the Public Guardian, so that information about the powers is openly available. Subsection (1) provides that continuing and welfare powers of attorney are only valid after registration.
76. Subsection (2) sets out the action required by the Public Guardian to register a continuing or welfare power of attorney. The Public Guardian must be sure that the nominated attorney is prepared to accept the appointment and will then enter the details of the granter and attorney in the public register.
77. Subsection (2)(b) provides for the Public Guardian to issue a certificate of registration, which the attorney may subsequently need to use to confirm that they are validly exercising their powers.
78. Subsection (2)(c) provides for the Public Guardian to inform the Mental Welfare Commission of every registered welfare power of attorney. This will allow monitoring of welfare attorneys by the Mental Welfare Commission.
79. Subsection (3) provides for so called "springing" powers of attorney. It allows documents conferring continuing or welfare powers of attorney to be sent to the Public Guardian, but registration to be postponed until after a specified event has occurred. This event could be the granter losing the capacity to manage his or her own affairs; however it could also be another trigger, such as moving out of their own home. It will be the Public Guardian's duty to check that the event has occurred before registering the continuing or welfare power of attorney, thus allowing the power to be exercised.
80. Subsection (4) establishes that a copy of the continuing or welfare power of attorney, validated by the Public Guardian, will have the authority recorded in it, as intended by the granter.
81. Subsection (5) places a duty on the Public Guardian to inform the granter, by sending a copy of the document, when the continuing or welfare power of attorney is registered. The document conferring power of attorney may also specify up to two individuals or officials that must also be sent a copy of the power of attorney when the Public Guardian registers it. This could be used to ensure that a relative, for example, or the local authority social work department, were aware that the granter now had a continuing or welfare attorney acting for them.
82. Subsection (6) allows appeals to the sheriff against the Public Guardian's decisions on whether an attorney accepts their appointment and on whether a springing event as at subsection (3) has occurred.

Section 20: Powers of sheriff

83. This section outlines the powers that sheriffs will have in relation to continuing and welfare attorneys.
84. Subsection (1) establishes the right to apply for an order from the sheriff. Anyone who claims an interest in the property, financial affairs or welfare of an adult who has granted a continuing or welfare power of attorney can apply. This provides a forum for interested parties to express their concerns about the attorney.

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85. Subsection (2) limits the sheriff's power to intervene to cases where the granter has lost capacity and it is necessary to promote or safeguard the adult's interests. If a granter still has the capacity to supervise the attorney, it would be unnecessary to give the sheriff authority over that arrangement, as the granter can supervise their own affairs.
86. Subsections (2)(a), (b), (c) and (d) set out what orders the sheriff can make to safeguard the granter's interests. The sheriff may order a continuing attorney to be supervised by the Public Guardian, or a welfare attorney to be supervised by the local authority. The sheriff may order a continuing attorney to submit accounts for audit by the Public Guardian. These accounts may be requested for any period when the attorney has acted, even while the granter retained legal capacity, to allow an overall picture of the attorney's management of the granter's estate. The sheriff may also ask a welfare attorney for a report on the exercising of their powers.
87. Subsection (2)(e) gives the sheriff the right to make an order revoking any of the powers the attorney is allowed to exercise, or to terminate their appointment. The Act does not, however, allow the court to vary the attorney's powers, since this would run counter to the granter's original intention.
88. Subsection (3) provides for the communication of any order the sheriff has made to the Public Guardian. The Public Guardian will record the order in his register and notify those listed in subsection (3)(b).
89. Subsection (4) states that the decision of the sheriff to order Public Guardian or local authority supervision of an attorney or requiring accounts or reports from a welfare attorney or that such an order is not required, is final.
90. Subsection (5) provides for the court to make orders as in this section to apply to foreign, as well as Scottish, continuing and welfare attorneys. This provides safeguards for granters who live or are present in Scotland, but who have appointed an attorney under the law of another country.

Section 21: Records: attorneys

91. This section requires continuing and welfare attorneys to keep a record of their actions. A continuing attorney is not required to keep formal accounts, merely a record of transactions that could be used to draw up accounts should a court require them. The code of practice for attorneys will contain general information about record-keeping for both continuing and welfare attorneys.

Section 22: Notification to Public Guardian

92. This section provides for the updating of the Public Guardian's registers and notification of statutory bodies and, in particular circumstances, of the granter of the power of attorney when an address recorded in the registers is changed, or the power of attorney comes to an end for any reason. In the circumstances set out in subsection (1), it is the attorney's duty to notify the Public Guardian, and in subsection (2), where the attorney has died, it is the duty of their representative to notify the Public Guardian, if they are aware of the power of attorney.
93. When the Public Guardian is notified under subsection (1) or (2) of a change to the power of attorney registered, he will update his registers and inform the local authority and, in particular circumstances, the Mental Welfare Commission of the changes, allowing them to update their records. When it is an event the granter could be ignorant of, the Public Guardian will also notify them of the new details or the coming to an end of the power of attorney.

Section 23: Resignation of continuing or welfare attorney

94. This section provides that once a continuing or welfare power of attorney has been registered by the Public Guardian, according to section 19, the attorney must give notice

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of their intention to resign, in order to safeguard against any lapse in administering the granter's affairs.

95. Subsection (1) lists those who must be notified. This ensures that the granter, and key people looking after them are aware of the impending change. If necessary, a guardianship application could then be made. Notification also ensures that the Public Guardian can maintain the register of continuing and welfare attorneys accurately.
96. Subsection (2) provides that an attorney's resignation becomes effective 28 days after the Public Guardian receives written notice as above, unless the attorney was a joint attorney, or a substitute attorney was also appointed, in which case subsection (4) may apply. When the attorney's resignation is effective, the Public Guardian will record this in the register.
97. Subsection (4) waives the need to wait 28 days for the resignation of an attorney to be effective, where the Public Guardian has received notice that a remaining joint attorney, or substitute attorney is prepared to act. The resignation would then be effective from the date the Public Guardian receives such notice.

Section 24: Termination of continuing or welfare power of attorney

98. Subsection (1) provides that, where the granter and attorney are married, the appointment as attorney will be automatically revoked on a decree of separation, divorce or declarator of nullity, unless the power of attorney states otherwise.
99. Subsection (2) establishes that where a guardian is appointed to deal with the same matters as a continuing or welfare attorney, the authority of the guardian shall supersede that of the attorney, whose appointment in that area is effectively terminated. The Public Guardian will be aware of this through notification of the appointment of the guardian, and will be able to amend the relevant register.
100. Subsection (3) provides that foreign attorneys' authority should also be superseded by the appointment of a guardian by a Scottish court.
101. Subsection (4) protects people who deal with attorneys without realising that their powers have terminated, particularly where the person concerned has acquired heritable property, unaware of circumstances provided in subsections (4)(a) and (b). Subsection (4)(a) provides for the situation where the attorney's appointment has terminated because their marriage to the granter has ended. Subsection (4)(b) provides for circumstances in which the attorney has been superseded by a guardian.