



# Adults with Incapacity (Scotland) Act 2000

2000 asp 4

## PART 2

### CONTINUING POWERS OF ATTORNEY AND WELFARE POWERS OF ATTORNEY

#### 15 Creation of continuing power of attorney

- (1) Where an individual grants a power of attorney relating to his property or financial affairs in accordance with the following provisions of this section that power of attorney shall, notwithstanding any rule of law, continue to have effect in the event of the granter's becoming incapable in relation to decisions about the matter to which the power of attorney relates.
- (2) In this Act a power of attorney granted under subsection (1) is referred to as a "continuing power of attorney" and a person on whom such power is conferred is referred to as a "continuing attorney".
- (3) A continuing power of attorney shall be valid only if it is expressed in a written document which—
  - (a) is subscribed by the granter;
  - (b) incorporates a statement which clearly expresses the granter's intention that the power be a continuing power;
  - (c) incorporates a certificate in the prescribed form by a solicitor or by a member of another prescribed class that—
    - (i) he has interviewed the granter immediately before the granter subscribed the document;
    - (ii) he is satisfied, either because of his own knowledge of the granter or because he has consulted other persons (whom he names in the certificate) who have knowledge of the granter, that at the time the continuing power of attorney is granted the granter understands its nature and extent;
    - (iii) he has no reason to believe that the granter is acting under undue influence or that any other factor vitiates the granting of the power.

- (4) A solicitor or member of another prescribed class may not grant a certificate under subsection (3)(c) if he is the person to whom the power of attorney has been granted.

## 16 Creation and exercise of welfare power of attorney

- (1) An individual may grant a power of attorney relating to his personal welfare in accordance with the following provisions of this section.
- (2) In this Act a power of attorney granted under this section is referred to as a “welfare power of attorney” and an individual on whom such power is conferred is referred to as a “welfare attorney”.
- (3) A welfare power of attorney shall be valid only if it is expressed in a written document which—
- (a) is subscribed by the granter;
  - (b) incorporates a statement which clearly expresses the granter’s intention that the power be a welfare power to which this section applies;
  - (c) incorporates a certificate in the prescribed form by a solicitor or by a member of another prescribed class that—
    - (i) he has interviewed the granter immediately before the granter subscribed the document;
    - (ii) he is satisfied, either because of his own knowledge of the granter or because he has consulted other persons (whom he names in the certificate) who have knowledge of the granter, that at the time the welfare power of attorney is granted the granter understands its nature and extent;
    - (iii) he has no reason to believe that the granter is acting under undue influence or that any other factor vitiates the granting of the power.
- (4) A solicitor or member of another prescribed class may not grant a certificate under subsection (3)(c) if he is the person to whom the power of attorney has been granted.
- (5) A welfare power of attorney—
- (a) may be granted only to an individual (which does not include a person acting in his capacity as an officer of a local authority or other body established by or under an enactment); and
  - (b) shall not be exercisable unless—
    - (i) the granter is incapable in relation to decisions about the matter to which the welfare power of attorney relates; or
    - (ii) the welfare attorney reasonably believes that sub-paragraph (i) applies.
- (6) A welfare attorney may not—
- (a) place the granter in a hospital for the treatment of mental disorder against his will; or
  - (b) consent on behalf of the granter to any form of treatment mentioned in section 48(1) or (2).
- (7) A welfare power of attorney shall not come to an end in the event of the bankruptcy of the granter or the welfare attorney.
- (8) Any reference to a welfare attorney—

- (a) in relation to subsection (5)(b) in a case where the granter is habitually resident in Scotland; and
- (b) in subsection (6),

shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed) relating to the granter's personal welfare and having effect during the granter's incapacity.

#### **17 Attorney not obliged to act in certain circumstances**

A continuing or welfare attorney shall not be obliged to do anything which would otherwise be within the powers of the attorney if doing it would, in relation to its value or utility, be unduly burdensome or expensive.

#### **18 Power of attorney not granted in accordance with this Act**

A power of attorney granted after the commencement of this Act which is not granted in accordance with section 15 or 16 shall have no effect during any period when the granter is incapable in relation to decisions about the matter to which the power of attorney relates.

#### **19 Registration of continuing or welfare power of attorney**

- (1) A continuing or welfare attorney shall have no authority to act until the document conferring the power of attorney has been registered under this section.
- (2) For the purposes of registration, the document conferring the power of attorney shall be sent to the Public Guardian who, if he is satisfied that a person appointed to act is prepared to act, shall—
  - (a) enter prescribed particulars of it in the register maintained by him under section 6(2)(b)(i) or (ii) as the case may be;
  - (b) send a copy of it with a certificate of registration to the sender;
  - (c) if it confers a welfare power of attorney, send a copy of it to the Mental Welfare Commission.
- (3) The document conferring a continuing or welfare power of attorney may contain a condition that the Public Guardian shall not register it under this section until the occurrence of a specified event and in that case the Public Guardian shall not register it until he is satisfied that the specified event has occurred.
- (4) A copy of a document conferring a continuing or welfare power of attorney authenticated by the Public Guardian shall be accepted for all purposes as sufficient evidence of the contents of the original and of any matter relating thereto appearing in the copy.
- (5) The Public Guardian shall—
  - (a) on the registration of a document conferring a continuing or welfare power of attorney, send a copy of it to the granter; and
  - (b) where the document conferring the continuing or welfare power of attorney so requires, send a copy of it to not more than two specified individuals or holders of specified offices or positions.

- (6) A decision of the Public Guardian under subsection (2) as to whether or not a person is prepared to act or under subsection (3) as to whether or not the specified event has occurred may be appealed to the sheriff, whose decision shall be final.

## 20 Powers of sheriff

- (1) An application for an order under subsection (2) may be made to the sheriff by any person claiming an interest in the property, financial affairs or personal welfare of the granter of a continuing or welfare power of attorney.
- (2) Where, on an application being made under subsection (1), the sheriff is satisfied that the granter is incapable in relation to decisions about, or of acting to safeguard or promote his interests in, his property, financial affairs or personal welfare insofar as the power of attorney relates to them, and that it is necessary to safeguard or promote these interests, he may make an order—
- (a) ordaining that the continuing attorney shall be subject to the supervision of the Public Guardian to such extent as may be specified in the order;
  - (b) ordaining the continuing attorney to submit accounts in respect of any period specified in the order for audit to the Public Guardian;
  - (c) ordaining that the welfare attorney shall be subject to the supervision of the local authority to such extent as may be specified in the order;
  - (d) ordaining the welfare attorney to give a report to him as to the manner in which the welfare attorney has exercised his powers during any period specified in the order;
  - (e) revoking—
    - (i) any of the powers granted by the continuing or welfare power of attorney; or
    - (ii) the appointment of an attorney.
- (3) Where the sheriff makes an order under this section the sheriff clerk shall send a copy of the interlocutor containing the order to the Public Guardian who shall—
- (a) enter prescribed particulars in the register maintained by him under section 6(2)(b)(i) or (ii) as the case may be;
  - (b) notify—
    - (i) the granter;
    - (ii) the continuing or welfare attorney;
    - (iii) where it is the welfare attorney who is notified, the local authority and (in a case where the incapacity of the granter is by reason of, or reasons which include, mental disorder) the Mental Welfare Commission;
    - (iv) where the sheriff makes an order under subsection (2)(c), the local authority.
- (4) A decision of the sheriff under subsection (2)(a) to (d) shall be final.
- (5) In this section any reference to—
- (a) a continuing power of attorney shall include a reference to a power (however expressed) under a contract, grant or appointment governed by the law of any country, relating to the granter's property or financial affairs and having continuing effect notwithstanding the granter's incapacity;

(b) a welfare power of attorney shall include a reference to a power (however expressed) under a contract, grant or appointment governed by the law of any country, relating to the granter's personal welfare and having effect during the granter's incapacity,  
and "continuing attorney" and "welfare attorney" shall be construed accordingly.

## **21 Records: attorneys**

A continuing or welfare attorney shall keep records of the exercise of his powers.

## **22 Notification to Public Guardian**

- (1) After a document conferring a continuing or welfare power of attorney has been registered under section 19, the attorney shall notify the Public Guardian—
- (a) of any change in his address;
  - (b) of any change in the address of the granter of the power of attorney;
  - (c) of the death of the granter of the power of attorney; or
  - (d) of any other event which results in the termination of the power of attorney,
- and the Public Guardian shall enter prescribed particulars in the register maintained by him under section 6(2)(b)(i) or (ii) as the case may be and shall notify the granter (in the case of an event mentioned in paragraph (a) or (d)) and, where the power of attorney relates to the personal welfare of the adult, both the local authority and (in a case where the incapacity of the granter is by reason of, or reasons which include, mental disorder) the Mental Welfare Commission.
- (2) If, after a document conferring a continuing or welfare power of attorney has been registered under section 19, the attorney dies, his personal representatives shall, if aware of the existence of the power of attorney, notify the Public Guardian who shall enter prescribed particulars in the register maintained by him under section 6(2)(b)(i) or (ii) as the case may be, and shall notify the granter and, where the power of attorney relates to the personal welfare of the adult, both the local authority and (in a case where the incapacity of the granter is by reason of, or reasons which include, mental disorder) the Mental Welfare Commission.

## **23 Resignation of continuing or welfare attorney**

- (1) A continuing or welfare attorney who wishes to resign after the document conferring the power of attorney has been registered under section 19 shall give notice in writing of his intention to do so to—
- (a) the granter of the power of attorney;
  - (b) the Public Guardian;
  - (c) any guardian or, where there is no guardian, the granter's primary carer;
  - (d) the local authority, where they are supervising the welfare attorney.
- (2) Subject to subsection (4), the resignation shall not have effect until the expiry of a period of 28 days commencing with the date of receipt by the Public Guardian of the notice given under subsection (1); and on its becoming effective the Public Guardian shall enter prescribed particulars in the register maintained by him under section 6(2)(b)(i) or (ii) as the case may be.

- (3) Where the resignation is of a welfare attorney, the Public Guardian shall notify the local authority and (in a case where the incapacity of the adult is by reason of, or reasons which include, mental disorder) the Mental Welfare Commission.
- (4) The resignation of a joint attorney, or an attorney in respect of whom the granter has appointed a substitute attorney, shall take effect on the receipt by the Public Guardian of notice under subsection (1)(b) if evidence that—
  - (a) the remaining joint attorney is willing to continue to act; or
  - (b) the substitute attorney is willing to act,accompanies the notice.

## **24 Termination of continuing or welfare power of attorney**

- (1) If the granter and the continuing or welfare attorney are married to each other the power of attorney shall, unless the document conferring it provides otherwise, come to an end upon the granting of—
  - (a) a decree of separation to either party;
  - (b) a decree of divorce to either party;
  - (c) declarator of nullity of the marriage.
- (2) The authority of a continuing or welfare attorney in relation to any matter shall come to an end on the appointment of a guardian with powers relating to that matter.
- (3) In subsection (2) any reference to—
  - (a) a continuing attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed), relating to the granter's property or financial affairs and having continuing effect notwithstanding the granter's incapacity;
  - (b) a welfare attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed) relating to the granter's personal welfare and having effect during the granter's incapacity.
- (4) No liability shall be incurred by any person who acts in good faith in ignorance of—
  - (a) the coming to an end of a power of attorney under subsection (1); or
  - (b) the appointment of a guardian as mentioned in subsection (2),nor shall any title to heritable property acquired by such a person be challengeable on those grounds alone.