

Powers of attorney

A power of attorney is a document in which you appoint someone you trust to look after your affairs. The person you give the power to manage your affairs is called your attorney. Powers of attorney are the best way for you to have maximum say in what happens if one day you can't make decisions yourself. Until that time, you are in control. Keep the document safe, and make sure your attorney (and anyone else you think should be told) knows where it is. The Adults with Incapacity Act makes it possible to have two powers of attorney. You can have one for your financial matters (a financial or continuing power of attorney) and one for your personal welfare (a welfare power of attorney). You can choose the same person to do both, but you don't have to.

Make sure your proposed attorney is willing

You should talk to whoever you want to be your attorney, to make sure he or she is willing. You don't legally have to do this, but the power of attorney must be registered with the Public Guardian before it can be used. The Public Guardian won't register a power unless satisfied that the attorney or attorneys you name are prepared to carry out the duties as attorney. If a proposed attorney refuses, it might be too late to choose someone else. It is wise to register your power of attorney as soon as possible after the document is signed to make sure that it is complete and correct.

It is a good idea for everyone – whether or not they have dementia – to set up powers of attorney, in case of illness or accident. You can grant a power of attorney only if you are capable of understanding what you

are doing. This means if you have early dementia it is very important to consider giving someone power of attorney as soon as possible. No-one, not even your close relatives, can arrange a power of attorney for you, so it must be done while you are able to express your own wishes. Later on, it may be too late.

It is possible for you to draw up a power of attorney document yourself although you may find it easier or more reassuring to use a solicitor. You can find further information on the website of the Office of the Public Guardian at www.publicguardian-scotland.gov.uk. If you do draw up the document yourself, it must include a certificate signed by a solicitor or other "prescribed" person such as a doctor stating that:

- he or she has interviewed you, the granter, immediately prior to the signing of the document;
- he or she is satisfied, because of his or her own knowledge of you or having consulted other named persons who know you, that you fully understand the nature of the powers being given and the extent of them; and
- he or 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.

Who to choose as your attorney

Think about who you would like to be your continuing and/or your welfare attorney. Any attorney should be someone you trust, for example:

- your partner or spouse
- a family member
- a close friend.

A firm of solicitors could be your continuing (financial) attorney, although your welfare attorney has to be an individual.

One attorney or more than one?

You can make separate or joint welfare and financial (also called continuing) powers of attorney. One advantage of making a joint power of attorney is that you only need to register once and have one registration fee to pay to the Office of the Public Guardian (currently £83).

There are several options when it comes to appointing an attorney. You can appoint:

- one person (or more than one) to be your welfare attorney and another person (or more than one) to be your financial attorney; or
- one person (or more than one) to be your welfare and financial attorney.

If you do appoint different people to be your welfare and financial attorneys, you need to be sure that they will co-operate closely with one another, as welfare decisions usually have financial implications and vice versa.

It is a good idea to appoint joint attorneys to work together, or one or more substitute attorneys, to take over if an original attorney resigns or dies. If you appoint joint attorneys, they will have to act together and both be involved in any decision making on your behalf. If you want them to be able to act together or separately, you need to include a statement in your power of attorney saying that you are appointing them “to act jointly and severally or severally”. This allows each attorney to act as an individual or jointly with each other.

A couple should each grant separate powers of attorney, although they can choose the same attorney(s). They may wish to appoint each other, perhaps with another family member or a solicitor jointly, or as a substitute. It is a good idea to

appoint someone younger than yourself, since a younger attorney is likely to outlive you.

The Adults with Incapacity Act says your attorney must always take your wishes into account when making decisions on your behalf, so it is important to make sure your attorney knows as much as possible about you and your preferences. Sometimes, if circumstances change, it may no longer be of benefit to you for your attorney to follow the precise instructions you set out in your power of attorney document. In these situations, it can be very helpful for your attorney(s) to work through the rules of the Act when making a decision which seems to go against your original wishes.

For example, when you granted your power of attorney, you may have expressed your wish not to be moved to a care home under any condition. However, circumstances might change so that your health, and perhaps the health of your main carer, means that staying at home may no longer be possible and you might benefit more from being in a care home receiving 24 hour care.

The code of practice for attorneys gives a lot of practical information about the type of things which you should consider.

Financial (continuing) power of attorney

A financial power of attorney only covers your property and financial affairs, and gives no power to take other personal decisions. The document must specify exactly what powers your attorney is to have, so check with your solicitor that all the necessary powers are included. You might list the powers you want to give, or you might give your attorney a general right to deal with all your financial affairs. But if you want your attorney to be able to deal with property, such as your house, the power of attorney must say so specifically.

Powers could include:

- paying bills
- collecting pensions and other money due to you
- dealing with bank or building society accounts
- having access to important financial information
- buying and selling investments and other property, including houses
- signing documents and entering contracts
- managing direct payments and other public funds provided for community care services
- bringing, defending or consenting to legal actions, for example, in the case of an accident
- making gifts of specified amounts to named people
- expenses for the attorney.

The Office of the Public Guardian provides information on its website at www.publicguardian-scotland.gov.uk. This is a useful starting point for instructing your solicitor, but you should also think about what decisions you want your attorney to be able to make on your behalf.

Note: A continuing attorney cannot make a will for you, take decisions on your personal welfare, such as care or medical decisions, make gifts to him or herself or to anyone else (unless you specifically authorise this), appoint a successor or do anything the power of attorney document does not list.

You can choose to have a continuing power of attorney operate straight away, while you are well, for convenience. This does not prevent you continuing to run your affairs while you are able to. Alternatively, you can specify that it can only be used after a particular event, for example if a doctor certifies that you have become mentally incapable of running your own affairs. This is known as a 'springing clause' and can be used in two ways:

- you can state that the power should not be registered with the Public Guardian

or used until the specific event has occurred, for example your lack of capacity has been assessed by your doctor; or

- you can have the document registered immediately but specify an event which must occur before it can be used by the attorney, e.g. your lack of capacity is confirmed in writing by a doctor. In this case, your document must contain a statement that you have considered how you would wish your incapacity to be determined.

The first option offers additional protection as the attorney does not hold the certificate until proof of incapacity is provided. However, because the power cannot be registered before the 'springing' event occurs, it will not have been checked by the Public Guardian. If it turns out to be incorrect, the attorney will have no power to act at all. If you have been assessed by that time as lacking capacity you won't be able to authorise any corrections to the power of attorney.

Welfare power of attorney

For a welfare power of attorney, you also choose what powers you want your attorney to have. For example, some or all of:

- deciding on your care arrangements
- managing your care, including care funded through direct payments and other public funds
- making decisions on your clothes, personal appearance, diet, leisure activities or holidays
- deciding where you should live
- having access to confidential or personal information about your welfare, such as health records
- consenting to medical treatment (if you want this power, it must be specifically stated in the document)
- consenting to you taking part in research
- bringing, defending or consenting to legal actions to do with your welfare.

Under the Adult with Incapacity Act's principles your welfare attorney must always take your wishes into account when making these decisions, so it is important to make sure he or she knows as much as possible about your likes and dislikes. For example, talk to him or her about your personal welfare concerns, such as medical conditions, how you would hope to be cared for in the future, religious or spiritual matters, any particular difficulties in family relationships and your preferences for diet, appearance and holidays. Ask him or her to keep a note of your wishes. However, your attorney doesn't necessarily have to follow your wishes, for example if circumstances change.

Welfare attorneys can only take on their powers if you become incapable of taking these decisions yourself. All welfare powers of attorney granted on or after 5 October 2007 have to contain a statement that the granter has considered how they would wish their incapacity to be determined. You don't have to say how you want your incapacity to be determined, only that you have considered it.

It is important to think about who you want to make the decision that you are no longer able to manage your own affairs. You might want a doctor or solicitor to determine that you are no longer capable, or you might decide that your proposed welfare attorney can determine this if he or she reasonably believes that you are incapable in relation to decisions about your personal welfare.

Creating a power of attorney

1. Discuss your plans with your friends and relatives and any professionals you are involved with.
2. Talk to the person or people you want to appoint as your attorney and make sure they are willing.
3. See a solicitor if you would rather not 'do it yourself'. Ask how much it will cost before you start – all solicitors must provide this information if they are asked.

4. Discuss with the solicitor what powers you want to include. If you are naming the same person as your continuing and welfare attorney, the cheapest way is to do both at once in the same document. Or you could name different continuing and welfare attorneys in separate documents, but at the same time.

A fairly standard power of attorney may cost £300 – 400, or sometimes more, depending on the time spent by the solicitor and the cost of any doctor's certificate if the solicitor feels the need for further evidence of your mental capacity. Ask for an estimate of the cost before you start. People on Income Support, Pension Credit or on a low income may be able to get help to cover the cost through the Legal Advice and Assistance scheme.

The solicitor will draw up the power of attorney document for you to sign. As a safeguard, it has to include a certificate signed by the solicitor or a doctor certifying that he or she spoke to you just before you signed and that you understood what you were doing and were not under anyone else's influence. If you are appointing the solicitor as your financial attorney, the certificate has to be signed by a different solicitor (or a doctor). This is to help prevent anyone taking advantage of someone who is vulnerable. If it is both a continuing and a welfare power of attorney, it must include two of these certificates, one for each part.

A continuing power of attorney must say in the document that it is meant to be continuing, that is, that it will still work if you become unable to manage your own affairs.

Your attorney will need to register the power with the Public Guardian. This can be done right away unless the power states that it can only be registered at a certain time or after a certain event (for example, if doctors certify your mental incapacity). There is a form for registration, and the fee is currently £83. If both the

welfare and financial powers are covered in one document there will be only one registration fee to pay.

To use the power of attorney (for example at your bank), your attorney will need to show a copy of the document provided by the Public Guardian together with a certificate of registration. If it isn't registered with the Public Guardian right away, you should make sure your attorney knows where the document is, so that he or she can find it when it is needed, and get it registered.

Safeguards

Both the Office of the Public Guardian and the local authority have a duty to protect your interests and safeguard you from harm. The Public Guardian is responsible for safeguarding your interests to do with property or financial affairs. He or she can investigate any complaints where the property or finances of an adult appear to be at risk, including how a continuing power of attorney is being used.

Your local authority can investigate problems with a welfare power of attorney. Under the Adult Support and Protection Act, local authorities also have a duty to make enquiries and investigate any circumstances where an adult appears to be at risk of harm. Local authorities have been given new powers to carry out investigations, and other public bodies have a duty to share with them any information about an adult who appears to be at risk. This includes the Office of the Public Guardian, the police, the NHS, and the Mental Welfare Commission.

You can terminate your attorney's appointment at any time, provided you are not mentally incapacitated. It is wise to have a clause in your power of attorney document which makes this clear to the attorney. Terminating the attorney's appointment is best done in writing. Your attorney should then notify the Public Guardian. If the attorney is not prepared

to do this, or if you have lost contact with him or her, send a copy of your letter to the Public Guardian explaining the circumstances, and he or she will deal with it.

If your attorney is taking decisions for you, but you are worried about what he or she is doing, you can complain to the Public Guardian (for all powers of attorney covering financial matters) on 01324 678300 or e-mail opg@scotcourts.gov.uk, or the local authority (for welfare powers of attorney). They will investigate. Anyone else who is worried could also complain. You can phone to discuss the problem, but put your complaint in writing if you want it investigated. The Mental Welfare Commission will look into matters if you are not satisfied that the local authority has investigated sufficiently thoroughly. You can also ask the Mental Welfare Commission for advice via their Helpline - 0800 389 6809 - or e-mail enquiries@mwscot.org.uk.

Summary

- People with dementia often say that the ability to manage money is one of the first skills to go.
- Making plans for your financial and personal welfare as soon as possible after a diagnosis is very important.
- Later on in the illness you may no longer be able to make certain arrangements.
- You can use powers of attorney to appoint someone you trust to look after your financial affairs (continuing power of attorney) and/or your personal welfare (welfare power of attorney).
- If you want, you can have different attorneys to look after your financial affairs and your personal welfare: you can also have one or more substitute attorneys to take over if your original attorney is unable to continue.
- Many people prefer to use a solicitor to draw up a power of attorney but you can 'do it yourself'.
- Having a power of attorney in place doesn't mean you can no longer make

any decisions for yourself.

- Your attorney must always take your wishes into account when making decisions on your behalf.
- You can also set out your wishes about your future care and medical treatment in an advance statement or an advance directive (or living will).
- If you haven't made a will or it has been some time since you reviewed an existing will, it is a good idea to do it while you are able – no-one else can do that for you.



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