YOUR GUIDE TO GRANTING A POWER OF ATTORNEY

mackinnons
solicitors

YOUR GUIDE TO GRANTING A POWER OF ATTORNEY

Many people think of Wills when looking to put their affairs in order but often never consider who would manage their business and personal affairs if they were to become either physically or mentally incapable of managing things for themselves.

The value of granting a Power of Attorney cannot be overestimated. Human longevity is increasing and if you wish to make plans for the future, it is important to consider putting a Power of Attorney in place. Granting a suitable Power of Attorney can mean that families avoid the harrowing difficulties which can arise where an individual loses capacity. In such circumstances, and if no suitable Power of Attorney is in place, your financial and business affairs can be impossible to manage in the short term. If a loss of capacity is long term then the family will require to go through the complicated, lengthy and very expensive court process of having a guardian appointed. Most importantly the person or persons appointed by the court may not be who you would have chosen and may struggle to know what your actual wishes would have been – this in turn may ultimately lead to very different decisions being made.

The existence of a properly drawn up Power of Attorney will allow speedy and appropriate intervention to be made, as required, on your behalf. The Power of Attorney will remain in full force and effect notwithstanding the incapacity of its grantor and will thus allow the appointed Attorney to take part in the process of e.g. considering and deciding what future care will be required and is appropriate.

FREQUENTLY ASKED QUESTIONS

1. WHAT IS A POWER OF ATTORNEY?

A Power of Attorney is a legal document which appoints someone to make decisions on your behalf. A Power of Attorney can deal with financial and/or welfare matters.

2. WHAT IS THE DIFFERENCE BETWEEN A CONTINUING AND A WELFARE POWER OF ATTORNEY?

A Continuing Power of Attorney gives power to the person appointed to deal with property, business, financial, tax and other such issues. These powers may start immediately and will continue in the event of your incapacity or may commence at a later date and only when/if you become incapable. This is a matter of choice and for discussion with your Solicitor.

A Welfare Power of Attorney gives power over decisions that need to be taken about your welfare and health care. These powers will only begin if you become incapable.

3. HOW IS A POWER OF ATTORNEY PUT IN PLACE?

To become effective and to enable an Attorney to act, the Power of Attorney must be registered with the Office of the Public Guardian which supervises all such appointments. This applies to all Powers of Attorney which are granted after 2001. The Office of the Public Guardian can ask an Attorney to provide an accounting for his/her actings and can ultimately seek the removal of an Attorney/refer cases to the Police for further investigation and prosecution.

4. I AM YOUNG AND FIT – WHY SHOULD I THINK ABOUT A POWER OF ATTORNEY AT MY STAGE IN LIFE?

People are choosing to make use of Powers of Attorney in different ways, e.g. parents whose offspring choose to spend a gap year abroad can be given a combined Continuing & Welfare Power of Attorney to help deal with any forms of eventuality ranging from lost passports to serious illness or someone may choose to grant a Power of Attorney to a trusted friend or professional to complete a financial transaction, such as a house purchase, likely to complete whilst they are out of the country.

Powers of Attorney are also incredibly useful for a sole trader or for small businesses. If a sole trader were to “fall off the proverbial ladder” and become incapable of running the business for even a month or two, if the business accounts were in his own name and no Power of Attorney was in place, no-one else would be permitted to access the accounts yet there would still be bills and suppliers to pay, tax returns to file, etc. This could be catastrophic for the reputation and credit history of the business as well as for any dependents relying on income.

Anyone who wanted to step in to run the business on a long term basis would have to apply to the court for guardianship – a process which is both expensive and slow – currently in Scotland guardianship applications can take at least 6 months from outset to appointment.

MACKINNONS – "OUR" POWER OF ATTORNEY

We, as a firm, have a specific and recommended Power of Attorney which we "tailor-make" to the needs of our individual clients.

Under the Adults with Incapacity (Scotland) Act 2000, the Power of Attorney must be in writing, must be signed by the grantor and must state clearly if the powers are continuing, welfare or a combination of both.

The Power of Attorney must include a statement which shows the grantor has considered how incapacity is to be determined and must incorporate a certificate from a practising Solicitor or Medical Practitioner which confirms they are satisfied the grantor understood the nature and extent of the document and that they had no issues to believe the grantor was acting under undue influence.

Our style of Power of Attorney contains very wide powers. It is our view that no-one can predict the future or the circumstances which might apply at the relevant point in time. Given that one should not appoint another party to act as Attorney unless full faith and trust is placed in that person, there is no point in "hamstringing" the Attorney from the outset.

We recommend that a Power of Attorney should include a power to make gifts. This can be very important where the grantor of the Power of Attorney is of substantial means and would, for their own part, wish to mitigate the effect of Inheritance Tax as far as possible. A client, if they do not find favour with such a clause, can simply have it deleted from our style. It is important, however, to note that unless the power in question is included, an Attorney will be prevented from engaging in legitimate Inheritance Tax mitigation, even where this might have been in line with the wishes of the grantor of the document. The reason for this is that without a specific power, the Inland Revenue will not recognise gifts made by Attorneys with a view to mitigating Inheritance Tax.

It is a requirement of the Act of 2000 that anyone appointed to act as Attorney should signify his consent to do so in writing and confirm that he/she is not bankrupt.

IF YOU ARE APPOINTED AS ATTORNEY....

This note is intended to be a useful guide in order that an individual appointed and accepting office as Attorney may be aware of his/her general responsibilities.

An Attorney is no more than an agent for the person appointing them. However, since the passing of The Adults with Incapacity (Scotland) Act 2000 it is arguable that the office of Attorney now goes well beyond that of an "old fashioned" agent.

As a first point, the Attorney should be aware of the fact that the 2000 Act sets out certain "gateway" Principles which every intervener is required to observe. Paraphrasing the Act, these Principles are as follows:-

- Any decision or intervention taken by an intervener must be for the benefit of the adult (in case of a Power of Attorney, the grantor of the document).
- The intervener/Attorney is required to take the least intrusive/restrictive method of intervention on behalf of the adult.
- The intervener is required to take into account the known past and present wishes of the adult.

- The intervener should consult with "relevant others" i.e. the nearest relatives of the adult, the primary carers and any other appropriate person(s) under the Act, e.g. a welfare guardian, The requirement to consult does not oblige the intervener/Attorney to simply follow the views of the "relevant others" and the intervener/Attorney must always act in what he/she considers to be in the best interests of the adult.
- The intervener/Attorney should endeavour to encourage the skills, training and education of the adult.

In truth, nowadays, the main purpose of granting a "protective" Power of Attorney is to ensure that the family of the adult are not forced to resort to a financial guardianship. This involves court proceedings, is long winded, highly expensive and is, frankly the least favourable way of seeking to secure intervention. If an adult does grant a Power of Attorney on a "protective" basis, the problems, the bureaucracy and difficulties of a financial guardianship can be avoided and this can be a great boon to the adult's family/friends/professional advisers.

In March 2001, the Scottish Executive published a Code of Practice for Interveners (which includes Attorneys). That Code of Practice should be regarded as being a "bible" of best practice for Attorneys. It is not our practice to supply each and every individual appointed to act as Attorney with a copy of the Code of Practice for the simple reason that it consists of just under 80 pages. However, a copy of the Code of Practice can be found on the website of The Office of the Public Guardian (www.publicguardian-scotland.gov.uk) and an Attorney is strongly recommended to make

reference to the same. Although the legal status of the Code of Practice is not entirely clear, an Attorney who does not follow the same may find it difficult to explain his/her actings to the Public Guardian (who has an overall supervisory jurisdiction in respect of the actings of Attorneys).

An Attorney must always make clear the capacity in which he is acting. An Attorney who fails to make clear that he/she is acting purely as an Attorney for another person may, in fact, find him/herself incurring personal liabilities to third parties with whom contracts are agreed. Thus, Attorneys should always make it clear that they are acting in a representative capacity on behalf of their Principal(s).

This note is intended to be helpful and of an informative nature. It is not intended to dissuade individuals from accepting office as Attorney. An Attorney who acts properly, complies with the Principles and the terms of the Code of Practice and who takes appropriate legal and financial advice, where necessary, is unlikely to encounter any difficulty. The message is simple – where you have been appointed to act as Attorney, this appointment is intended to be in the best interests of the person who appointed you – they have placed full faith and trust in you and they expect you to act appropriately, in their best interests, in taking into account the Principles of the Code of Practice which are, after all, conceived for the benefit of elderly/vulnerable individuals.

WHO CAN BE AN ATTORNEY?

An individual may choose whoever they wish but must bear in mind that an Attorney is in a position of trust and must therefore be someone they are confident will act responsibly and who has the necessary skills to carry out the tasks required of an Attorney.

You, as grantor, should also consider whether to appoint more than one Attorney, separate Attornies for continuing and welfare matters, or substitute Attornies as well as the age, personal health and circumstances of the Attorney appointed.

A grantor CANNOT give the Attorney the authority to appoint a substitute or successor.

SUMMARY

No-one has automatic authority to make personal decisions for you if you lose the ability to make choices for yourself or begin to find it difficult to deal with your papers and personal affairs UNLESS there is a valid Power of Attorney set up in advance.

To be certain that the people you want make the decisions and choices you want them to and to save your family undue stress and worry at what is already potentially a difficult time, we would urge you to consider acting now and putting a Power of Attorney in place at modest cost thus avoiding the necessity for court involvement and added unnecessary expense.

If you would like further information or to discuss matters, please contact our Private Client Department who will be happy to provide more details and advice.

379 North Deeside Road
Cults, Aberdeen AB15 9SX
Tel: 01224 **868687**

www.mackinnons.com

Offices also at
Aberdeen
14 Carden Place, Aberdeen AB10 1UR
Tel: 01224 **632464**
Aboyne
Ballater Road, Aboyne,
Aberdeenshire AB34 5HN
Tel: 013398 **87665**

mackinnons
solicitors