

NOTE RE: VALUE OF GRANTING POWER OF ATTORNEY

The value of granting a power of attorney cannot be overestimated. Human longevity is increasing. In the recent Census, it was disclosed that there were more people alive over the age of 60 than under the age of 16. When we are young and have a young family we have no difficulty in accepting that it is appropriate to arrange life insurance to provide protection to our families in the event of early and untimely death. Similar considerations apply throughout life and in particular when we are older, to the granting of a power of attorney. Granting a suitable power of attorney can mean that our families avoid the horrendous difficulties which can arise where an individual loses capacity. In such circumstances, and if no suitable power of attorney is in place, the financial and business affairs of the older client can be impossible to manage in the short term. If a loss of capacity is permanent then the family of that older person will require to go through the complicated, long winded and expensive process of having a financial guardian appointed. This can be avoided if the older person has granted a power of attorney.

The granting of a suitable power of attorney will allow speedy and appropriate intervention on behalf of the older person. The power of attorney will remain in full force and effect notwithstanding the supervening incapacity of the granter and can allow the attorney to take part in the process of deciding what care etc will be appropriate for the older person.

Messrs W & A S Bruce have a specific and recommended power of attorney for older clients. In that regard we would offer the following comments:

- The granting of a power of attorney is a protective step. It is not of itself a necessary acknowledgement of incipient inability. The document need not come into effect immediately and can in fact be “postponed” until the granter has lost capacity. Where required a clause to the foregoing effect can be included in the power of attorney itself.
- 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 reposed 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 granter of the power of attorney is wealthy and would, for their own part, wish to mitigate the effect of inheritance tax as far as possible. The relevant gifting powers are detailed in clause 16 of our recommended format. Where a client does not find favour with the clause in question, the clause can be deleted. However, it is important 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 granter 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 (later referred to as “IHT”).
- The provisions headed “**WELFARE POWERS**” clauses 21-31 of our recommended format are also of importance. These represent the new “welfare” powers authorised by the Adults with Incapacity (Scotland) Act 2000. The powers detailed in clauses 21-31 only come into effect when the granter of the power of attorney has lost capacity. The powers in question do, however, allow the attorney to take part in the relevant decision making process regarding the care etc of the granter of the power of attorney. These welfare powers will not be available unless clauses 21-31 are specifically included in the relevant document.
- All powers of attorney granted after April 2001 require to be registered with the Office of the Public Guardian. The Public Guardian is the official who has responsibility for

overseeing the actings of Attornies. He can ask an attorney to provide an accounting for his or her actings and in a bad case, can seek the removal of an attorney who is considered to have misbehaved.

- It is a requirement of the Act of 2000 that anyone appointed to act as attorney should signify his consent so to do in writing. That being so, when a client grants a power of attorney it is our normal practice to send a copy of the same to the individual appointed as attorney, at the same time having the latter sign the form of consent required by the Office of the Public Guardian. Please note that anyone currently declared bankrupt is unable to act as Attorney.

The responsibilities of the attorney

Any individual who accepts appointment as attorney takes on weighty responsibility and, on occasions, an onerous task. The attorney requires to comply with the principles set out in the 2000 Act as also with The Code of Conduct promulgated by the Scottish Executive. Anyone appointed as an attorney should familiarise himself with both of the same. If he fails to comply with the Principles/The Code of Conduct and is also negligent, he could, at least in theory, be found liable in damages to the granter or to the executors of the latter. It is only fair that the attorney should be made aware that his task may not be an easy one and it is important that the attorney should be aware of the degree of responsibility and, indeed, the possible liability which he may be taking on. This cautionary note is not intended to dissuade individuals from accepting office as an attorney – an attorney who acts properly, adhering to the Principles and the Code of Conduct, and taking appropriate legal advice when required, has nothing to fear.

We should be happy to answer any queries which you may have in relation to our above comments or with regard to the format of power of attorney which we as a firm have adopted.

Appointment as an attorney

This note is not intended to be a learned treatise on the responsibilities of the main individual appointed (and accepting office) as an attorney. It is, however, 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 within Capacity (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, if the attorney should be aware of the fact that the 2000 Act sets out certain “gateway” Principles which every intervenor (including an attorney) is required to observe. Paraphrasing the Act, the Principles are as follows:

- Any decision or intervention taken by an intervenor must be for the benefit of the adult (in the case of a power of attorney, the granter of the document).
- The intervenor/attorney is required to take the least intrusive/restrictive method of intervention on behalf of the adult.
- The intervenor is required to take into account the known past and present wishes of the adult.
- The intervenor should consult with “relevant others” (*i.e.* the nearest relatives of the adult, the primary carers, and any other appointee under the Act (for example, a welfare guardian). It should be noted, however, that the requirement to consult does not obliged

- the intervenor/attorney to simply follow the views of the “relevant others” (*i.e.* the intervenor/attorney must act in what he/she considers to be the best interests of the adult.
- The intervenor/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 do not require to be forced to resort to a financial guardianship. This involves court proceedings, is long-winded, expensive and is, frankly, the least favourable way of seeking to secure intervention. This is not intended to be a criticism of the 2000 Act — however, if an adult grants a power of attorney on a “protective” basis, the problems, 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 intervenors (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 power of attorney can be found on the Website of The Office of the Public Guardian (www.publicguardian-scotland.gov.uk) and the 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 actions to the Public Guardian (who has an over-all, supervisory jurisdiction in respect of the actions 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 attorney for another person may, in fact, find himself/herself incurring personal liability 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.

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 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 reposed 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.

**FOR ADVICE IN RELATION TO YOUR SPECIFIC CIRCUMSTANCES
PLEASE CONTACT YOUR SOLICITOR**

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