

Power of Attorney

What is a power of attorney?

A power of attorney is a written document giving someone else authority to take actions or make decisions on your behalf. This could be to deal with your financial affairs and/or welfare matters. It could be used in the future if you become incapable.

The Power of Attorney details the names of the people, known as attorneys, who you want to help you, and lists the individual powers that you want them to have. The Power of Attorney will also state when your attorneys can begin acting.

Who can make a Power of Attorney?

Anyone over the age of 16 can make a Power of Attorney, but there are restrictions if you have been made bankrupt.

Once they have been discharged from their bankruptcy they can then be appointed as a Power of Attorney for an estate. Having a bankruptcy in your past does not prevent you from becoming a Power of Attorney. However, until the discharge has occurred the **Powers of Attorney Act** prohibits an undischarged bankrupt person acting on a Power of Attorney.

What does incapable mean?

Your capacity could be impaired gradually or suddenly as a result of an accident or illness. A registered and licensed medical doctor will be able to say whether you are incapable or not.

Someone over 16 who is incapable of managing their own affairs ('an adult with incapacity' or someone who 'lacks legal capacity') is unable to make or act on the decisions needed to look after to their own affairs.

The law defines an adult with incapacity as someone who is incapable of:

- making decisions; or
- acting on decisions; or
- communicating decisions; or
- understanding decisions (this includes being able to understand or remember information about the decision, including information about the foreseeable consequences of deciding one way or another, or of failing to make the decision altogether)

Because of

- 'mental disorder', or
- Inability to communicate because of physical disability.

Most people associate incapacity with age related problems, like dementia. However, a young person can lose capacity because of an accident or medical condition, or may have learning disabilities that mean they need help with making decisions. Some people have fluctuating conditions and need help only some of the time. In some cases a person may only need help with their financial affairs but in others a greater degree of assistance or supervision may be required, for example, with issues of personal welfare. Capacity can be impaired gradually, or suddenly as a result of an accident or illness. A doctor will be able to say whether the person whose affairs you are thinking about managing is an adult with incapacity.

The Scottish Government has produced a leaflet called ['It's Your Decision'](#) for adults who may need help to make important decisions and need someone to manage their affairs for them.

What would happen if I don't have a Power of Attorney?

No one has an automatic right to take actions on your behalf without legal authority. If you are unable to make decisions about your affairs, your family or friends may have to go to court to get the authority to act on your behalf.

Nobody has the automatic right to take actions on your behalf without legal authority. This includes family and partners.

Is a Power of Attorney not for older people?

No, nobody likes to think that they may not be able to look after them self but accidents or illness can happen to anyone.

Is a Power of Attorney not for people with lots of money?

No, it is not just about looking after money/property it can also let you plan who should decide personal welfare issues for you.

When would you manage someone's affairs?

You might want to manage someone else's affairs when they:

- are physically disabled or have a mental disorder, either temporarily or on a long-term basis
- are unable to communicate, perhaps because of a stroke or severe sensory impairment

- feel unable to make decisions for themselves, because of mental illness or for other reasons
- have a learning disability
- are out of the country for a while.

Ideally, arrangements will be put in place before they are needed, but this information also tells you what you can do if someone you know is already unable to manage their own affairs.

What does managing someone's affairs involve?

While managing someone's affairs you might:

- look after their bank accounts, savings, investments or other financial affairs
- buy and sell property on their behalf
- claim and spend welfare benefits on their behalf
- decide where they live
- make decisions about their day-to-day personal care or healthcare.

Depending on the arrangements in place you may have the authority to carry out some or all of these tasks.

Who can I appoint as my attorney?

You can appoint anyone you want, over the age of 16. This could be a family member, spouse, partner or a friend, a solicitor or accountant, or a combination. It's usually a good idea to have more than one attorney or maybe what is called a substitute attorney to step in if your attorney can no longer do things for you.

You can appoint someone to deal with your financial matters and someone different to deal with your personal welfare.

It is good practice to discuss with the person you want to be your attorney what being an attorney actually involves. It will be helpful if you keep a note of the matters discussed and give your prospective attorney a copy too. Although, it's your choice who to appoint, you cannot appoint someone who is currently declared as bankrupt to deal with your financial and property affairs.

Your attorney should be someone you trust, someone who knows your wishes. It's important to make sure you have the same understanding about how and when your Power of Attorney is to be used.

Are there different types of Power of Attorney?

The majority of Power of Attorneys registered are a combination of continuing and welfare powers. However, it is your choice as to the type of Power of Attorney you wish to grant.

Continuing Power of Attorney (sometimes called financial Power of Attorney)

A continuing power of attorney will allow you to take care of the granter's day-to-day finances, and (depending on exact wording of the power of attorney) do things like pay bills, deal with their bank accounts, collect benefits and money payable to them, and buy or sell property. These powers can be used when the granter is still capable and can continue to be used if they can no longer manage their own affairs. Alternatively, the power of attorney can specify that it can only be used when the granter is no longer capable of managing their own affairs. A doctor will then need to certify that they have lost the power to make financial decisions before you can start using your powers.

Welfare Power of Attorney

A welfare power of attorney allows you to make decisions on behalf of someone else about their personal welfare. This can include decisions about care arrangements, where the person lives, their clothes, diet and leisure activities; and giving or withholding consent to medical treatment. As a welfare attorney you may have access to personal information, such as health records, if this is specified in the power of attorney.

These powers can only be used when the granter has stopped being able to look after themselves because of incapacity. A doctor will need to certify that they have lost the power to make welfare decisions before you can start using your powers.

Combined Power of Attorney

Combined powers of attorney include both welfare and financial powers. The financial powers can be effective immediately. They will remain in place even if the granter subsequently becomes incapable of managing their own affairs. The welfare powers can be used only if the granter has become incapable of managing their own welfare.

How or where would I get one?

Any local solicitor should be able to assist you to draft a Power of Attorney and provide legal advice on the matter. Alternatively, some companies and stationery shops sell Power of Attorney packs. Useful information is also available from websites.

A power of attorney must incorporate a certificate in which a solicitor, advocate or doctor states that they:

- have interviewed the granter immediately before the document is signed
- are satisfied that, at the time of signing, the granter understands what is being signed
- have no reason to believe that the pressure or undue influence has been put on the granter.

In many cases it will be obvious that the granter is capable of understanding the power of attorney. However, if the granter appears to be failing in capacity, recent medical evidence may be needed before the certificate can be signed.

How much does it cost?

A professional may charge you to draw up a Power of Attorney and prices vary. The Power of Attorney should include a certificate signed by a practising solicitor or medical doctor. The certificate is needed to confirm that you are capable of understanding the Power of Attorney. You might be charged a fee for this service.

You will also be charged a registration fee from the Office of the Public Guardian (Scotland).

What happens to my Power of Attorney?

The Power of Attorney must be registered with the Office of the Public Guardian (Scotland) before it can be used, even if you are still capable of doing things for yourself.

The following documents need to be sent to register your Power of Attorney:

- your signed Power of Attorney, including the fully completed certificate;
- confirmation that your attorney/s are freely willing to act on your behalf; and
- registration fee.

You can send your documents to the Office of Public Guardian by post or submit your Power of Attorney electronically using the electronic Power of Attorney registration facility. Step-by-step guidance is available on their website - www.publicguardian-scotland.gov.uk

Office of the Public Guardian (Scotland)

Hadrian House
Callandar Business Park
Callandar Road
Monday-Friday
FALKIRK, FK1 1XR

Telephone: 01324 678300

Email: opg@scotcourts.gov.uk

Opening hours: 9am - 5pm

Once the Power of Attorney is registered, your documentation and an authentic copy of the Power of Attorney along with a certificate will be returned to the sender.

Can my attorney use my Power of Attorney before I become incapable?

Yes, they can help you with your finances if you want them to do so but they cannot make decisions about your welfare until you are no longer able to make those decisions for yourself.

Duty to keep records

Attorneys acting on your behalf have a duty to keep records of their actions. This means that continuing attorneys i.e. attorneys with financial related powers should keep an ongoing financial accounting in relation to your property and financial matters. Welfare attorneys should keep records relating to your welfare issues. Guidance is provided in the Code of Practice.

The Code of Practice issued by Scottish Government offers further guidance: www.scotland.gov.uk/justice/incapacity

Can I cancel the Power of Attorney once it is registered?

You can cancel your Power of Attorney or any of the powers granted in it once it has been registered with Office of Public Guardian (Scotland). Information is available from www.publicguardian-scotland.gov.uk explaining how to do this.

How can you help someone who has not made a power of attorney and is unable to manage their own affairs?

Intervention and guardianship orders

If no power of attorney is in place and a family member or close friend is suddenly unable to deal with their own affairs as a result of mental or physical incapacity, it may be possible for you to be appointed as an intervener or guardian. This is done by applying to the sheriff court. This can be a complicated and lengthy process and the Office of the Public Guardian recommends that you get help from a solicitor. Legal aid may be available.

The court can issue intervention and guardianship orders that cover financial matters or welfare matters, or both. An intervener can be appointed when someone needs authority for a one off action or to make a single decision, for example selling a home or deciding what medical treatment is best for that person at a particular time. A guardian can be appointed when there are several issues to be dealt with and decisions will need to be made to manage someone's affairs on an ongoing basis, for example running a trust.

You can find the relevant forms, guidance notes and information on how to apply on the Office of the Public Guardian's website at www.publicguardian-scotland.gov.uk for [intervention orders](http://www.publicguardian-scotland.gov.uk) and at www.publicguardian-scotland.gov.uk for [guardianship orders](http://www.publicguardian-scotland.gov.uk). The forms will need to be completed and sent to the court with two medical reports and other supporting documentation. Your solicitor will co-ordinate the reports and draft the necessary paperwork. If you or someone else close to the adult with incapacity cannot take on the responsibility of being an intervener or guardian, someone from their local authority's social work department can apply.

The Office of the Public Guardian supervises orders dealing with money or property, and can investigate complaints about the misuse of these powers. The local authority social work department supervises guardians and interveners with welfare powers. The Mental Welfare Commission also has powers to protect the interests of adults with

incapacity due to mental disorder, including the power to investigate complaints. There is more information on welfare guardianships on their website at www.mwcscot.org.uk

You can find a helpful leaflet explaining what being an intervener or guardian involves called ['Guardianship and Intervention Orders – making an application: A Guide for Carers' here](#).

Where can I get further help or information?

Your local Citizens Advice Bureau or solicitor may be able to help, along with other services previously mentioned in this Briefing document.