Understanding Welfare Powers of Attorney - Scotland

This factsheet explains what a Welfare Power of Attorney is, how one can be used, and how to appoint one. This is applicable to people living in Scotland. If you live in England, Wales or Northern Ireland please see our factsheets ‘Understanding Lasting Powers of Attorney for Health and Welfare – England and Wales’ and ‘Your rights in Northern Ireland’. If you have any questions or would like further information about your end-of-life rights and choices you can call our free Information Line on 0800 999 2434

There are two separate types of Power of Attorney; a Continuing Power of Attorney, which covers areas of your life where money and property are involved, and a Welfare Power of Attorney, which relates to decisions about your health, personal care and welfare. This factsheet only concerns a Welfare Power of Attorney.

What is a Welfare Power of Attorney?

A Welfare Power of Attorney is a written document that gives one or more trusted persons the legal power to make decisions about your health and welfare if you lose the capacity to do so yourself. This can include decisions about medical treatment, where you are cared for and the type of care you receive, as well as day-to-day things like your diet, dress and daily routine. The person who grants power is known as the ‘Granter’ and the person appointed to make decisions is the ‘Attorney’.

Attorneys only begin to act for you if you lack the capacity to make or communicate the decision(s) in question. Your Attorney could not make decisions for you if you were able to do so yourself.

What does capacity mean?

Mental capacity is the ability to make decisions for yourself about a particular matter. Having ‘capacity’ means having the ability to understand and retain information relating to the decision, understanding the consequences of any choice you make, taking that information into account, and being able to communicate your wishes. You might ‘lack capacity’ because, for example, you have:
dementia
a mental health problem
a brain injury
had a stroke
been given end-of-life sedation

If you are an adult with mental capacity you have the legal right to refuse any medical treatment, and the law assumes that individuals have the capacity to make decisions unless it is proven otherwise. For decisions about your health, care and consent to or refusal of treatment, a doctor or other healthcare professional will need to decide whether you have the capacity to make that decision.

Whether or not you have capacity is decided on a decision-by-decision basis. For example, you might have capacity to decide whether you want to be cared for in hospital or at home, but not have capacity to decide whether you want to refuse life-sustaining treatment. You might lose capacity to make a decision for a short time (for instance, if you are knocked unconscious) or for the indefinite future (for instance, if you were in a persistent vegetative state).

How do I create a Welfare Power of Attorney?

To create a Welfare Power of Attorney you need the following things:

- **A written document**
  This document must detail the specific powers that you wish your Attorney(s) to have, clearly state that the powers are Welfare (rather than Continuing, for finance) and be signed by you. It must also include a statement which states that the grantor has considered how their incapacity is to be determined. Your signature must then be witnessed by someone who in turn must sign the document. The Office of the Public Guardian (Scotland) provides sample written documents to help you draw up your own.

- **A certificate of capacity**
  The certificate template is available from The Office of the Public Guardian’s website. It has to be signed by a solicitor or doctor registered to practice in Scotland to confirm that:
  - they have spoken to the Granter immediately before the document was signed
  - they are satisfied that the Granter fully understands the purpose of the Welfare Power of Attorney and the decision-making power that any Attorney would have;
  - they have no reason to believe that the Granter is acting under duress
  Please note that your Attorney cannot be the person who signs your certificate of capacity.
• A registration form
   Also available from The Office of the Public Guardian’s website, this registration form includes full details of the granter and the Attorney(s). The Attorneys must sign the form to confirm that they are freely willing to take up the role of Attorney.

The completed registration form, written document and certificate of capacity should be sent to The Office of the Public Guardian for registration with the fee (currently £70). Your Power of Attorney is not valid or legally binding until this process is complete, and Attorneys have no authority to act until it has been registered.

The Office of the Public Guardian (Scotland) is part of the Scottish Court Service. They manage the Power of Attorney registration process and also investigate concerns where an Attorney may not be acting in the granter’s best interests.

Who can I appoint as my Attorney(s)?

Your Attorney(s) can be any person over the age of 16 who has mental capacity. It is important to appoint someone you trust and who understands your wishes. You can also appoint one or several substitute Attorneys to take over if your original Attorney cannot continue to act.

You can appoint more than one person if you wish. If you choose to do so, you can specify in your written document how you want them to act:

- **Jointly** Unless you state otherwise your Attorneys will have to act together and agree on all decisions made. Depending on your wishes you can state what you would like to happen if one Attorney dies or is untraceable. For example you may want the remaining Attorney to continue to act alone, or a substitute Attorney to step in and join the remaining Attorney.

- **Jointly and severally or severally** This means that your Attorneys have to agree on decisions that are made together but they can also act alone. If you wish them to be able to act together or separately, you should include in the written document that you are appointing them “to act jointly and severally”.

- **Jointly for some decisions, and jointly and severally for other decisions** This means that you can specify the decisions that should be made together and the decisions where the Attorneys can act alone.

Appointing more than one Attorney can act as a safeguard to ensure your wishes and best interests are respected. However, appointing multiple Attorneys may create conflict if they have to agree on all decisions before they can take any action
on your behalf. To help Attorneys understand how they should act the Scottish Government has written a Code of Practice for Attorneys, available from the Scottish government website.

**Granting your Attorney Sufficient Powers**

You can give your Attorney(s) any power you want to (as long as it concerns your health and welfare) but it is vital that the powers are written in a clear, understandable way as they will be interpreted very strictly. Even if you mean to give a specific power your Attorney(s) will not be able to make that decision on your behalf unless it is clearly specified within the written document. It is therefore very important that the powers you intend to grant are specific, explained in a way that is easily understandable and not open to interpretation.

**Who should I give decision-making power to?**

Should you lose the ability to make or communicate decisions for yourself, the person you appoint will be able to make decisions about your health and welfare on your behalf. You therefore need to trust your Attorney(s) to understand your wishes, respect your values and make the best decision for you. Your Attorney(s) must also feel confident and comfortable making potentially life-changing decisions on your behalf.

To help you decide who to appoint, ask yourself these questions:

- Do they understand my wishes?
- Will they respect my values?
- Could they stand up for what I want, even if the doctor disagrees?
- Do they live near me?
- Can they be contacted in an emergency?

**What decisions can my Attorney(s) make?**

It is important to consider all the welfare decisions that you may want to be made on your behalf in the event of you losing capacity. You should discuss these at length with your prospective Attorney(s). The Office of the Public Guardian (Scotland) provides a list of possible powers, which include power to:

- decide where you should live
- have access to your personal information held by any organisation
- refuse medical treatment on your behalf.
- consent to treatment on your behalf
- decide what type of care you receive
- make decisions about your diet, dress and personal appearance
• make decisions on what social and cultural activities you pursue

For a fuller list of suggested powers see the Scottish government’s Code of Practice for Continuing and Welfare Attorneys, which is available at http://www.scotland.gov.uk/Resource/Doc/216725/0058106.pdf

To request or download the Welfare Power of Attorney forms, or for sample written documents go to:

http://www.publicguardian-scotland.gov.uk/forms/
Tel: 01324 678300
Email: opg@scotcourts.gov.uk

How can we help?
- Compassion in Dying can support you to make a Welfare Power of Attorney
- We provide a free and comprehensive guide to Your Rights at the End of Life
- The following factsheets may be useful to you:
  - Understanding Advance Decisions to Refuse Treatment – England and Wales
  - Understanding Advance Directives - Scotland
  - Understanding Lasting Powers of Attorney for Health and Welfare – England and Wales

If you would like any of the other factsheets mentioned here, or help with completing an Advance Decision, making a Welfare Power of Attorney, or information about end-of-life rights more generally please call our free Information Line on 0800 999 2434.