

Power of Attorney

Explanatory Notes Scotland

As part of our legacy service, we can refer you to our specialist partner Redstone Wills Limited (Redstone) who can help you find a solution that's right for your individual circumstances, arranging your Will or Power of Attorney (POA) with minimum fuss.

Whether you are completing your POA instructions by post, telephone or Skype, it is useful to have some guidance to help you answer some of the questions and understand some of the terms used in creating a POA.

Please read these guidance notes before completing your POA application or attending your telephone or Skype appointment.

1. Choosing which type of POA you require

What is a Power of Attorney?

A POA is a legal document that allows someone to choose other people to make decisions on their behalf, including when they lack the mental and/or physical capacity to make the decision themselves.

A POA is always 'completed' while the person still has capacity to make decisions.

However, a POA cannot be used until it has been registered with the Office of the Public Guardian Scotland (OPG). There is a fee payable to the OPG (see the Legal Documents and Estate Administration Tariff of Charges for more details).

A Power of Attorney is generally referred to as a POA throughout the rest of this guidance.

There are two types of POA to reflect different decision-making capabilities:

'Continuing'

This is concerned with decisions about your property and finance allowing your Attorney(s) to make decisions about paying bills, dealing with your bank accounts, collecting benefits, selling your house, etc.

You can decide whether your Continuing Attorney(s) can make decisions immediately or at a later date, such as in the event you lose mental capacity.

'Welfare'

This deals with decisions about your health and personal welfare, allowing your Attorney(s) to make decisions on treatment, care, medication, where you live, etc. Your Welfare Attorney can only make decisions in the event you lose mental capacity.

Continuing and Welfare powers can be combined in one POA document.

The benefits of making a POA

A POA allows you to plan in advance:

- the decisions you want to be made on your behalf if you lose capacity to make them yourself

- the people you want to make these decisions and
- how you want the people to make these decisions.

Having a POA is a safe way of maintaining control over decisions made for you because the POA will clearly state:

- the name of the person(s) you wish to appoint (called an 'Attorney');
- the powers you wish to grant to that person;
- that you have considered how your incapacity is to be determined.

A POA must be registered with the Office of the Public Guardian (OPG Scotland) before it can take effect. It is wise to register it immediately even if the Attorney does not use their Power until some time in the future, e.g. where there is a restriction that means it cannot be used unless capacity has been lost.

There is a fee payable for registration. You can appoint the same person to deal with financial and Welfare matters, (please note you can't appoint a Professional Attorney for Welfare POAs), or different people. Many welfare decisions have financial implications e.g. where someone should live, so if there are two or more Attorneys they need to co-operate.

Remember, if you lose mental capacity at some point – for whatever reason – if you haven't completed a POA, other people may need to apply to the Sheriff's Court to be able to make any decision on your behalf. This can be costly, and can be demanding and stressful for your relatives, friends and carers. By choosing whom you want to make decisions for you, having a POA puts you in control of decisions eventually being made on your behalf from the beginning.

IT IS GOOD PRACTICE TO REGISTER YOUR POA EARLY AS IT CAN'T BE USED UNTIL YOU DO.

2. Full names

You will need to provide all names in full including middle names – not just initials – as this information will be used in your POA.

3. Certificate Provider

Where you live has an impact on what laws need considering when creating your POA.

For example, in Scotland your certificate provider must be a solicitor registered to practice in Scotland, a practising member of the Scottish Faculty of Advocates or a registered and licensed medical practitioner.

4. You and your spouse/partner details

If you are married or in a civil partnership and you both wish to arrange your POA, then Redstone can take your instructions at the same time, though you will both need to be present. If you both have the same or similar requirements, e.g. the same attorneys and required powers, Redstone can take these as 'Mirror' instructions. If you have significantly different requirements then you should each submit a single instruction.

5. Choosing your Attorney(s)

Your Attorney(s) should be someone you are confident will always act responsibly in your interests, has the necessary skills and is competent, reliable and willing to act for you. Your Attorney must be aged at least 16, can be a relative, friend, spouse or you can appoint a professional Attorney such as a firm of solicitors. Other requirements are:

- for a Continuing POA, the Attorney cannot be bankrupt or be in the process of being made bankrupt
- for a Continuing POA a trust corporation can be Attorney, however
- for a Welfare POA, the Attorney must be an individual.

You can have more than one Attorney and can also nominate one or more substitutes in the event that the Attorneys selected can no longer act. They must follow the Code of Practice for Continuing and Welfare Attorneys which reflect the safeguards under the Adults with Incapacity (Scotland) Act 2000.

If you have chosen more than one Attorney, how do you want them to act?

If you choose more than one Attorney you must decide whether they are to make decisions:

- together – ‘jointly’;
- independently; or
- together and independently – ‘jointly and severally’; which means they can all act together but they can also act separately if they wish.

You may appoint your Attorneys together in respect of some matters and together and independently in others. If you appoint more than one Attorney and do not state whether they are appointed together or together and independently, when your POA is registered they will be treated on the basis that they are appointed together.

Jointly:

Choosing this option means that all your Attorneys must always make all decisions together. If one of your Attorneys does not agree with something, that decision cannot be made on your behalf. You might choose this option, for example, if you want to be sure that your Attorneys are in agreement about every decision.

However, bear in mind that:

- getting agreement from all your Attorneys could take extra time and delay otherwise straightforward decisions which may need to be taken very quickly (even if there is no disagreement)
- if your Attorneys cannot work together, your POA may be cancelled and
- if one of your Attorneys dies or can no longer act, your POA will be cancelled unless a substitute Attorney has been appointed.

Jointly and Severally:

Choosing this option means that all your Attorneys can act together or independently for all decisions. So, any one of your Attorneys can make any decision on your behalf.

You might choose this option if, for example:

- one of your Attorneys is closely involved in your financial affairs, and you trust them to make your decisions on their own;

- one of your Attorneys is frequently unavailable (working abroad, for example), and

- you want to ensure that your POA continues to be workable if one of your Attorneys die.

Many people find this option works best for them.

Jointly for some decisions, and Jointly and Severally for other decisions.

Choosing this option means that your Attorneys can make some decisions independently. However, for other decisions they must all agree. You might choose this option if, for example, you want your Attorneys to:

- make decisions about medical treatment on their own and
- be in agreement when making more significant decisions – like where you live.

If you choose this option, you need to list all the decisions that can be made:

- jointly;
- jointly and severally.

Bear in mind that if one of your Attorneys should die (or can no longer act on your behalf), the other Attorney will not be able to make the decisions you have specified to be taken jointly. In this situation, it is advisable to have a substitute Attorney.

6. Choosing a substitute Attorney

You can name a substitute(s) in case an Attorney is unable to or no longer wishes to continue acting for you.

A Continuing Attorney will be unable to act if:

- they are or become bankrupt
- if they are your spouse and you divorce or
- they are your civil partner and you terminate the civil partnership.

Your Attorney(s) can also change their mind and may not want to act for you. If this is the case, they must tell you and the OPG.

If you have appointed more than one original Attorney and more than one substitute Attorney, you should set out the order in which the substitutes should act. For example, if you appoint your spouse and child as your original Attorneys and your grandchildren as the substitutes, you could say that your grandchildren are to replace the first original Attorney who is unable to act or they are to step in only when both original Attorneys are unable to act. If you have appointed joint Attorneys and one of them can no longer act, they are all replaced by all of your replacement Attorneys.

7. What if an Attorney dies or resigns?

If an Attorney dies, their personal representatives should notify the OPG and remaining or substitute Attorney(s) will continue to act. Remember, where Attorneys can only make decisions jointly and one Attorney dies, the POA ceases unless a substitute Attorney has been appointed.

An Attorney who wishes to resign should inform the Grantor, the OPG, and any other Attorney named in the POA. The resignation will not take effect until after 28 days, once the OPG receives notification.

8. Restricting the powers of your Attorney(s) or adding conditions

In Scotland there is no specified format for a POA. The drafting is therefore important as the wording of the document may be open to interpretation. It is normal to grant your Attorney(s) general and specific powers, which should be clear in their meaning so that they can be easily interpreted.

Redstone have worked closely with their Scottish Legal Documents writers to provide what they feel is a comprehensive list of Continuing and Welfare powers that should suit most people's needs. These are summarised below and will be contained within your POA. You should therefore think about any restrictions you may wish to apply and if you do wish to exclude or amend such powers, these should be stated in your Instructions to Redstone.

Continuing Powers

General Powers

To manage your whole affairs as your Attorney(s) think fit regarding your estate – either immediately, at a point in future, or following certification by a medical practitioner that you are not capable of looking after your affairs.

Specific Powers

- collect, discharge and settle any money and property due to you;
- authorise expenditure for services or items required for your benefit;
- open and operate any accounts containing your funds, manage investments and purchase and manage property (heritable or moveable);
- have access to information regarding your financial affairs and your Will and handle returns or claims regarding your liability to tax;
- claim and receive on your behalf all pensions, benefits, allowances etc. to which you may be entitled;
- borrow or lend, make gifts;
- employ professional services, for example solicitors, bankers;
- reimburse themselves for any reasonable outlays or expenses incurred whilst acting as your Attorney.

Welfare Powers

General Powers

To make decisions on your behalf in relation to your personal welfare following certification by a medical practitioner that you are not capable of looking after your affairs.

Specific Powers

- decide what care and accommodation may be appropriate;
- consent or refuse consent to any medical treatment, procedure or therapy or medical research (subject to restrictions in the law);
- decide about taking part in education, training, work, holidays and cultural or social activities;
- make decisions about your dress, diet and appearance;

- exercise rights of access to your personal data and records;
- take legal action on your behalf involving your personal welfare;
- be reimbursed for any reasonable outlays or expenses whilst acting as your Attorney.

9. What are the steps and safeguards in creating a POA?

When you decide to arrange a POA there are certain steps that occur:

- the POA must be expressed in a written document and clearly state that the powers are Continuing, Welfare or a combination of both;
- it must be signed by you, the 'Granter'
- a Welfare POA must include a statement, which shows that you have considered how incapacity is to be determined. This is also required in a Continuing POA where the powers are only exercised once you have lost capacity
- it must include a certificate in a prescribed form by a practicing solicitor, member of the Faculty of Advocates or a registered and licensed medical practitioner, which certifies they have interviewed you immediately before you sign the POA and they are satisfied that you understand it and are not under any pressure to make it
- you can specify people you wish to receive a copy of the registered POA document. Up to two people can be specified
- the POA must be registered with OPG before it can be used
- the OPG will have to be satisfied that the Attorney(s) named are prepared to act. It is therefore wise for you to discuss with your prospective Attorneys what it involves and you can make your wishes and feelings clear – including providing them with sufficient information about your financial affairs and your likes, dislikes and any personal welfare concerns.

10. 'Specified Person(s)' notifying other people of registration

You can specify up to two people who you wish to receive a copy of the registered POA document. If you do wish to specify persons to receive a copy, this should be included in the Instruction Form and will be included in the POA document.

If there is no reference to specified persons within the POA document and copies are required after it has been registered, a fee will be payable to the Public Guardian.

11. When an Attorney can act

Your POA cannot be used until it has been registered with the OPG. Either you or your chosen Attorney(s) can apply to register the POA. It is wise to register it as soon as possible.

If you choose not to register it immediately then there is a possibility that, between the time of writing and submitting the POA for registration, there may be changes to the registration requirements. If, at this time, you are incapable and your input is required, the POA could not be registered.

If you register it immediately, a Continuing POA can be used straight away, unless you have specified that it should only be used when you lack capacity. If you have mental capacity, you can continue to act on your own behalf.

Remember, a Welfare POA can only be used once you lack capacity.

Skipton Trustees Limited can assist with registration so that the POA can be used immediately if you wish. Please note that if you wish Redstone to register your POA, they will collect the OPG registration fee from you (payable to Scottish Courts and Tribunal Services).

It is good practice to register your POA early.

12. The Certificate Provider

Who can be a Certificate Provider?

The Certificate Provider is the person you select who confirms that you understand the POA and that you are not under any pressure to make it. You will need to choose a suitable person and they must be a solicitor registered to practice in Scotland, a practising member of the Scottish Faculty of Advocates, or a registered and licensed medical practitioner.

Please note that some professionals may make a charge for completing this Certificate.

Who cannot be a Certificate Provider?

- an Attorney or substitute Attorney named in this POA or any other POA for the Granter. If the person who is granted the power is a solicitor in a firm, another solicitor in the same firm may sign the certificate
- a family member related to the Granter or any of their Attorneys or substitute Attorneys
- a business partner or paid employee of the Granter or any of their Attorneys or substitutes
- the owner, director, manager or employee of a care home that the Granter lives in, or a member of their family
- a director or employee of a trust corporation appointed as an Attorney or substitute Attorney in this POA
- employees of Skipton Building Society or any company in the Skipton Building Society Group.

As family members cannot be Certificate Providers, it is good practice not to use anybody who has a family connection of any kind.

Please note that the Certificate is a vital part of the POA document. Without it, the POA is not valid and cannot be registered.

13. Giving guidance to your Attorney

You can also give guidance to your Attorney(s) to accompany your POA through a 'letter of wishes'. This is not legally binding but they should take into account your expressed wishes when they are making decisions for you, if reasonable to do so. This gives

you the opportunity to provide broader information that you would like them to consider when making decisions on your behalf. For example:

- your views on different medical treatments
- areas you prefer to live in
- your preferences for exercise, preferred helpers or care workings
- who you would like your Attorney(s) to consult.

Guidance is anything that you feel will help your Attorney(s) when making decisions in your best interests.

A requirement that cannot be incorporated in the specific powers can often be achieved as guidance. For example, if you have three Attorneys acting jointly and severally, you cannot include a restriction or condition that two of them must act jointly in relation to decisions about moving into residential care. It is possible, however, to state in the guidance for your Attorneys that you wish them to work together for decisions of this kind.

You can list as many guidance notes as you like, but please bear in mind that making lots of guidance could result in your POA being impractical.

14. Paying Attorneys

If you wish to allow for your Attorney to claim fees and/or out of pocket expenses, you may make provision in the POA document. Professional Attorneys, such as solicitors or accountants, charge for their services. You should discuss this with your Attorney(s) and record any decision you make about payment in the POA.

15. Changing your mind

You can cancel (revoke) the POA even after it is registered if you have the mental capacity to do so. You must tell your Attorney if you do, and if it is registered, you will need to ask the OPG in writing to remove it from the Register of POAs. This must include a certificate provided by a solicitor, practicing member of the Faculty of Advocates or medical practitioner that they are satisfied you understand its effects and that you have not been pressurised.

16. Storing your POA

If anything happens to your POA, or if your Attorney(s) do not know where to find it, you might as well not have written one. You need to decide how to look after your POA, then let your Attorney(s) know where it is.

Never keep your POA in a safety deposit box. If you become incapacitated, the deposit box cannot be opened until confirmation has been obtained that your representatives have a right of access.

Talk to Redstone today
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