Powers of Attorney

This Fact Sheet is one of a series by J. & H. Mitchell W.S.

Have you ever wondered what would happen if you were suddenly unable to look after your own affairs? Curiously, many of us make provision for our retirement and for our dying, but not for our living in an incapacitated state. We provide for the bus knocking us dead, but not for its brushing us to one side.

There are many times in our lives when we might need to reach a decision or to sign something but, for some reason, are unable to do. Sometimes, these occasions may be foreseen, such as being abroad for an extended holiday or going into hospital for an operation. Often, though, these times are not foreseeable, as in the case of an accident, a sudden stroke, memory loss, blindness or whatever.

There may even be times when we are stranded abroad, perhaps without money, or when our signature is required on a formal document.

Increasingly nowadays, even your nearest and dearest are not able to intercede when your welfare is at stake. Your doctor is bound by patient confidentiality, whilst the Local Authority's Department of Social Services has various statutory powers. Here, it can be increasingly important to ensure that you have given someone a voice to intercede and speak up on your behalf. This is an aspect which we find concerns people most as they face an uncertain future perhaps in some form of residential care, where decisions may be made for them by officials rather than family.

If you have been in the habit of giving away some money each year, for example in order fully to utilise your exemptions from Inheritance Tax, have you considered what would happen if you were to become incapacitated? These payments would stop. However, you may prefer that such payments continue, to the benefit of your family and loved ones.

There are ways to overcome these problems

Where there is a married couple and one becomes incapacitated, the other can usually keep operating the Bank and Building Society accounts, *provided* that those accounts are in joint names in the first place, with either spouse being able to sign cheques and withdrawal

forms. The able spouse will not however be able to sell the house, or sign a Tax Return, or any papers relating to Stock Exchange investments. The position becomes even worse if at any time the able spouse in due course also becomes incapacitated. With the increased use of ISA accounts, and increasing vigilance by financial institutions in relation to anti-money-laundering procedures, the other spouse often finds that he or she is less able to step in.

The formal way out of this deadlock is for the family to apply to the Office of Public Guardian for the appointment of someone to look after the affairs of an incapacitated person or couple. That someone is called a Guardian (previously a *Curator bonis)*. The Guardian has to administer carefully the affairs of the incapacitated person, under the supervision of the Public Guardian. The process is lengthy and very expensive and it is recommended that this be avoided wherever possible. In the case of stalemate, it is unfortunately the only way to proceed. But it is possible to avoid that stalemate by planning ahead.

There is indeed one simple solution to all these problems

The solution is to grant a *Power of Attorney*. A Power of Attorney made in Scotland now falls under the auspices of the Adults with Incapacity (Scotland) Act 2000. This requires that the granter is of sound mind at the time of granting the Power, that he or she knows what a Power of Attorney is and is under no duress to grant one to his or her nominated Attorneys. Once granted, the Power of Attorney can last until the granter's death.

The Power of Attorney can cover two separate aspects:

1. the Continuing Power of Attorney can cover not only financial and administrative issues, but some tax planning opportunities; and

2. the Welfare Power of Attorney covers welfare issues, enabling the Attorney to take an active part in ensuring the future care for and well-being of the granter.

It is usually recommended that you enter into a combined Continuing and Welfare Power of Attorney. Although it is possible to nominate different Attorneys for each of these two functions, it is usually recommended that you choose the same 'team' of Attorneys for both (see below), so as to avoid any conflict.

It is very important for you to appreciate that, in acting for you as the granter, your Attorneys must act only to the minimum extent necessary and always in the granter's best interests.

You can select one person as your Attorney or two (or more) who act jointly or individually; or you can appoint one person, whom failing another. It is usually recommended to appoint

at least two people to act as your Attorneys, either one being able to act at the same time, so as to be able to look ahead to the future, and to avoid an effective end to your Power of Attorney if you have selected only one person as your Attorney who has become incapacitated or has died.

The Attorney is usually a member of the immediate family, a good friend and/or adviser. The choice may link in with your choice of Executors in your Will and should of course take account of geography. There is less merit, if you live here, in appointing your daughter in Devon to act as your Attorney, than appointing a good friend, neighbour or lawyer, who is on the spot, where the help is needed.

Whoever you appoint should be one or more people whose judgment you can trust to act reasonably, who understand your situation and can take financial and welfare decisions on your behalf and are people who are likely, on the law of averages, to outlive you.

If your Attorney is a lawyer and requires to manage your affairs for you, he or she will charge an annual fee for doing so. This should always be reasonable for the work involved. This may in many cases be preferable to your expecting a friend or member of your family to do it all free of charge, possibly from some distance and with all the responsibilities both to you and to the other members of your family that such financial management involves.

The Power of Attorney itself is a relatively simple document. It states who are to be appointed as your Continuing and Welfare Attorneys. It confirms that they remain so unless you recall their appointment in writing at any time. It grants a relatively standard list of powers which cover, for instance, operating Bank accounts, dealing with Income Tax Returns, attending to investments and insurance policies, looking after property and businesses, looking after welfare issues and the like and generally providing your Attorneys with sufficient flexibility to administer any matter which might reasonably be required. After all, it is not possible today to know what might need to be done by them on your behalf in the future.

Once made and registered, a Power of Attorney technically comes into effect then. However it is usually stored in our strongroom and would only come into active operation when it has to. You do have to tell your Attorneys now of your having named them in a new Power, because they will have to sign a form consenting to the registration of the Power of Attorney at the Office of the Public Guardian.

Even where a Power of Attorney comes into effect, it can be on a temporary basis only, for example whilst you recover from a major operation, then falling into abeyance when your are once more able to look after your own affairs.

The procedure for an Attorney to act is also very simple. The Attorney can sign his or her own name and then state that he or she is your Attorney.

A Power of Attorney comes to an end when the granter dies, or whenever the granter withdraws the Power, which can be done by a simple letter of withdrawal delivered to the Attorney at any time.

The cost of our preparing a Power of Attorney and having it registered at the Office of the public Guardian can be considered as the one-off premium for a potentially important insurance policy. The insurance policy is the Power of Attorney itself. You are insuring against deadlock and are ensuring that you nominate those you would wish to look after your finances and welfare if at any time you were unable to do so yourself. One never knows when the Power of Attorney may be needed and, as often as not, it will be needed when it could be too late for you to grant one, so it is well to have one signed and put to one side, just in case.

If you ask "When should I draw up a Power of Attorney?", the answer has to be "Now". If you are writing a Will, or you own your house, or have Bank and Building Society accounts or stock exchange investments (especially ISAs) in your own name, or indeed any other financial matters which could not be dealt with other than by you with your own signature, then it must make sense for you to sign a Power of Attorney now, even if it is then simply stored away in your lawyer's Strongroom meantime. After all, like any insurance policy, you cannot know when the need might arise and, if you wait until then, it may be too late.

As a matter of practice, whenever anyone comes into our Office to talk about tax planning and/or a Will, we mention two other matters to them at the same time, as options to consider too. The first is a Living Will - to authorise family members to consent to having a life support machine turned off to enable you to die with dignity. The second is a Power of Attorney - because it is not enough to provide properly for your death, but also for the rest of your life.

Although carefully prepared, this Fact Sheet is a guide only and is not intended to be comprehensive. Specific advice should be requested on individual situations.

2012 edition

J. & H. Mitchell, W.S.
• 51 Atholl Road • Pitlochry • PH16 5BU •