

ADULT SUPPORT AND PROTECTION (SCOTLAND) ACT 2007

EXPLANATORY NOTES

THE ACT – AN OVERVIEW

Part 2

Adults With Incapacity

Section 57 – Powers of attorney

90. This section amends sections 15, 16, 19, 20, 22 and 23 of the 2000 Act.
91. Subsections (1) and (2) amend section 15 (creation of continuing power of attorney) and section 16 (creation and exercise of welfare power of attorney) respectively. They provide that where the person does not have sufficient knowledge of the granter it is sufficient that the person consults one person who does have knowledge of the granter to ascertain that the granter understood the nature and extent of the power of attorney. Previously in these situations it was necessary to consult more than one person. These amendments also provide that all welfare powers of attorney and those continuing powers of attorney which will start on incapacity must contain a statement to the effect that the granter has considered how incapacity should be determined. They further provide, to put beyond doubt, that a solicitor for the purpose of providing a certificate in sections 15 and 16 of the 2000 Act is a ‘practising solicitor’ and provide a definition of that expression. Subsection (1) also contains a declaratory provision that a continuing power of attorney ceases to have effect if the granter or attorney becomes bankrupt.
92. Subsection (3) inserts a new section 16A to provide that where a power of attorney contains both welfare and financial powers in a single document only one certificate is required.
93. Subsections (4), (5), (6) and (8) contain a number of minor changes relating to notification of welfare powers of attorney.
94. Subsection (7) introduces a new section 22A dealing with revocation of continuing and welfare powers of attorney. There was no express provision in the 2000 Act dealing with revocation of powers of attorney and the common law governed the position. This new statutory provision provides that revocation by the granter of a power of attorney (or any of the powers in it) must be done by giving notice in writing to the Public Guardian and must incorporate a certificate by a practising solicitor or a member of a prescribed class stating that s/he interviewed the granter immediately before the document was signed, that the granter understands the effect of the revocation and was not under undue influence. The revocation will be registered by the Public Guardian which is the point at which revocation takes effect. The Public Guardian will notify the attorney of the revocation and, in addition, where it is a welfare power of attorney, the Mental Welfare Commission and the local authority.