

Termination of power of attorney and the Adults with Incapacity (Scotland) Act 2000

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***S.L.T. 87** *The author considers potential legal issues arising from termination of a power of attorney under the Adults with Incapacity (Scotland) Act 2000 .*

Introduction

This article considers certain legal issues which may arise from termination of a power of attorney under the Adults with Incapacity (Scotland) Act 2000 ("the Act"). In the following paragraphs, the author will comment on (i) revocation, (ii) reduction on the grounds of incapacity, (iii) the interplay with guardianship, and (iv) ancillary considerations in contentious cases.

Revocation

The regulation of powers of attorney is governed by Pt 2 of the Adults with Incapacity (Scotland) Act 2000 — which applies to continuing and welfare powers of attorney. In summary, a power of attorney requires to conform to the requirements of ss.15 or 16 of the Act and thereafter, under s.19 of the Act, the power of attorney requires to be registered with the Office of the Public Guardian.

A registered power of attorney will subsist until a terminating event. A terminating event includes the death of the adult or a formal revocation of the power of attorney. Revocation can be at the instance of the adult (i.e. the grantor of the deed) or by the sheriff, under s.20 of the Act.

Where revocation is at the instance of the adult, s.22A of the Act prescribes the formalities to be followed. These formalities include, per s.22A(2)(b)(ii), the requirement for certification by a solicitor or member of a prescribed class. However, that certification is not identical to the certification required under ss.15 or 16 of the Act. Whereas certification under s.15(3)(c)(ii) and/or s.16(3)(c)(ii) relates to the grantor's understanding of "the nature and extent" of the power of attorney, the certification under s.22A relates to the grantor's understanding of "the effect" of the deed. This may be an important distinction to be aware of, in the scenario where the grantor of an existing power of attorney wishes to revoke that deed and grant powers in favour of other persons. Of course, this presumes that the grantor retains capacity. The author comments further on capacity, below.

In addition to termination of authority as a result of death or by revocation, s.24(2) of the Act makes express provision for termination of the authority under a power of attorney where a guardian is appointed with like powers. Section 24(2) provides:

"The authority of a continuing or welfare attorney in relation to any matter shall come to an end on the appointment of a guardian with powers relating to that matter."

In the author's view, this section clearly acknowledges that a guardianship application may be made notwithstanding that there is an existing power of attorney.

Reduction: incapacity

In light of the certification requirements under ss.15 or 16 of the Act, there may be little opportunity to seek reduction of a registered power of attorney on the grounds of incapacity. Nonetheless, the remedy of reduction might still fall to be considered in extreme cases (where there is evidence to rebut (i) the presumption of capacity, and (ii) certification). In this regard, *Walker: Civil Remedies* observes at p.149 that a deed granted by an individual who lacked capacity "is totally void": see also the general discussion on the remedy of reduction.

In the foregoing situation, an issue to consider is whether the adult previously granted power(s) of attorney, when capax. There could be a complication if the "challenged" deed incorporated a revocation of a previous grant. In that event, if it was established that the deed was "totally void" then it appears clear that no part could be given effect to. This might result in a lacuna in the management of the adult's affairs if there was not a party with the necessary authority to instruct the re-registration of the former power of attorney. ***S.L.T. 88**

Accordingly, in the unusual situation of considering reduction of a power of attorney, thought might be given to the utility of seeking orders under the Act (particularly under s.3 — which the author comments on, below).

Statutory regime: guardianship

We turn, now, to consider the statutory regime for guardianship in the context where an adult has granted a power of attorney and subsequently lost capacity.

As practitioners will likely be aware, a guardianship application is made pursuant to s.57 of the Act. That section allows an application to be made by "any person ... claiming an interest in the property, financial affairs or personal welfare of an adult". Thus there is a relatively unrestricted opportunity for a party to seek guardianship. But that opportunity is tempered by s.58 of the Act, which regulates the sheriff's powers in determining a guardianship application. Section 58(1) provides:

"(1) Where the sheriff is satisfied in considering an application under section 57 that —

(a) the adult is incapable in relation to decisions about, or of acting to safeguard or promote his interests in, his property, financial affairs or personal welfare, and is likely to continue to be so incapable; and

(b) no other means provided by or under this Act would be sufficient to enable the adult's interests in his property, financial affairs or personal welfare to be safeguarded or promoted,

he may grant the application."

Therefore, the sheriff is expressly required to have regard to (i) any other means (as provided for under the Act) of safeguarding or promoting the adult's affairs, and (ii) the sufficiency of such means. The decision of the sheriff is discretionary. However, the existence of a power of attorney does not preclude the sheriff from determining that a guardianship order ought to be granted. This reflects the underlying "section 1" principles of the Act.

So far as the author is aware, there are no reported decisions which directly consider the competency of granting a guardianship order where there is an existing power of attorney. That may be because of the permissive terms of s.24(2) — as noted above. However, the competency of granting a guardianship order was implicitly approved of in *Application in respect of S, 2013 S.L.T. (Sh Ct) 65*. That case concerned an application for directions, which failing a guardianship order, in circumstances where there was concern over the suitability of an unregistered power of attorney. The result of the case was that a direction was given that the power of attorney was unsuitable, and a guardianship order was made.

When evaluating the suitability of an attorney or powers of attorney, each case will, of course, turn on its own merits.

Ancillary considerations: contentious cases

Where there is an existing power of attorney, it might be thought that further intervention under the 2000 Act would be unlikely. However, that supposes that the attorney (i) has the necessary powers (e.g. the issue in *Application in respect of S*), and (ii) that they act commensurate with their statutory and common law duties. As regards the latter point, the prospect of a challenge about the attorney's suitability cannot be ruled out. It is in this context that the author highlights the use of interim orders, when applying for a guardianship order.

There are two particular procedural matters to consider, having regard to the interests of an incapable adult. These matters are: (first) the need for an interim guardianship order under s.57(5) of the Act; and (secondly) the utility of seeking ancillary orders under s.3 of the Act.

The power under s.3(1) of the Act is wide:

"In an application or any other proceedings under this Act, the sheriff may make such consequential or ancillary order, provision or direction as he considers appropriate."

In the author's view, this remedy might be used to great effect. Take the example of an attorney who refuses to allow access to the adult for the purpose of compiling s.57(5) reports for an (opposed) guardianship application. On the face of it, it would not be in the adult's interests for the power of attorney to be revoked without the appointment of an interim guardian, but such **S.L.T. 89* appointment might not be possible without access to the adult. In the author's view, a possible route around this conundrum lies with s.3 of the Act.

Final comments

The issues which can (and do) arise under the Act are varied and interesting. In so far as this article comments upon the narrow subject of termination of a power of attorney, the author recognises that in many cases there will be no difficulties. The comments herein are made in a hypothetical context.

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