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MONEY BOX LIVE

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LEWIS: Hello. More than three quarters of a million people in the UK have dementia and many of them (and indeed many others) are incapable of managing their own finances. Often a relative takes out a power of attorney to manage their affairs for them, but that can seem complicated. How do you set up a power of attorney, what should you ask, what costs are involved? If you give someone those powers yourself, can you decide when they take over your decisions? And if you are an attorney, you may well find banks have different and sometimes very difficult rules about what exactly people with a power of attorney can and can't do. If a person doesn't agree though to a power of attorney before they lose the mental capacity to give the power to someone else, then their affairs are taken over by the Court of Protection - or in Scotland, the Sheriffs Court - and that can be more expensive and difficult for relatives. So whether you're thinking of making a power of attorney, persuading a relative to make one, or you already have one and perhaps you're unsure how to operate it, why not call Money Box Live now - 03700 100 444. With me today to answer your questions are Caroline Bielanska from Solicitors for the Elderly; Steve Wade from the Office of the Public Guardian, which covers England and Wales; and in Edinburgh we have Sandra McDonald, the Public Guardian for Scotland. And our first question is ... I'm sorry, my screen's gone completely blank. I'm going to take ... It's from Keith. I beg your pardon, our first question is from Keith. Keith, hello, sorry about that. What's your question for the panel? (*silence*) Keith, can you hear me? Keith doesn't seem to be able to hear me. Marion I think is waiting with a question. Marion, your question please? (*silence*) And we seem to have a problem

with Marion. We have had some problems with the phone lines. Never mind, let's just take some emails. Let's start with Pamela who's emailed us from Oxford. And she wants to explain the difference between the old power of attorney and the newer one. The newer one certainly started in England in 2007, but there used to be a different sort - an enduring power of attorney before that. Let's start with the English position first. Caroline Bielanska, old and new powers of attorney?

BIELANSKA: Yes well in 1986 it was, from then on you could make an enduring power of attorney in respect of your finances, and in the event that you were becoming or lost mental capacity, it had to be registered. From 2007, we were not able to make enduring powers and instead had lasting powers of attorney. There are two types - a welfare and healthcare power and a financial power - but they do need to be registered before they are used with the Public Guardian, so it doesn't really matter whether you've got capacity or not.

LEWIS: So is the process - I'll ask the Public Guardian who's here, Steve Wade - is the process that you fill in the forms; you do this and then they have to come to your office and register them? Is that how it works?

WADE: That's right. And as Caroline says, that is a difference from the previous system. An older enduring power could be used before the person lacked capacity without registration. That was one of the changes that came in in 2007 with the new powers - partly for people's protection and so there was a wider awareness that the power of attorney would be in existence - so now any power has to be registered with us before it can be used even if the person has capacity.

LEWIS: And when somebody comes to you with a power of attorney and says well I've got this power of attorney, I'm registering it - my grandmother, mother, wife, whoever it is has capacity - does that mean they can then operate their affairs even though that person is perfectly capable of doing it themselves?

WADE: It depends on the power of attorney. For a health and welfare power of attorney, even if it's been registered with us it can only be used when the person lacks

capacity to make those decisions for themselves. With the property and affairs power, it is different. Normally it can be used straightaway once it's been registered; but if the person making it would prefer that it only applies when they've lost capacity, they can place a restriction to that effect in the power when they make it.

LEWIS: Right, so you have to do that in the power when you actually make it to make sure that it doesn't apply when you're still able to deal with your own affairs. Caroline?

BIELANSKA: Just a little point. It's not always a good idea to put that sort of provision in. A lot of people choose to do it because they think they don't want their attorneys to step in prematurely, but ultimately if you do have capacity you still have control and you can always say to your attorney I don't want you to make decisions. And sometimes it isn't about mental capacity; it might be physical capacity. Where someone has had a stroke, for example, and they don't have the use of their hands to sign documents, they might want someone to be able to make decisions.

LEWIS: And Sandra McDonald in Edinburgh, you do have two powers in Scotland but it's slightly simpler, I think, than it is in England.

McDONALD: Yeah, the two powers are the same - essentially a financial power of attorney and a welfare power of attorney - which could be taken separately or jointly together. That's been the system since 2000. Largely, as you've heard from Steve, the system is the same in that they would be registered before use. A welfare power of attorney could only be used once the person has lost their incapacity and a financial one can be used straightaway. And, as Caroline has indicated, there may be very good reasons why you would want somebody to assist you straightaway if you had physical limitations, but you can put the same restriction in that Steve's talked about if you definitely do not want it to be used until you lose your incapacity.

LEWIS: And Keith who was going to call us from Bournemouth - in fact did, but for some reason we can't put him through to everyone else - Keith wants to know how much does it actually cost to do this? He says there seem to be two prices when he's

looked into it. Let's take England and Wales first, Steve Wade.

WADE: Well the cost to register a power of attorney, each power of attorney with us, is £130. The forms themselves are available free of charge and they can be downloaded from our website, www.direct.gov.uk/mentalcapacity, or by phoning our contact centre. And it's only at the point of registering with us that the £130 fee is chargeable.

LEWIS: Right. And Caroline Bielanska, are there other costs? If you go to a lawyer, presumably they will charge you as well, won't they?

BIELANSKA: Yes of course, unfortunately. It would be lovely to be able to do it for free ...

LEWIS: *(over)* You have to work for money. Yes, I understand that.

BIELANSKA: ... but we have to - like everyone in this world - we have to earn a crust. A lot of solicitors will do these for a fixed price. Fees vary from solicitor to solicitor and from around the country. Some firms will do it on time spent and that's particularly important if you've got someone who you need to go into their own home or a care home because they're already compromised. Then there's much more work that's involved. But it is about ringing around and finding out.

LEWIS: Yes, so there are costs to rack up certainly in England and Wales. Sandra McDonald, I believe it is cheaper in Scotland - not necessarily for the solicitor but certainly for your process?

MCDONALD: Yeah the solicitors' situation is probably similar to Caroline's described. The registration process with the Public Guardian in Scotland is £70 and you could be charged that for the joint document. If you do want to register them separately, then it would be £70 for both documents each, £140 in total.

LEWIS: Right, so it is cheaper if you do them both at once in Scotland. And Steve Wade, can I just clarify. I've heard complaints about this in the past - that people have filled in the forms, sent them off, they've not been quite right, you've sent them back. They have to pay 130 quid again. Is that right?

WADE: The situation has changed. I mean we do try and if there are errors on the forms that can be corrected, we do try and work with the person applying to make those corrections.

LEWIS: Without charging them?

WADE: Without charging and to register them. Unfortunately if the instrument has so many flaws that it just is not possible to make them valid and we have to reject it, then it is necessary to make a fresh application. There is a fee chargeable for that, but from October last year that fee is half what it used to be ...

LEWIS: *(over)* Oh right.

WADE: ... so it only costs £65 to come back if you did have to. But, as I say, we do do all we can to try and make an application registerable.

LEWIS: That's very good news because we've certainly had complaints about that before. Obviously out of date. Caroline?

BIELANSKA: I just wanted to remind everyone that of course it is possible to get a remission or you might qualify for an exemption of the fee if you're on means tested benefits. So things like pension credit or income support, people won't have to pay a fee.

LEWIS: So you can get it free?

BIELANSKA: Absolutely.

LEWIS: And Sandra McDonald, does that apply in Scotland as well?

McDONALD: No, it doesn't. A £70 fee would apply across the board if you wish to register.

LEWIS: Right, okay, well that's something to remember. Marion from North Yorkshire was going to call us as well and she wants to know ... she's a widow and she has no family and so her attorney would be her solicitor. Can she put safeguards in place to protect her assets should (as she puts it) anything go wrong? Caroline?

BIELANSKA: Well I'm not quite sure what she means about anything going wrong - whether it's about paying for care or whether it's concerns about solicitors' charges. A solicitor will charge of course if they're acting as an attorney and they should put a charging clause in and discuss with Marion what the basis of the charge will be. It can be fixed, it can be limited and capped. It could be that if she's got a quite complex estate, she might want a degree of accountability so that accountants can double check what the solicitors are doing. Of course solicitors are insured, so if anything were to go wrong - God forbid - then she's not actually going to lose anything because solicitors are indemnified by legal insurance.

LEWIS: And I suppose that's why - I'm sure you'd agree with this - it's important, if you don't have family, to have a solicitor doing it because they are indemnified in that way?

BIELANSKA: Very, very important to have that backing.

LEWIS: And Sandra McDonald, any differences in Scotland on that or not?

McDONALD: No, that would be the same. But if I might also add in that Scotland and England and Wales both have an investigation service through the Office of the Public Guardian which allow people to raise concerns - and that's anybody, not just the granter of the power of attorney - if they've got concerns about the way an

attorney may be acting, they can lodge that with our respective offices and we can look into that. So people shouldn't be concerned about what their attorney may or may not be doing.

LEWIS: So I suppose that might be useful, Steve Wade, even for a relative if they think another relative has a power of attorney and is not behaving in the interests of the person who's given the power because you have to act in their interest, don't you?

WADE: You do, absolutely. And if people do have concerns, as Sandra said, the procedure's the same in England and Wales - people can raise those concerns with us. They can do that confidentially. We have a well established whistle blowing procedure, so people needn't fear that if they raise their concerns with us, then that means it's necessarily going to get back to people.

LEWIS: Okay. Let me apologise again to listeners. We're having terrible technical problems. We've got no calls coming through - at least they can't get through to the broadcast section of the studio - and so I am reading out people's calls that we know they wanted to make and I'm also reading out emails. And this one is from Ann, still on this question of the two kinds of power of attorney. She says, 'My daughter and son-in-law both have enduring powers of attorney' - these were obviously made before 2007 - and the firm who prepared them have now suggested they take out a health and welfare lasting power of attorney, suggesting social services has a legal power to decide how things will happen if you're unable to handle your own affairs. Caroline?

BIELANSKA: Well I mean I think it's a good idea to consider whether to make a health and welfare lasting power. Even if you don't have such a power, no-one is authorised to make health and welfare decisions and it could mean that social services step in and make decisions which perhaps the family aren't in agreement with, or indeed healthcare professionals could make decisions that the family are not in agreement with. By having a health and welfare power in the event that the maker lacks capacity, the trusted attorney will hopefully make the right decision that you would have wanted them to make.

LEWIS: So you can have an enduring power of attorney from before October 2007 and a lasting power to cover health and welfare under the new system. They can operate together?

BIELANSKA: Absolutely.

LEWIS: We've also had a message from Derek who wants to ask this question. 'I made a power of attorney in 1999. It hasn't been activated yet. Given the changes in the law, is the document still valid?' Steve?

WADE: Assuming that the document was validly made and all of the signatures were in place before October 2007, then the document remains valid. It can be used without registration whilst the donor still has capacity. If capacity is lost, then it will need to be registered with the Office of the Public Guardian.

LEWIS: Okay. And let's take an email now. Thanks for that message, Derek. I'll take an email now from Jim who says there is a probably ... he's warning people really that if you go to get a power of attorney and the person can no longer give permission and he recently tried to do this with an elderly relative, but the relative's condition had deteriorated so much that the hospital was unable to agree that he could actually consent to it. That's a danger, isn't it? What happens then if someone can't give a power of attorney but can't manage their own affairs?

WADE: I mean to make a power of attorney, then the person does need to have the capacity to make it. If they've lost capacity and decisions need to be made, the only option is to make an application to the Court of Protection. The court's done a lot of work to make the process there as simple and as easy as possible, but obviously it's never going to be as simple as taking powers into your own hands and making a power of attorney.

LEWIS: And it's much more expensive, Caroline, the Court of Protection?

BIELANSKA: Oh absolutely. The application to the court is £400. You've got to get medical evidence which will cost you and then there are ongoing costs which are annual. So it can over the years, if someone's going to survive for a long period of time, it can go into thousands. Even if you don't have anyone, you know it's just family dealing with it, it can cost a lot. So it's always cheaper to make a lasting power.

LEWIS: Better to make a lasting power in advance. And Sandra McDonald, it's not called the Court of Protection in Scotland, is it?

McDONALD: No, but it's a similar process. As Steve described, someone would need capacity to be able to grant the power of attorney. If they had already lost that before granting the power, then an application would have to be made to their relevant Sheriff Court in the district that they lived. And again, as Caroline has indicated, there are increased costs with the application to the court and ongoing costs thereafter, so definitely we would always advocate somebody to think ahead, do a power of attorney - be that financial and/or welfare - whilst they remain capable.

LEWIS: Okay, good advice there. For anyone who's wondering if they should get down to it, probably now's a good time. Thanks to Jim and to Derek for those questions. And we've had a few emails about joint and several attorneys, and this is from Jo who says, 'My mother signed an enduring power of attorney, set up for my sister and I to work jointly but not severally, not separately.' And it's never been registered but the relationship in the family has deteriorated and it's impossible for her and her sister to agree on things. 'Mother now has dementia. What can we do?' Caroline?

BIELANSKA: Well when mum made the power, she should have been advised about the problem of having attorneys appointed jointly. It does mean that if one person can't act or won't act, then the power can't be used and it's frustrated. That said, even though mum has dementia, depending on the extent of her dementia it is possible if she has sufficient capacity, she may still be able to make a fresh power, making a joint and several power. The power itself, the one that is in existence, just it might be

useful to see whether there are replacements who are able to act because if both of them were prepared to disclaim and say they weren't going to act, then the replacements could step in.

LEWIS: They have to have been specified in the power though, don't they?

BIELANSKA: Within the power itself.

LEWIS: I gather that's not the case.

BIELANSKA: Otherwise, unfortunately it's an application to the Court of Protection.

LEWIS: And Steve ... Thanks for that, Jo. And there's a similar question from Elizabeth - a related question, I should say. Her father appointed three attorneys jointly rather than jointly and severally. One of the attorneys died. They had to apply again and pay again. Presumably the father was still capable of giving consent. Is that right - you have to go through the whole thing again if one of them dies?

WADE: I mean this is the problem with appointing attorneys to act jointly, and especially appointing more than two to act jointly - is it does mean all the attorneys need to be acting together.

LEWIS: Yes.

WADE: It's one of the things when people are making the power of attorney and they're considering how to frame it.

LEWIS: I suppose people are concerned though that to give three separate people full powers over their affairs might be a bit risky?

WADE: I think that's right. And we always say when people are going through this

process and they're making these kinds of decisions, having these conversations as early as possible and involving all of the people does mean that you put off some of the problems that you could create further down the line.

LEWIS: Indeed. We now do have a caller on the line. Her name is Olivia.

OLIVIA: Hello. Yes, I'd like to ask about the fact that I am the sole attorney for my mother, but I would be looking into the question of deputyships and appointing another member of my family to stand in if I'm away. I'm due to be going abroad. Can I default my powers onto somebody else?

LEWIS: Right, Caroline you're shaking your head.

BIELANSKA: Unfortunately not. It's not possible for an attorney or indeed a deputy to assign responsibilities for making decisions to another person. If you're appointed as an attorney, it's a personal appointment to you. You're the one that has to make the decision. I take it that mum's lost capacity?

OLIVIA: Yes, yes that's right.

BIELANSKA: So really I mean there isn't an awful lot you can do other than trying to set up a system so that it isn't a problem that you're abroad. Thankfully with internet and telephone banking, all of those sorts of things, a lot of decisions can still be made even if you're abroad.

OLIVIA: Yes. And what about a deputyship? I've heard about that.

BIELANSKA: Well the court wouldn't appoint a deputy to make decisions when you're not around because there's an attorney. You are the attorney. What they would be looking at is if you were to decide you don't want to do it anymore, then they would appoint someone else.

OLIVIA: And also if something happens to me while I'm abroad, does the attorney power stop there and then or can they then appoint a deputy?

WADE: Yes I mean if the attorney, something were to happen to them so they were no longer able to act, then an application could be made to the Court of Protection and the court would in those circumstances consider appointing a deputy.

LEWIS: Sandra McDonald - briefly in Scotland, similar provisions?

McDONALD: It's the same for the sole attorney position. It can leave some difficult situations if the sole attorney is no longer available to act, you know, on a temporary basis like the lady's described, so certainly we would advocate thinking about a second or third appointment to go alongside that. But if I could just come back to the previous email about the joint and several.

LEWIS: Of course.

McDONALD: Steve was indicating that if all of the two or the three attorneys weren't available to act, there might be problems in England and Wales. But in Scotland, if one of the multiple attorneys was no longer available - for instance they predeceased the granter of the power of attorney - the power of attorney would continue with the remaining attorneys and would be perfectly valid. And that would include even if it got down to just the one final remaining attorney, so they became a sole attorney then.

LEWIS: Right, that's an interesting difference. Thanks for telling us that. And I now believe we can go to Andrew. Andrew, I don't know where you are, but please tell us what your question is.

ANDREW: Hi, good afternoon. Yeah I'm in King's Lynn. I'm ringing really about my son. He's just turned 18. He's severely autistic and he has no comprehension or understanding of money. And that's not really been a problem while he was a child,

but of course now he's 18 he's an adult, and organisations now won't sort of talk to me about his finances. They want to talk to him, but of course he can't understand and he can't express himself. So I'm really wondering what can be done. Do I need a power of attorney to handle everything for him?

LEWIS: Okay. And we've had a very similar email from Eileen who says her son is 14 with a learning disability. Should they be thinking about a power of attorney? So a couple of questions the same.

BIELANSKA: Well as far as finances are concerned, if your son doesn't really have a huge amount and all he's getting is state benefits, then you could be an appointee for him through the DWP. If he does have money in his own name, then you would need to apply to the Court of Protection to be a deputy. As far as welfare decisions are concerned - things like where your son was to live or healthcare decisions - it is possible to apply to the Court of Protection to be a welfare deputy. But it's extremely rare that the court will choose anyone to appoint because under the Mental Capacity Act, it is possible for whoever needs to make the decision to make that decision without any specific authority.

ANDREW: Right.

LEWIS: Andrew, can I ask you, is your son able to give you the powers or is he not able?

ANDREW: No, he really doesn't understand. I mean he has the ...

LEWIS: *(over)* Right, so he's not, so you have to go to the Court of Protection?

ANDREW: Yeah, I mean he has the mental sort of capacity, the understanding of something like a 2 or 3 year old, so you know things are very difficult for him.

LEWIS: Right, yes. So presumably, Steve Wade, if somebody did have the power,

they could still become attorneys in the normal way, otherwise they have to go to the Court of Protection?

ANDREW: That's right. And of course with all of these conditions, the severity of the condition can affect the range of decisions that could be made. So just because someone has a condition, it doesn't necessarily mean they can't make all decisions or that they don't necessarily, aren't necessarily able to make a power of attorney.

LEWIS: Okay, well thanks very much for your call, Andrew. I hope that helps. Just briefly ... We've got another caller on the line, but I just want to mention banks because we've had a number of emails and we looked at this in Money Box a couple of weeks ago - people saying ... Teresa says, 'I have a power of attorney but I've had nothing but hassle with my bank. The building society was equally bad.' 'Some are very quick, helpful; others are slow and unhelpful', says Ken. What can you do when you've got a power, Caroline, but you go to the bank and they won't let you open an online account or they won't let you access or deal with accounts or move money around as you want to?

BIELANSKA: Yeah, I totally understand and share the frustration. Different financial institutions - it's not just banks and building societies, it's the whole range of financial institutions around - have different systems and it's not one system in place; and even within banks, they might have different systems. They should have appropriate systems and certainly Solicitors for the Elderly and the OPG have been working with the British Banking Association and Building Societies Association to try and get this improved.

LEWIS: And I suppose, Steve Wade, you could complain, could you, like on any other financial service and go to the Ombudsman if you didn't think they were behaving correctly?

WADE: You could. You'd need to complain through the bank's internal processes first ...

LEWIS: First, yes.

WADE: ... and if you were unhappy with that, then you could go to the Ombudsman. But, as Caroline says, we have all been working very hard. The British Banking Association, the OPG, Solicitors for the Elderly, as well as other organisations like Age UK and the Law Society have been working very closely to try and make sure that there's uniformity in the way lasting powers of attorney are identified and the procedures that the banks put in place to deal with those.

LEWIS: And Sandra McDonald, are banks in Scotland any better?

McDONALD: Sadly no. It's very similar frustrations. Of course a lot of the banks are national banks now anyway, so the difference between England and Scotland is not necessarily marked; and we've been doing similar work that Steve describes to try and work with the banking associations to get this increasingly recognised. It can be even a little bit harder in Scotland because a lot of the banks are English based and they recognise lasting power of attorney and are looking for that. And in Scotland it's called a continuing power of attorney and they're not identifying with the same item, so it can be harder for people in Scotland to try and get their power of attorney recognised.

LEWIS: Trained in English ways working in Scotland.

McDONALD: Yes.

LEWIS: We've just got time I think for Paul who's on the line from Dorset. Paul, your question?

PAUL: Yes, good afternoon. I have a power of attorney over my aunt, and she has a will and her executor (who wasn't another member of the family) has predeceased her. The question is can I as her executor appoint or have appointed alternative executors seeing that she no longer has one?

LEWIS: So as her attorney, can you appoint executors to her will?

BIELANSKA: No, you can't do that.

LEWIS: No.

BIELANSKA: But that may not be a problem. Really the fact ... So there's no executor in the will now that's living, is that right?

PAUL: There is one - a firm of solicitors.

BIELANSKA: Okay, well it is possible for an attorney to apply to the Court of Protection for another executor to be appointed should that be really necessary, but that costs money.

LEWIS: And trust the solicitors to do the executor's work?

BIELANSKA: Yes you've still got someone there who's been appointed, so you have to think long and hard as to whether it's financially viable to do anything and just wait and see.

PAUL: Yeah, I have no confidence in the solicitor. This is the problem.

BIELANSKA: Oh, I'm very sorry to hear that.

LEWIS: Briefly any thoughts?

WADE: I think, as Caroline said, the choice is between letting the existing executor get on with it or making an application to the Court of Protection.

LEWIS: Okay, I'm going to give you ten seconds to answer this. Thank you very much for your call, Paul. I'm sorry we couldn't resolve it to your complete

satisfaction. If you make a power of attorney and then you recover, can you revoke it? Caroline?

BIELANSKA: Oh yes, you can always revoke a power of attorney provided you've got capacity.

LEWIS: Right, okay. Well that is all we have time for. My apologies for the lack of calls for the first twenty minutes of the programme due to technical issues. Let me thank Caroline Bielanska from Solicitors for the Elderly; Steve Wade from the Public Guardian Office in England and Wales; and Sandra McDonald, the Public Guardian of Scotland. Thanks to you for your calls and your emails particularly, which were a lifesaver today. Find out more from our website: bbc.co.uk/moneybox. I'm back on Saturday with Money Box and here next Wednesday afternoon to take more of your calls.