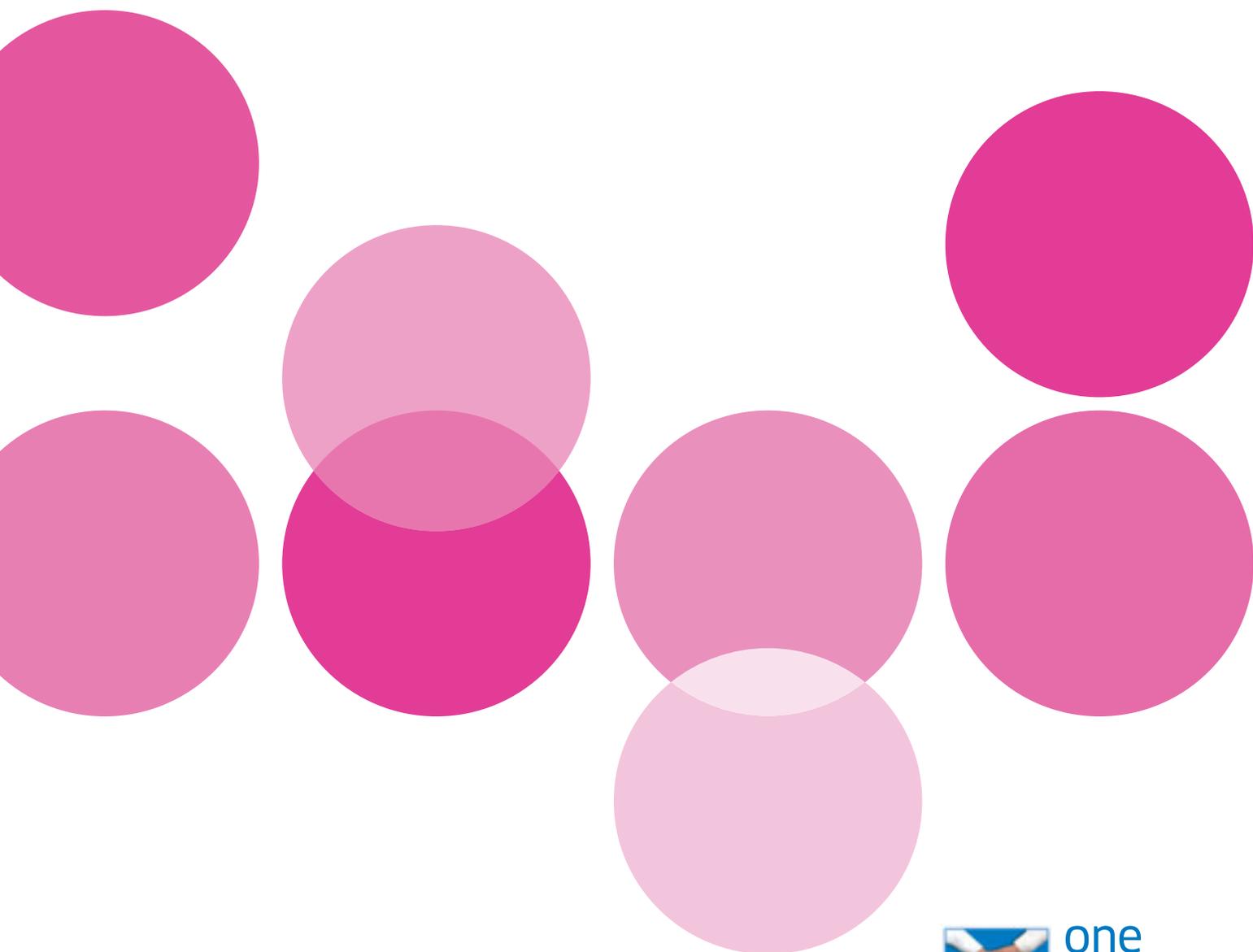


ADULTS WITH INCAPACITY
(SCOTLAND) ACT 2000

Code of Practice

For Continuing and Welfare Attorneys

March 2011



one
scotland
SCOTTISH GOVERNMENT

ADULTS WITH INCAPACITY
(SCOTLAND) ACT 2000

Code of Practice

For Continuing and Welfare Attorneys

March 2011



© Crown copyright 2011

ISBN: 978-1-78045-144-2

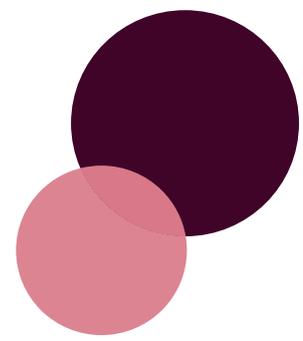
The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

Produced for the Scottish Government by APS Group Scotland
DPPAS10238 (03/11)

Published by the Scottish Government, April 2008

Reprinted with minor amendments by the Scottish Government, March 2011

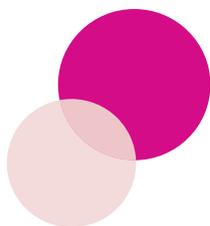
The text pages of this document are printed on recycled paper and are 100% recyclable



Contents

Introduction	1
About this code of practice	1
Terms used	2
Chapter 1 About the Adults with Incapacity (Scotland) Act 2000	4
Who the Act can help	4
What incapacity means under the Act	5
How the Act can help	5
Co-existence of the Act with other measures	7
Principles to be followed	7
Communicating with the person	8
Deciding when a person needs the help of the Act	9
Bodies involved in the regulation of attorneys	9
Provisions relating to nearest relative	10
Displacement or withholding of information from nearest relative	10
Legal Aid	11
Limitation of liability	12
How does the Act protect the adult from abuse?	13
For further information and advice	13
Chapter 2 Creating a power of attorney	14
What is a power of attorney?	14
Statutory requirements for making a valid power of attorney	15
Who can be an attorney?	16
Solicitors or organisations as attorneys	17
Appointment of joint or substitute attorneys	17
Possible powers to be included in a continuing power of attorney	17
Possible powers that may be included in a welfare power of attorney	19
Involvement of prospective attorney at time of granting	20
Granting sufficient powers for an attorney to act	22

	Costs of acting as an attorney	22
	Revocation (cancellation) of a power of attorney	22
Chapter 3	Exercising powers of attorney (continuing and welfare)	24
	What responsibilities do attorneys have?	24
	Duty of care	25
	Fiduciary duty (position of trust)	25
	Duty to keep records	25
	Duty of confidentiality	25
	Liability	26
	Action on becoming aware of the adult's incapacity	26
	Informing the adult and others	26
	What to do if the adult has communication difficulties	27
	Holding regular reviews	28
	If you think action is needed - apply the principles	28
	Check your powers	29
	Make sure you can be contacted	30
	Responsibility to act	30
	What if you encounter resistance to the exercise of your powers?	31
Chapter 4	Specific guidance on exercising continuing powers of attorney	32
	Managing the person's finances	32
	Review the person's property and financial affairs	33
	Find out if anyone else has powers over the person's finances and/or property	34
	Find out if anyone has welfare powers in relation to the person	34
	Paying for community care services	35
	Assessing the need for change	35
	Taking stock of the need and timescale for future changes	35
	Obtaining specialist advice	36
	Updating your file	36



If you think that action needs to be taken	37
Check your powers	37
Setting out your proposals for change	38
Recording action taken	39
Ongoing functions as a continuing attorney	40
Monitor the adult's property and financial affairs	40
Assessing the need for further action	40
Seeking the advice of the Public Guardian	41
What to do where there are conflicting views on a proposed action or decision	41
Conflict of interest affecting you as attorney	42
What to do where your powers are insufficient	43
What if there is a complaint against you	44
Possible court proceedings in the event of a complaint	44
Supervision by the Public Guardian	45
Chapter 5 Specific guidance on exercising welfare powers of attorney	47
Managing the adult's welfare	47
Reviewing current arrangements and needs	48
Find out if anyone has powers over the person's property and financial affairs	49
Community care services	50
Assessing the need for change	51
Obtaining specialist advice	52
Updating your file	53
If you think that action needs to be taken	53
Check your powers	54
Setting out your proposals for change	54
Recording action taken	56
Ongoing functions as a welfare attorney	57
Monitor the adult's personal welfare	57
Deciding the need for further action	57
Seeking the advice of the local authority and MWC	58

	What to do when there are conflicting views on a proposed intervention	58
	Conflict of interest affecting you as attorney	60
	What to do where your powers are insufficient	61
	What if there is a complaint against you	62
	Possible court proceedings in the event of a complaint	62
	Supervision by the local authority	64
	Purposes of supervision	64
	Supervision regulations	65
	Visiting	65
	Provision of information	65
Chapter 6	Stopping being an attorney	66
	Not getting started	66
	Resigning	67
	Other circumstances that bring powers to an end	68
Chapter 7	Pre-act attorneys and attorneys under the law of another country	69
	If you were an attorney before the Act came into force	69
	Attorneys appointed under the law of another country	70
	Relationships with the law of other countries and jurisdictions	70
Annex 1	A guide to communicating with the person with impaired capacity	71
Annex 2	Useful addresses	73



Introduction



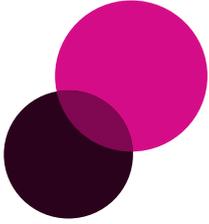
The Adults with Incapacity (Scotland) Act 2000 ('the Act') was introduced to protect individuals with incapacity and to support their families and carers in managing and safeguarding the individuals' welfare and finances. The Act was one of the earliest pieces of legislation passed by the Scottish Parliament. A two-year project was funded by the Executive to monitor how the Act was working. The results were positive, but showed that some changes could be made¹ to streamline procedures and enable more adults and their carers to benefit from the Act.

This revised edition of the code of practice for continuing and welfare attorneys takes account of changes to the Act that were introduced in part 2 of the Adult Support and Protection (Scotland) Act 2007.

ABOUT THIS CODE OF PRACTICE

This code is for anyone appointed as an attorney under the Act, that is, as continuing and/or welfare power of attorney. In this code 'you' means you as an attorney or, as the context implies, a prospective attorney (apart from Chapter 2 which is addressed to prospective granters of powers of attorney). The code applies equally to a lay person and to a professional continuing attorney such as a solicitor or accountant. If you are a professional, you will also need to apply your own code of conduct and professional ethics and good practice, and follow professional regulatory requirements in relation to your duties as attorney.

¹ Scottish Executive (2004) Adults with Incapacity (Scotland) Act Learning from Experience



The Act provides in section 13 that the Scottish Ministers will prepare codes of practice containing guidance for those exercising powers under the Act. Whilst these codes of practice are guidance and therefore not binding, failure to comply with them may be one of the factors considered by the Public Guardian, the Mental Welfare Commission, the local authority or the sheriff in considering matters such as the continuing suitability of the person to exercise those functions, in investigating circumstances in which the adult appears to be at risk or in applications before the court.

Although, under the Act, the code strictly applies only when you start exercising the functions of an attorney, for completeness it also covers the initial stages when someone is contemplating granting a power of attorney. Chapter 2 provides a guide for individuals considering appointing an attorney.

Chapters 1, 3, 6 and 7 are common to continuing and welfare attorneys. However chapter 4 and chapter 5 respectively deal with exercising continuing and welfare attorneys. In many cases a single individual will have both continuing and welfare powers, although the Act allows for the appointment of joint attorneys.

The code will also be of interest to anyone considering granting a power of attorney, or anyone else with an interest, to understand how an attorney is expected to act.

The code does not provide information on how to register powers of attorney. This is provided in the ‘Guide to Powers of Attorney’ produced by the Office of the Public Guardian (Scotland) (OPG).

TERMS USED

- Throughout the code of practice the Adults with Incapacity (Scotland) Act 2000 is referred to as **‘the Act’**;
- **‘granter’** refers to the person who has appointed someone to be his/her attorney;
- **‘attorney’** refers to the person who has been appointed to act on behalf of the granter;
- **‘adult’** refers to a person aged 16 or over with impaired capacity – also referred to in this code as the ‘person’ or ‘individual’, or ‘granter’ in the context where capacity has been lost;
- **‘independent advocate’** refers to someone employed by an independent advocacy service to support adults to express their views;

- **‘carer’** refers to a relative or friend who supports the adult without payment;
- **‘primary carer’** means the person who is the main carer (usually a family member or friend) but, where there is no unpaid main carer it could be an organisation mainly engaged in the day to day provision of care for the person;
- **‘proxy’** means a person appointed under the Act to make decisions or take actions on behalf of the adult. The term includes continuing and welfare attorneys, welfare and financial guardians, people authorised under intervention orders and withdrawers under the access to funds scheme;
- **‘named person’** means the person nominated by the adult under the Mental Health (Care and Treatment) Scotland Act 2003. The named person can represent the adult’s interest and support him or her. This is automatically the primary carer where the person has not named someone else;
- **‘relevant others’** is used in the Code to summarise all those who the Act states must be consulted, where it is practical and reasonable to do so; and where the Act requires certain persons to be informed or ‘intimated’. This includes: the nearest relative, the primary carer of the adult and the adult’s named person (if there is one); any guardian, continuing attorney or welfare attorney of the adult who has powers relating to the proposed intervention; and any person whom the sheriff has directed should be consulted; any other person appearing to the person responsible for authorising or effecting the intervention to have an interest in the welfare of the adult or in the proposed intervention, where these views have been made known to the person responsible; any views expressed on behalf of the adult by a person providing an independent advocacy service;
- **‘practising solicitor’** is a solicitor holding a practising certificate issued in accordance with Part 2 of the Solicitors (Scotland) Act 1980 (c.46);
- **‘Office of the Public Guardian (Scotland)’** is referred to as the **OPG**;
- **‘Mental Welfare Commission’** is referred to as the **MWC**.

Chapter 1



ABOUT THE ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

WHO THE ACT CAN HELP

- 1.1** The Act aims to help people (age 16 and over) who lack capacity to act or make some or all decisions for themselves. It covers people whose incapacity is caused by a mental disorder, such as severe dementia, learning disability, acquired brain injury, or severe mental illness. It also covers people who are unable to communicate due to a physical condition such as a stroke or severe sensory impairment. The Act supports their carers and others in managing and safeguarding the welfare and finances of the person.
- 1.2** The Act introduced arrangements for making decisions about personal welfare and managing the finances and property of individuals whose capacity to make or carry out specific decisions is impaired. It allows carers and others to have authority to do so on their behalf.
- 1.3** The law in Scotland generally presumes that adults (those aged 16 or over) are capable of making personal decisions for themselves and of managing their own affairs. That presumption can only be overturned on evidence that the person lacks capacity to make a decision. It is important to remember that having a diagnosis of, for example, dementia, does not mean, of itself, that the person is unable to make decisions for him/herself.

WHAT INCAPACITY MEANS UNDER THE ACT

1.4 The Act recognises that a person may be legally capable of some decisions and actions and not capable of others. The Act says that a person lacks capacity to take a particular decision or action when there is evidence that he/she is unable to do so.

1.5 For the purposes of the Act, ‘incapable’ means incapable of:

- acting on decisions; or
- making decisions; or
- communicating decisions; or
- understanding decisions; or
- retaining the memory of decisions

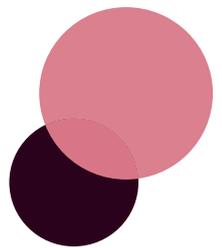
in relation to any particular matter due to mental disorder or inability to communicate because of physical disability.

1.6 This means that no one should be treated as unable to make or act on a decision unless all practical steps have been taken to assist him/her. How information is presented can help or hinder someone to make a decision. The person should not be considered as ‘incapable’ simply because he or she has a poor memory, short-term memory loss or difficulty in communicating his/her view. For example, someone with dementia may be able to consent to a decision but may not be able to remember a decision made earlier. He/she should be assisted with memory aids such as notes of previous discussions. Someone with a communication difficulty may be helped to overcome this for example, through the use of an interpreter, equipment to assist communication or the help of a specialist professional, e.g. learning disability social worker or speech and language therapist. For further information on communicating with the person see Annex 1.

HOW THE ACT CAN HELP

1.7 The Act provides the following ways for managing and safeguarding a person’s welfare, financial affairs or both:

1.7.1 Power of attorney – this is a means by which individuals, whilst they have capacity, can grant someone they trust powers to act as their continuing (financial) and/or welfare attorney, in case capacity is lost at some future point. One or more persons can be appointed.



- 1.7.2 Access to Funds scheme** – this is a way of accessing the adult’s bank or building society account in order to meet his/her living costs. An application can be made to the Public Guardian by an individual or organisation. The person or organisation appointed is called a ‘withdrawer’.
- 1.7.3 Guardianship order** (welfare and/or financial) – may be applied for by one or more individuals acting together or local authority and granted by the sheriff. This is appropriate where the person requires someone to make specific decisions on his/her behalf over the long term. Financial guardianship may be appropriate where the person’s finances are complex.
- 1.7.4 Intervention order** (welfare and/or financial) – may be applied for by an individual or local authority and granted by the sheriff to carry out a one-off action or to deal with a specific issue on behalf of the adult.
- 1.7.5 Management of (care home/hospital) residents funds** – A certificate of authority may be granted to a care home manager by the supervising body (local authority or health board) where the resident lacks capacity to manage his/her own funds and there is no other arrangement in place to manage these funds.
- 1.7.6 Medical treatment decisions** – a doctor is authorised to provide medical treatment and care to someone who is unable to consent, subject to certain safeguards and exceptions. In addition, certain other health care practitioners, if accredited to do so, have authority to provide treatments which they are qualified to administer.
- 1.7.7 Medical Research** involving adults who cannot consent is authorised subject to safeguards and conditions (For further details see Code of Practice for persons authorised to carry out medical treatment or research under Part 5 of the Act)

The Act aims to ensure that solutions focus on the needs of the individual for example: a person with dementia may be able to decide what sort of support he/she would prefer to help with day to day living, but be unable to manage his/her money. In such a case a financial intervention may be all that is needed. In other circumstances a combination of welfare and financial measures may be necessary.

- 1.8** Several people may be involved in supporting the adult through appointments under the Act or in other ways, e.g. as a DWP appointee.² They should communicate with each other in carrying out their responsibilities.

² www.dwp.gov.uk

- 1.9 Details about the above measures under the Act are provided in the relevant codes of practice and guides available from the Office of the Public Guardian and the Scottish Government (see Annex 2 for details).

CO-EXISTENCE OF THE ACT WITH OTHER MEASURES

- 1.10 The Act does not authorise action in every matter where the adult may have impaired capacity. There are certain decisions which can never be made on behalf of a person who lacks capacity to make those specific decisions. This is because they are either so personal to the individual concerned, or governed by other legislation. For example consent to marriage or making a will are not matters where an intervention under the Act would be competent.
- 1.11 The Act co-exists with other possible legal measures that may be taken to support the adult, for example the setting up of a trust for the benefit of the adult.

PRINCIPLES TO BE FOLLOWED

- 1.12 The Act requires the following principles to be applied when deciding which measure will be most suitable for meeting the needs of the individual. The principles must also be used whenever decisions need to be made on behalf of the adult. The Act aims to protect people who lack capacity to make particular decisions, but also to support their involvement in making decisions about their own lives as far as they are able to do so.

Principle 1 - benefit

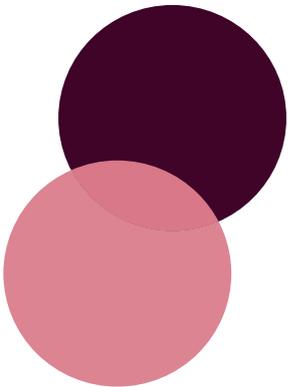
- Any action or decision taken must benefit the adult and only be taken when that benefit cannot reasonably be achieved without it.

Principle 2 - least restrictive option

- Any action or decision taken should be the minimum necessary to achieve the purpose. It should be the option that restricts the person's freedom as little as possible.

Principle 3 - take account of the wishes of the adult

- In deciding if an action or decision is to be made, and what that should be, account shall be taken of the present and past wishes and feelings of the adult, as far as they can be ascertained. The person should be offered appropriate assistance to communicate his or her views (for further guidance see Annex 1).



Note: that it is compulsory to take account of the present and past wishes and feelings of the adult if these can be ascertained by any means whatsoever.

Principle 4 - consultation with relevant others

- In deciding if an action or decision is to be made and what that should be, account shall be taken of the views of: the nearest relative and the primary carer of the adult; the adult's named person; any guardian or attorney with powers relating to the proposed intervention; any person whom the sheriff has directed should be consulted; any other person appearing to have an interest in the welfare of the adult or the proposed action, where these views have been made known to the person responsible – in so far as it is reasonable and practicable to do so.

Principle 5 - encourage the adult to exercise whatever skills he or she has and to develop new skills

- Any guardian, continuing attorney, welfare attorney or manager of an establishment exercising functions under this Act shall, in so far as it is reasonable and practicable to do so, encourage the adult to exercise whatever skills he or she has concerning property, financial affairs or personal welfare, as the case may be, and to develop new such skills. While this is a requirement for the categories of appointee stated above, it represents good practice for all others with decision making or management powers.

COMMUNICATING WITH THE PERSON

1.13 Principle 3 means that you, as the attorney, must take account of the person's present and past feelings and wishes so far as possible. Some adults will be able to express their wishes and feelings clearly, even although they would not be capable of taking the action or decision which you are considering. For example, he/she may continue to have opinions about a particular item of household expenditure without being able to carry out the transaction personally.

1.14 In some cases special effort may be required to communicate with the person. This might mean using memory aids, pictures, non-verbal communication, advice from a speech and language therapist. (See Guide to Communication in Annex 1).

DECIDING WHEN A PERSON NEEDS THE HELP OF THE ACT

- 1.15** If you are unsure about the needs of the person you are concerned about or if the Act can help, it is advisable to contact the local authority social work department in the area where the person lives. The local authority has a duty to assess the needs of a person who may lack capacity due to a mental disorder or severe communication difficulty caused by a physical condition. You can also seek advice and information from the OPG on financial matters and from the Mental Welfare Commission (MWC) on welfare matters. Specialist voluntary organisations may also be able to help (see Annex 2). A formal assessment of capacity is necessary in relation to applications under the Act.

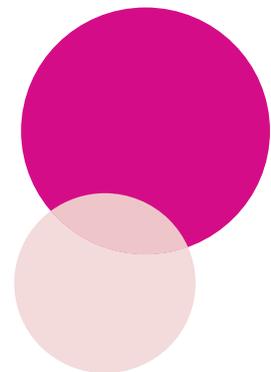
BODIES INVOLVED IN THE REGULATION OF ATTORNEYS

- 1.16** The position of attorney relies on a relationship of trust between the granter and the attorney. There is however a need to balance the voluntary nature of the arrangements with appropriate protection for the adult, and for third parties who conduct business with the attorney in place of the adult. The Act therefore provides for four bodies to be involved in the regulation of attorneys in the exercise of their functions. These are: the OPG, the courts, the local authority, and the MWC.

The Office of the Public Guardian (Scotland) (OPG)

The Public Guardian has a wide range of powers under the Act, to:

- register powers of attorney, intervention and guardianship orders;
- authorise access to funds, register withdrawers and issue certificates;
- supervise continuing (financial) attorneys where ordered to do so by the sheriff;
- supervise financial guardians and withdrawers;
- investigate complaints against anyone authorised to manage the finances of an adult, including continuing attorneys;
- provide information and advice (non-legal) on financial matters in relation to the Act.



The Mental Welfare Commission (MWC)

The Commission has an important role in protecting the interests of adults with incapacity due to mental disorder. It provides a range of guides for carers, service users and professionals and a freephone helpline – see Annex 2.

The Local Authority

Local authorities have a duty to assess the needs of people who may lack capacity to make some or all important decisions for themselves and to provide information to carers who have been appointed as attorneys or guardians. They have a duty to investigate complaints against welfare attorneys and, in certain circumstances, the court can order the local authority to supervise a welfare attorney.

The Court

Where a serious complaint is upheld the court can reduce or remove the powers granted to an attorney and the attorney may be replaced by the appointment of a guardian. The court is also responsible for the appointment of financial and welfare guardians.

PROVISIONS RELATING TO NEAREST RELATIVE

- 1.17 Under section 4(1) of the Act it is possible for anyone, (including the adult him/herself), who has an interest in the adult's property, financial affairs or personal welfare to apply to the sheriff to have the nearest relative displaced, or to have information withheld from the nearest relative. Such applications cannot be made in advance of any incapacity.

DISPLACEMENT OR WITHHOLDING OF INFORMATION FROM NEAREST RELATIVE

- 1.18 On an application the court may, having regard to the principles and being satisfied that to do so will benefit the adult, make an order that:
- certain information shall not be disclosed, or intimation of certain applications shall not be given, to the nearest relative of the adult;
 - the functions of the nearest relative of the adult shall, during the continuance in force of the order, be exercised by a person, specified in the application, who is not the nearest relative of the adult but who:
 - is a person who would otherwise be entitled to be the nearest relative in terms of this Act;

- in the opinion of the court is a proper person to act as the nearest relative; and
- is willing to so act; or
- no person shall, during the continuance in force of the order, exercise the functions of the nearest relative.

1.19 In relation to your role as attorney, the granter may have discussed with you his/her position with regard to his or her nearest relative – that there has been no contact for a long time and would not wish it in the future; or the circumstances may arise that the nearest relative is posing a barrier to your carrying out your duties as an attorney. In either case you may wish to apply to the court to have certain information withheld from the nearest relative.

1.20 Alternatively, you as attorney will need to be aware if any order has been made displacing the nearest relative or if anyone else has been ordered by the sheriff to exercise the functions of nearest relative when you come to apply the principles to the exercise of your powers. You can get this information from the Public Guardian.

LEGAL AID

1.21 An adult, someone authorised to act on his or her behalf under the Act, or anyone claiming or having an interest in the adult's welfare or affairs may be able to apply for legal aid. For example, costs may be incurred in making an application to the courts or in seeking legal advice. Two sorts of legal aid are available under the Adults with Incapacity Act:

- **Advice and Assistance**

will be available, subject to the statutory financial eligibility test being satisfied, to enable people to seek advice from a solicitor on any aspect of the Act. It is the solicitor who applies the financial eligibility test in respect of applications for legal aid for Advice and Assistance. Where the applicant is someone other than the adult, the financial eligibility test will be assessed on the resources of the adult and not the applicant.

- **Civil Legal aid**

will be available without a means-test in respect of applicants for an intervention or guardianship order which includes welfare powers or a mix of welfare and financial powers. In this case the solicitor applies to Scottish Legal Aid Board (SLAB) who decides if the application meets the eligibility criteria. Where there is no welfare element and the application is for financial powers only, SLAB will look at the income and capital of the adult.

- 1.22 The SLAB website www.slab.org.uk provides information by region on solicitors registered for legal aid work. A fact sheet on the Adults with Incapacity Act and legal aid is available at:
<http://www.scotland.gov.uk/Topics/Justice/Civil/awi>.

LIMITATION OF LIABILITY

- 1.23 Section 82 of the Act provides that no liability shall be incurred by a guardian, a continuing attorney, a welfare attorney, a person authorised under an intervention order, a withdrawer or the managers of a residential establishment for any breach of any duty of care or fiduciary duty owed to the adult if he, she or they have:

acted reasonably and in good faith and in accordance with the principles;
or failed to act and the failure was reasonable and in good faith and in accordance with the principles.

- 1.24 This is a crucial provision which emphasises the importance of anyone exercising powers under the Act being fully familiar with the principles and applying them properly to decisions and actions taken.

HOW DOES THE ACT PROTECT THE ADULT FROM ABUSE?

1.25 The Act provides a number of safeguards for adults through the roles and functions of the statutory bodies described above and in other ways. These include checks on the suitability of the proposed guardian, intervener or withdrawer; the displacement of the nearest relative as described in paragraphs 1.18-20: a formal assessment of the adult's capacity; and the registration of all appointments with the OPG. The Act makes provision for investigations and where complaints are upheld, a range of measures may be taken. In serious cases the OPG, MWC and/or local authority will refer the matter to the sheriff court.

It is an offence for anyone exercising welfare powers under the Act to ill treat or neglect an adult. The penalties for someone found guilty on summary conviction of the offence under the Act are up to 6 months imprisonment or a fine of up to £5000. Someone convicted of the offence on indictment may be imprisoned for up to 2 years or given an unlimited fine.

FOR FURTHER INFORMATION AND ADVICE

1.26 If you are unsure about the needs of the person you care for and whether the provisions of the Act will help, there are several sources of help: the local authority social work department in the area where the adult lives; the Citizen's Advice Bureau, or a specialist voluntary organisation. The OPG will provide advice on financial matters in relation to the Act and the MWC has a helpline to deal with welfare queries where the person has a mental disorder. (Annex 2, Useful Addresses). You can also consult the Scottish Government's website at:
<http://www.scotland.gov.uk/Topics/Justice/Civil/awi>.

Chapter 2



CREATING A POWER OF ATTORNEY

WHAT IS A POWER OF ATTORNEY?

- 2.1** A power of attorney is a document appointing someone to act for the granter and to make decisions on behalf of the granter. The person who grants the power is known as the ‘granter’ and the person appointed is the ‘attorney’. Anyone concerned to make plans for the future should consider making a power of attorney. A power of attorney can be useful both for someone anticipating permanent incapacity or to deal with periods of temporary incapacity. This could be relevant to someone with a fluctuating condition.³ In this chapter ‘you’ refers to ‘you’ as the granter. However this chapter is also relevant to the prospective attorney – to understand the requirements for creating a valid power of attorney.
- 2.2** Powers of attorney can deal with financial and/or welfare matters.
- 2.3** A continuing power of attorney is a power over the granter’s property or financial affairs which is intended to continue, or, (where so specified) to start, to have effect in the event of the granter’s becoming incapable in relation to decisions about the matter to which the power of attorney relates.

³ Patrick H. (2006) Mental Health, Incapacity and the Law in Scotland. Tottel

- 2.4** A welfare power of attorney relates to decision making in relation to the granter's personal and health care and can only come into effect on the onset of incapacity in relation to the powers granted.
- 2.5** The granter can appoint the same person to deal with financial and welfare matters, 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.
- 2.6** You may wish to engage an appropriate professional to draw up your power of attorney, such as a solicitor, or do so yourself. The OPG website provides sample powers of attorney documents which cover all possible variations in terms of types, appointment/s and powers:
http://www.publicguardian-scotland.gov.uk/whatwedo/sample_power_of_attorney.asp.

STATUTORY REQUIREMENTS FOR MAKING A VALID POWER OF ATTORNEY

- 2.7** The following statutory requirements apply to the creation of power of attorney document:
- a power of attorney must be expressed in a written document;
 - the document must be signed by the granter; and state clearly that the powers are continuing or welfare or a combination of both;
 - a power of attorney must contain a statement to the effect that the granter has considered how his/her incapacity should be determined where the authority of the attorney commences on incapacity;
 - it must incorporate a certificate in the prescribed form by a practising solicitor, a practising member of the Faculty of Advocates or a registered and licensed medical practitioner which certifies that he or she:
 - has interviewed the granter immediately before the granter signed the document;
 - is satisfied, either because of knowledge of the granter or because of consultation with another person who has knowledge of the granter, that at the time of granting the power, the granter understands its nature and extent; and
 - has no reason to believe that the granter is acting under undue influence.

- 2.8** The Act does not specify how the certificate should be ‘incorporated’, but the Public Guardian has indicated that she will accept a certificate that is attached to the power of attorney document in the same manner as all other pages of the document itself. This is likely to mean stapled in the vast majority of cases. The certificate is prescribed by the Adults with Incapacity (Certificates in Relation to Powers of Attorney) (Scotland) Regulations 2008.
- 2.9** The person being granted power of attorney cannot also be the person who signs the certificate described above. However if the prospective attorney is a solicitor in a firm, another solicitor in the same firm may sign. Where the firm itself is being appointed the continuing attorney, it is good practice for the certifier to be someone independent of the firm.
- 2.10** Attorneys have no authority to act until the power of attorney document has been registered by the Public Guardian. (Whether or not the powers can be exercised thereafter will depend on the terms of the power of attorney, i.e. whether the granter has included a ‘springing clause’ that is a clause specifying an event that must happen before the attorney can act, e.g. an assessment of incapacity by a medical practitioner).

WHO CAN BE AN ATTORNEY?

- 2.11** You are free to choose whomever you want to be your attorney. However, you will wish to bear in mind that an attorney has a position of trust and should be someone who is competent and reliable. He or she should have the skills and abilities to carry out the necessary tasks.
- A welfare attorney can only be an individual.
 - A continuing attorney can be an individual or firm, e.g. of solicitors.
 - you can appoint a combination of both individuals and professionals.
- 2.12** An individual cannot act as a continuing attorney if he/she is bankrupt at the time of the appointment or thereafter. If you become bankrupt, your continuing power of attorney will be terminated. People who are bankrupt can still act as a welfare attorney. If you become bankrupt, this will not affect your welfare power of attorney.

SOLICITORS OR ORGANISATIONS AS ATTORNEYS

2.13 A continuing attorney could be a body such as a firm of solicitors or accountants, or a financial institution or a voluntary organisation. Where the continuing attorney is not an individual, it is good practice for an individual to be identified as having particular responsibility for performing the functions of attorney.

APPOINTMENT OF JOINT OR SUBSTITUTE ATTORNEYS

2.14 You should also consider the question of whether you wish to appoint more than one attorney. You may appoint:

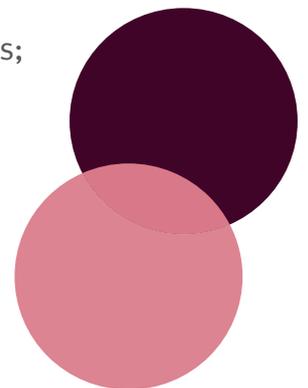
- separate attorneys to exercise functions in relation to property and financial affairs and in relation to personal welfare;
- joint attorneys with similar or different powers;
- one or more substitute attorneys to take the place of an attorney who dies or resigns.

2.15 You cannot give your attorney/s the right to appoint a substitute or a successor.

POSSIBLE POWERS TO BE INCLUDED IN A CONTINUING POWER OF ATTORNEY

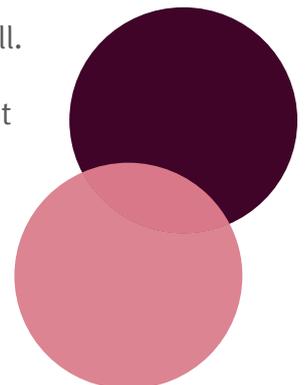
2.16 You should try to foresee all the property and financial affairs which may need to be managed in the event of your incapacity. You should discuss with the prospective attorney and any professional you have engaged the extent of powers which you wish the attorney to exercise. These could include in particular power to:

- purchase or sell heritable property (land or buildings);
- open, close and operate any account containing your funds;
- claim and receive on your behalf all pensions, benefits, allowances, services, financial contributions, repayments, rebates and the like to which the you may be entitled;
- have access to financial information concerning you, such as the amount of funds you hold in an account;
- deal with your income tax;
- make any alimentary payments to your spouse and/or children for which you may be liable;



- pay your household expenses;
- invest your savings in interest bearing accounts; bonds; stocks and shares or any other form of investment; stating any restrictions such that investments must not be in stocks and shares or must only be in ethical investments;
- make gifts on your behalf, including any limits on the size of such gifts or the potential recipients;
- run, sell or wind up any business you own;
- purchase out of your income or capital a vehicle or any other equipment which may be required for your benefit;
- pay for private medical care and residential care costs;
- borrow money on your behalf and to repay the interest and capital on any loan taken out by you or by the attorney on your behalf;
- agree to any common repairs or improvement scheme in respect of which you are still liable and to defray the expenses thereof from your income or capital;
- pursue, defend or compromise any legal action on your behalf involving a claim for property or money;
- pay for you to go on holiday and for the expenses of any accompanying carer or for respite care;
- pay your attorney/s or other agents fees and expenses associated with the exercise of their functions;
- receive, renounce or vary any testamentary or other entitlements; grant deeds of covenant, or make any other provisions from your estate;
- set up any form of trust;
- have access to confidential financial information to which you would have been entitled to have access;
- have access to confidential information about your will.

2.17 The attorney may not need to exercise all the powers that you grant. Either the occasion may not arise to exercise particular powers; or he/she may find that when the principles are applied the exercise of the powers would not be justified. The important point is that you try to foresee the powers which may be required to meet your needs.

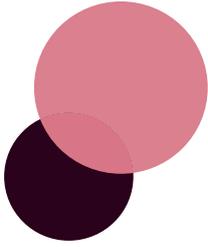


2.18 It is advisable for you to discuss your feelings and wishes regarding the exercise of your powers with your prospective attorney. For example do you have any views about what type of investments you would wish to make or avoid? Do you have views about remaining in own home as opposed to moving into residential care? do you wish any particular property to be safeguarded as inheritance for a particular person? Do you attach sentimental value to any particular property? If you would want your attorney to consult with others (for example with any of your children or other relatives) you should declare this in the power of attorney document.

POSSIBLE POWERS THAT MAY BE INCLUDED IN A WELFARE POWER OF ATTORNEY

2.19 You should try to foresee all the welfare decisions which may need to be taken in the event of your incapacity and discuss these with the prospective attorney and any professional you have engaged. These could include power to:

- decide where you should live;
- have access to your personal information held by any organisation;
- consent or withhold consent to medical treatment for you, where not specifically disallowed by the Act, i.e. your attorney cannot place you in hospital for the treatment of mental disorder against your will; nor consent on your behalf to certain medical treatments specified in regulations. With regard to other treatments, the doctor responsible must obtain consent from your attorney, where it is reasonable and practicable to do so. Arrangements are set out in the Act for obtaining a second opinion where the attorney and doctor disagree. Even where your attorney and the doctor agree, the Act gives a right to ‘any person having an interest in the personal welfare of the adult’ to appeal to the Court of Session about the medical treatment in question. For full details consult the Part 5 Code of Practice ‘For persons authorised to carry medical treatment and research’;
- consent to participation in research, in accordance with safeguards set out in Part 5 of the Act;
- pursue, defend or compromise any legal action on your behalf involving your personal welfare;
- provide access for medical treatment, dentistry, etc. where this will benefit you;
- make decisions on your diet, dress and personal appearance;
- make decisions on social and cultural activities that you may pursue;

- 
- arrange for you to undertake work, education or training;
 - decide with whom you should or should not consort;
 - take you on holiday or authorise someone else to do so;
 - have access to confidential documents or information relating to you where you would have access to such documents or information on a personal basis, such as access to medical records or personal files held by social work services.

2.20 Note that these are only examples of powers that might be included. In any particular case, some powers may be inappropriate and others may need to be added.

INVOLVEMENT OF PROSPECTIVE ATTORNEY AT TIME OF GRANTING

2.21 Although there is no requirement for you to gain the agreement of the person you wish to become your attorney, the Public Guardian will have to be satisfied when she comes to register the power of attorney that the person named is prepared to act. Therefore, it is good practice for you to discuss with the person what being an attorney involves. It will be helpful if you keep a note of the matters discussed at this time and for the prospective attorney to have a copy. This is because there may be a long interval of time before the power needs to come into operation (if at all).

2.22 The purpose of the discussion is to ensure that:

- you and the prospective attorney have the same understanding about what you want to happen in the event that you become unable to make decisions or act for yourself at some point in the future;
- you offer sufficient powers to ensure that your attorney can do what you would wish;
- you make your wishes and feelings clear;
- you provide the prospective attorney with sufficient information regarding your financial circumstances: income, liabilities and assets; existing arrangements; where certificates, titles, records, papers, etc are kept; particulars of professional advisers, etc; details such as income tax office and national insurance number; and the people who should be consulted about the exercise of your powers;
- it is clear whether you want a continuing power of attorney to be exercisable immediately (i.e. before incapacity) or only to start at the onset of incapacity.

If you are appointing a welfare attorney you should ensure that he/she knows your likes and dislikes and personal welfare concerns fairly thoroughly. In the course of your discussions you and the prospective attorney might cover the following issues, preferably not on a single occasion, but in the course of building up your relationship of trust:

- views as to how you would like to be cared for if the expected arrangements break down, or if you become unwell;
- hobbies and activities and the places you like to visit and the social groups you enjoy being part of;
- particular dislikes and activities, places or people you would prefer to avoid;
- medical history and any particular medical problems which require treatment or could require treatment in the future; regular supply of medication for any condition, such as asthma or high blood pressure;
- medical treatment information, where present treatment (if any) takes place and the names of the medical practitioners; particular dental, eyesight, hearing, orthopaedic or other problems which will require specialist attention;
- particular close relatives and friends with whom you would like to keep in touch;
- issues surrounding family relationships as relevant;
- views about the need to attend particular events such as weddings, funerals, or celebrations surrounding the birth of a child, in relation to any particular family member or friend; views about issues such as, for example, where and with whom to spend Christmas or other regular festivals;
- holiday preferences and about particular concerns such as burning easily, inability to swim, fear of animals, etc.;
- your personal preferences regarding diet, dress or appearance that you would wish to have respected;
- continue with a particular religious affiliation or keeping in touch with any particular member or members of faith groups.

This list is not comprehensive. It is a guide as to the kind of issues that arise in people's lives at some time and which you may wish to consider in drawing up your power of attorney.

GRANTING SUFFICIENT POWERS FOR AN ATTORNEY TO ACT

2.23 You have wide powers to grant whatever powers you choose. Powers are strictly interpreted, which means that when it comes to legal interpretation of the powers granted there is no possibility of deducing implied powers. You need to be sure that, while capable, you give the necessary powers. However, that does not mean that all possible powers have to be spelled out in detail. It can be fully effective, for example, to confer ‘the whole powers in relation to my property and financial affairs which can competently be granted upon a continuing attorney, without limitation’, if that is what you want. It is also possible to grant much more limited powers if you wish.

REGISTERING A POWER OF ATTORNEY

The information about registration is provided in the OPG’s Guidance Notes on Registering Powers of Attorney available on request from the Public Guardian’s office or download from OPG website www.publicguardian-scotland.gov.uk See Annex 2.

2.24 If a long interval is likely to elapse between the original grant, and the time of your incapacity, it will of course be possible to hold further discussions to review the original grant. It is good practice for you to hold further periodic discussions with the prospective attorney to ensure that the powers granted remain appropriate and sufficient. For example if you acquire significant investments since the original grant, you may want to grant a prospective continuing attorney additional powers to maintain or reinvest these investments.

COSTS OF ACTING AS AN ATTORNEY

2.25 There is no provision in the 2000 Act for reimbursement of a welfare or continuing attorney. If you wish to allow your attorney to claim fees and/or out of pocket expenses in relation to his or her functions as an attorney, you may make provision in the power of attorney for this. In the case of a continuing attorney who is a professional person, such as a solicitor or accountant, the power of attorney is likely to make express provision for the deduction of fees and expenses.

REVOCATION (CANCELLATION) OF A POWER OF ATTORNEY

2.26 You (whilst you are capable) may revoke (cancel) the power of attorney (or any of the powers granted by it) after the document conferring the power of attorney has been registered, by giving notice in writing to the Public Guardian.

2.27 A revocation notice is only valid if it is expressed in a written document.

2.28 The document must be signed by the granter.

2.29 It must incorporate a certificate in the prescribed form by a practising solicitor, a practising member of the Faculty of Advocates or a registered and licensed medical practitioner which certifies that he or she:

- has interviewed the granter immediately before the granter signed the document;
- is satisfied, either because of knowledge of the granter or because of consultation with another person (whom he or she names in the certificate) who has knowledge of the granter, that at the time the revocation is made the granter understands its effect; and
- has no reason to believe that the granter is acting under undue influence.

2.30 On receiving a revocation notice, the Public Guardian shall:

- enter the details in the register maintained by her;
- notify the continuing or welfare attorney; and
- where it is a welfare attorney who is notified, the local authority and the MWC.

2.31 You can revoke the power of attorney originally registered with the OPG and register a new one at the same time (for details see the OPG's Guidance Notes for Registration).

Chapter 3



EXERCISING POWERS OF ATTORNEY (CONTINUING AND WELFARE)

WHAT RESPONSIBILITIES DO ATTORNEYS HAVE?

3.1 Once you start to act under the powers granted, you must meet certain standards:

- follow the Act's principles (see chapter 1 paragraph 1.12);
- consider whether the person has the capacity to make the decision in hand for him/herself – and if not to consider whether the granter is likely to regain capacity to make the decision in the future;
- only make those decisions that the power of attorney gives you authority to make;
- apply certain standards of care and skill (duty of care) when making decisions;
- carry out the granter's instructions;
- not take advantage of your position and not benefit yourself (fiduciary duty);
- keep records;
- respect confidentiality;
- comply with any directions imposed by the sheriff court.

DUTY OF CARE

An attorney must act with due skill and care in exercising the powers he/she has been given in relation to the adult. A professional person acting as a proxy must demonstrate the skill and care that would be expected of a reasonably competent member of that profession.

FIDUCIARY DUTY (POSITION OF TRUST)

An attorney has what is known as a 'fiduciary duty' to the granter. This means that you are in a position of trust with respect to the matters covered by your powers. You should not take advantage of your position – nor put yourself in a position where your personal interests conflict with your duties. Nor must you allow other influences to affect the way in which you act as an attorney. Decisions must always benefit the granter. Attorneys must not profit or get any personal benefit from their position, apart from receiving gifts where the power of attorney allows it.

DUTY TO KEEP RECORDS

Continuing attorneys should keep accounts and keep the person's money and property separate from their own. Welfare attorneys should keep a record of matters relating to the personal welfare of the adult – for example, his or her care plan from the social work department if there is one; a note of special events or significant incidents, including illness and accidents.

DUTY OF CONFIDENTIALITY

There are three separate issues that arise under the heading of confidentiality. These are:

- your right to have access to confidential information about the adult;
- the use and proper disclosure of confidential information about the adult;
- your fiduciary duty (the trust placed in you) to maintain the adult's confidentiality.

The issue of access to confidential information concerning the adult should be covered in the original grant of power of attorney. Similarly your right to disclose information about the granter should have been covered in the power of attorney document.

Where someone holding confidential information refuses to disclose it to you and your powers do not explicitly authorise you to demand it, then you should consider whether the party in question owes to the adult other duties in addition to the duty of confidentiality which may override the duty of confidentiality, and if so to explain this.

- **Example:** an investment adviser may owe the adult a duty of confidentiality not to disclose the size and location of his or her investments, but may also owe a duty of giving the adult the best possible advice on the investment of his or her estate. The latter duty would imply that disclosure of the size and location of the investments to you as continuing attorney would be justified.

If you cannot obtain the information you need because of inadequacy of your powers as attorney, you might refer the matter to the Public Guardian, take legal advice, or seek an intervention order in relation to the information in question.

LIABILITY

- 3.2** If you act reasonably and in good faith, and in accordance with the principles, you will not be liable for any breach of any duty of care or fiduciary duty.

ACTION ON BECOMING AWARE OF THE ADULT'S INCAPACITY

INFORMING THE ADULT AND OTHERS

- 3.3** When you become aware of the granter's loss of capacity in relation to matters in hand, it would be good practice to meet with the granter and others with an interest in his or her welfare and finances, e.g. other family members. This should be done as soon as reasonably practicable after learning of the person's incapacity. The purpose of the meeting is to explain your position as welfare and or continuing attorney and what your powers will cover. You may need to refresh your memory as to what your powers as attorney cover by consulting the document granting your powers. Needless to say, if there are both continuing and welfare attorneys you should co-operate with each other so that the same meeting can cover both property, financial affairs and welfare matters.

- 3.4** If it is not possible to meet with others together then you should try to meet with each person face to face. If this is not possible, for example because the nearest relative lives far away or the primary carer (if this is someone other than you) is not able or willing to meet, you should write to each of them. Your letter should inform them how you propose to go about your functions.
- 3.5** If you have welfare powers, you should explain that you will undertake a review of the arrangements in place for caring for the granter's personal welfare and that you will report the outcome of the review to them and discuss what, if any, action needs to be taken.
- 3.6** You should explain that you will need their co-operation in carrying out the review, for example in obtaining information about the adult's health, how he/she spends time, how he/she copes with personal care and so on.
- 3.7** If you have continuing powers you should explain that you will undertake a review of all financial matters over which you have powers and may need their co-operation. That if you make any changes to the person's current arrangements you will keep them informed.

WHAT TO DO IF THE ADULT HAS COMMUNICATION DIFFICULTIES

- 3.8** If the adult has communication difficulties, the guidance in Annex 1 may help.
- 3.9** If your attempts to communicate with the adult are not proving successful, you should still take into account the information you have gathered about the adult's wishes and feelings in the past; and any information you can obtain from those involved with the adult on a day to day basis. You should keep a record of the attempts to communicate, even if they are unsuccessful.
- 3.10** In cases where the adult has seriously impaired capacity and communication, for example, a person with profound and complex learning disabilities, it would be acceptable practice to meet separately with relevant others.



HOLDING REGULAR REVIEWS

3.11 You should review the person's welfare and/or financial needs at appropriate intervals. A review should involve the person (as far as possible) and others concerned with his/her care and or financial management. The frequency of review will depend on any change in circumstances and extent of your day to day contact with these individuals. However it would normally be good practice to hold a review at least once every six months. For further details see chapter 4 (financial) and chapter 5 (welfare).

IF YOU THINK ACTION IS NEEDED - APPLY THE PRINCIPLES

3.12 The outcome of a review may be that an action/intervention may be needed. In reaching a decision as to whether and what action to take you must apply the principles. The principles are set out below with examples relating to situations which may arise for both welfare and continuing attorneys.

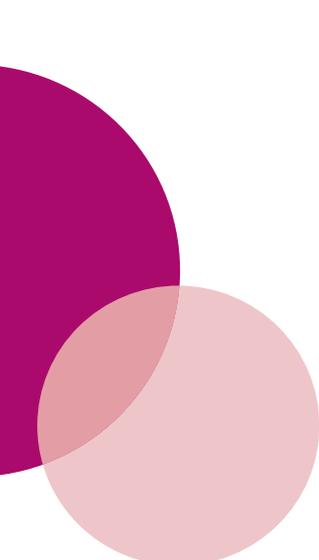
- First you must consider whether the intervention would **benefit** the person, and that benefit cannot be achieved in any other way.

Example: if a substantial amount of the adult's surplus funds is in a current account, it will benefit the adult in terms of maximising income to place the funds in an interest bearing account and it will not be possible to maximise income without making some change.

Example: if the person is inactive and lethargic, try to find out how he or she is feeling, whether he/she is unwell or unhappy; whether the person is undernourished and why that might be, e.g. help needed with shopping for food or assistance with preparing and/or consuming meals. Find out what activities would be of interest or if the person would like more company at home or outings to see friends and relatives or places of interest. If you think the person may be depressed then contact the person's GP.

- Secondly you should consider whether the proposed action is the **least restrictive option** in relation to the freedom of the person, but consistent with what needs to be achieved to benefit the person.

Example: continuing with the example of the account, you will wish to consider how much freedom the person should retain to divert funds to alternative use. If the purpose of the intervention is to maximise income, but the adult may also need access to capital, you should not be tying up the account where there will be no early access or a substantial penalty for such access.



Example: to move the person into a care home might be considered a restrictive option (unless, for example, the person is isolated and living in a top floor tenement flat). Before deciding that the person can no longer live at home, you must take steps to find out whether additional support from community care services would enable the person to remain at home for longer. If you reach the view that the person must move into a care home, try to find a home which will meet the need to maximise opportunities for the person to keep up interests and contacts, enable exercise as appropriate to the person's capabilities; provide appropriate stimulation and maintain as much independence as feasible for the person.

- It is important that you take **into account the past wishes and feelings of the person**. You should be aware of his/her past wishes from earlier discussions and should have notes of these on file.

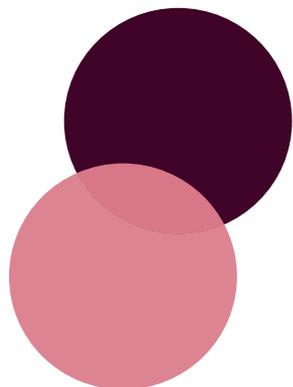
Example: there is no point in investing in stocks and shares if the person has already made it clear that he or she prefers safe investments with a lower return to risky investments. You should also respect the person's wishes and feelings regarding ethical investments.

Example: If the person has made it clear in the past that he or she dislikes clubs and day centres then there is no point in making such arrangements. Conversely, if the person has said in the past that he/she would rather live in a care home than be a burden to relatives, that view should be taken into account.

- In relation to every particular decision and or action that you are considering you will also need to **take account of the present wishes and feelings of the person so far as they can be ascertained**. If the person has communication difficulties you made need assistance from a specialist social worker or speech and language therapist to do this.
- You also need to **take account of the views of the nearest relative, and relevant others**. They may also help identify issues you may have overlooked in your review, for example, the person's fondness for animals or favourite places to visit. You might wish to write or phone in advance of any further meeting to report the outcome of your review.

CHECK YOUR POWERS

- 3.13** If, following a review, you decide that a major decision needs to be taken you should check whether your powers would cover that particular intervention. You will only be able to act as attorney where you have been granted the powers to do so.



- 3.14** It is not possible to add powers once the granter has lost capacity. However it may be possible for the desired action to be achieved through the social work department. For example, if the person requires community care services or a move to a care home and you don't have the power to consent, the local authority may be able to use its powers under the Social Work (Scotland) Act 1968. Or, depending on circumstances, it may be appropriate for you to apply for a welfare guardianship or intervention order. For further information see the booklet 'Guardianship and Intervention Orders – making an application'. Information about accessing Scottish Government publications can be found at Annex 2.
- 3.15** You should make a note of: the findings of your review; what decisions or actions you have considered; actions and decisions taken; and add this to your file.

MAKE SURE YOU CAN BE CONTACTED

- 3.16** You should ensure that you can be easily contacted by the person, nearest relative and relevant others. You should give them full contact details, including any other names by which you may be known, your preferred contact address, telephone number, fax and e-mail, your emergency contact details and the name and contact details of any other person who can get a message to you quickly.
- 3.17** You should give advance notice to all of the above if you are likely to be unavailable for any period of time.

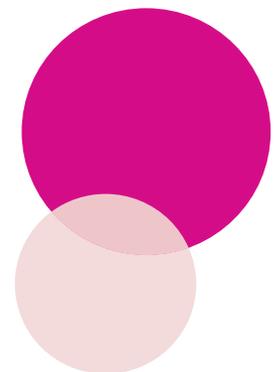
RESPONSIBILITY TO ACT

- 3.18** Although it is helpful to be familiar with the granter's affairs, it can be important to step back and review the whole situation, in case there are elements which you have not previously thought about or may not have been fully aware.
- 3.19** Your role should not be purely reactive. You should not just wait until someone else comes to you with a problem about the person's health, welfare, property or financial affairs. You should take stock of these affairs for yourself and take action where necessary. The extent to which you can be proactive will depend on the powers you have been granted and you should check that your powers cover any action that you are considering.

- **For example:** if you have continuing powers and the adult is accumulating significant income, you should see whether it can be applied for the adult's benefit, and otherwise ensure that it is invested where it will obtain a reasonable rate of return. If the adult is or may be entitled to benefits, you should take steps to claim these on his or her behalf.
- **For example:** if the adult becomes unable to manage his or her personal care without help you should approach the social work department for a needs assessment and support services. If the adult is unwell, you should consult a medical practitioner.

WHAT IF YOU ENCOUNTER RESISTANCE TO THE EXERCISE OF YOUR POWERS?

- 3.20** You may find that when you first start to exercise your powers you encounter resistance.
- 3.21** It will be essential to be able to produce your certificate of registration to fundholders and others with whom you may do business on behalf of the person.
- 3.22** Others may question whether the granter is in fact incapable of taking the actions or decisions that you propose to take. You must be sure that you are acting within your powers. You should refer to the clause in the power of attorney on how incapacity is to be decided and check that you have complied with this. It may also be advisable to seek advice from the OPG (on the exercise of continuing powers) or the MWC (on the exercise of welfare powers). If the person him/herself or someone else with an interest in his/her welfare contends you are in breach of your powers then he/she can make a formal complaint.
- 3.23** Ultimately it is for the courts to decide if someone is incapable and others could apply to the sheriff to have the granter interviewed or assessed. You can direct anyone who doubts your position to his/her right to seek directions from the sheriff under section 3(3) of the Act, or you can seek such directions yourself.



Chapter 4



SPECIFIC GUIDANCE ON EXERCISING CONTINUING POWERS OF ATTORNEY

MANAGING THE PERSON'S FINANCES

- 4.1 You are not obliged to invest the person's estate for maximum profit but you must exercise at least the standard of financial management that he/she would expect.
- 4.2 You are not obliged to do anything which would otherwise be within your powers if doing it would, in relation to its value or utility, be unduly burdensome or expensive.
- 4.3 The funds and assets you are managing still belong to the granter and you should usually keep the person's finances separate from your own or anyone else's. There may be occasions where the granter and attorneys have agreed in the past to keep their money in a joint bank account. It is possible to continue this. But in most circumstances attorneys must keep finances separate to avoid any possibility of mistakes or confusion.
- 4.4 If you abuse your position, for example by using the granter's funds for your own benefit, you may be liable to make good his/her losses. It is also possible that anyone investigating your actions may consider such use as theft or fraud and report the matter to the police or, if you are a professional person, to your supervisory body.

- 4.5** If you live in the same household as the granter, the use of his/her funds for household expenses that benefit you as well as the person will not count as abuse.
- 4.6** If you act reasonably and in good faith, and in accordance with the principles, you will not be liable for any breach of any duty of care or fiduciary duty.

REVIEW THE PERSON'S PROPERTY AND FINANCIAL AFFAIRS

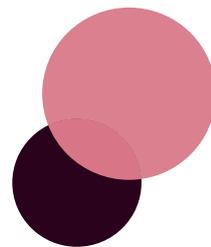
- 4.7** You may yourself be the nearest relative and/or primary carer of the person. You may also be familiar with his/her affairs either because you have day to day contact, or you have already been exercising a power of attorney while the granter retained capacity. It may be that the person's property and financial affairs are very simple and that there are few new decisions to be made.
- 4.8** The following good practice guidance is written mainly from the point of view of an attorney who has not had any day to day knowledge or experience of the adult's affairs but should also be used as a check by attorneys who believe that they are reasonably familiar. It is good practice for all attorneys to review the adult's property and financial affairs. This might involve:
- checking whether the adult owns his/her own home, whether solely or jointly, whether there is any outstanding loan, and what arrangements are in place to pay such a loan;
 - if the person resides in someone else's home, whether he/she has occupancy rights by reason of being a spouse, civil partner or cohabitant;
 - if the person is renting, what arrangements are in place to pay the rent and what security of tenure he/she has over the property;
 - the size and location of the person's savings and investments;
 - checking what regular outgoings the adult has or is likely to have, for example bills for utilities, council tax, hire purchase or catalogue, and what arrangements are in place to pay these;
 - checking what income the person is receiving, what are the payment arrangements, and whether the adult is receiving all the benefits and other sources of income to which he or she may be entitled;
 - checking what liabilities the adult may have to aliment other members of his/her family.

FIND OUT IF ANYONE ELSE HAS POWERS OVER THE PERSON'S FINANCES AND/OR PROPERTY

- 4.9** You should be aware that as continuing attorney, you may not be the only person with powers to intervene in the person's affairs.
- 4.10** You should remind yourself whether there is a joint attorney and if so how the powers are distributed between you.
- 4.11** You should also check whether there is any other person with powers over the adult's financial affairs, in particular:
- any trustees of a trust set up for the benefit of the adult, or in which the adult has an interest;
 - any holder of a joint account with the adult;
 - any person authorised by the Public Guardian (under Part 3 of the Act) to access funds;
 - any Department for Works and Pensions appointee who has authority to receive benefits on behalf of the adult;
 - anyone who has been managing the adult's affairs under arrangements involving no official appointment. (It is likely that your powers will supersede those of any such person, but you should only intervene if that is justified under the Act's principles.
- 4.12** If your powers include powers to run the person's business, you will need to ensure that you identify any partner or co-director in the business, and obtain copies of all partnership agreements and other relevant documents, and take advice on how the granter's business should be run and administered.

FIND OUT IF ANYONE HAS WELFARE POWERS IN RELATION TO THE PERSON

- 4.13** You should check if there is anyone who has welfare powers in relation to the person, such as a welfare attorney or someone authorised under an intervention order. You and they should consult with each other, and you may be required to deal with the financial consequences of decisions by a person exercising such powers.



PAYING FOR COMMUNITY CARE SERVICES

- 4.14** You should also find out if the person has been in receipt of community care services and if there is a charge for these services. Although some services are free, there may be a charge for others. You will need to identify the social work officer within the local authority who has been responsible for arranging services.
- 4.15** It will be a matter for any attorney with welfare powers in relation to a grantor to ensure that he/she is receiving appropriate services. A welfare attorney with powers to make care arrangements is entitled to apply for Self-directed support⁴ on behalf of the person, if he or she wishes to do so. Regular payments are then made into a separate account in the name of the welfare attorney.

ASSESSING THE NEED FOR CHANGE

- 4.16** It would be good practice to make your own assessment of whether the adult's property and financial affairs are in a satisfactory shape. For example:
- are funds being fully utilised for the person's benefit;
 - are current standing orders adequate to pay for any regular and ongoing expenses;
 - are any surplus funds invested so as to secure a reasonable return bearing in mind the size of the funds;
 - are there benefits or other income to which the person may be entitled and which are not being claimed?

TAKING STOCK OF THE NEED AND TIMESCALE FOR FUTURE CHANGES

- 4.17** You should find out when it will become necessary to make decisions about various matters, such as the:
- renewal of a lease;
 - repayment of any outstanding loan;
 - reinvestment of any funds that reach maturity, such as a life assurance policy;
 - future support of any dependant of the person, for example, spouse, children;
 - any possible move to residential care.

⁴ The local authority has power to make Self-Directed Support payments to enable the welfare attorney or welfare guardian to arrange and pay for services of his/her choice based on a formal needs assessment. See National Guidance on Self-Directed Payments, 9 November 2007 at <http://www.scotland.gov.uk/Publications/2007/07/04093127/0>

OBTAINING SPECIALIST ADVICE

4.18 Consider whether you need specialist advice on decisions to be made now or in the near future. Examples:

- With regard to the investment of funds you may wish to obtain independent financial advice.
- If the adult's financial affairs are complex, or you have to fill in financial forms such as a tax return, you may need the advice of an accountant.
- If the question of the sale or purchase of a house or other heritable property arises, you will certainly need legal advice.
- You will also be well advised to seek legal advice if it appears to you that the adult may have a claim against a third party for damages such as for personal injury.
- If you are empowered to run a business belonging to the adult, you may well need legal and accountancy advice.
- If you require an accountant or a financial adviser and do not already have one you should contact the Institute of Chartered Accountants of Scotland (ICAS) or the Financial Services Authority (FSA).
- If you require a solicitor and do not have ready access to one, you should contact the Law Society of Scotland. Always consider whether the adult may be entitled to legal aid. SLAB has a list of solicitors in your area registered for legal aid.

UPDATING YOUR FILE

4.19 When you have carried out the initial review of the adult's financial affairs, it would be good practice to update your file to record the following information:

- sources of income and the weekly or monthly amounts;
- outgoings and how these are met;
- accounts with financial institutions, including account name and number, and address of financial institution, and if possible the amount in each account, and where and by what means any income is paid;
- any loans for which the adult is liable and arrangements for paying these;

- any insurance or life assurance policies held by the adult;
- any bonds, shares or other investments held by the adult, and wherever possible the actual bonds or share certificates;
- any regular payments which the adult is liable to make in relation to dependants, such as aliment to separated spouse; or children whom the adult is liable to maintain; or school fees;
- any other people with power to intervene in the adult's financial affairs;
- name, address and other contact details of any person with welfare powers in relation to the adult and any officer of the social work department providing community care services to the adult;
- names, addresses and other contact details of any professional advisers with whom you will be dealing over the adult's financial affairs, such as financial adviser, accountant or practising solicitor.

IF YOU THINK THAT ACTION NEEDS TO BE TAKEN

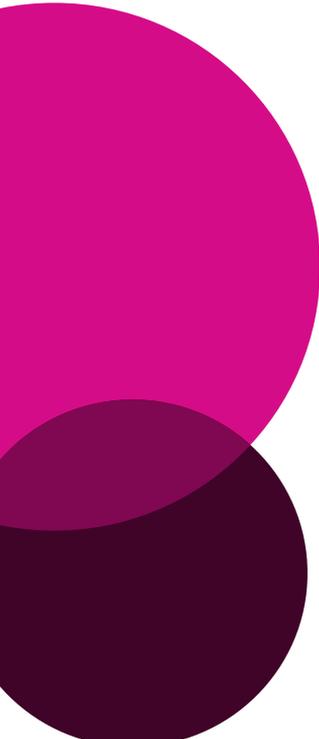
4.20 If the outcome of the review is that certain actions may need to be taken you must apply the principles.

CHECK YOUR POWERS

4.21 If you decide that an intervention is needed, you should check whether your powers would cover that particular type of intervention.

- **Examples:** You may think that the adult's savings would be better invested in bonds. But you may not have been granted power to reinvest the adult's savings.
- You may think that the adult is entitled to an allowance such as an attendance allowance, but you may not have been granted power to claim benefits on behalf of the adult. However, in this situation you can apply to the Department for Work and Pensions to become the person's appointee.

4.22 You may consider that for tax planning reasons an entitlement should be renounced or a gift made, but you can only do these things if specifically authorised to do so in the power of attorney document.



4.23 You will only be able to intervene as attorney where you have been granted the powers to do so. It is not possible to add powers once the adult has lost capacity. Where financial powers are needed to enable you to act, you, or someone else, may apply to become a withdrawer or financial guardian or intervener, as appropriate. Where you feel an important welfare decision/s needs to be made, and there is no one else with appropriate powers, you may wish to bring the situation to the attention of the social work department, and/or consider applying for a welfare guardianship or intervention order. For further details see Guardianship and Intervention Orders – making an application. A Guide for Carers (Annex 2).

SETTING OUT YOUR PROPOSALS FOR CHANGE

4.24 Once your review is complete you should check your powers. This re-reading of the document may also highlight issues that you may have overlooked in your review of the adult's affairs. For example the power of attorney may cover tax planning, but you may have overlooked this. When you are satisfied that your review is complete it would be good practice to finalise your proposals in a written document which you should give to the adult and send to others with an interest in his or her property or financial affairs. You should place a copy of this document on your file.

4.25 Having sent out your proposals, you should meet the person to explain what you feel is the best plan of action and seek his/her views as far as possible. The adult may be capable of instructing you on the matter in question, although not capable of carrying out the action for him or herself. The adult may also be able to indicate a view by non-verbal language or signals.

4.26 Then ideally meet with the nearest relative or anyone nominated by the sheriff to act in place of the nearest relative and primary carer, named person, any welfare attorney, and any other person with an interest in the property or financial affairs of the adult, at which you can explain your findings and recommendations and seek their views. If a meeting is not possible you should write explaining your proposals to each of these, and invite written comments.

4.27 If you have taken professional advice, you may also wish to involve your professional adviser or advisers in the meeting; or copy your proposals to the professional adviser or advisers and invite their comments.

- 4.28** You should also take account of the persons past wishes and feelings pertinent to the matter in hand. For example, before disposing of an asset, you may require to check whether it has been specifically bequeathed to someone in the adult's will.
- 4.29** If the adult has communication difficulties, the guidance in Annex 1 should be followed.
- 4.30** You should also find out the views of the nearest relative or anyone nominated by the sheriff to act in place of the nearest relative, named person and primary carer. If the nearest relative is unable to attend meetings, for example, because he or she lives far away, or does not respond to letters, then you may not be able to ascertain the nearest relative's views. Similarly, if the primary carer or named person is unable or unwilling to give views, then you may not be able to ascertain the primary carer's views, but all reasonable efforts to do so must be made.
- 4.31** You are obliged to find out the views of any welfare attorney, and anyone else appearing to have an interest in the welfare of the adult, in so far as it is reasonable and practicable to do so. Such a person is likely to have made his or her interest known to you and to be willing to express views.
- 4.32** You should, in so far as it is reasonable and practicable to do so, encourage the adult to exercise whatever skills he or she has concerning his property and financial affairs, and to develop new such skills.

RECORDING ACTION TAKEN

- 4.33** Having followed this process it should be possible to reach conclusions on the actions needed in relation to the person's property and financial affairs, which are based on proper investigation, and which comply with the principles. You should record these conclusions on your file. For example, you should file:
- photocopies or electronic copies of any correspondence relating to the adult's property or financial affairs;
 - a copy of any instructions that you give to a financial institution, utility company or other body in relation to payments by the adult or to the adult;
 - invoices and receipts for purchases of £100 and over incurred on behalf of the adult;

- receipts for any sales made of the adult's property;
- any correspondence with HM Revenue and Customs on behalf of the adult;
- any correspondence with the adult's employer or pension provider;
- any correspondence concerning insurance or life assurance policies relating to the adult or the adult's property;
- documents relating to any loan incurred by the adult; or any insurance policy.

4.34 You must keep the adult's financial affairs strictly separate from your own and be ready to account for how you have spent funds belonging to the adult and what you have done with any payments due to the adult and made to you.

4.35 You should keep all receipts for purchases of £100 or more, on behalf of the person and any guarantees or insurance policies in respect of purchases so that you can exercise the person's rights as purchaser to have property repaired or replaced.

ONGOING FUNCTIONS AS A CONTINUING ATTORNEY MONITOR THE ADULT'S PROPERTY AND FINANCIAL AFFAIRS

4.36 It is your responsibility, within the scope of your powers, to monitor the adult's property and financial affairs.

- **For example**, if it is within the scope of your powers to rent out property owned by the person, it is your responsibility to make sure that rents are collected regularly and paid to the adult and that any landlord responsibilities are carried out.

4.37 You should also check that the adult's finances remain under control, by monitoring statements of account, and ensuring that deficits are not incurred. You should take the necessary steps to avoid the adult incurring unnecessary debt.

ASSESSING THE NEED FOR FURTHER ACTION

4.38 Either as a result of the review and your own monitoring, or because you are approached by someone else with an interest, you may decide that one or more further interventions in the person's affairs are needed.

4.39 The process for carrying out further decisions or actions is similar to that you carried out initially. Briefly, for each proposed action, you must observe the principles, check that your powers as continuing attorney will permit you to take the action or decision in question, and record what you have done.

SEEKING THE ADVICE OF THE PUBLIC GUARDIAN

4.40 The Public Guardian has a duty to provide continuing attorneys with information and advice about the performance of their functions, when requested to do so. It is a good idea to contact the Public Guardian if in doubt about the scope of your powers, or about the course of action you propose to take.

WHAT TO DO WHERE THERE ARE CONFLICTING VIEWS ON A PROPOSED ACTION OR DECISION

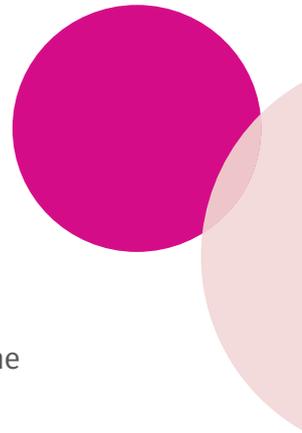
4.41 When you hold reviews with the adult, the nearest relative and relevant others regarding the exercise of your powers, you should try to ensure that you provide as much information in advance as possible. Do not take action that will come as a surprise to the others and make sure that you have taken proper account of their views.

4.42 Despite your best efforts, however, there may occasionally be disagreements which cannot be readily resolved.

- **For example**, there may be a dispute as to how the granter's funds should be managed, with relatives who stand to inherit from the adult being concerned to maximise the profitability of investments; while you may believe that more money should be spent on meeting the person's present needs.

4.43 In seeking to persuade others of your point of view, you should direct those who disagree with you to your statutory responsibilities as attorney, to the powers that the granter chose to confer, and to the fact that the granter selected you to exercise those powers for him or her. It will assist you if you can show that you have:

- applied the principles systematically;
- balanced one principle against another in the correct manner. For example you need to consider benefit to the adult as well as least restrictive action or decision. If someone who disagrees with you takes this principle as a starting point, he or she may be attaching insufficient weight to the need to benefit the adult;



- taken account of the past and present wishes and feelings of the person so far as these can be ascertained;
- taken account of the views of the nearest relative or anyone nominated by the sheriff to act in place of the nearest relative and primary carer, named person, and anyone else appearing to you to have an interest in the welfare of the granter or in the proposed intervention. But you do not need to accord undue weight to any one view. Nor do you need to follow the majority view where you have carried out your own assessment of the need for action, and it does not agree with the majority.

4.44 If you are unable to persuade others to accept your judgement, you may wish to seek additional advice, for example from the Public Guardian, from a practising solicitor, an accountant or an independent financial adviser. If you can produce written advice that supports your decision, this may help in defending your actions.

4.45 Ultimately you may find that you simply have to insist. If you are confident in your judgement, do not back down. You would be letting the person down if you gave in for the sake of peace; or stood down, leaving the granter with no-one (or someone other than you, whom he/she did not choose) to take care of his/her affairs.

4.46 If you still encounter difficulty you can advise those who disagree with you of their right to complain to the Public Guardian. You can also direct those who disagree with you to section 3(3) of the Act which allows them to apply to the sheriff for directions. Alternatively you can exercise your own right to apply for directions under section 3(3).

CONFLICT OF INTEREST AFFECTING YOU AS ATTORNEY

4.47 As continuing attorney, you may be someone close to the granter in another capacity such as relative, or carer. You may find that this occasionally creates a conflict of interest between your own personal interests and your fiduciary duty. Do not let this worry you unduly. The very person who is best to be attorney is likely to be someone close to the granter and this situation will not be uncommon.

- **For example**, if you are living in the same household as the granter you may be in some doubt as to how far you are entitled to spend the adult's resources on general household expenses. If you or your children are destined to inherit money from the adult, you may feel reluctant to spend the adult's estate in a lavish manner on his or her welfare when this will diminish the residual estate.

4.48 In these as in all other circumstances you should observe the principles. Ask the person's opinion and consult anyone else with an interest in his/her property or financial affairs and welfare. If the person cannot express an informed opinion, consider what he/she would have done had he/she remained capable.

4.49 If you are in doubt about the proper course, or find that you are being challenged, there are various options open to you. You could:

- Ask an independent practising solicitor or someone from an independent advocacy project to represent the interests of the adult in discussing the matter with you. The expense of this can be met from the granter's resources (or the adult may be eligible for legal aid).
- Consult the Public Guardian.
- Seek directions from the sheriff under section 3(3) of the Act.

WHAT TO DO WHERE YOUR POWERS ARE INSUFFICIENT

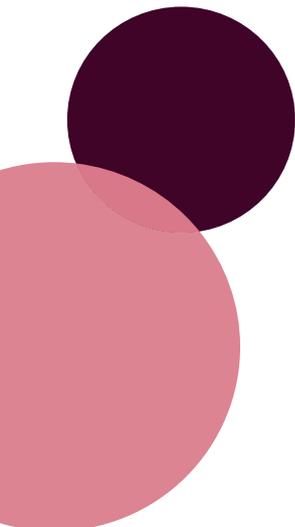
4.50 You may find that your powers are insufficient to carry out a particular intervention which is necessary.

- **For example**, the time may come to sell the person's house so that he/she can move into residential care, but the person may not have granted you powers to deal in heritable property. You may find that the person has a legal entitlement, but your powers do not allow you to claim it (or alternatively to renounce it) on his/her behalf. You may find that the granter's estate has grown larger than anticipated, and tax planning measures, not included in the power of attorney, become necessary.

4.51 In these circumstances you may need to consider using one of the other interventions under the Act.

- You could, for example, apply to the sheriff for an intervention order to empower you to take the necessary steps. A separate code of practice is available dealing with intervention orders and guardianship.
- If you find that your continuing power of attorney is inadequate in a number of ways, for example because of drafting flaws in the original document, or a step-change in the adult's means (say, a large inheritance or settlement of damages) you may need to apply to the sheriff for financial guardianship to make good the deficiencies.

4.52 Before taking such a step you will need to apply the principles to ensure that guardianship is indeed justified and necessary.



WHAT IF THERE IS A COMPLAINT AGAINST YOU

- 4.53** If someone has a complaint against you, and either does not put it to you or is not satisfied with your response, he/she has recourse to the Public Guardian. The Public Guardian has a duty to receive and investigate, while the adult is alive, all complaints regarding the exercise of functions relating to the property or financial affairs of an adult made in relation to continuing attorneys.
- 4.54** The Public Guardian will contact you about any complaint received and ask you for your version of the facts. If you have applied the principles correctly, have taken advice, have kept relevant documents such as bank statements and receipts, and have recorded your decisions and actions on a file as recommended above, you should have nothing to fear from such an investigation.
- 4.55** The Public Guardian also has powers to obtain records when carrying out investigation inquiries into complaints made. The Public Guardian has the power to require continuing attorneys to provide records and other relevant information that may reasonably be required. The Public Guardian can also require banks and other financial institutions to provide records and other relevant information about the accounts of the adult concerned.

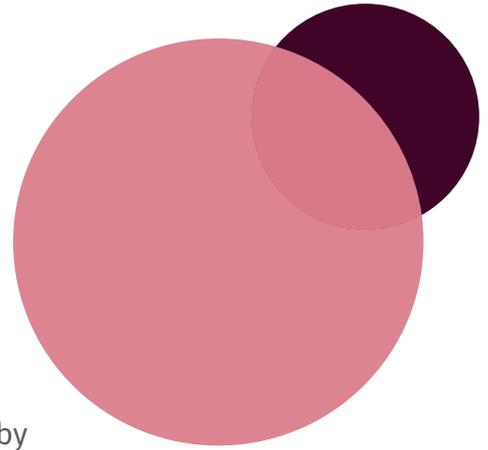
POSSIBLE COURT PROCEEDINGS IN THE EVENT OF A COMPLAINT

- 4.56** A person who is dissatisfied with your actions as continuing attorney also has recourse to the sheriff. An application to the sheriff may be made by any person claiming an interest in the property, financial affairs or personal welfare of the granter. You can also apply for directions under section 3(3).
- 4.57** The sheriff may dismiss such an application from a person challenging your actions, or may give the applicant or yourself directions. Everything will depend on the case which is put to the sheriff and his/her view of what is required by the principles in the situation which has been set out. You may wish to seek legal advice. The cost of such legal advice will normally be payable out of the granter's estate.
- 4.58** Where the sheriff, on such an application, is satisfied that the granter is incapable in relation to decisions or actions to safeguard or promote his/her own interests, in so far as these relate to the power of attorney, the sheriff may make an order ordaining you to be subject to the supervision of the Public Guardian.

- 4.59** This will mean that you carry on as continuing attorney, but you will have to account for your decisions and actions to the Public Guardian, whereas previously you did not have to account formally to anyone.
- 4.60** The sheriff can also ordain that you submit accounts in respect of any period specified in the order for audit to the Public Guardian.
- 4.61** The sheriff's decision on an order made for your supervision, or for you to submit accounts, is final.
- 4.62** The Public Guardian has a duty to add the details of any order made by the sheriff to the register, and to notify the granter as well as you of its terms.
- 4.63** If you find yourself in this situation, this does not mean an end to your functions as continuing attorney. If you have kept records as recommended above you should have little difficulty in producing the necessary accounts, although you may need to hand your files to a professional accountant or practising solicitor to prepare accounts in the proper form for submission to the Public Guardian.
- 4.64** If you are ordered to be under the supervision of the Public Guardian you should regard it as a help rather than a threat. As a first step you should have a meeting with the Public Guardian, show her your file, ask her what she wants you to record in your file from now on, and agree a deadline for the submission of the account of your activities to date. In the event that it appears necessary to the Public Guardian to safeguard the property or financial affairs of the granter, she has the power to take part in or initiate court proceedings.
- 4.65** In extreme cases the sheriff can revoke your powers or some of them.

SUPERVISION BY THE PUBLIC GUARDIAN

- 4.66** The Act requires the Public Guardian to supervise continuing attorneys where ordered to do so by the Sheriff.
- 4.67** Supervision is intended to ensure that attorneys are carrying out their functions properly and, depending upon the content of the court order, may relate to some or all of your actions with the adult's estate.
- 4.68** Upon the court issuing an order for your supervision a copy will be sent to you and to the granter and may also be sent to the local authority.



- 4.69** It is likely that the court will require you to lodge an accounting of your transactions with the granter's estate. The initial account will require to cover a specified period. Accordingly, the account should commence by showing a description of the estate under your control at the commencement of the accounting period, detail income received and expenditure incurred, and conclude showing the balance under your control at the end of the account period. The Public Guardian may in due course call for sight of bank books, invoices or other material to support the entries in your account.
- 4.70** The Public Guardian will inform you of the date by which you require to lodge the initial account of your financial management. Failure to lodge the account by the due date may result in the matter being reported to court and your possible removal. Any subsequent accounts required will be due on the anniversary of the first account lodged.
- 4.71** Should the Public Guardian not be satisfied with the account or records produced she will try to resolve the matter with you but, if unable to do so, may report her concerns to the court and seek to have you removed from the office of attorney.
- 4.72** Your account will be available for inspection by anyone with an interest in the adult's estate.
- 4.73** While under the Public Guardian's supervision you will require to obtain her approval for any gifts you propose to make from the adult's estate or for the sale or purchase of any accommodation used or to be used as a dwelling house by the adult. The Public Guardian will not require you to seek permission for small gifts (with a value of £100 or less) for traditional celebrations such as birthdays, anniversaries, or weddings. The Public Guardian may also require you to obtain advice in relation to the investments retained by you on behalf of the adult.
- 4.74** If the Public Guardian considers it necessary she may consult with the MWC and the local authority if there appears to be a common interest.

Chapter 5



SPECIFIC GUIDANCE ON EXERCISING WELFARE POWERS OF ATTORNEY

MANAGING THE ADULT'S WELFARE

- 5.1** Remember that capacity is not ‘all or nothing’. Your powers can only operate when the granter loses capacity in the area or areas of decision-making granted in the document. Since 5 October 2007 the power of attorney must include a statement that the granter has considered how incapacity should be determined. The granter may then also have specified how this should happen. You will be acting wrongfully and without authority if you try to intervene when the person could still take a decision on the particular matter in question on his/her own behalf.
- 5.2** As explained below in relation to the principles (see chapter 3 paragraph 3.12), even if the person has lost the capacity to make a decision, he/she may still have wishes or feelings about the matter, and you must ascertain those wishes or feelings in whatever way is appropriate to the individual, and take account of them in exercising your powers.

REVIEWING CURRENT ARRANGEMENTS AND NEEDS

5.3 The following good practice guidance is written mainly from the point of view of an attorney who has not had any day to day knowledge or experience of the adult's welfare but should also be used as a fail-safe by attorneys who familiar with the person and his/her needs. It is good practice for all attorneys to review the adult's welfare. Depending on your powers, this might involve:

- Checking whether the person seems well and happy in his/her current circumstances. If not, can the circumstances be changed so as to improve matters for example by modifying the home in some way, and obtaining further support from community care services.
- Assessing the person's accommodation and facilities for suitability for his/her needs. For example, could the person benefit from special equipment to assist with a physical disability, or a move of bedroom nearer a bathroom; or more privacy? Is the accommodation warm enough?
- Has the person adequate clothing? Is there any need for clothing to be purchased which would make it easier for the adult to dress independently?
- How is the person supplied with meals? Can he or she cook meals or heat them up so as to learn or maintain the use of skills? Is there someone who cooks for the adult? Does the adult attend a luncheon club or could he or she do so if suitable arrangements were made? Does the adult receive meals on wheels and if not, could these benefit the adult? Does the adult have special dietary requirements, for example religious, vegetarian, low fat, low salt, gluten free, etc., which are being met?
- Is the person's home clean and well-maintained? Would he/she wish it to be cleaned and decorated by contractors? It is important, however, not to impose your own standards on the person.
- Make sure you know who is looking after the person on a day to day basis, and who else is involved, such as a community care officer, medical practitioner, hospital consultant, community nurse.
- How does the person spend his or her time during the day? Is he or she attending any kind of activities or day centre? Does he or she have friends or relatives who call? Does he or she have hobbies or interests? If the adult is bored, why is this the case and can anything be done about it? For example, it may be that the primary carer has no access to the adult's funds for outings.

- Is the person in employment or training? If not, is there any possibility of improving the adult's quality of life by arranging for training or employment within the adult's capacity?
- What were the person's normal holiday preferences? Would it benefit the adult if his or her carer had a holiday or if the adult had a holiday away from the carer? Should periodic respite care be arranged?
- Does the person have a faith/religious affiliation that he or she would wish to maintain? Is there a member of the person's faith community who visits or might be willing to visit the person? Are there arrangements to take the person to his or her place of worship?
- Does the person have any ongoing medical problems and how are these being tackled? What is the diagnosis, likely development of any illness, and longer term prognosis?
- Is the person's personal appearance acceptable? Again it is important not to impose your standards on the adult, paying full respect to the adult's known preferences, wishes and feelings, but the adult's dignity is important and specific issues such as whether hair and nails are clean and well cut should be considered;
- Does the person enjoy personal dignity and privacy? Could his or her welfare be improved by increasing the his or her independence?
- Is the person maintaining contact with others who are important to him or her? Could his/her quality of life be improved by facilitating such contact, for example by encouraging visitors or even paying expenses for visits to and by others.

FIND OUT IF ANYONE HAS POWERS OVER THE PERSON'S PROPERTY AND FINANCIAL AFFAIRS

- 5.4** Unless you are have both welfare and financial powers of attorney you will need to find out (if you have not already done so) if there is a continuing attorney, guardian, or withdrawer (under the Access to Funds scheme) who controls the granter's finances. This is because your decisions on welfare matters may require expenditure and you may wish to make arrangement for the reimbursement of expenses you may incur on behalf of the adult. This information can be obtained from the Public Guardian.

- 5.5** You may have been appointed jointly with someone else appointed as continuing attorney and if so you will need his or her co-operation.
- 5.6** If there is no-one with power over the adult's finances, you may wish to consider applying for one of the other interventions in the Act to obtain such power yourself, for example as a withdrawer from the adult's account under Part 3.
- 5.7** You should also check as far as possible whether there is any other person with powers over the adult's financial affairs, in particular:
- any trustees of a trust set up for the benefit of the adult, or in which the adult has an interest (the person's solicitor is likely to know this);
 - any nominees for particular assets;
 - any discretionary pension fund arrangements;
 - any holder of a joint account with the adult;
 - any Department for Work and Pensions appointee who has authority to receive benefits on behalf of the adult;
 - anyone who has been managing the adult's affairs under informal arrangements.

COMMUNITY CARE SERVICES

- 5.8** If the granter is in receipt of community care services, you should find out the name of the social work officer within the local authority who arranged these. You should contact this officer explaining that you have become welfare attorney to the adult, offer to produce your registered power of attorney, and ask to discuss the person's welfare needs.
- 5.9** If the person has not been assessed for community care services, or has a disability and has not had his/her needs assessed you should make a request for an assessment to the local authority social services department.
- 5.10** If the person is attending a day centre, you should also speak to the staff at the day centre to find out their views of his/her welfare needs.
- 5.11** If the person is in a care home, you should visit him/her and check for yourself that he/she is being properly cared for, asking the questions that are suggested above.

ASSESSING THE NEED FOR CHANGE

- 5.12** It would be good practice to make your own assessment of whether the person's care needs are being satisfactorily met. See above for the kinds of questions you might want to ask yourself, having discussed these matters with the person and others involved in caring for him/her.
- 5.13** In reaching your assessment, you must have regard to and be clear about your own powers in the power of attorney document. You may find, for example, that you identify a need, but that you would not be able to make a decision or take the necessary action because you do not have the powers. In some cases the person may be able to take the action or make the decision personally, but in others you may need to seek additional powers or find out if the local authority has the powers needed, e.g. to provide services.
- 5.14** You should ascertain when it will become necessary to make decisions about or attend to various matters, such as:
- if the person's tenancy is due to come to an end, renewal or obtaining alternative accommodation;
 - if the person's spouse is seeking a divorce in which case you may need to make arrangements to ensure that the adult has adequate legal advice on his or her position regarding property and financial affairs, residence of and contact with children and so on;
 - if the person has decided to marry (but remember that you cannot consent to marriage, only the adult can do so. What you can do is take into account the consequences for the adult's living arrangements and so on);
 - if the person is due to come into funds, such as on the maturity of a life assurance policy, which would enable additional goods or services to be purchased;
 - any possible move to a care home;
 - any operation or other treatment required by the adult in respect of a medical condition;
 - visits to the dentist, chiropodist, etc.;
 - the person is seeking or changing work, or training, or wishing to exercise or develop an artistic talent or to attend occupational therapy, or a different day centre placement;

- a holiday or respite care for the person;
- attendance at particular family or social occasions such as weddings, ceremonies related to the birth of a child, reunions, etc.;
- care of the person in the event that his/her carer becomes ill or absent for some reason.

OBTAINING SPECIALIST ADVICE

5.15 You should consider whether decisions need to be made now or in the near future on which you require specialist advice.

- **Example:** if the person has a developing medical condition you will need to ensure that he/she receives adequate medical care, provided this is within the scope of your powers. You will need access to any consultant or other medical practitioner caring for the person, so that you can discuss his/her condition and treatment options. But remember that you do not have the right to consent to certain treatments. For information about what to do if you disagree with the doctor, see the Code of Practice for persons authorised to carry out medical treatment or research under Part 5 of the Act at: <http://www.scotland.gov.uk/Topics/Justice/Civil/awi>.
- **Example:** if you need to make a decision or take action which may involve the use of restraint, you should consult the good practice guidance produced by the Mental Welfare Commission⁵ and seek the advice of the local authority social services department.

5.16 It would be against the principles of the Act to do anything which is strongly resisted by the person (unless the particular matter is included specifically within the powers granted). If you think this is an issue you are advised to consult the local authority social work department.

5.17 As indicated above, it may also be appropriate to seek an early community care assessment or a disability assessment.

5.18 You may be able to receive help and support from a voluntary organisation which assists people with disabilities in general, or people with particular conditions. You may also find a source of help and support for yourself in these organisations. See Annex 2.

⁵ Rights, Risks and Limits to Freedom' (2006), 'Safe to Wander' (2007) and 'Covert Medication – a legal and practical guide' (2006)

5.19 If you require a solicitor and do not have ready access to one, you should contact the Law Society of Scotland. The Scottish Legal Aid Board has a list of solicitors in your area who are registered to carry out legal aid work.

UPDATING YOUR FILE

5.20 When you have carried out the initial review referred to above of the person's welfare needs and how these are being met, it would be good practice to update your file to record the following information:

- the name, address and other contact details of all those involved in the person's day to day care;
- the name and address of all those with powers over the person's property and financial affairs;
- the name and address of any officer of the social work department providing community care services for the adult; and any home help or other service provider involved in the person's community care;
- the name and address of any relatives or friends with an interest in the person's welfare;
- the name and address of any relatives or friends with whom the person maintains contact;
- any forthcoming or regular appointments which should be kept by the adult in relation to personal welfare matters such as visits to the hospital, dentist, chiropodist, etc.;
- the names, addresses and other contact details of any professional advisers with whom you will be dealing with regard to the adult's welfare, such as a psychologist or solicitor;
- the names and addresses of any voluntary body contacts which you have established;
- a note of any key decisions required in the foreseeable future.

IF YOU THINK THAT ACTION NEEDS TO BE TAKEN

5.21 The outcome of the review described above may be that certain actions need to be taken to improve the person's care and quality of life. In determining whether an action or decision needs to be taken on behalf of the person, you must apply the principles.

CHECK YOUR POWERS

- 5.22 If you decide that a major decision needs to be taken you should check whether your powers would cover that particular action.
- 5.23 You should make a note of the findings of your review and your recommendations and add this to your file.

SETTING OUT YOUR PROPOSALS FOR CHANGE

- 5.24 When you are satisfied that your review is complete it would be good practice to set out your proposals in a written document which you should send to the granter and others with an interest in his/her welfare. You should keep a copy of the document in your file.
- 5.25 Having sent out your recommendations, it would be good practice to meet again with the person to explain your plans and get their views. The granter may be capable of instructing you on the matter in question, although not capable of carrying out the action for him/herself. The granter may also be able to indicate a view by non-verbal language or signals.
- **For example**, the person may ask you not to seek help from a particular person or agency because of bad experiences in the past. He/she may wish a move to a care home to be put off for longer, even though he/she is not receiving the best possible care at home. The person may prefer his/her own surroundings with their imperfections to an unknown new place of residence. These views should be respected (but see also paragraph 5.41 about seeking advice in the event of disagreement).
- 5.26 You should encourage the person to be as independent as possible in terms of managing his/her personal care; to maintain existing skills and to develop new skills.
- **Examples:** A stroke victim who has lost substantial mental and physical capacity could, for example, with suitable support, learn to care for him or herself to some extent. A person with dementia should be encouraged to take his/her own decisions about clothing, diet, appearance and leisure activities, rather than having these things dictated to him/her by someone else, however convenient that may be. For someone with a brain injury, encouragement to use skills and develop new skills may be a major part of the rehabilitation process.

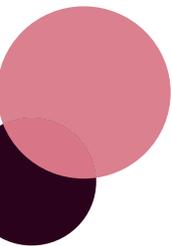
5.27 You should consider to what extent the person could act for him/herself.

- **Examples:** The person could be given the opportunity to choose his/her own clothes. Certain clothes stores have a policy of assisting people with disabilities to use changing rooms and allow spouses to help each other. Or the person could indicate his or her choice from pictures in a clothes catalogue.
- Before visiting a restaurant, you could find out about the person's preferences, read or show the menu to the adult and encourage him or her to choose his or her own dishes rather than relying on someone else's views of what he or she should have. Voluntary organisations may be able to advise on the existence of accessible information such as picture illustration books about everyday situations.
- The person, if mobile and able to do so without undue risk, could be encouraged to take walks, travel by public transport, attend recreational or social activities and make small shopping purchases independently. The person could be provided with specialised equipment such as a motorised wheelchair, a stair-lift, taps operated by levers or low level sinks in order to be able to do more for him or herself. The use of personal alarms and other modern technology could enable the adult to enjoy more independence without running undue risks. An assessment by an occupational therapist will help to identify what will be appropriate to the needs and home circumstances of the individual. Voluntary organisations which provide a befriending service could also be contacted to ascertain whether they provide services that could enable the adult to lead a fuller life.

5.28 If the person has communication difficulties see the guidance in Annex 1.

5.29 You have a duty to seek the views of any continuing attorney, and of any person appearing to you to have an interest in the welfare of the granter in so far as it is reasonable and practicable to do so. Such a person is likely to have made their interest known to you and to be willing to express views.

5.30 You should also contact and ideally meet with the nearest relative, primary carer, named person and significant others at which you can explain your findings and proposals and convey the views of the person. If a meeting is not possible you should send a letter explaining your recommendations to each of them, and invite written comments.

- 
- 5.31** If a support worker or community nurse is involved in providing services to the adult, you may wish to include him or her in the meeting, or arrange to see these workers separately.
- 5.32** If you have taken professional advice, you may also wish to involve your professional adviser or advisers in the meeting; or copy your recommendations to the professional adviser or advisers. Similarly, if you have regular support from a voluntary body, you may wish to involve them.

RECORDING ACTION TAKEN

- 5.33** Having followed this process it should be possible to reach conclusions on the actions needed in relation to the adult's personal welfare, which are based on proper investigation, and which comply with the principles. You should record these conclusions on your file. For example, you should file:
- photocopies or electronic copies of any correspondence relating to the granter's personal welfare;
 - a note of any important telephone calls about the granter's welfare; for example if someone phones to inform you of any incident relating to the person, such as fall at the day centre or involvement in some other accident, argument or fight; or of the adult's being taken ill;
 - copies of invoices and receipts for purchases of £100 or more incurred on behalf of the person. The granter may be able to reimburse you personally, or you may yourself have powers over the granter's financial affairs. Otherwise you will need to agree arrangements with anyone having powers over the adult's financial affairs how you will be reimbursed, and present the originals of any invoices and receipts to that person;
 - any correspondence with anyone having powers over the adult's property or financial affairs about how the adult's welfare needs are to be met. For example, you as welfare attorney may not wish to seek powers to access funds with the adult's bank account under Part 3 of the Act; but you may need to have correspondence with someone who does wish to apply. The application requires an estimate of all the person's planned expenditure, care costs, transport costs, etc.

ONGOING FUNCTIONS AS A WELFARE ATTORNEY

5.34 You should have regular contact with the person and others involved with his/her care. The frequency of review meetings will depend on the extent of your contact, but it would be good practice to hold a review at least every 6 months.

MONITOR THE ADULT'S PERSONAL WELFARE

5.35 It would be good practice, within the scope of your powers, to monitor the adult's personal welfare.

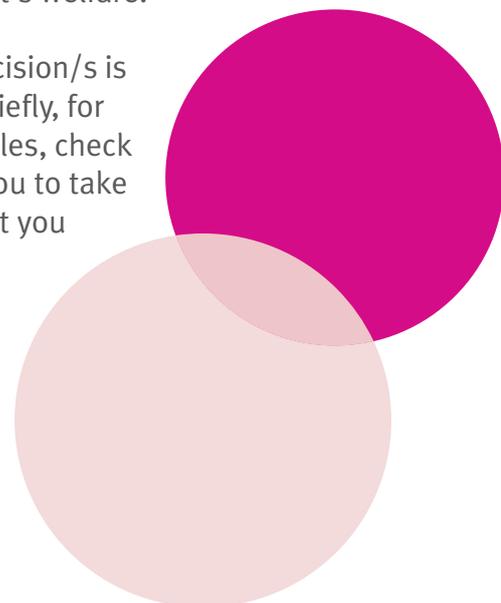
- **For example**, if it is within the scope of your powers to arrange for the adult to receive medical treatment, you should ensure, if no-one else is doing so, that you consult a medical practitioner promptly in the event of the adult becoming unwell.

5.36 Although you may not have any financial powers yourself, you should also check that the adult's finances remain under control, by regular liaison with anyone having such powers. You may need to seek financial powers, or encourage someone else to do so, if a lack of proper arrangements is preventing you from operating as welfare attorney.

DECIDING THE NEED FOR FURTHER ACTION

5.37 Either as a result of your own monitoring, or because you are approached by someone else with an interest, you may decide further action/s or decision/s need to be taken in relation to the adult's welfare.

5.38 The process for carrying out further action/s or decision/s is similar to that you will have carried out initially. Briefly, for each proposed action, you must follow the principles, check that your powers as welfare attorney will permit you to take the action or decision in question, and record what you have done.



SEEKING THE ADVICE OF THE LOCAL AUTHORITY AND MWC

5.39 The Public Guardian notifies the local authority of all registered powers of attorney with welfare powers therefore, your local authority will have been made aware of your appointment. Although the local authority has no function of supervising a welfare attorney unless ordered by the sheriff, it has a responsibility to give you advice and guidance on the exercise of your welfare powers. It is therefore a good idea to contact the local authority social work department if in doubt about the course of action you propose to take on behalf of the adult. You should keep a note of the contact details of any social worker with whom you have had contact and record any conversation and action agreed.

5.40 The Public Guardian also notifies the MWC of all registered power of attorneys with welfare powers. The MWC can provide valuable advice to anyone exercising welfare powers in relation to an adult whose incapacity is due to mental disorder.

WHAT TO DO WHEN THERE ARE CONFLICTING VIEWS ON A PROPOSED INTERVENTION

5.41 When you hold reviews with the adult, the nearest relative, primary carer, named person and relevant others, you should let them know in advance of any issues you wish to discuss, Do not take action that will come as a surprise to the others but make sure that you have taken proper account of their views. Keep an open mind until you have heard, understood and considered all relevant views.

5.42 Despite your best efforts, however, there may occasionally be disagreements which cannot be readily resolved.

- **For example**, there may be a dispute as to whether the person should be moved into a care home, with some of those with an interest believing that the person's capital in the house should be preserved and that relatives can or should continue to care for the adult.

5.43 In seeking to persuade others of your point of view, you should direct those who disagree with you to your statutory responsibilities as attorney, to the powers that the granter chose to confer, and to the fact that the granter selected you to exercise those powers for him or her.

It will assist you if you can show that you have:

- applied the principles systematically;
- balanced one principle against another in the correct manner. For example you need to consider benefit to the adult as well as minimum intervention. If someone who disagrees with you takes minimum intervention as a starting point, they may be attaching insufficient weight to the need to benefit the adult;
- taken account of the past and present wishes and feelings of the adult so far as these can be ascertained;
- where reasonable and practicable, taken account of the views of the nearest relative or anyone nominated by the sheriff to act in place of the nearest relative and primary carer, named person and anyone else appearing to you to have an interest in the welfare of the adult or in the proposed intervention. But you do not need to accord undue weight to any one view. Nor do you need to follow the majority view where you have carried out your own assessment of the need for an intervention, and it does not agree with the majority. On the other hand, you should never be afraid to reconsider where new information or a new point of view is drawn to your attention.

5.44 If you are unable to persuade others to accept your judgement, you may wish to seek additional advice, for example from the MWC, from the local authority, from a solicitor, a medical practitioner or a voluntary body. If you can produce written advice that supports your decision, this may help in defending your actions. In particular, you should seek advice if the person disagrees with a particular course of action which you are convinced is in his/her best interests, for example a move to care home.

5.45 Ultimately you may find that you simply have to insist. If you are confident in your judgement, do not back down. You would be letting the person down if you gave in for the sake of peace; or stood down, leaving the person with no-one (or someone he/she did not chose) to make welfare decisions on his/her behalf.

5.46 If you still encounter difficulty you can advise those who disagree with you of their right to complain to the local authority. You can also direct those who disagree with you to section 3(3) of the Act which allows them to apply to the sheriff for directions. Alternatively you can exercise your own right to apply for directions under section 3(3).

5.47 Part 5 of the 2000 Act provides the rules on the general authority under which a medical practitioner may give treatment to an adult. It makes provision for the resolution of disputes between medical practitioners and welfare attorneys (and between them and others having an interest) and for appeals to the courts in respect of decisions taken under this Part.

5.48 If you do not agree with the medical practitioner primarily responsible for the adult's medical treatment, and the doctor does not accept your view, the doctor must request the MWC to provide a 'nominated medical practitioner', from a list held for this purpose, to give a further opinion as to the medical treatment proposed. The nominated medical practitioner must have regard to all the circumstances of the case and must consult you. The nominated medical practitioner must also consult another person nominated by you, if it is reasonable and practicable to do so. If after taking these steps the nominated medical practitioner certifies that in his or her opinion the proposed medical treatment should be given, then the medical practitioner primarily responsible may give the treatment, unless you or some other person with an interest in the adult's welfare appeals to the Court of Session against this. The medical practitioner primarily responsible for the treatment also has a right of appeal to the Court of Session against the decision of the nominated medical practitioner.

CONFLICT OF INTEREST AFFECTING YOU AS ATTORNEY

5.49 As welfare attorney, you may be someone close to the granter in another capacity such as relative, or carer. You may find that this occasionally creates a conflict of interest between your own personal interests and your fiduciary duty. Do not let this worry you unduly. The very person who is best to be attorney is likely to be someone close to the granter and this situation will not be uncommon.

- **Example:** relatives might argue that it would benefit the person to spend Christmas at home, instead of remaining at the care home, but you as welfare attorney might feel that this is too risky as he/she might require nursing care that family members could not provide. Alternatively, relatives might press you not to take the person on a particular outing or trip, such as to the wedding of a family member, but you might feel that the person would enjoy it and that the risk is acceptable.

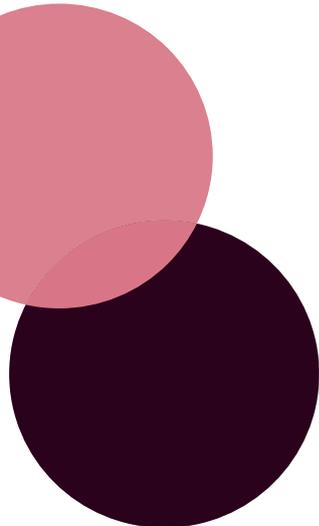
- 5.50** In these as in all other circumstances you should observe the principles. Ask the person's opinion and consult anyone else with an interest in the person's welfare. If the step which is being contemplated has implications for property or financial affairs, then the continuing attorney or anyone else with powers to intervene in the person's property or financial affairs should be consulted. If the adult cannot express an opinion, consider what the adult would have thought of the proposal had he or she remained capable. For example, if the adult expressed views in the past about participating in gatherings, these should be taken into account.
- 5.51** If you are in doubt about the proper course, or find that you are being challenged, there are various options open to you. You could:
- ask an independent solicitor or someone from an independent advocacy project to represent the interests of the adult in discussing the matter with you;
 - consult the local authority or MWC;
 - seek directions from the sheriff under section 3(3) of the Act.

WHAT TO DO WHERE YOUR POWERS ARE INSUFFICIENT

- 5.52** You may find that your powers are insufficient to carry out a particular action or decision which is necessary. For example, the time may come to sell the person's house, but there may be no-one with powers to deal in the adult's heritable property.
- 5.53** In these circumstances you may need to consider using one of the other interventions under the Act or asking someone else to do so.

The options include:

- Applying to the Public Guardian under Part 3 to withdraw funds from an account held by the adult to meet his or her day to day expenses. The Public Guardian can provide an application form and guidance notes on this procedure. It is also covered by a code of practice.
- Applying to the sheriff for an intervention order under Part 6 of the Act to empower you to take the necessary steps or give the necessary consent. You would then be acting on that matter under the intervention order rather than as an attorney. There is a separate code of practice on intervention orders and guardianship.



5.54 If you find that your welfare power of attorney is inadequate in a number of ways, for example because of drafting flaws in the original document, or a step-change in the person's condition, or a change in personal circumstances such as the death of the primary carer, you may need to apply to the sheriff for welfare guardianship. However it may be possible to achieve what is needed for the adult, through the social work department. The Social Work (Scotland) Act 1968 enables local authorities to use their powers to provide necessary services to adults who are unable to consent to them (so long as the adult does not resist) and no one else is applying for a guardianship order with the necessary powers.

WHAT IF THERE IS A COMPLAINT AGAINST YOU

5.55 If someone has a complaint against you, and either does not put it to you or is not satisfied with your response, he or she has recourse to the local authority in the first instance. The local authority has a duty to receive and investigate complaints regarding the exercise of welfare powers by an attorney or guardian.

5.56 The MWC also has an interest where the adult's incapacity is due to mental disorder, and the complainer can contact the MWC direct, although the MWC will only investigate a complaint (where dissatisfied with a local authority response or the local authority has failed to investigate).

5.57 The local authority will contact you about any complaint received and ask you for your version of the facts. If you have applied the principles correctly, have taken advice, have kept relevant documents such as correspondence, and have recorded your decisions and actions on a file as recommended above, you should have nothing to fear from such an investigation.

5.58 You will need to produce similar information should the MWC have cause to investigate or reinvestigate the complaint.

POSSIBLE COURT PROCEEDINGS IN THE EVENT OF A COMPLAINT

5.59 A person who is dissatisfied with your actions as welfare attorney also has recourse to the sheriff. An application to the sheriff may be made by any person claiming an interest in the property, financial affairs or personal welfare of the granter. You can also apply to the sheriff for directions under section 3(3).

- 5.60** The sheriff may dismiss such an application from a person challenging your actions, or may give the applicant or yourself directions. Everything will depend on the case which is put to the sheriff and his or her view of what is required by the principles in the situation which has been set out.
- 5.61** Where the sheriff upholds the complaint, the sheriff may make an order ordaining you to be subject to the supervision of the local authority for a period specified by the sheriff.
- 5.62** This will mean that you will have to account for your decisions and actions to the local authority, whereas previously you did not have to account formally to anyone.
- 5.63** The sheriff can also order you to make a report to him or her to account for how you have been exercising your powers.
- 5.64** The sheriff's decision on an order made for your supervision, or for you to submit a report, is final.
- 5.65** The Public Guardian has a duty to add the details of the terms of any order made by the sheriff to the register, and to notify the granter, the local authority and the MWC as well as yourself.
- 5.66** If you find yourself in this situation, this does not mean an end to your functions as welfare attorney. If you have kept records as recommended above you should have little difficulty in producing the necessary report to the sheriff. You may wish to seek legal advice. The cost of such legal advice will normally be payable out of the granter's estate.
- 5.67** If you are ordered to be subject to local authority supervision, you should regard this as a help rather than a threat. You can regard the officer of the local authority who is responsible for your supervision as providing you with necessary advice and support. You should have a meeting with this officer, show him or her your file, and ask what records he or she would like you to keep in future, and what form the supervision will take.
- 5.68** In extreme cases the sheriff can revoke (cancel) your powers or some of them.

SUPERVISION BY THE LOCAL AUTHORITY

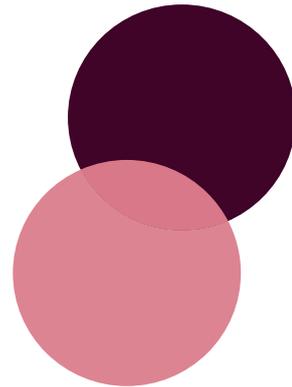
5.69 The Act requires local authorities to supervise welfare attorneys where ordered to do so by the sheriff. An application to the sheriff to order supervision of a welfare attorney may be made by any person claiming an interest in the personal welfare of the adult. It is the responsibility of the Public Guardian to notify the local authority of the order. If you also have continuing powers of attorney you may be subject to supervision by the Public Guardian.

PURPOSES OF SUPERVISION

5.70 Supervision is intended to ensure that proxies are carrying out their functions properly. It should focus specifically on potential problems that might require action by the local authority. Supervision should relate to the particular circumstances of your case within the context of general local authority guidance and procedures.

5.71 The extent of local authority supervision of a welfare attorney may be specified in the order made in each case. But amongst the purposes of supervision of welfare attorneys by authorities are:

- To ensure generally that you are exercising powers in such a way that the person's interests are being safeguarded and promoted. This is important because the person is unlikely to be able to complain effectively if you are not acting appropriately.
- To assess the impact of any significant changes in circumstances on the person's welfare and the way you carry out your duties as attorney.
- To identify any potential need for you to be removed or to have your powers modified.
- To identify if an application should be made for other orders under the Act about the exercise of your powers as welfare attorney. For example the sheriff may order a welfare attorney to report to him/her self. The sheriff has general powers to make consequential or ancillary orders or directions, impose conditions on orders granted, and call for further information.
- To identify whether other measures under the 2000 Act may be necessary, e.g. applications for intervention or guardianship orders.



SUPERVISION REGULATIONS

5.72 Regulations (The Adults with Incapacity (Supervision by local authorities) (Scotland) Regulations 2001) specify the form that supervision of attorneys with welfare powers should take.

VISITING

5.73 The local authority will arrange for the person and yourself to be visited at a frequency specified by the sheriff. If the sheriff does not specify a period then at least once a month, for the duration of a period set for supervision.

5.74 During a visit, the local authority will want to inspect the records that all proxies are required to keep under the Act.

5.75 The local authority may arrange or contract with another body to carry out supervisory visits. For example, the local authority might ask another authority to visit on its behalf, if you do not live in the same local government area as the adult.

5.76 If appropriate, visits to the adult and to you may be combined, although the local authority is likely to consider carrying out separate visits, for example where there appears to be conflict between you and the adult.

5.77 Visits will normally be made by appointment, but in certain circumstances the local authority may decide to make an unannounced visit, for example to gain a view of the person's living circumstances.

PROVISION OF INFORMATION

5.78 The Regulations require a welfare attorney who is being supervised by the local authority to provide any report or specific piece of information about the personal welfare of the adult or the exercise by the attorney of his or her personal welfare functions, as the authority may from time to time reasonably require.

5.79 The local authority is likely to require you to report significant accidents or incidents affecting the adult. These might include, for example, accidents resulting in significant injury, incidents that could have resulted in serious injury, or episodes of challenging behaviour by the adult resulting in harm to him or herself or to others. Accidents to the adult's property or theft or loss should also be reported, as this may have an impact on the adult's welfare either material or psychological. You can expect to receive guidance from the local authority on what reporting is required. If you live at some distance from the adult, the authority may need to rely on reporting by others, such as agencies providing care to the adult.

Chapter 6



STOPPING BEING AN ATTORNEY

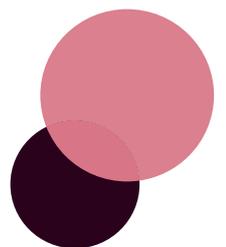
NOT GETTING STARTED

- 6.1 There may be a long time lapse between being appointed as attorney and being required to use your powers. If your personal circumstances or those of the granter change drastically during that time, you may feel that you are no longer suitable to act as attorney.
- 6.2 It is good practice to remind yourself occasionally that you have agreed to be given continuing or welfare powers of attorney and to notify the granter while he or she is still capable if you think your ability to take on the role may be in doubt. This would allow the granter to revoke your powers and appoint someone else while still capable; or alternatively to appoint a joint attorney to share the powers with you or a substitute attorney in the event that you can start, but cannot continue.
- 6.3 If you can foresee that circumstances will make it impossible for you to act, you must tell the person straight away. It is possible that even if the granter has started to lose capacity in relation to some matters, he or she still has sufficient understanding to be capable of appointing another attorney.

- 6.4 The Act requires the Public Guardian to register continuing and welfare powers of attorney. At that stage the Public Guardian must be satisfied that the person appointed to act is prepared to act. You will be required to indicate your willingness to act on the Public Guardian's registration form. So if you do not wish to act, you may refuse to complete that portion of the form. But if at all possible you should notify the person first and as a matter of good practice you should endeavour to ensure that appropriate alternative arrangements are put in place.

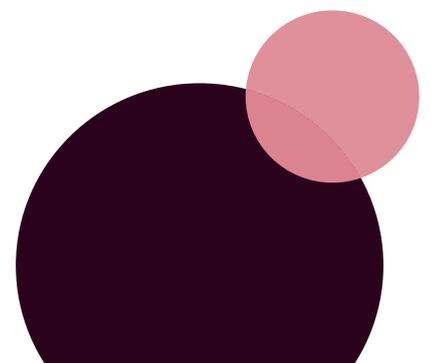
RESIGNING

- 6.5 After the continuing or welfare power of attorney has been registered, you may resign if you wish or need to do so, but must follow the requirements below.
- 6.6 You must write to the granter, the Public Guardian, any guardian, or where there is no guardian, the adult's primary carer, and the local authority, where they are supervising the welfare attorney, giving notice that you intend to resign. Your resignation will not take effect for 28 days after the Public Guardian receives the notification. This is designed to ensure that there are no gaps in the arrangements for taking care of the interests of the adult. Where the resignation is of a welfare attorney the Public Guardian will notify the local authority and the Mental Welfare Commission of your resignation.
- 6.7 If you are a joint attorney, the notice of your resignation should be accompanied by evidence that the remaining joint attorney is willing to continue to act. If a substitute attorney has been appointed by the granter, evidence that that person is willing to act should accompany the notice.
- 6.8 If you can, you should include a signed letter from the substitute attorney when you send in your notice of resignation. This will mean that your resignation will be effective from date of receipt. You will not have to wait 28 days. If that is not possible, but you are in contact with the substitute attorney you should ask the substitute to write to the people concerned as listed above. If no indication is received the Public Guardian will need to ascertain if the substitute attorney is willing to act.



OTHER CIRCUMSTANCES THAT BRING POWERS TO AN END

- 6.9** If the granter and the continuing or welfare attorney are married to each other the power of attorney shall, unless the document conferring it provides otherwise, come to an end upon the granting of:
- a decree of separation to either party;
 - a decree of divorce to either party;
 - declarator of nullity of the marriage.
- 6.10** The authority of a continuing or welfare attorney in relation to any matter comes to an end on the appointment of a guardian with powers relating to that matter.
- 6.11** The power of attorney will also end if:
- in the case of a continuing attorney, the attorney or the granter becomes bankrupt. But a welfare power of attorney does not come to an end in the event of the bankruptcy of the granter or the welfare attorney;
 - the adult recovers capacity to the point that he or she can take steps to revoke the power of attorney and does so;
 - the granter dies;
 - the attorney dies;
 - the continuing or welfare power of attorney is revoked by order of the sheriff.
- 6.12** If the power of attorney is terminated you should make sure that you keep the records of what you did while acting as attorney and be prepared to make these records available to a guardian or other attorney, if one has been appointed in your place or in the event of the adult's death, to his or her executor.
- 6.13** If you have been unaware that your powers have terminated you will not be liable for any acts undertaken in good faith.



Chapter 7



PRE-ACT ATTORNEYS AND ATTORNEYS UNDER THE LAW OF ANOTHER COUNTRY

IF YOU WERE AN ATTORNEY BEFORE THE ACT CAME INTO FORCE (WHETHER OR NOT YOU HAD STARTED TO EXERCISE YOUR POWERS)

- 7.1** The Act provides that when Part 2 came into force in April 2001, any person holding office as:
- an attorney under a contract of mandate or agency with powers relating solely to the property or financial affairs of an adult became a continuing attorney under the Act;
 - an attorney under a contract of mandate or agency with powers relating solely to the personal welfare of an adult became a welfare attorney under this Act;
 - an attorney under a contract of mandate or agency with powers relating both to the property and financial affairs and to the personal welfare of an adult became a continuing attorney and a welfare attorney under the Act.
- 7.2** ‘Pre-Act’ attorneys have to follow the principles in section 1 of the Act, but are not required to have their powers registered by the Public Guardian. It will, however, be possible for the courts to order that a ‘pre-Act’ financial attorney should be placed under the supervision of the Public Guardian or that a ‘pre-Act’ welfare attorney should be supervised by the local authority or that the attorney should have to report to the court.

ATTORNEYS APPOINTED UNDER THE LAW OF ANOTHER COUNTRY

- 7.3 If you are an attorney appointed under the law of another country, including that of England, Wales and Northern Ireland you will not be required to have your powers registered by the Public Guardian: but you will be subject to many provisions of the Act.
- 7.4 The sheriff may order for example that a foreign welfare attorney should be supervised by the local authority or that a foreign continuing attorney should be supervised by the Public Guardian.
- 7.5 The authority of a foreign continuing or welfare attorney comes to an end if a guardian is appointed by a Scottish court with powers relating to the same matter.

RELATIONSHIPS WITH THE LAW OF OTHER COUNTRIES AND JURISDICTIONS

- 7.6 The relationships between the legal systems of Finland, France, Germany, Scotland and Switzerland are governed by the Hague Convention on the International Protection of Adults of January 2000. The Convention came into force between those jurisdictions in 2009. In the future, it will also apply as regards other countries when they ratify it. (The Convention is not yet in force for England and Wales or Northern Ireland: it was ratified by the UK in 2003 but only in respect of Scotland.) The up-to-date position on ratification can be found on the Hague Conference website at http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=71. The provisions of the Convention are incorporated into Scots law at Schedule 3 to the Act.
- 7.7 Schedule 3 to the Act also contains provision for the recognition of equivalent measures taken under the law of a country other than Scotland for the personal welfare or protection of property of an adult with incapacity. This is conditional on the jurisdiction of the authority of the other country being based on the adult's habitual residence there.
- 7.8 The Act defines when the Scottish courts have jurisdiction, and which sheriff court has jurisdiction. If in doubt, take legal advice.

Annex 1



A GUIDE TO COMMUNICATING WITH THE PERSON WITH IMPAIRED CAPACITY

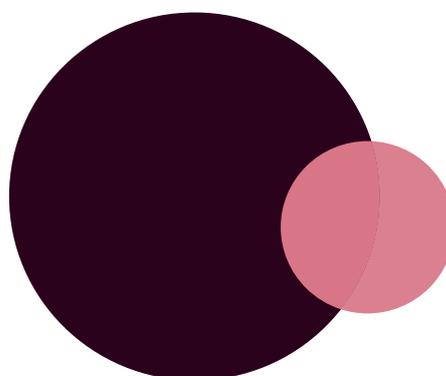
Principle 3 means that you, as the attorney, must take account of the person's present and past feelings and wishes so far as possible. Some adults will be able to express their wishes and feelings clearly, even although they would not be capable of taking the action or decision which you are considering. For example, the adult may continue to have opinions about a particular item of household expenditure without being able to carry out the transaction personally.

In communicating with the adult the following points may be helpful:

- take time to explain to the adult what decision requires to be made and what issues are involved;
- use simple language;
- choose a time of day when the adult is alert and ready for a discussion;
- choose a quiet location where interruptions are unlikely;
- use any aids which might be helpful, such as pictures or videos;
- where there are language or speech difficulties, seek assessment and support from a speech and language therapist;

- use appropriate visual aids or sign language for those with hearing difficulties;
- ensure that any mechanical devices such as hearing aids, or voice synthesiser, are used properly to assist communication;
- in extreme cases of communication difficulties, seek advice from the adult's doctor about what kinds of specialised assistance might be available;
- maximise the help of others who know the adult and who are trusted by the adult, for example relatives, friends, GP, social worker, community worker, the adult's named person (if there is one), befriender or member of the clergy to ascertain whether the adult has recently expressed views on the matter in question; or to help you to explain the matter to the adult and seek the adult's views; but be careful to ensure that they are helping to communicate the adult's views without imposing their own. (Their own views may also be important, but that is a separate matter.);
- use the services of an advocacy project which supplies volunteers or other staff to promote independently the rights, views and wishes of people who have difficulty in expressing these for themselves. For contact details for advocacy services see Annex 2;
- seek specialist help from a Speech and Language Therapist or specialist social worker, e.g. learning disability;
- if all efforts fail, be prepared to abandon the attempt and try at another time.

For further information see Communication and Assessing Capacity: a guide for health and social work officers at the Scottish Government website:
<http://www.scotland.gov.uk/Topics/Justice/Civil/awi>.



Annex 2



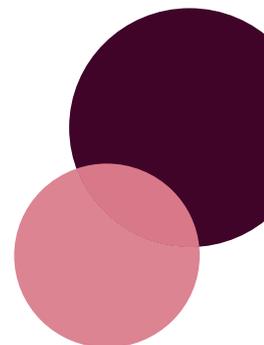
USEFUL ADDRESSES

Office of the Public Guardian (Scotland)
Hadrian House
Callendar Business Park
Callendar Road
Falkirk FK1 1XR

Enquiry line: 01324 678300

www.publicguardian-scotland.gov.uk

For information and advice about matters covered by the Act. The OPG's focus is primarily on financial matters. If they cannot assist directly with queries on other matters relating to adults with incapacity (e.g. welfare, health, care) they will point you to other agencies who will be able to help. The OPG does not provide legal advice. All OPG publications, including forms and guidance notes can be downloaded. Hard copies are available on request.



Mental Welfare Commission for Scotland

Thistle House
91 Haymarket Terrace
Edinburgh
EH12 5HE

0131 313 8777

www.mwscot.org.uk

Helpline: 0800 389 6809

The Commission provides advice on welfare matters in relation to AWI and free good practice guides – see website for further information.

Scottish Government

Justice Directorate
Area 2W
St Andrew's House
Regent Road
Edinburgh
EH1 3DG

Tel: 0131 244 3581

<http://www.scotland.gov.uk/topics/justice/civil/awi>

Adults with Incapacity Act Codes of Practice and other publications are listed on, and can be downloaded from, the website. Information about obtaining hard copies of these documents is available on the website or by calling 0131-244 3581.

Local Authority

To contact your local authority on matters relating to welfare/personal care issues and the Act you should ask for the social work department or community services department at the local council offices in the area where the adult lives. The address is in the phone book.

Sheriff Courts

The address and telephone number of the local sheriff court where the adult lives will be in the telephone directory. You can also find details of the local sheriff court by accessing the Scottish Courts website, www.scotcourts.gov.uk/

Department for Work and Pensions

There is a free Benefit Enquiry Line for People with Disabilities on 0800 88 2200 (textphone users 0800 24 33 55). From the local authority you can also get details of the local welfare rights office that will give you advice and help with benefits. You will find useful information and guidance for disabled people and carers on the Department for Work and Pensions website – www.dwp.gov.uk

Care Commission
Headquarters
Compass House
11 Riverside Drive
Dundee DD1 4NY
01382 207100

www.carecommission.com

The Care Commission is an independent body which regulates care services in Scotland. It inspects and investigates complaints in relation to care homes; short break/respite care services; housing support; adult placement schemes; support services; care at home; nursing agencies; and hospice care. There are national care standards for all these services.

Law Society of Scotland
26 Drumsheugh Gardens
Edinburgh
EH3 7YR
0131 226 7411

www.lawscot.org.uk

The Law Society is the governing body for solicitors. It provides information to the public on where to find and what to expect from solicitors.

Scottish Legal Aid Board
44 Drumsheugh Gardens
Edinburgh EH3 7SW

0131 226 7061

Legal Aid Helpline: 0845 122 8686

www.slab.org.uk

Provides advice and information on entitlement to legal aid for applications in relation to the Adults with Incapacity Act; and a list of solicitors registered for legal aid work.

Citizens Advice Bureau – you will find the address of your nearest CAB in your phone book or at www.cas.org.uk

Scottish Independent Advocacy Alliance
Melrose House
69a George Street
Edinburgh EH2 2JG

0131 260 5380

www.siaa.org.uk

This website will provide a link to the Independent Advocacy Service Directory for Scotland.

Alzheimer Scotland – Action on Dementia
22 Drumsheugh Gardens
Edinburgh EH3 7RN

Office: 0131 243 1453

Freephone 24hr Dementia Helpline 0808 808 3000

www.alzscot.org

Provides a free guide for carers and people with dementia in Scotland: ‘Dementia: Money and Legal Matters’. The website also provides information about the different kinds of powers of attorney and how to set them up. You can call the Dementia Helpline to arrange for a copy to be sent to you.

ENABLE
2nd Floor
146 Argyle Street
Glasgow G2 8BL
0141 226 4541
www.enable.org.uk

Supports people with learning disabilities of all ages by campaigning, providing information, legal advice, training and other services.

Capability Scotland – Advice Service
11 Ellersly Road
Edinburgh EH12 6HY
0131 313 5510
www.capability-scotland.org.uk

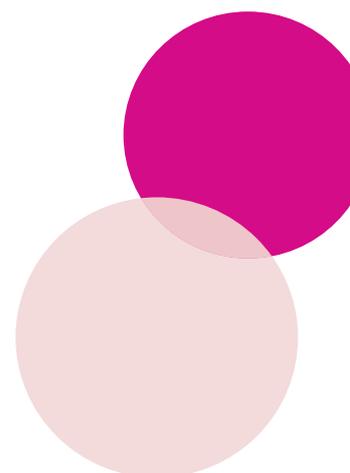
Provides advice and information and local services for people with a range of disabilities, their families and carers.

Scottish Association for Mental Health
Cumbrae House
15 Carlton Court
Glasgow G5 9JP
0141 568 7000
www.samh.org.uk

Provides information, legal advice and support to people with mental health issues.

SENSE Scotland
43 Middlesex Street
Kinning Park
Glasgow G41 1EE
0141 429 0294
www.sensescotland.org.uk

Works with children and adults who have communication support needs because of deafblindness, sensory impairment, learning and physical disabilities.



PAMIS
Head Office
Springfield House
15/16 Springfield
University of Dundee
Dundee DD1 4JE

01382 385 154

www.dundee.ac.uk/pamis

PAMIS works with people with profound and multiple learning disabilities, their family carers and professionals who support them.

Headway Scotland

Helpline: 0808 800 2244

www.headway.org.uk

Headway provides: support and help to people affected by brain injury through a network of local groups and branches; information and advice; carer support; and a range of services (which vary from area to area).

Chest, Heart and Stroke Scotland (CHSS)

Third Floor

Rosebery House

9 Haymarket Terrace

Edinburgh EH12 5EZ

Adviceline: 0845 077 6000

www.chss.org.uk

e-mail adviceline@chss.org.uk

CHSS aims to improve the quality of life for people affected by chest, heart and stroke illness through medical research, advice and information and support in the community.



© Crown copyright 2011

This document is also available on the Scottish Government website:
www.scotland.gov.uk

APS Group Scotland
DPPAS10238 (03/11)

ISBN 978-1-78045-144-2

