

dignity &  
rights  
ethical treat  
respect ca  
& equality

GOOD PRACTICE GUIDE

# Money matters



# Contents

Why have we produced this guide?	3	Additional Information – trusts	22
Quick guide to options for financial management	5	Case examples	23
Further notes	10		

## **Our aim**

The Mental Welfare Commission aims to ensure that care, treatment and support are lawful and respect the rights and promote the welfare of individuals with mental illness, learning disability and related conditions. We do this by empowering individuals and their carers and influencing and challenging service providers and policy makers.

## **Why we do this**

Individuals may be vulnerable because they are less able at times to safeguard their own interests. They can have restrictions placed on them in order to receive care and treatment. When this happens, we make sure it is legal and ethical.

## **Who we are**

We are an independent organisation set up by Parliament with a range of duties under mental health and incapacity law. We draw on our experience as health and social care staff, service users and carers.

## **Our values**

We believe individuals with mental illness, learning disability and related conditions should be treated with the same respect for their equality and human rights as all other citizens. They have the right to:

- be treated with dignity and respect.
- ethical and lawful treatment and to live free from abuse, neglect or discrimination.
- care and treatment that best suit their needs.
- recovery from mental illness.
- lead as fulfilling a life as possible.

## **What we do**

Much of our work is at the complex interface between the individual's rights, the law and ethics and the care the person is receiving. We work across the continuum of health and social care.

- We find out whether individual care and treatment is in line with the law and good practice.
- We challenge service providers to deliver best practice in mental health and learning disability care.
- We follow up on individual cases where we have concerns and may investigate further.
- We provide information, advice and guidance to individuals, carers and service providers.
- We have a strong and influential voice in service policy and development.
- We promote best practice in applying mental health and incapacity law to individuals' care and treatment.

## Why have we produced this guidance?

This guide has been produced by the Commission, in consultation with two other organisations who have responsibilities in this area – the Office of the Public Guardian (OPG), and the Care Inspectorate – because of our concerns about the impact of financial management on the welfare of those who lack capacity.

We regularly meet individuals whose quality of life could be significantly enhanced by effective management of their funds. We are aware of several cases where adults with a learning disability, for example, were leading chaotic lives, with bills unpaid, insufficient food and clothing and where they were open to exploitation.

In these instances, Department of Work and Pensions (DWP) appointeeship by the local authority or other body or financial intervention under the Adults with Incapacity Act would have protected the person's health and well being and improved their quality of life.

We believe that, for someone who is unable to manage their own finances, better management of those finances, using existing guidance and legislation, can be an integral part of providing for their health and welfare. It needs to be discussed as part of the care management role, and appropriate measures considered, bearing in mind the principles of the Adults with Incapacity Act. These principles include the benefit to the individual, the least restrictive option and ensuring that, whatever level of skills the individual has, those skills are taken into account.

Professionals need to feel confident in their knowledge of available financial measures. Being able to give information and advice, or seek clarity about the range of roles and responsibilities of those dealing with the individual's financial affairs, is an essential part of the care management role. For example, professionals may need to give initial advice to relatives on the possible options for managing the person's finances, or request confirmation on powers of attorney from the OPG to clarify the extent of powers when planning future care arrangements. They particularly need to be aware of the duties on the local authority conferred by the Adult with Incapacity Act and the Adult Support and Protection Act, as well as the scope of DWP appointeeship.

This guidance is intended to provide a useful overview for a range of practitioners tasked with safeguarding the welfare of adults who lack capacity. We hope that this will provide them with some confidence when advising on ways to effectively manage the finances of a person who cannot manage their finances themselves. While it is not comprehensive, our guidance does cover the main options available for financial management. The information is presented in an easy to access table format, supported by more detailed guidance, links to relevant websites and case examples.

When considering intervening in a person's financial affairs under the Adults with Incapacity Act, it is important to have regard to the principle of taking 'the present and past wishes and feelings of the person as far as they can be ascertained' into account. Professionals should remember the individual's right to independent advocacy. An advocate does not act independently of the person but rather helps the person to represent their own views and wishes.

The Acts referred to in this document are – The Adults With Incapacity (Scotland) (2000) Act, and The Adult Support and Protection (Scotland) Act 2007.

## QUICK GUIDE TO OPTIONS FOR FINANCIAL MANAGEMENT

### Option One – Assistance On An Informal Basis

---

<b>How</b>	Informal arrangement.
<b>Who can act?</b>	Family member, friend, neighbour.
<b>Advantages and safeguards</b>	Free, flexible They know the individual's circumstances.
<b>Further considerations</b>	This could be open to exploitation. No record of transactions needed. Intervention may be open to challenge as relative/friend has no legal authority to act.

---

### Option Two – DWP Appointeeship (see page 13 for further information)

---

<b>How</b>	Application from a prospective appointee (stating reasons why the individual is unable to act in relation to the management of their state benefits).
<b>Who can act?</b>	Family member, friend, corporate organisation, e.g. Social Work Dept, hospital Patients' Fund manager, voluntary organisation.
<b>Advantages and safeguards</b>	Straightforward. No fees. Individual may lack capacity to manage their benefits or need protection from exploitation. All appointeeships are granted and withdrawn by DWP, usually following interviews with payee and proposed appointee. Gives access to all DWP benefits.
<b>Further considerations</b>	No formal right of appeal. No scrutiny of management of funds once the arrangement has been set up. Restricted to management of individual's DWP benefits and pensions. Does not allow for management of other funds, e.g. work-related pensions.

---

## Option Three – Continuing Powers of Attorney (CPOA). Part 2 of the Adults With Incapacity Act (see page 15 for further information)

---

**How** The individual, whilst retaining capacity, chooses who they wish to act as CPOA and decides the powers they should have. The granter can decide if they want the powers activated in the event of their future incapacity or at any point before they lose capacity if they no longer want to manage their own affairs

---

**Who can act?** Solicitor or accountant, family member, friend or a combination of the above.

---

**Advantages and safeguards** Relatively straightforward.

Granter can do this with the help of solicitor. Information about granting and registering a power of attorney is available on the Office of the Public Guardian's (OPG) website.

Useful if a person has a progressive illness e.g. Huntington's, Alzheimer's or fluctuating illness e.g. bi polar disorder.

If the CPOA is to continue when the granter loses capacity this needs to be clearly stated in the document.

If the CPOA is only to begin in the event of incapacity, there needs to be a clear statement to that effect. There must be a statement that the granter has considered how their incapacity is to be determined and the mechanism for this specified, e.g. certificate from GP, two certifying medical practitioners. Clarity on how incapacity will be determined can be helpful in avoiding future disputes.

This is a proactive measure and gives the granter the choice of which financial decisions they wish to relinquish and who they want to make those decisions and at what point they are able to do so.

Must be registered with OPG before attorney can act.

Provision for joint CPOA.

OPG will consider and may investigate any complaints regarding possible mismanagement where an individual has been deemed as being incapable. Referral form and more information on investigative powers are available on OPG website.

---

**Further considerations** The cost of registering CPOA with the OPG is £70 (at 1/12/2014).

The granter may wish to consult a solicitor in drawing up a CPOA.

Solicitor's fees for drawing up CPOA vary greatly and can be costly. The granter can ask for an estimate of the cost in advance.

[Legal aid](#) helps those on low and modest incomes to afford legal assistance. [Advice and assistance](#) is available for drawing up a CPOA. If someone is eligible for advice and assistance support, the most they will have to pay is £142 per person (correct at time of writing in September 2014). This is inclusive of all fees, VAT and registration costs.

Determining the actual point when the granter has lost capacity can cause disagreements if not specified.

---

## Option Four – Access to Funds. Part 3 of the Adults With Incapacity Act (see page 19 for further information)

---

<b>How</b>	Application to OPG to set up 'designated bank account'.
<b>Who can act?</b>	<p>Permits an individual or an organisation, such as a charity or voluntary organisation, or the local authority, to open and operate a 'designated bank account' to pay for normal living expenses.</p> <p>An organisation such as a nursing home, which is eligible to manage a resident's funds under Part 4 of the Act, cannot apply to manage them under Part 3 of the Act.</p>
<b>Advantages and safeguards</b>	<p>Flexible, inexpensive and straightforward. The funds in the designated account can be accessed by the applicant but not by the individual.</p> <p>If assets and income of the individual are not known, OPG can authorise bank/building society to release information.</p> <p>OPG can give the withdrawer authority to open bank accounts on the individual's behalf, if the individual has no suitable account, or transfer funds from one account to another e.g. higher interest-bearing account.</p> <p>Provision for joint withdrawers to act. Provision for a reserve to be appointed to act when a sole withdrawer is unable to do so.</p>
<b>Further considerations</b>	<p>Mainly for ongoing living costs though lump sums can be applied for e.g. equipment, TV, paying arrears, holiday – where it meets the needs and benefits the individual.</p> <p>Not suitable where an individual's finances are complex, held in a joint account or involve investments.</p> <p>Finances must largely predict needs over next three years, though withdrawer can apply to vary transactions after the initial authority is granted.</p> <p>Application can include details of all options, e.g.:</p> <ul style="list-style-type: none"><li>• transfer of funds, request for lump sums, closure of accounts.</li><li>• arrangements for current direct debits or standing orders.</li><li>• small charges by OPG and for medical certificate of incapacity. These can be recovered from the individual's funds as part of a lump sum request in original application.</li></ul>

---



## Option Five – Management of Patients'/Residents' Funds. Part 4 of the Adults With Incapacity Act (see page 22 for further information)

---

**How** Application with certificate of incapacity to supervising body to manage funds up to £10,000, excluding DWP benefits.

---

**Who can act?** Care home, services with limited registration and hospital managers.

The Care Inspectorate (Social Care and Social Work Improvement Scotland) is the supervising body for care homes, and services which provide accommodation but are not a care service (limited registration services).

NHS Boards are the supervising body for hospitals.

Health Improvement Scotland are the supervising body for independent and private hospitals.

---

**Advantages and safeguards** Relatively straightforward once the application is processed.

No cost to the individual for the Certificate of Authority from the Care Inspectorate, but there is a fee set by the Scottish Government which doctors may claim for assessing capacity.

Allows management of superannuated pensions and other monies that otherwise might only be accessed by financial guardianship.

Record of transactions required.

---

**Further considerations** Care homes receive no payment for this responsibility and may be reluctant to take it on.

Excludes benefits and therefore may also require appointeeship.

Cannot use Part 4 of the Act to access savings which have accrued from benefits – another organisation such as the local authority or an individual may need to access these via Part 3 or Part 6 of the Adults with Incapacity Act.

---

## Option Six - Financial Intervention Orders. Part 6 of the Adults With Incapacity Act (see page 24 for further information)

---

<b>How</b>	Application to the Sheriff Court for a one-off intervention or action e.g. selling a house. Two medical reports and a report from a 'suitable' person.
<b>Who can act?</b>	Family, friend, carer, local authority, solicitor, accountant.
<b>Advantages and safeguards</b>	Very useful if one-off event will settle financial situation. Registration and monitoring by OPG. This has more limited powers than a guardianship order.
<b>Further considerations</b>	Same process as financial or welfare guardianship. Fee due to OPG for registration.  Solicitor will charge according to the value and complexity of the estate when making the application and there will be further costs if a solicitor is administering the estate.  <u>Legal aid</u> is available for intervention orders to eligible incapable adults. If there are welfare provisions, then there is no financial eligibility test, but only a test on the merits of the case. Solicitors offering a legally aided service can be found by using the tool on the Scottish Legal Aid Board's website ( <a href="http://www.slab.org.uk/public/solicitor-finder/">http://www.slab.org.uk/public/solicitor-finder/</a> ).  OPG will monitor the intervener and will require periodic reports until all actions have been completed.  Interveners are not remunerated for carrying out their duties in terms of the intervention order.  If powers sought to sell or purchase heritable property (land, houses), the intervener must ask Public Guardian to consent to the sale or purchase price of the heritable property.

---

## Option Seven – Financial Guardianship. Part 6 of the Adults With Incapacity Act (see page 24 for further information)

---

<b>How</b>	An application to the Sheriff Court for ongoing management of the individual's estate.
<b>Who can act?</b>	Family, friend, carer, solicitor, accountant or combination of these. Can be joint or substitute guardians or additional guardians appointed at a later date.
<b>Advantages and safeguards</b>	Suitable when financial matters are complex or involve larger sums of money and decisions to be made over a longer period of time. Appointment generally lasts three years. If authority still needed after three year expiry date, further application to be made to the Sheriff Court. High standard of book keeping and accounting required. Inventory, management plan and annual account required by OPG. OPG will investigate complaints about ongoing management of estate.
<b>Further considerations</b>	Lengthy and more costly than other measures under the Act. Guardian may claim expenses and/or remuneration from estate. This may be disproportionately expensive if the estate is small. <u><a href="#">Legal aid</a></u> is available to eligible individuals. The test for eligibility covers both the merits of the case and the financial resources of the individual. Solicitors offering a legally aided service can be found by using the tool on the Scottish Legal Aid Board's website ( <a href="http://www.slab.org.uk/public/solicitor-finder/">http://www.slab.org.uk/public/solicitor-finder/</a> ). Caution (insurance) may be needed. Additional approval from OPG for major transactions e.g. selling or buying heritable property, gifts not specified as recurring expenses in management plan. Fees to be paid to OPG: registration fee, approving inventory and management plan, consent to selling/buying heritable property, approving gifts in excess of £100 if not in financial management plan. However PG may waive these fees in certain circumstances. See website.

---

## FURTHER NOTES

### Option Two – DWP Appointeeship

#### Purpose

If a Department of Work and Pensions (DWP) claimant is 'incapable of managing their affairs' in relation to the management of their state benefits, a person or organisation can act as their appointee. 'Incapable of managing their affairs' is not defined in the DWP regulations and the executive officer from the DWP has discretionary powers in relation to the appointment of an appointee. The appointee then has the authority to receive and manage benefits on behalf of the DWP claimant. An appointee could be required where the claimant has a severe physical disability or mental incapacity, specifically in relation to management of finances. This can include consideration of his or her vulnerability to exploitation.

An appointee can be an individual e.g. a friend or relative, or an organisation, or representative of an organisation, e.g. the local authority, a solicitor, the manager of care home, NHS Patients' Funds etc. A suitable appointee must be over 18 years of age and be both capable and trusted to manage the finances for the benefit of the claimant. They must be aware of the responsibilities of this role, which includes repaying overpaid benefit. The prospective appointee may be asked to provide evidence from a suitably qualified professional, who has a personal knowledge of the claimant, to support their application.

<https://www.gov.uk/become-appointee-for-someone-claiming-benefits>

An appointment to act is made under Regulation 33 of the Claims and Payments Regulations 1987. An officer of the DWP acting on behalf of the Secretary of State can authorise an appointee to act in this role.

#### Application process

1. The prospective appointee should fill out a BF56 available from the Job Centre Plus office that is local to the claimant.
2. In some circumstances, the DWP may be contacted regarding a person's inability to manage their state benefits and there may be no one suitable to act in this role. In this situation, the DWP representative may contact the local social work office for advice and guidance. In these circumstances, consideration should be given by the local authority as to whether they should act as corporate appointees.
3. On receipt of the form BF56 an officer from the DWP will then make arrangements for a home visit to the claimant and the prospective appointee. These interviews are usually conducted separately. The officer will determine whether appointee action is appropriate and that the candidate is suitable. They may ask for evidence of the person's inability or lack of capacity to manage finances. They may explore any conflict of interest issues as part of this process. There are exceptions to this process, however, e.g. where medical evidence of incapacity in relation to management of finances has already been submitted. As part of this process, the DWP representative will give clear guidance about what is expected of the appointee and the responsibilities they take on if they become the appointee.
4. Once an appointment is made, the appointee and not the claimant receives all correspondence from the DWP.
5. If the claimant regains capacity, the appointee should write to the DWP cancelling the appointeeship.

## **Safeguards**

- An appointment is never approved on the grounds that it is 'convenient' for the claimant or the prospective appointee, e.g. an application to be an appointee is not appropriate if the customer is not able to get to the bank or no longer wishes to manage their affairs.
- When alerted, the DWP can investigate any concerns about an appointee's management of the claimant's affairs. Once a decision has been made to follow up concerns, payment of benefits is frozen until the investigation is concluded.
- If there is doubt about a claimant's 'ability to act' or capacity to manage finances, the DWP officer will require further evidence.
- If there is thought to be a conflict of interest or undue pressure, the DWP officer is expected to investigate this.

## **Points for consideration**

- There is no cost when applying to be an appointee.
- This is a straightforward way to manage someone's finances, particularly if their finances are mainly made up of DWP benefits.
- The ability of the local authority, as well as an individual, to act as appointee extends the usefulness of this measure, particularly for individuals who are vulnerable, without trusted contacts or open to exploitation.
- An appointee may not be appropriate if other financial measures are in place e.g. Continuing/Financial Power of Attorney or Financial Guardianship.

## Option Three – Continuing Powers of Attorney (CPOA)

### Part 2 of the Adults with Incapacity Act

#### Purpose

A continuing (financial) power of attorney is a legal document by which an individual, whilst having capacity, can grant powers to manage their property and/or financial affairs to an individual or individuals they trust or to a solicitor or accountant. The powers can start immediately or come into effect if capacity is lost at some point in the future. An individual, individuals, or a company, such as solicitors or accountants can be appointed.

#### Application process

1. A continuing power of attorney (CPOA) must be expressed in a written document which sets out the precise powers that the granter wishes the attorney(s) to have. The document must be signed by the granter. The advice of a solicitor may be sought in drawing up a power of attorney, will writing companies can also assist or Adults with Incapacity Act pro forma continuing power of attorney forms can be purchased at stationery shops

2. Where the CPOA is only to come into effect on incapacity, a statement must be included to that effect and a statement that the granter has considered how their incapacity is to be determined. Specifying how incapacity will be determined e.g. certified by GP, certified by two medical practitioners, can be helpful in avoiding future disputes which may impact on the appropriate management of the vulnerable adult's property or financial affairs.

3. The CPOA document must be accompanied by a prescribed certificate of capacity signed by a prescribed person (a solicitor registered to practice in Scotland, a member of the Scottish Faculty of Advocates or a registered medical practitioner) which states that:

- s/he interviewed the granter immediately before the granter signed the document,
- the granter was not acting under undue influence and
- the granter understood the nature and extent of the powers being granted.

The document and certificate will be sent to the OPG Scotland to be registered. The named attorney(s) must indicate in writing that they are prepared to act in this capacity.

Advice for solicitors drawing up CPOA and working with vulnerable adults can be found below.

[https://www.lawscot.org.uk/rules-and-guidance/section-f/division-h-guidance-on-continuing-and-welfare-powers-of-attorney/guidance/continuing-and-welfare-powers-of-attorney-\(2\)](https://www.lawscot.org.uk/rules-and-guidance/section-f/division-h-guidance-on-continuing-and-welfare-powers-of-attorney/guidance/continuing-and-welfare-powers-of-attorney-(2))

<https://www.lawscot.org.uk/rules-and-guidance/section-b/rule-b1-standards-of-conduct/guidance/b15-vulnerable-clients-guidance>

4. To speed up the process, it is recommended that the Public Guardian's registration form be completed. This can be obtained from the OPG or downloaded here: <http://www.publicguardian-scotland.gov.uk/docs/poaregform09.pdf>

5. Once registered with the OPG, they will issue a certificate of registration. Depending on what is stated in the CPOA document, the powers can then be used immediately, at any point prior to the granter becoming incapable or on incapacity. Attorneys have no authority to act until the power of attorney document has been registered by the OPG. There is a fee to register.

6. The granter can revoke a CPOA, or any of the powers granted, once it has been registered with the OPG, provided they still retain the capacity to do so. The granter must give notice of the revocation in writing. This must be accompanied by a certificate completed by a prescribed person (see list above) and must be attached to the letter informing the OPG of the revocation.

The granter should try to foresee all property and financial affairs which may need to be managed. Further information can be found in the Code of Practice for Continuing Powers of Attorney and also in the document 'A guide to making a power of attorney' available from the OPG.

<http://www.publicguardian-scotland.gov.uk/docs/POA%20Guide.pdf>

A welfare power of attorney, also covered by Part 2 of the Adults with Incapacity Act, relates to decision making in relation to the granter's personal care and can only come into effect on incapacity. This is not dealt with in this guidance but further information can be found on the OPG website. As welfare decisions often have financial implications, where both welfare and financial powers of attorney exist, it is important that they complement each other.

## **Safeguards**

The OPG's responsibilities in relation to powers of attorneys are to:

- maintain a register of all documents relating to continuing attorneys for inspection by members of the public.
- provide advice and guidance to continuing attorneys.
- investigate on receipt of a complaint or concern regarding the exercise or functions, relating to the property or financial affairs of a granter with incapacity, in relation to continuing attorneys.
- supervise and investigate the continuing attorney and audit any accounts submitted, when instructed by a Sheriff to do so. Under S 20(2) of the Act any interested party can apply to the Sheriff where there are concerns about safeguarding the finances and property of the individual.

## **Points for consideration**

- Granter can appoint persons they trust.
- The powers can be as flexible or as specific as the granter chooses.
- If capacity fluctuates, then the powers can be brought into effect when required and relinquished when the person regains capacity. However, the granter needs to consider how the point of incapacity will be determined.
- Where the granter has specified that CPOA powers are to be triggered at the point of incapacity, it may be difficult for the prospective attorney to decide when this point is reached. This should be specified to avoid any future disagreement.

- The power of attorney document can be difficult to complete without professional help. This has cost implications. [Civil Legal Aid](#) is not available for Powers of Attorney, as there is no court action. However, the Scottish Legal Aid Board (SLAB) provides funding for '[Advice and Assistance](#)' (A&A), where the person is financially eligible for this. A&A can be available when a person first consults a solicitor. It may be sufficient to set up a Power of Attorney. Solicitors grant A&A and they decide if the client is eligible. If this initial grant is insufficient to cover all the costs of the case, they can ask SLAB for more – if the client has to be seen at home, or in hospital, an increase may be needed. Information on this and other issues can be found in [this leaflet](#) or on the SLAB website at <http://www.slab.org.uk/>
- Someone can work out if they qualify for support with Power of Attorney by using the online calculator on the Scottish Legal Aid Board's website (<http://www.slab.org.uk/public/advice/index.html>). If they think they qualify, they can find a solicitor who offers a legally aided service by using the tool on the Scottish Legal Aid Board's website (<http://www.slab.org.uk/public/solicitor-finder/>). The solicitor will assess their eligibility.
- Staff on the legal aid information line – **0845 122 8686** – will help someone to work out if they are eligible for support towards the cost of legal assistance for Power of Attorney.
- If someone is eligible for [advice and assistance](#) the most they will have to pay is £142 per person (correct at time of writing in September 2014). This is inclusive of all fees, VAT and registration costs.
- There is no provision in the Act for reimbursement of expenses incurred by a continuing power of attorney. Provision for out of pocket expenses is a matter for the granter of the power of attorney and should be written into the document.
- The attorney(s) can only act during the lifetime of the granter.
- The Public Guardian must be made aware of any changes of circumstances, such as changes of address of the granter or attorney(s) or the death of the granter or attorney(s).

### Relevant links

AWI Act Part 2: <http://www.legislation.gov.uk/asp/2000/4/part/2>

AWIA Code of Practice for Continuing and Welfare Powers of Attorney:  
<http://www.scotland.gov.uk/Publications/2008/03/19074726/0>

Office of the Public Guardian (Scotland): <http://www.publicguardian-scotland.gov.uk/>



## **Option Four – Access to Funds**

### **Part 3 of the Adults With Incapacity Act**

#### **Purpose**

This is a straightforward means by which one or more people, or an organisation, including the local authority, can access the funds in a bank or building society of an adult with incapacity in order to meet their day-to-day living costs.

Funds can only be accessed where they are held in an account in the sole name of the individual who is without capacity. Other arrangements can be made where money is in a joint account – see Code of Practice.

The funds can be used by the 'withdrawer' to pay for food, clothes, utility bills, care home fees and other items for the individual's benefit.

Funds continue to belong to the individual, but cannot be accessed by him or her once authority has been granted to the withdrawer.

Where the income and assets are unknown, the OPG can also authorise banks/building societies to release information about the individual's account, so a decision can be made as to how those should be managed.

Where the individual does not have an account or a suitable account for this purpose, the OPG can authorise an account to be opened in their sole name to receive income or funds to which they are entitled. A second account may also be opened where necessary e.g. a savings type account.

The Access to Funds Scheme cannot be used where there is already a guardian or attorney with powers related to the funds in question, or where there is an intervention order relating to those funds. Where financial assets are complex, Part 6 rather than Part 3 of the Act may be more appropriate for managing these.

An organisation which is eligible to manage funds under Part 4 of the Act, such as a residential or nursing home, may not manage them under Part 3.

#### **Application process**

1. Where the potential 'withdrawer' has insufficient information on the individual's funds, they may first need to apply to the OPG for a certificate authorising the fund holder(s) to provide them with the necessary information (Form ATF 1). This application must be supported by a medical certificate and fee.
2. When the relevant information is available, but there is no suitable account, the withdrawer can apply to open a suitable account in the name of the individual within their application for authority to access funds (Form ATF 2). If approved, the OPG will issue a certificate giving authority to open a suitable account. Once the withdrawer supplies the OPG with the details of that account, a further certificate will be issued allowing the withdrawer to open a designated account and begin accessing the funds identified in the application.
3. Where there is already information on the individual's funds and there is a suitable account, the withdrawer can apply straight away for authority to access funds using Form ATF 2.

4. In the application the withdrawer is required to itemise the estimated expenditure needed for the person's daily living expenses and the amount to be transferred from the individual's 'current account' to the designated account on a regular basis. The period of authority normally lasts for three years, so any increases that may be required over that period need to be taken into consideration. In the event of unforeseen expenditure being required after the initial authority is granted a variation may be applied for on Form ATF 5.

5. A medical certificate of incapacity must accompany the application to access funds.

6. Conditions also have to be met relating to the suitability of the withdrawer.

7. Authority to access one-off lump sums (e.g. specialised equipment or to pay off debts) can be applied for additionally with the appropriate evidence provided.

### Safeguards

- Applications by individuals must be countersigned by a person who knows the applicant(s).
- Organisations applying must show they are fit for the purpose of dealing with the individual's funds. Once satisfied of an organisation's fitness to access funds, the OPG will issue an organisation list number, which can be used for subsequent applications.
- A current medical certificate must be completed and sent along with the application.
- The OPG is required to intimate the application to relevant parties and the individual, and to examine the suitability of the applicant(s) before issuing the appropriate certificate enabling the withdrawer to act.
- Records must be kept and the OPG can inquire into any complaints or concerns.  
<http://www.publicguardian-scotland.gov.uk/docs/Fact%20Sheet%20No%201%20A%20Guide%20to%20Investigations.pdf>
- Random reviews are carried out to ensure the individual's funds are being used appropriately.

### Points for consideration

- This is an easy way to access funds for daily living, where there are funds in addition to DWP benefits. Where there are only DWP benefits, appointeeship may be sufficient.
- It is extremely useful in gathering information on the individual's estate where this is unknown, in order to plan the management of their funds.
- It ensures the individual's money can be held in a suitable interest-bearing account.
- The ability of the local authority, as well as any adult to act as withdrawer, extends the usefulness of this measure for those who have no friends or relatives who can act in this capacity. Most local authorities are registered under Part 3 of the Act.
- Low cost measure. There are fees involved for the provision of a medical certificate and for the OPG registration fees but these can be retrieved from the individual's funds if included in the application. OPG Fees Schedule: <http://www.publicguardian-scotland.gov.uk/whatwedo/fees.asp>

### Relevant links

Amendments to Adults with Incapacity Act in Part 2 of Adult Support and Protection (Scotland) Act 2007: <http://www.legislation.gov.uk/asp/2007/10/part/2>

Code of Practice Part 3: <http://www.scotland.gov.uk/Publications/2008/03/13130144/0>

## Option Five – Management of Patients’/Residents’ Funds

### Part 4 of the Adults With Incapacity Act

#### Purpose

This is a mechanism whereby managers of care homes, or hospitals, can manage residents’ funds where they lack capacity to do so themselves. In carrying out these functions NHS hospital managers are supervised by the Health Board. Care home managers are supervised by the Care Inspectorate, managers of independent and private hospitals by Healthcare Improvement Scotland and the State Hospital managers, by the State Hospital Board. In addition, services which provide accommodation but are not care services can apply for limited registration to manage residents’ funds and are supervised by the Care Inspectorate.

Managers will be able to manage cash or funds, excluding DWP benefits, up to the value of £10,000. They may also hold or dispose of a resident’s moveable property, where it would realise less than £100. Funds must be in an interest-bearing account. DWP benefits would be managed separately under appointeeship by the manager or other interested party.

To date there have been a relatively small number of applications by care homes to manage residents’ funds. Regular reviews of care by the care home and the local authority should look at enhancing a resident’s lifestyle and maximising their opportunities and consideration of the management of their financial resources is part of this. Appendix 6 of the Part 4 Code of Practice gives ideas of how such funds can be spent.

#### Application process

1. To manage funds, an establishment must first be registered with its supervising body. Establishments, other than the State Hospital or NHS hospitals, may choose to opt out of Part 4 of the Act as part of their registration, or following registration. Most do not opt out as this is an integral part of the resident’s care and support.
2. If they consider Part 4 the best option for managing a resident’s funds, the manager then obtains a certificate of incapacity for that person from a medical practitioner. The costs associated with this may be charged to the resident.
3. This is submitted with relevant information to the supervisory body. The application for use by care homes can be found on the Care Inspectorate website, along with instructions on how to progress the application. Applicants need to be clear how intervention under Part 4 of the Act will benefit the resident and how the other principles of the Act have been taken into account.
4. The supervisory body issues a Certificate of Authorisation under Section 42 to enable the manager act. The resident should be notified when the medical certificate is completed and of the intention to manage their funds under Part 4 of the Act, though intimation may be withheld if it is thought to pose a ‘serious risk to the resident’s health’ ( Adults with Incapacity (Scotland) Act 2000 S37(8)).

#### Safeguards

- The supervisory bodies are responsible for granting the Certificates of Authorisation, for investigating complaints and ‘from time to time making inquiry’ into the management of the resident’s funds.

### Points for consideration

- It enables receipt and management of moderate amounts, from superannuated pensions and other monies, which might otherwise only be accessed by financial guardianship or by another organisation or individual accessing them by Part 3 of the Act.
- Low cost to the patient/resident – cost of medical certificate comes from their estate.
- Most care homes to date have not chosen to manage residents' funds under Part 4 of the Act. There is no reimbursement for the administration of a resident's funds under Part 4, which may deter care homes from seeking to use Part 4 when it might be appropriate.
- Part 4 does not allow the manager to access money in a bank account which has accumulated from DWP benefits. Other measures under the Act may be required to access these.

### Relevant links

AWI Act Part 4: <http://www.legislation.gov.uk/asp/2000/4/part/4>

Code of Practice Part 4 for Managers: <http://www.scotland.gov.uk/Publications/2003/07/17846/23738>

Code of Practice Part 4 for Supervisory Bodies:

<http://www.scotland.gov.uk/Publications/2003/07/17845/23737>

Care Inspectorate website: <http://www.careinspectorate.com/>

Care Inspectorate information HUB: <http://hub.careinspectorate.com/>

## **Option Six – Financial Intervention and Guardianship Orders**

### **Part 6 of the Adults With Incapacity Act**

#### **Purpose**

Financial intervention and guardianship orders are applicable when the individual is incapable, their property and finances require protection and there is no other means of achieving this.

Financial intervention orders are normally suitable when there is a single issue that requires to be dealt with on behalf of the individual, where the outcome can be predicted, and where there is no other means of dealing with this. This could be a financial or property transaction, or legal action which requires signing a document or going to court.

Financial guardianship orders are applicable where more than one financial measure is required and there are longer term needs for management of finances and/or property.

The person(s) appointed to act as financial intervener or guardian may be a relative or friend with the expertise to manage the individual's estate or a professional such as a solicitor or an accountant. The local authority may act as financial intervener, where it is appropriate, but may not act as financial guardian.

There are an increasing numbers of private guardianship applications in relation to the implementation of the Self Directed Support Act on 1st April 2014.

#### **Application process**

1. The application for a financial intervention or guardianship order may be made by a relative, friend, professional person or the local authority where it is necessary and no one else is doing it.
2. The summary application to the Sheriff Court, which includes the powers sought, must be accompanied by two medical reports of incapacity. Where the powers sought cover only financial and property matters, i.e. no welfare powers, a report from someone with sufficient knowledge of the individual and applicant must also accompany the application and speak to the appropriateness of the order and suitability of the person(s) nominated. This report could be by a solicitor or accountant, social worker, relative, carer or other professional involved with the individual.

However, where an application covers any aspect of personal welfare, the report must be completed by the mental health officer. Where the incapacity of the individual is due only to their inability to communicate, the chief social work officer will complete a report.

3. There are prescribed timescales for preparation of the reports, intimation of the application, caution and notifications of the granting of an order detailed in the Code of Practice.

4. Once the order has been granted, it is registered with the OPG, who also has a supervisory role in the exercise of the powers. As part of this supervision, within three months of issue of their certificate of authority, financial guardians are required to produce an inventory to the OPG containing information about the property and finances under their control. Supporting information is also required to be sent with the inventory, e.g. bank statements.

Within four months of issue of the certificate of authority, the guardian is required to produce a management plan which explains how they intend to manage the individual's property and finances. The guardian will have to obtain written financial advice if the value of the individual's moveable estate is more than £25,000.

A financial guardian cannot use all their powers until the management plan is approved and are restricted to paying for day-to-day living expenses and in gathering the individual's estate.

Annually thereafter, financial guardians must submit their accounts to the OPG for review, including receipts and invoices to verify expenditure. Each year, financial guardians must keep records of how they exercise their powers.

### Safeguards

- The court will examine the appropriateness of the order and suitability of the nominated person and can ask for further information and reports.
- Application intimated to the individual (unless it would pose a serious risk to their health) and to interested parties.
- The OPG requires an inventory of the estate, a management plan and the submission of annual accounts. Additional consent is required from the OPG for the acquisition or disposal of property and for gifts of over £100.
- The OPG has the power to investigate mismanagement of funds:  
[http://www.publicguardian-scotland.gov.uk/whatwedo/investigations\\_team.asp](http://www.publicguardian-scotland.gov.uk/whatwedo/investigations_team.asp)
- The Sheriff will normally demand that caution is taken out, though has the discretion to waive this. Caution is a type of insurance to safeguard the individual's estate from any loss due to the actions of the intervener or guardian.

### Points for consideration

- Financial guardianship enables appropriate management of larger or more complex estates.
- Advice and scrutiny are provided by the OPG.
- Application process can be lengthy and costly. Costs can be recovered from the individual's estate.
- [Legal aid](#) is available for financial intervention and guardianship orders to eligible incapable people. The tests to be applied would be probable cause, reasonableness and financial eligibility based on the incapable individual's resources. Where [legal aid](#) is granted it may cover all the costs of an application. However, if the issue leading to the intervention concerned welfare aspects then there is no test of financial eligibility and [legal aid](#) will cover all the costs of an application.<sup>1</sup>
- Someone can work out if the incapable individual qualifies for support with their financial intervention or guardianship order by using the online calculator on the Scottish Legal Aid Board's website (<http://www.slab.org.uk/public/advice/index.html>). If they think the incapable individual qualifies, they can find a solicitor who offers a legally aided service by using the tool on the Scottish Legal Aid Board's website (<http://www.slab.org.uk/public/solicitor-finder/>). The solicitor will apply to SLAB for a grant of legal aid.

<sup>1</sup> This is the case at the time of publication but is currently under review and should be checked with SLAB

- Staff on the legal aid information line – **0845 122 8686** – will help someone to work out if the incapable individual is eligible for support towards the cost of legal assistance for the financial intervention or guardianship order.
- Supplementary report comments on the appropriateness of the order and the suitability of the proposed guardian. Proposed guardian should be made aware of what is expected from them by author of this report.
- There may be ongoing costs for the annual administration of the estate, where this is being carried out by a professional person such as a solicitor or accountant. The OPG will set the level of payment, taking into account the size of the estate. If the estate is less than around £20,000, these costs can considerably deplete the remaining assets. Where the individual's estate has diminished, it may be more advantageous to manage their monies under Part 4 or Part 3 of the Act.
- The Sheriff may require caution, which can be disproportionately expensive and sometimes there can be delays in obtaining this. Caution is an insurance bond to safeguard the individual's estate from loss caused by negligent actions or omissions by the guardian. There are currently (2014) three companies who provide caution – Zurich Global Corp UK Surety Division, Royal and Sun Alliance Insurance PLC, and Marsh Ltd who administer the Aviva Scheme. Rates and speed of processing applications for caution varies between companies. More information can be sought from the OPG.

### Other relevant links

Revised Code of Practice Local Authorities Exercising Functions under the AWI Act:

<http://www.scotland.gov.uk/Publications/2008/03/20114619/0>

Revised Code of Practice for Persons Authorised to act under Intervention Orders and Guardianship:

<http://www.scotland.gov.uk/Publications/2008/03/18094148/0>

Guardianship Information OPG:

[http://www.publicguardian-scotland.gov.uk/whatwedo/guardianship\\_order.asp](http://www.publicguardian-scotland.gov.uk/whatwedo/guardianship_order.asp)

Intervention Orders information OPG:

[http://www.publicguardian-scotland.gov.uk/whatwedo/guardianship\\_order.asp](http://www.publicguardian-scotland.gov.uk/whatwedo/guardianship_order.asp)

OPG Fees Schedule: <http://www.publicguardian-scotland.gov.uk/whatwedo/fees.asp>

## ADDITIONAL INFORMATION – Trusts

This booklet focuses on handling money which already belongs to the individual person. Where a person may receive money in the future, it is sometimes desirable to manage this through a specially created trust. This may avoid the need to take out financial guardianship and can sometimes be advantageous if receipt of the funds would have an impact on means-tested benefits.

Trusts are often set up by families who wish to set money aside to benefit a person with a learning disability or mental health problem, including when making provision in a will. Trusts can also be used where a person is awarded Criminal Injuries Compensation, or damages in a legal case, or where funds are being raised to help pay for a person's care or treatment.

One option is the ENABLE Scotland Trustee Services, which manages individual trusts, mainly set up for the benefit of people with learning disabilities. <http://www.enable.org.uk/families/thinkingaboutthefuture/trusts/Pages/My-Trust.aspx>

Anyone considering a trust should take advice from a solicitor or other specialist adviser. The Law Society website may help you find a solicitor. [http://www.lawscot.org.uk/wcm/lssservices/find\\_a\\_solicitor/Core/directory.aspx](http://www.lawscot.org.uk/wcm/lssservices/find_a_solicitor/Core/directory.aspx)

- [Advice and assistance](#) may be available under the Legal Aid scheme for advice from a solicitor on setting up a trust. Someone can work out if they qualify for support with setting up a trust by using the online calculator on the Scottish Legal Aid Board's website (<http://www.slab.org.uk/public/advice/index.html>). If they think they qualify, they can find a solicitor who offers a legally aided service by using the tool on the Scottish Legal Aid Board's website (<http://www.slab.org.uk/public/solicitor-finder/>). The solicitor will assess their eligibility.
- Staff on the legal aid information line – **0845 122 8686** – will help someone to work out if they are eligible for support towards the cost of legal assistance for setting up a trust.
- If someone is eligible for [advice and assistance](#) the most they will have to pay is £142 per person (correct at time of writing in September 2014).

### Other Useful Links

[http://www.alzscot.org/assets/0000/0276/Dementia\\_-\\_Money\\_and\\_Legal\\_Matters\\_-\\_Vol\\_1.pdf](http://www.alzscot.org/assets/0000/0276/Dementia_-_Money_and_Legal_Matters_-_Vol_1.pdf)

[http://www.alzscot.org/assets/0000/0277/Dementia\\_-\\_Money\\_and\\_Legal\\_Matters\\_-\\_Vol\\_2.pdf](http://www.alzscot.org/assets/0000/0277/Dementia_-_Money_and_Legal_Matters_-_Vol_2.pdf)



## CASE EXAMPLES

### Case Example 1

Mr H was a civil servant and had to retire early due to early onset dementia. He lives alone. A concerned neighbour has brought his situation to the attention of the local authority as he has been living in poor conditions and in a state of self - neglect. He has not claimed the appropriate DWP entitlements since leaving work and his debts have mounted up as he has failed to deal with any of his correspondence. He is entitled to an occupational pension which has been paid into his bank account. Occasionally he will go to the bank and withdraw relatively large amounts of cash but he has little recall or evidence of how he has spent this.

The local authority have completed a community care assessment and are now providing a care package of three visits per day, seven days a week. Mr H is happy with this support. He has been assessed by the Community Mental Health Team as lacking capacity with regard to financial matters. As he has no relatives, the local authority has applied to be corporate appointees for his DWP pension and benefits. They have established that he has several thousands in savings and have also applied to the OPG under Part 3 Access to Funds to manage this money. They have asked for an initial lump sum to pay off his debts and improve his living conditions and then regular payments towards his bills and weekly outgoings.

### Case Example 2

Miss Y has dementia. She had drawn up a continuing power of attorney (PoA) to come into effect on her incapacity and her nephew is now acting as her attorney. She receives considerable care and support from two of her nieces who live nearby. They were unaware until their aunt lost capacity that she had made this arrangement.

Whilst her nephew ensures there is just enough money left on a weekly basis for food and the utility bills and council tax are paid, there is little extra money made available for extra items which her nieces feel would improve her life. The lady herself has always been able to afford a very comfortable lifestyle and this is no longer the case. When Miss Y's nieces ask for extra funds for their aunt, her nephew has refused these requests and has been quite hostile. Miss Y also has support from an agency that come in morning and evening but due to unpaid fees a letter has come to Miss Y's address threatening to terminate the service. Her nieces have also had increasing suspicions that, although in a low-paid job, her nephew and his wife have been going on exotic holidays and have spent money on a new car, clothes and expensive meals out.

After much deliberation Miss Y's nieces approach the OPG about this. Whilst the OPG make it clear they are unable to recover monies already lost and any misappropriation of funds would be a police matter, they investigate the ongoing concerns. They report the matter to the local authority under Adult Support and Protection proceedings. They establish from Miss Y's bank that large sums have been withdrawn amounting to £30,000 and ask the bank to freeze the account. When asked to account for this money, Miss Y's nephew is unable to provide any verification of the destination of Miss Y's funds and is generally obstructive. His inability to provide accurate accounting and evidence that his actions have led to the arrears and potential loss of service and suggest he is not using the PoA for the benefit of his aunt.

In the first instance the OPG make an approach to the Sheriff to direct a full accounting from the attorney. If his accounting proves inadequate or shows misuse of his powers, a second approach can be made to the Sheriff to have the attorney's powers restricted or removed altogether. The question would

then arise as to how Miss Y's affairs could be properly managed should the power be removed. In this instance Miss Y's nieces could consider applying to be financial guardians or approach a solicitor to make an application to act as financial guardian. If Miss Y's nephew appears to have acted fraudulently, the matter can be referred to the police by her nieces or the OPG.

It is important to note that delays in reporting concerns about mismanagement of funds by a PoA to the OPG can lead to further loss of the individual with incapacity's funds. The OPG does not have powers to recover funds. They can investigate current circumstances and, where there is evidence of the PoA not acting for the benefit of the individual, can put measures in place to protect their finances whilst they investigate the situation.

### **Case Example 3**

Mr D is 25 years of age and has a learning disability and Autistic Spectrum Disorder. He has had a package of support including three days at a day centre and 42 hours of support from an agency to assist with personal care and social and recreational activities. The local authority has been reassessing his care and support following the introduction of self-directed support and Mr D's parents are keen to take up the option of directly employing personal assistants for Mr D. They feel that will allow them to have a more person-centred support plan with more consistency of personnel and greater flexibility in the hours of support.

Agreeing to use and manage self-directed support involves legal responsibilities such as contracting with an agency or becoming an employer, as well as managing and accounting for a direct financial payment for Mr D's package from the local authority. Mr D does not have the capacity to understand these responsibilities, even with help. His parents need to apply to be welfare and financial guardians for him to have the legal authority to act as proxy decision-makers for him in welfare and financial matters. The local authority will agree to this plan and make a direct payment to them.

### **Case Example 4**

Mr T was an art teacher and a respected water colourist who was involved in a road traffic accident resulting in an acquired brain injury. He received Criminal Injuries Compensation of £40,000. He spent a lot of his money initially on alcohol and gave a considerable amount away to charities before being admitted to a care home. He has £7000 left, has an occupational pension and his DWP benefits.

Mr T has alienated many of friends due to his confrontational behaviour in the past and has no visitors. He has limited opportunities to get out as he requires staff to accompany him and his interests in art and sculpture exhibitions are not shared by other residents. He has very limited understanding of his financial affairs and the home act as DWP appointee for his benefits.

Prior to his last review he complained to his keyworker that he only ever got out to go shopping or on bus trips with a lot of women with whom he says he has nothing in common. The home manager has tried to get him a volunteer befriender without success. She is aware he has some money in a bank book that he has never used since his admission. She wonders whether this could be spent on a support worker from an agency who could get to know him and take him out to art galleries and exhibitions every couple of weeks. She raises this with the reviewing officer from the local authority who is positive about the idea and she makes enquiries as to the likely cost.

The reviewing officer also contacts an independent advocacy service to work with Mr T to establish his opinions initially on spending his money on furthering his interest in art but also to gather and promote his views and feelings about other activities he would want to pursue.

There is discussion as to whether the local authority should access the funds in his bank account under Part 3 Access to Funds or whether the manager should access these under Part 4 Management of Residents' Funds. Either is possible. As the matter has drifted on for some considerable time with no progress, the care home manager makes an application to the Care Inspectorate under Part 4 for a Certificate of Authority to manage these funds with a view to using these for the staffing, transport and incidental costs of his art outings.

### **Case Example 5**

Miss A works as a Human Resources manager for a retail chain. She has a bi polar affective disorder and has been becoming increasingly unwell over the past month. She has been spending her savings on booking holidays, buying a sports car, giving money away to various 'acquaintances' and she is beginning to get into debt.

She is admitted to hospital under the Mental Health Act but she is still managing to use her bank cards to buy expensive items for which she has no need. As a duty of care, the multi disciplinary team make the decision to remove her bank cards from her. They postpone contacting her bank to freeze her accounts as her episodes of illness are usually short-lived.

As Miss A's condition improves, she agrees that ward staff can give her bank cards to her mother for safe-keeping. At her discharge planning meeting her social worker discusses the current financial situation with Miss A and her mother. There is no easy solution to the issues but a number of alternatives are considered:

- Miss A could consider granting a CPOA to her mother which can be operated when she is becoming unwell. This could potentially be difficult e.g. establishing how her incapacity to manage money would be determined, and how destructive the arrangement might be to her relationship with her mother who is her main support.
- Miss A could terminate or restrict the number of credit cards she holds and/or reduce the credit levels available to her.
- She could put the majority of her savings into an account where a period of notice is required for withdrawal and have a current account with a small overdraft limit.
- CAB can be contacted for debt management advice.
- Independent advocacy could be involved to assist Miss A in looking at the options and ensuring her views are heard in the decision-making process.











Thistle House  
91 Haymarket Terrace  
Edinburgh  
EH12 5HE  
Tel: 0131 313 8777  
Fax: 0131 313 8778  
Service user and carer freephone:  
0800 389 6809  
[enquiries@mwscot.org.uk](mailto:enquiries@mwscot.org.uk)  
[www.mwscot.org.uk](http://www.mwscot.org.uk)