

ADVICE NOTES

Can a Power of
Attorney authorise
significant restrictions
of liberty?

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Can a welfare attorney granted a specific power to overcome resistance, authorise a significant restriction of liberty when the adult with incapacity resists or objects?

Unfortunately the law is unclear, and the increased awareness of the need for legal authorisation for a deprivation of liberty has led to a number of powers of attorney being granted with specific powers to authorise deprivation of liberty, or to impose coercive measures such as restraint.

There is an argument that if an adult has granted an attorney the power to consent to care arrangements, including arrangements amounting to a deprivation of liberty, this should be respected, in the same way that the person's consent, if capable, would suffice to permit depriving them of their liberty.

We recognise this argument, and would generally encourage people granting powers of attorney to be as specific as possible in the powers they grant. However, on balance, **we do not believe a power of attorney can be safely relied on to authorise coercive measures which amount to a deprivation of liberty**, for the reasons set out below.

When a person with capacity withdraws consent, then any deprivation of their liberty would need to be authorised by another legal measure such as might be granted by a court, if it is deemed necessary for it to continue. Otherwise their continued deprivation of liberty becomes illegal, both at common law, and under Article 5 of the European Convention on Human Rights.

But what protection is there for an adult with incapacity to withdraw their consent?

An adult when they have capacity can grant any welfare or financial powers to an attorney. The registered power of attorney document may be completed without the oversight of a solicitor, and the doctor who confirms the capacity of the grantor does not have to pay detailed consideration to the powers granted, only to the capacity of the adult. The power of attorney document does not go before a court, but is registered in Scotland by the Office of the Public Guardian. If it is a competent legal document they must register it. It is possible for a power to authorise the attorney to decide for themselves when a person has become incapable, with no independent verification.

The principles of the Adults with Incapacity Act require respect for the wishes and feelings, past and present, of an adult who subsequently has lost capacity, at the time an attorney plans to exercise the welfare powers. Thus if the adult appears to oppose or resist the arrangements it is arguable that it would not be in accordance with the principles to rely on the power of attorney to authorise them. This approach to the principles is supported by Article 12 of the UN Convention on the Rights of Persons with Disabilities, which makes clear that measures affecting a person's legal capacity must respect their 'rights, will and preference'. It is unfortunate that the Adults with Incapacity Act does not spell out the extent of an attorney's powers to overcome the resistance of an incapable adult in respect of measures which might amount to a significant restriction or deprivation of liberty (except in relation to the specific bar on admitting a person to hospital for treatment for mental disorder against their will). Nor does the Act make clear whether an attorney who is a carer can use or authorise the use of restraint, where an adult appears to wish to leave his or her place of residence or day service.

Section 70 of the Adults with Incapacity Act provides for guardians, but not powers of attorney, to apply for an order in the event of "Non-compliance with decisions of a guardian with welfare powers". It says that, where any decision of a welfare guardian is not complied with by the adult, the sheriff can make an order requiring the adult to comply with the decision of the guardian.

If an adult with capacity granted a power, in the power of attorney document, specifically to overcome their own resistance to a decision of their power of attorney, and then having lost capacity, resists or refuses to comply with the decision of their welfare power of attorney, the power of attorney still has no recourse to seek compliance using section 70.

The Adults with Incapacity Act provides at section 3 that any welfare attorney unsure about the extent of their powers could seek instructions from a sheriff.

Crucially, how can a person who has lost capacity exercise their right to challenge the decision of a power of attorney who is authorising a significant restriction of liberty against their present wishes, relying only on the power granted to them by that same person when they had capacity?

"the right to liberty is too important in a "democratic society" within the meaning of the Convention for a person to lose the benefit of the protection of the Convention for the single reason that he gives himself up to be taken into detention"

De Wilde, Ooms and Versyp v Belgium [1971] ECHR 1

Where any person is involved in carrying out the wishes of a welfare power of attorney and being told to overcome the resistance of the adult with incapacity, for instance a care home manager, we believe they could seek directions of the court and ask that the authority of the power of attorney to overcome the resistance of the adult is reviewed by the sheriff. The only procedure for this to happen in the Adults with Incapacity Act is an application for a direction under s3.

The Code of Practice for Continuing and Welfare Attorneys Second Edition (Updated February 2018) available on the Scottish Government website

<http://www.gov.scot/Resource/0053/00532315.pdf> states in a section entitled:

What if you encounter resistance to the exercise of your 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.

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.

In a later section 5.16, it states:

Obtaining specialist advice

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.

Our View

The Mental Welfare Commission is cognisant of all these arguments and until further legal clarity is forthcoming takes the cautious view that it is better for a court to have authorised an intervenor, (even if they have the power specified in a power of attorney document), to overcome the persistent verbal, or non-verbal, resistance of an adult with incapacity to a *significant restriction of liberty*.

Some resistance may be very temporary, but easily overcome with persuasion or direction. Some resistance may be for interventions not considered to be a significant restriction of liberty, such as to ensure personal hygiene or nutrition. Some resistance may need to be overcome for the immediate safety of the adult or other people. In these situations, we accept that a legal process is not required if the attorney is acting within the apparent scope of their powers. However, for persistent strongly held views or determined efforts, for instance, to leave a care setting, we recommend that the welfare attorney, or others concerned about the powers being exercised by the power of attorney, either seek welfare guardianship with the appropriate power, or at the very least seek the direction of the sheriff under s3(3) for clarification on the extent of the attorney's powers.

See also:

“Deprivation of Liberty (Updated July 2015) Dr Jill Stavert” on the Commission's website:

https://www.mwscot.org.uk/media/234442/deprivation_of_liberty_final_1.pdf





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