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GOOD PRACTICE GUIDE

Reviewed November 2017

This guide has been updated to reflect key changes to the Mental Health Act implemented on 30 June 2017. This version replaces the previous 2015 version.

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Who we are and what we do

Our Mission

To be a leading and independent voice in promoting a society where people with mental illness, learning disabilities, dementia and related conditions are treated fairly, have their rights respected, and have appropriate support to live the life of their choice.

Our Purpose

We protect and promote the human rights of people with mental illness, learning disabilities, dementia and related conditions.

Our Priorities

To achieve our mission and purpose over the next three years we have identified four strategic priorities.

- To challenge and to promote change
- Focus on the most vulnerable
- Increase our impact (in the work that we do)
- Improve our efficiency and effectiveness

Our Activity

- Influencing and empowering
- Visiting individuals
- Monitoring the law
- Investigations and casework
- Information and advice

Why we have produced this good practice guide

While the vast majority of attorneys undertake their role with care and respect, there are times when the situation is more difficult and the Commission has been asked for advice and guidance.

The Mental Welfare Commission has therefore compiled this guide to assist health and social care staff faced with issues that arise from the operation of powers of attorney. It may also be of interest to people drawing up their own power of attorney, and to prospective attorneys.

The website of the Office of the Public Guardian (Scotland) and the Code of Practice for this part of the Adults with Incapacity (Scotland) Act 2000 (Part 2) (referred to as 'the Act') provide clear and detailed advice on creating and exercising powers of attorney. This guide does not duplicate that, but looks at some of the practical and ethical dilemmas that arise and considerations for attempting to resolve these.

<http://www.publicguardian-scotland.gov.uk/>

<http://www.gov.scot/Publications/2011/03/24114457/0>

What is a power of attorney?

A power of attorney is an authority given by an individual, who is known as the granter, to another person(s), known as the attorney/s, to deal with aspects of the granter's affairs. This could relate to financial/property matters and/ or personal welfare.

- Powers relating to the granter's financial /property affairs are known as 'continuing powers' and may be given either with the intention of taking effect immediately and continuing upon the granter's incapacity, or to begin on the incapacity of the granter.
- Welfare powers cannot be exercised until the granter has lost the capacity to make these decisions.

Power of attorney is different from guardianship. A power of attorney is drawn up when the granter has the mental capacity to do so. If the person has lost capacity and does not have a power of attorney, an individual or the local authority, can apply for welfare guardianship in order to make welfare decisions for them. An individual or a professional, such as a solicitor or accountant, can apply for financial guardianship in order to make decisions about property and finances. The local authority can also make an application for financial guardianship but cannot act as the financial guardian.

Why is it important to consider capacity and undue influence?

It is important to establish that the granter understands the implications of drawing up a power of attorney and the decisions they wish their attorney to take for them. They must grant these freely without being subject to undue influence.

The Mental Welfare Commission often hears of a proposed attorney taking someone to a solicitor to get them to draw up a power of attorney. It is vital for the solicitor to establish the person both has capacity and is not subject to the undue influence of the proposed attorney. Where a solicitor has doubts about the potential granter's capacity, they should seek the opinion of a medical practitioner.

The Commission published a report in 2012 about Mr and Mrs D who had learning disabilities and granted welfare and financial power of attorney to Mr D's brother (Mr E) who later abused these powers.

The solicitor undertook the work of drawing up the power of attorney document at the request of Mr E. We felt there was considerable doubt that the Ds were ever effectively instructing the solicitor in relation to the granting of the powers of attorney. The 2000 Act and Codes of Practice assume that the granter(s) are giving power of attorney of their own volition. In many cases, including the Ds' case, this is not what happens. It is often others, including the prospective attorney, who initiate the process.

It is important to look closely at the definition of incapacity in the Act. Section 1 of the Act states that incapacity shall be construed as being incapable of:

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

We did not think that the assessment of the capacity of the Ds to grant or revoke the powers of attorney included a proper consideration of their capacity to act to protect their own interests. We also believed that there was no proper consideration of the role of undue influence of Mr E and the presence of other factors that might have affected their capacity for these actions.

We thought it unlikely that the couple fully understood the implications of the 30 powers they were giving to Mr E. They told us they were unaware of the reason for their attendance at the GP surgery on the day when they were asked to grant the powers of attorney. Whilst the solicitor was there, and took steps to try to explain the powers on that day, we felt this was insufficient.

The couple had learning disabilities - Mr D had limited reading skills, Mrs D could not read at all - and they had not had time and independent support to consider the implications of giving these powers. This was particularly important given what we learned of the influence Mr E had over them and his ability to intimidate them.

In response to our report, in August 2013 the Law Society produced two separate pieces of guidance - Vulnerable Clients Guidance, and Guidance on Continuing and Welfare Powers of Attorney. The guidance should be read subject to the terms of relevant Law Society of Scotland Practice Rules 2011.

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

<https://www.lawscot.org.uk/rules-and-guidance/section-f-guidance-relating-to-particular-types-of-work/division-h-guidance-on-continuing-and-welfare-powers-of-attorney/guidance/guidance-on-continuing-and-welfare-powers-of-attorney/>

The issues discussed in the guidance for solicitors include:

- Effective communication strategies with vulnerable clients including consideration of the place and time of meetings, using straightforward language and documentation and independent support.
- 'Incapacity to act' and awareness of how undue influence can impact on this.
- The difference between due and undue influence.
- The need to seek expert guidance from a medical practitioner or clinical psychologist if there is any doubt about capacity.
- The advisability of seeing vulnerable clients alone to try to establish their wishes, particularly if someone else has initiated the process.
- Consideration of who is the client and possible conflicts of interest.

Is it acceptable for someone to sign a power of attorney whilst in hospital?

Social work and hospital staff have raised concerns with us about families arranging for someone to draw up a power of attorney whilst the person is in hospital. There have been concerns about the extent to which the person could enter into this process in an informed manner, as well as queries about the role of health staff and solicitors in this context.

Whilst it is for a solicitor or, if they are in doubt, a medical practitioner to determine if someone has capacity to grant a power of attorney, we think it is good practice for a solicitor to make their presence known on a ward and, where there is any doubt about capacity, to ask nursing or medical staff's opinion. Even if the solicitor already knows the individual, their capacity may have been affected by the events that brought them into hospital.

Often staff have been concerned when they have seen solicitors coming onto the ward, documents being signed and solicitors leaving again. A solicitor can complete the Schedule 1 certificate of capacity as well as witnessing the signing of the power of attorney document. If staff think the person does not have capacity, they should say so to the solicitor, record that fact, and discuss further with a doctor. The doctor may wish to take up his or her concerns about capacity directly with the solicitor, or alert the Office of the Public Guardian (Scotland) to the concerns before the document is registered. Similarly, if staff feel the person is being coerced or unduly influenced by a friend or relative, they should say so to the solicitor, document what they have done, discuss with the person's doctor and alert the Office of the Public Guardian (Scotland). Whilst this may be a private matter between the person and their solicitor, in some cases there may be adult protection concerns which staff need to be alert to and have a duty to act on.

Ward staff may be asked to operate as witnesses to the power of attorney document. Staff need to be aware of any hospital policy on this and carefully consider their position where they have any doubts about the legality of the situation. In witnessing a power of attorney document a member of staff is simply confirming that the person did in fact sign it. They are making no judgment on the granter's capacity or the content of the power of attorney document. However if there are doubts about capacity or undue influence, it would not be wise for the member of staff to act as a witness.

<http://www.publicguardian-scotland.gov.uk/>

Who should be informed about a power of attorney?

There is no requirement for the granter to tell anyone, other than the proposed attorney, that he or she is drawing up a power of attorney document. However, it may avoid difficulties in the future if the granter considers now who might need to know about it.

There are potential problems if close relatives are not aware of a power of attorney. Where there are tensions in family relationships, these may intensify when one relative begins to make welfare or financial decisions as attorney when others are unaware of this. In most cases such disputes would not have been what the granter would have wished.

Similarly the proposed attorney may wish to think about the implications of accepting the role, particularly in regard to their relationships with other family members. When acting as attorney, they will need to be mindful of the principles of the Adults with Incapacity Act in all decision making, which include taking into account the views of others with an interest in the person's welfare.

<http://www.legislation.gov.uk/asp/2000/4/section/1>

The certificate of registration and power of attorney document are only issued to the person who sends the application to the Office of the Public Guardian (Scotland) (usually a solicitor). The granter receives a copy of the power of attorney document.

Up to two additional copies can be issued to other people but only if the document specifically identifies that a copy should be sent to them.

The power of attorney can only be used when registered and the attorney should provide a certificated copy of the document to relevant staff to confirm their status to act as a proxy decision-maker.

Case Example

Mrs S drew up and registered her power of attorney appointing two of her three daughters as her welfare and continuing attorneys. She did not inform her eldest daughter of this. As she became frailer and increasingly confused, it was her eldest daughter who cared for her at home. Mrs S was admitted to hospital in an emergency after a fall and her eldest daughter and health and social work staff concluded she required nursing home care. It was only at this stage that her other two daughters made it known that they were her welfare and financial attorneys. Her eldest daughter was not only upset that her mother required full-time care, but that her sisters and her mother had not made her aware of the power of attorney at an earlier stage. The situation escalated when the two younger daughters wanted their mother to return home.

Can someone have capacity to grant a power of attorney but lack capacity for some other decisions?

Yes. It is important to make the distinction between the granter's ability to make certain welfare and financial decisions, and the granter's ability to grant a power of attorney i.e. to understand the nature and extent of the powers they are granting and who they wish to make decisions for them.

Case Example

Mrs T has mild to moderate dementia and was admitted to a care home. Although she was quite confused at times, she was very clear with her solicitor, her care manager and the manager of the care home that she did not want her children to have any dealings with her finances, as she thought they would fall out over this. She wanted her solicitor to manage these. Her solicitor visited her on several occasions and consulted with the professionals who knew her and found this was a view she consistently expressed.

He considered that, although she did not have a grasp of her finances, she was able to instruct him to draw up a continuing power of attorney.

What should be done if there are concerns about someone's capacity to grant a power of attorney or that they are under undue influence?

If there are concerns that the granter has drawn up a power of attorney document and has not understood its effects or has been subject to undue influence, it is important to contact the Office of the Public Guardian (Scotland) promptly so that they can examine this before it is registered.

Once registered, the power of attorney can only be revoked if the granter still has the capacity to do so. Otherwise it can only be revoked by applying to the Sheriff. This would involve legal fees for the applicant and sufficient evidence that the person did not have capacity to create the power of attorney at the time of granting.

Case Example

Mr L is a young man with a neurological disorder which has progressively affected his physical health, speech and cognitive functioning. He was left money by his father in 2003 and it was not clear to professionals what happened to this money. His benefits were managed by his cousin, who was his appointee. There were some concerns about the influence exerted on him by both his mother, whom he lived with, and the cousin, who lived nearby. As his mental and physical health deteriorated, there were increasing issues with the care he was receiving - he was dirty and poorly dressed, came to his day centre evidently hungry, led a very restricted lifestyle in that he was sent to bed very early, and he was not allowed to attend any social activities. His mother was very resistant to any social work or health involvement.

It became clear that in November 2010 Mr L had granted power of attorney in welfare and financial matters to his cousin. Amongst other concerns, his cousin was frequently seen in Mr L's motability car (Mr L reported he had never been in it), was known to be going on exotic holidays, and had refurnished her own house, despite being on benefits herself. Professionals involved were concerned that Mr L had not had the capacity to grant powers of attorney, and that the attorney was not operating the powers in line with the principles of the Act.

The local authority, having had confirmation of Mr L's incapacity in June 2011, applied to be welfare guardian and financial intervener. This was strongly contested by the attorney, who maintained that, although there were assessments to indicate he lacked capacity in July 2011, Mr L had had capacity in November 2010 when the power of attorney was registered. The Sheriff ruled there was insufficient evidence

that Mr L lacked capacity in November 2010, refused the local authority's application for welfare guardianship and a financial intervention order, but made an order for supervision of the financial attorney by the Office of the Public Guardian (Scotland) and supervision of the welfare powers by the local authority.

The attorney did not co-operate with the Office of the Public Guardian (Scotland) in their request for accounts, nor with the local authority in attending meetings to improve welfare issues. When the matter eventually went back to court, a welfare and financial guardianship order was granted to the local authority and a solicitor respectively.

It appeared that substantial sums of Mr L's money had been misspent between 2005 and 2011. As Mr L was deemed to have capacity until July 2011, the Police did not take matters further. Similarly the Office of the Public Guardian's involvement only dated from July 2011 onwards. The local authority as welfare guardians placed Mr L in alternative accommodation with appropriate care and support.

<http://www.publicguardian-scotland.gov.uk/investigations>

When can a power of attorney take effect?

Powers relating to the granter's financial and property affairs are known as 'continuing powers' and may be given with the intention of taking effect immediately and continuing upon the granter's incapacity, or beginning on their incapacity.

Welfare powers cannot be exercised until the granter has lost the capacity to make these decisions. A power of attorney document may contain either continuing powers, welfare powers or a combination of both.

When a continuing power of attorney is to begin only in the event of incapacity, or if welfare powers are included, the document should always include a statement confirming that the granter has considered how their incapacity is to be determined. If it is omitted, this can lead to disputes about when the attorney can act. It is good practice for the granter to consider stating in the document how incapacity is to be determined or highlighting who should determine when the granter has lost capacity.

Where an attorney is stating they are acting as attorney, they should be expected to produce the certificated power of attorney document that has been registered with the Office of the Public Guardian. Relatives on occasions will refer to themselves as having power of attorney when they are in fact the person's appointee for Department of Work and Pensions benefits, or they are simply the next of kin. It is important for services to ask for a copy of the document to see that it has been registered with the Office of the Public Guardian, to check what the powers are, and, if there is a clause about how the granter wants their incapacity determined, what that says. For instance, where it states that the power of attorney requires to be triggered by a written medical statement of incapacity, this should be provided along with a copy of the power of

attorney document. It is important that staff read the power of attorney document with regard to the powers and any stipulation about when the attorney can act, particularly where there are contentious decisions.

Case Example

Miss X had a mild learning disability and she had granted a continuing and welfare power of attorney to her niece, who had arranged the appointment with the solicitor. The solicitor who drew up the power of attorney was unsure about her capacity, and her GP provided a certificate of capacity to confirm her ability to grant this. There was a statement in the power of attorney which required a written medical statement of incapacity to be provided to the attorney before she could act as either the continuing or welfare power of attorney.

Miss X had a brother and sister but was not in contact with either of them due to allegations that they had financially exploited her in the past. Her niece also had no contact with them. The local authority provided a package of care to support Miss X on a daily basis, and home care staff had regular contact with her niece, as she managed Miss X's finances and dealt with any necessary decisions about her care and support.

Miss X was admitted to hospital and was found to have a terminal illness. Her niece told ward staff that she was Miss X's attorney and she did not want any information passed to the other two relatives and did not want them to visit Miss X. The ward initially accepted these restrictions, which caused controversy in the ward when the other relatives turned up at visiting time to see her. The staff also asked the niece to provide them with a copy of the power of attorney document.

When this was produced it was clear that, although the document had powers about the sharing of personal data, there were no powers allowing the attorney to exclude others from visiting Miss X. In addition, the conditions for activating the power of attorney required a written medical statement of incapacity which the niece could not produce. As there was no evidence that Miss X had lost capacity, ward staff involved advocacy to determine Miss X's views about the sharing of medical information and her wishes about her relatives visiting. She decided she wanted to see her sister but not her brother, who had always been very dismissive of her.

She was happy for her sister to receive information about her diagnosis.

Can an attorney with welfare powers force the adult with incapacity to comply with their decisions?

The principles of the Act should govern any intervention by the attorney. This means all decisions made for the person should be justifiable in terms of the guiding principles. These are that any intervention must:

- benefit the person;
- be the least restrictive option;
- take the past and present wishes of the adult into account;
- consult with relevant others involved with the person; and
- encourage the person to exercise whatever skills he or she has concerning their welfare, property or financial affairs and develop new skills.

The Act does not permit the use of force other than in Section 47 (7)(a) in relation to medical treatment if it is 'immediately necessary and only for so long as necessary in the circumstances' and in Section 70 which relates to non-compliance with welfare guardianship powers. The code of practice for attorneys (2011) says:

4.44 If you are unable to persuade others to accept your judgement....

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.

We therefore consider that whilst an attorney can persuade the person to comply with the powers, and can insist that they comply, they cannot enforce compliance.

If it is necessary to enforce compliance, an application to the court for a welfare guardianship order with a Section 70 warrant to comply should be considered by the attorney, another interested party or the local authority.

How does the Cheshire West Supreme Court decision about deprivation of liberty affect decisions made by an attorney?

A decision by the UK Supreme Court on a case brought against Cheshire West and Chester Council in England broadens what can be seen as deprivation of liberty, to include continuous supervision and control. This may have implications for services, and in the longer term may require changes to the law in Scotland. This guidance aims to assist services in understanding good practice in the context of the Cheshire West decision.

Where there are any concerns about a deprivation of liberty, services and decision-making proxies may need to seek their own legal advice. The Cheshire West decision is a substantial development from previous decisions of domestic courts and the European Court of Human Rights, such as the HL or Bournewood case.

The implications for Scottish legislation will be the subject of debate for some considerable time yet. The Scottish Law Commission has reported on proposed legislative changes. Following this, we anticipate that the Government will have to respond and consult on what they consider are necessary amendments to existing legislation.

The Cheshire West decision poses challenges to the operation of incapacity law in Scotland as it currently stands.

https://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0068_Judgment.pdf

The UK Supreme Court's view on the definition of deprivation of liberty considerably broadens existing interpretations in Scotland which have been held, for the most part, by health and social services. These interpretations have evolved over the years from accepted common practice, but have been further informed by the Scottish Government's Guidance in CCD5/2007 following the amendment to the Social Work (Scotland) Act 1968 with the introduction of Section 13ZA

http://www.sehd.scot.nhs.uk/publications/CC2007_05.pdf

The ruling states that deprivation of liberty is a matter of fact, and does not depend on the purpose of the intervention or the nature of the person's individual circumstances. The majority of the judges involved agreed that the fundamental characteristics of deprivation of liberty are being 'under continuous supervision and control' and lack of freedom to leave.

Until there are legislative changes, services need to operate within the existing statutory framework, and be informed by the developing case law. If services are satisfied that a person who cannot consent will be deprived of their liberty, it is necessary to consider what lawful authority justifies that detention. At the same time, unless and until Parliament or the courts determine otherwise, current legislation remains in full effect, including the provisions of s13ZA of the Social Work (Scotland) Act 1968, and the principle set out in s1(4) of the Adults with Incapacity (Scotland)

Act 2000 that 'There shall be no intervention in the affairs of an adult unless the person responsible for authorising or effecting the intervention is satisfied that the intervention will benefit the adult and that such benefit cannot reasonably be achieved without the intervention.'

In considering issues of deprivation of liberty in the context of discharge from hospital, it is also important to bear in mind that the same European Court of Human Rights

requirements pertain to health care settings as to social care settings. In other words, a person who is under continuous supervision and control and not free to leave a hospital is no less deprived of their liberty than a person subject to similar constraints in a care home. The ruling in Cheshire West should not be a justification for delaying discharge to a social care setting if that is agreed to be the appropriate care setting for an individual.

In short, the Commission believes that what was good practice before the Cheshire West case will in large part remain good practice now, but that the decision makes it even more necessary that there is a proper and auditable process for taking decisions on care arrangements for people who lack capacity, and that this process fully reflects the principles of the 2000 Act.

Where it is determined, in accordance with those principles, that the operation of a power of attorney is insufficient for the decisions required, an application for welfare guardianship should be made. It is important to identify any particular measures which may constitute or contribute to a deprivation of liberty, ensuring that the measures are necessary and justified, and seeking specific authority in the order. Such measures may include restraint or any use of physical force, preventing a person from leaving or requiring them to return to their place of residence, or intrusive surveillance, whether personal or through technology. (See section on ‘What if someone disagrees with other welfare decisions made by their attorney?’)

Local authorities should also, in implementing their statutory duties, including under s57 of the 2000 Act, reflect on the guidance issued in CCD5/2007. Integrating key elements of this guidance into assessment and care management decision making processes would help establish an auditable trail of good practice which informed the decision as to whether or not statutory powers should be sought to implement a care plan, or a significant change to existing care plans.

What should be done if there are concerns about an attorney’s decisions in relation to the person’s welfare?

There may be differences of opinion on welfare matters between professionals and the welfare attorney or between the attorney and the person who has lost capacity.

Some of these are discussed below, with case examples to illustrate how disputes may be resolved, as well as the legal and ethical difficulties in making decisions which the person is unhappy with.

The local authority and welfare concerns

Where there are concerns about an attorney’s decisions relating to someone’s welfare, the local authority has a duty to investigate any complaint about how the welfare attorney is exercising their powers, or investigate any circumstances where the

person's welfare is at risk (Section 10 AWI Act). Under the Adult Support and Protection (Scotland) Act 2007 (the ASP Act) the local authority also has a duty to inquire into the circumstances of an 'adult at risk', as defined by this Act (Section 4). The definition is 'an adult unable to safeguard their own well-being, property, rights or interests, and who is at risk of harm and because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected'.

<http://www.legislation.gov.uk/asp/2007/10/contents>

In the first instance, the complainant should seek advice from the social work office in the person's locality and provide as much information as possible to highlight their concerns. Although concerns can also be raised anonymously, this does make the situation more difficult to investigate.

Depending on the nature of the concerns, the local authority may give advice and guidance or may gather further information to determine whether the person is at risk and what further intervention is required. In most cases, the local authority will try to resolve the concerns without recourse to further use of legislation. This will obviously depend on the seriousness of the allegations and the cooperation of the attorney and others. There are a range of formal interventions which the local authority may consider. Any other person claiming an interest in the adult's affairs may also use the measures below.

1. Application to the Sheriff for direction under Section 3 of the Adults with Incapacity (Scotland) Act 2000

Where there are concerns about how certain powers are being exercised, the local authority or any other interested party can apply to the Sheriff for direction on how to proceed. The Sheriff has broad discretionary powers under this section. These can potentially be very useful in resolving disputes, or for resolving doubts and difficulties even where there is no dispute.

The Sheriff can make consequential or ancillary orders such as the measures available under Section 20, which includes removing some or all of the attorney's powers or requiring the attorney to be supervised.

The Sheriff can:

- give direction to any of the parties with functions under the Act;
- attach conditions or restrictions to any order;
- order further reports; and
- appoint a safeguarder for the person, to represent their interests or gather their views.

2. Application to the Sheriff for an order under Section 20 of the Adults with Incapacity Act

With regard to welfare matters, the local authority or any other interested party can apply to the Sheriff under Section 20 (or the Sheriff may take such measures as a result of an application under Section 3) for an order to have the welfare attorney supervised by the local authority; for any of the powers granted to be revoked or for revocation of the appointment of the attorney, as the case of Mr L illustrates (see What should be done if there are concerns about someone's capacity to grant a power of attorney or that they are under undue influence?). The Sheriff can also order a report from the attorney as to the manner in which they have exercised their powers over a particular period.

3. Application for welfare guardianship by the local authority or other party

Where there are significant concerns about how the attorney has been exercising their powers, and no foreseeable resolution to these concerns, another interested party or the local authority may consider applying for a welfare guardianship order.

A guardianship order, if granted, would end the authority of the attorney only in relation to the matters covered by the guardianship order (unless they specifically ask for the power of attorney to be revoked).

4. Adult Support and Protection Act

Where an adult is at risk as defined in the Adult Support and Protection Act, the local authority may instigate adult protection proceedings.

Investigation can result in informal measures being agreed. There may be application for an assessment order, a removal order or a banning order under the Adult Support and Protection Act, or measures such as guardianship under the Adults with Incapacity Act may be considered.

The Mental Welfare Commission

The Mental Welfare Commission's functions are set out in Section 9 of the Adults with Incapacity Act. The Commission can provide advice on, and inquire into, any concerns about the operation of welfare attorneys, guardians or interveners or the care and support of anyone subject to the Act where they appear to be at risk. The Commission may take up concerns with local authorities or health boards or consult with the Office of the Public Guardian (Scotland). Where concerns have not been fully investigated, the Commission can make further inquiries into these matters.

What should be done if there are concerns about an attorney's decisions in relation to the person's finances or property?

We increasingly hear of family disputes regarding the operation of the powers by the attorney. Many of these centre on allegations between family members around financial transactions which are benefiting the attorney rather than the person, or where the attorney has not taken into account the views of other relevant parties in welfare decisions.

The Office of the Public Guardian (Scotland) and financial concerns

Where someone has lost capacity and there are concerns about the management of their property or financial affairs by their attorney, contact should be made with the Office of the Public Guardian (Scotland) Investigations Team by phone, letter or email, or the referral form available on the Office of the Public Guardian website (one for local authorities and one for others). The complainant should explain the reasons why they think that the person's property or financial affairs appear to be at risk, and provide any evidence which may have to support those concerns. The Office of the Public Guardian will be able to provide advice and guidance.

A concern can also be raised anonymously, but progress and conclusion of such an investigation may be limited due to an inability to clarify information with the complainant.

<http://www.publicguardian-scotland.gov.uk/investigations>

The Investigation Team seeks to ensure an individual's property or financial affairs are suitably safeguarded and not at risk from abuse or misuse. An investigation involves finding out whether the person is incapable of managing their affairs, and gathering information from all relevant parties. This is done by interviewing people and reviewing documentation such as medical opinions, bank statements, financial records, receipts, legal papers, etc. A view is then taken as to whether or not the person's property or financial affairs appear to be at risk.

The Office of the Public Guardian do not:

- investigate concerns relating to personal welfare.
- attempt to resolve any personal or family disagreement.
- retrieve debt of any kind owed to a third party by the person.
- investigate concerns relating to a capable person or continue to investigate concerns/ complaints if medical evidence confirms that a person is capable of managing their own finances.
- commence or continue to investigate following the death of the person.

No action will be taken if the Public Guardian is of the view that the person's property and financial affairs are being suitably managed and safeguarded. Advice and guidance may be given if necessary to ensure continued protection of his or her affairs. If the Public Guardian decides that a particular person is capable but appears vulnerable to outside influences, they will formally refer the matter to the local authority for the area in which the person is resident. This is a legal requirement in terms of section 5 (3) of the Adult Support & Protection (Scotland) Act 2007.

If it is the Public Guardian's view that someone's property and/or financial affairs are at risk:

- Advice and guidance may be given to appropriate parties so that safeguards can be put in place to make sure the person's property and financial affairs are suitably protected.
- In certain circumstances the person's bank accounts may be frozen or income suspended until redirected for the benefit of the person.
- A recommendation may be made for an appropriate body or person to consider making an application under the Act, e.g. access to funds or financial guardianship; or where appropriate to consider appointeeship.
- An application may be made to the Sheriff seeking to have anyone acting under the Act, or under any other authority, to either be formally supervised or removed.
- If there is an indication of fraud or theft the OPG may refer the matter to the police.
- Refer the matter to the local authority for the area in which the person is resident as a legal requirement in terms of section 5 (3) of the Adult Support and Protection (Scotland) Act 2007.

Case Example

Miss Y has dementia. She had drawn up a continuing power of attorney 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, utility bills, and council tax to be 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 cousin, 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 as, although in a low-paid job, her nephew and his wife have been going

on expensive holidays and have spent money on a new car, clothes and expensive meals out.

After much deliberation, Miss Y's nieces approach the Office of the Public Guardian (Scotland) about this. Whilst the Office of the Public Guardian 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 suggest he is not using the power of attorney for the benefit of Miss Y.

In the first instance, the Office of the Public Guardian asks 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 Office of the Public Guardian.

It is important to note that delays in reporting concerns about mismanagement of funds by an attorney to the Office of the Public Guardian can lead to further loss of the person's funds. The Office of the Public Guardian does not have powers to recover funds. They can investigate current circumstances and, where there is evidence of the attorney not acting for the benefit of the person can put measures in place to protect the person's finances whilst they investigate the situation.

What happens if the attorney disagrees with the doctor about medical treatment?

Where there is a proxy (someone with power of attorney, welfare guardianship or an intervention order) with powers to consent to or refuse medical treatment, the proxy should make themselves known to the medical practitioner who is treating the person, and this information should be clear within the medical notes. They should also provide a copy of the registered power of attorney document to confirm their status and their decision-making powers. Where the document has stated that incapacity must be determined by a medical practitioner, this written statement must also be provided. The practitioner who is treating the person should seek the attorney's consent to treatment where this is 'reasonable and practicable'. An attorney with appropriate

powers may discuss treatment options on the patient's behalf but cannot insist on a particular treatment.

Where there is a disagreement as to a proposed medical treatment which cannot be resolved, the medical practitioner can request a 'nominated medical practitioner' from the Mental Welfare Commission to give an independent opinion as to the proposed treatment. There is a further level of appeal to the Court of Session. These measures are set out in Section 50 of the Adults with Incapacity Act and in the Adults with Incapacity Act Part 5 Code of Practice.

<http://www.scotland.gov.uk/Publications/2010/10/20153801/0>

Where someone is being treated under the Mental Health Act, it would be good practice to consult an attorney who has powers to consent to or refuse medical treatment, but treatment for their mental health condition may be given without the attorney's consent. Treatment for any health problems that are not 'the cause or consequence of the mental disorder' require the attorney's consent where it is reasonable or practicable to obtain it.

Under the common law 'principle of necessity', it is reasonable in an emergency to take necessary action to safeguard a person who is unable to consent and who, without treatment, would come to significant harm. In such circumstances it would not be possible or reasonable for the attorney to be contacted prior to treatment.

Can someone be given covert medication (concealing medication in food or drink)?

Covert medication must never be given to someone who is capable of deciding about medical treatment. Where a person lacks capacity and is rejecting medication, covert medication may, in certain circumstances, be necessary, following full consideration of the principles of the Adults with Incapacity Act and the alternatives. Where there is an attorney with the power to give or refuse consent, they must be consulted unless it is impracticable to do so. Where covert medication is being considered, we would expect that a covert medication care pathway has been followed and a Section 47 certificate and treatment plan is in place.

http://www.mwcscot.org.uk/media/140485/covert_medication_finalnov_13.pdf

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Who can make decisions about resuscitation?

If a person lacks capacity and has a welfare attorney or guardian, the attorney or guardian must be consulted about cardiopulmonary resuscitation (CPR) decisions, which are made on a balance of benefits and risks. Welfare attorneys and guardians cannot demand treatment that is clinically inappropriate. Where there is disagreement between the healthcare team and an appointed welfare attorney about whether CPR should be attempted in the event of cardiac or respiratory arrest, this should be resolved as quickly as possible by discussion and, if necessary, a second clinical opinion.

- If the healthcare team wishes to attempt CPR but the welfare attorney or guardian refuses to give consent, the Mental Welfare Commission must appoint a 'nominated medical practitioner' to give an opinion. This opinion is final unless appealed to the Court of Session.
- If the healthcare team does not believe that attempting CPR would benefit the patient, and the welfare attorney disagrees, a second opinion should be sought from another health board. There is no recourse to a nominated medical practitioner from the Commission or the Court of Session.

See NHS Scotland Do Not Attempt Cardiopulmonary Resuscitation (DNACPR) Integrated Adult Policy - Decision Making & Communication

<http://www.scotland.gov.uk/resource/doc/312784/0098903.pdf>

Who decides whether continuing care should be in hospital a nursing home?

We frequently get contacted by proxies (someone with power of attorney, welfare guardianship or an intervention order) and by services about disputes that arise when a hospital decides that someone no longer requires hospital treatment and is ready for discharge, but the proxy considers that:

- the person requires continuing hospital care; or
- the person to stay in hospital until there is a vacancy in the care home they have chosen.

An attorney or guardian has no more power to decide that a person should continue to stay in hospital beyond the date they are ready for discharge than the person themselves would have if they had capacity.

Over the last 10 years there has been a change in provision with fewer longer term hospital beds, and an expansion in care homes which provide specialist care for people with dementia or who are frail and elderly. Where someone can be

appropriately cared for in a care home, this is felt to offer a better quality of life than a hospital ward.

If an attorney considers the person requires continuing hospital care, they should refer to the Scottish Government's guidance on this, which includes the eligibility criteria and the process of appeal.

http://www.sehd.scot.nhs.uk/mels/CEL2008_06.pdf

Where someone who lacks capacity is moving from hospital to a care home, it is obviously preferable that they only have one move. Where the wait for the care home chosen by the attorney is short, it may be possible to negotiate with the Responsible Medical Officer to extend the stay in hospital briefly but this will depend on the pressure on beds. Where there is likely to be a longer waiting time, the person may have to move to an interim placement. The attorney does not have the authority to demand that the person remains in hospital care.

The Scottish Government Guidance on Choosing a Care Home on Discharge from Hospital issued in December 2013 provides detailed advice on managing the choice of care homes for people assessed as requiring on-going long term care in a care home, following a hospital stay and the mechanisms for dealing with disagreements.

http://www.sehd.scot.nhs.uk/mels/CEL2013_32.pdf

What authority does an attorney have to influence packages of care?

In terms of care packages, the attorney should be fully involved in any assessment of need, but cannot dictate what the local authority provides. Where there is disagreement between the attorney and the local authority on the appropriateness of a care package, it is often because the attorney feels more care and support is required, there has been a reduction in the care package due to a reassessment of need by the local authority, or the attorney is dissatisfied with the quality of the service provision. In the first instance, this should be discussed with the care manager and the risks that the attorney identifies or the shortcomings of the current service considered. Where an assessment of need has been part of the Self Directed Support process, there are generally review panels who will examine whether the assessment leaves the person at risk, and how that risk can be minimised, for instance by allocating more support hours or through the use of technology.

Where there remain difficulties in resolving differences, the attorney has the option of making a formal complaint to the local authority if they feel the process of assessment has not been carried out properly. The attorney will receive a response to this and can go to the Public Services Ombudsman if they feel the complaint has not been dealt with fairly or correctly. These are the options available to any person or their carer, not just a welfare attorney.

In certain circumstances, where the use of the attorney's powers is affecting the delivery of an appropriate care package, the local authority or anyone with an interest can apply to the Sheriff, who can make orders such as the measures available under Section 20 including removing some or all of the attorney's powers or requiring the attorney to be supervised, or appointing a welfare guardian under Part 6 of the Adults with Incapacity Act.

Case example

Mrs W has a neurological condition and lacks capacity to consent to decisions about her welfare. Her husband has power of attorney to make these decisions. There are difficulties in delivering appropriate care to Mrs W, as her husband criticises and upsets her carers and there have been 40 carers over the last year and a half of whom have declined to work with Mrs W because of her husband's attitude. The social worker is having great difficulty finding a care agency that will provide support. Mr W has put in a formal complaint that the social worker is incompetent in providing appropriate services to his wife. The complaint has not been upheld by the local authority or the Office of the Public Services Ombudsman. The local authority have offered payment through Self Directed Support for Mr W to directly employ personal assistants for his wife, but he has declined this. The local authority is considering applying for welfare guardianship. This will not necessarily make the care package at home viable and they may have to consider removing Mrs W to a residential unit.

What if the person indicates disagreement with the doctor and the attorney's decision regarding medical treatment?

The definition of treatment under the Adults with Incapacity Act includes 'any procedure or treatment designed to safeguard or promote physical or mental health' and covers investigations of physical disorders. Treatment can be given to a person who is incapable of consenting under Part 5 following the completion by a medical practitioner of a Section 47 certificate of incapacity and consultation with the welfare attorney, where the attorney has relevant powers. However, force cannot be used, unless 'immediately necessary and only for as long as necessary'.

Where resistance by the individual is anticipated, multidisciplinary discussion may be useful. The discussion should cover the necessity and immediacy of the need to proceed and how to proceed, bearing in mind the principles of the Act. The attorney should be involved in these discussions. A second opinion from another medical practitioner may be useful. It may be necessary to consider an application for medical powers under an intervention order or a welfare guardianship order with a Section 70 compliance order.

See guidance on Consent to Treatment:

<http://www.mwscot.org.uk/media/51774/Consent%20to%20Treatment.pdf>

What if someone is resisting personal care?

We are frequently asked about situations where a person with dementia in a care home is resisting personal care. Whilst the attorney may feel the care home staff should insist, staff may be reluctant to override the person's wishes where it requires 'hands on' intervention.

This needs careful care planning. The necessity and frequency of a shower or a bath will depend on factors such as incontinence. If the person is continent, it may be sufficient to have a wash down rather than a shower if they are more cooperative with this.

Where a bath or shower is necessary, because of incontinence for instance, there needs to be a discussion as to how often this is required and what the optimum conditions are to try to assist the person with this e.g. the time of day, using a care worker who has a good relationship with the person, the person's preference for bath or shower, washing someone's hair separately from having a shower, the use of music etc.

Where lack of personal hygiene may threaten skin integrity or increase the likelihood of infection, a section 47 certificate should be completed which includes fundamental healthcare procedures. However, neither a Section 47 certificate, nor an attorney with powers to make decisions about healthcare or personal care, can authorise restraint of an adult to effect personal hygiene tasks. Where it is likely that restraint is required on a regular basis, we consider that an application for the appropriate powers should be made in a guardianship order. The power in the order should be specific and indicate that restraint may be required. The Sheriff is then clear what he or she is granting in terms of powers, and staff will be clear they are acting within the law.

What if someone disagrees with other welfare decisions made by their attorney?

On occasion, someone may express disagreement with other welfare decisions made by their attorney, such as placement in a care home. The Commission considers that where someone is clearly opposed to an action by their attorney, the attorney does not have the authority to enforce that decision. The attorney should involve the local authority where the decision relates to care and support, to discuss the necessity of the intervention and whether other measures such as welfare guardianship need to be considered. Alternately, direction under Section 3 could be sought from the Sheriff.

Can a Scottish power of attorney be used in other parts of the UK?

A Scottish continuing power of attorney can be used in other parts of the UK if an organisation (e.g. a bank) accepts its authority, but if not, there are difficulties. The organisation may ask for an endorsement of the Scottish power of attorney by the relevant authority in that jurisdiction e.g. in England from the Office of the Public Guardian for England and Wales. If a Scottish power of attorney cannot be used without an endorsement and this endorsement is not provided, the Scottish power of attorney becomes a worthless document. It is recognised that this is an unacceptable position and perhaps not what was intended. The matter rests with other jurisdictions to agree and make any changes that are required.

If the person is now based in another UK jurisdiction and is still capable, they may wish to consider drawing up a new power of attorney under that legislation. If capacity has been lost, someone may need to apply to the Court of Protection for deputyship, the equivalent of Scottish guardianship.

Where someone has moved to another part of the UK, the validity of their welfare power of attorney may be questioned. The Commission's advice has been that where the person is not compliant or there are disputes between relatives, application should be made for powers in the appropriate jurisdiction. This will require an application for the equivalent of a welfare guardianship order.

If you need more information about the system in England and Wales or how best to proceed, contact the Office of the Public Guardian for England & Wales:

Telephone: 0300 456 0300

E-mail: customerservices@publicguardian.gsi.co.uk.

For N. Ireland, information is available from the Office of Care and Protection, NI Courts and Tribunals Service:

Website: <https://www.courtsni.gov.uk/en-GB/Services/OCP/Pages/default.aspx>

Telephone number: 028 9072 5953

Can an attorney use a non-Scottish power of attorney in Scotland?

A non-Scottish continuing power of attorney can be used in Scotland if an organisation (e.g. a bank) accepts its authority but, if they do not, things are more complicated. The organisation may require some form of Scottish endorsement of the power of attorney, but interpretation of the Scottish legislation suggests a non-Scottish power of attorney is not automatically valid in Scotland and consequently there is no arrangement under the law for having it formally endorsed. The law in this area lacks certainty. The Office of the Public Guardian is seeking to have this clarified.

As an interim measure, they have devised a certificate which can be printed and presented along with the power of attorney. This may assist in getting a non-Scottish power of attorney accepted in Scotland. To get more information generally or advice about how best to proceed in a given case, contact or e-mail the Office of the Public Guardian (Scotland): opg@scotcourts.gov.uk

Similarly the validity of a Health and Welfare Power of Attorney (England and Wales) in Scotland is unclear. Where there are disputes over the person's care, support or treatment or they are non-compliant with the decisions of the attorney, the attorney or someone else may need to apply for welfare guardianship under the Adults with Incapacity Act.

Useful links

Adults with Incapacity (Scotland) Act 2000

<http://www.legislation.gov.uk/asp/2000/4/contents>

Code of Practice for Continuing and Welfare Attorneys

<http://www.scotland.gov.uk/Resource/Doc/347702/0115819.pdf>

Office of the Public Guardian (Scotland)

Hadrian House, Callendar Business Park, Callendar Road, Falkirk, FK1 1XR

Telephone: 01324678300

Website: <http://www.publicguardian-scotland.gov.uk/>

Law Society for Scotland

<http://www.lawscot.org.uk/>

Scottish Legal Aid Board

<http://www.slab.org.uk/>

Scottish Independent Advocacy Alliance

<https://www.siaa.org.uk/>

Alzheimer Scotland

<http://www.alzscot.org/>

Headway

<https://www.headway.org.uk/Regions/Scotland.aspx>





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
www.mwscot.org.uk