mentalwelfare commission for scotland

Powers of attorney and their safeguards

An investigation into the response by statutory services and professionals to concerns raised in respect of Mr and Mrs D (Full anonymised report)

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Introduction

Powers of attorney and their safeguards: An investigation into the response by statutory services and professionals to concerns raised in respect of Mr and Mrs D

Who we are and what we do

The Mental Welfare Commission is an independent organisation working to safeguard the rights and welfare of everyone with a mental illness, learning disability or other mental disorder. Our duties are set out in mental health and incapacity law.

We are made up of people who have understanding and experience of mental illness and learning disability. Some of us have worked in healthcare, social care or the law. Some of us are carers or have used mental health and learning disability services ourselves.

We believe that everyone with a mental illness, learning disability or other mental disorder should

- Be treated with dignity and respect.
- Have the right to treatment that is allowed by law and fully meets professional standards.
- Have the right to live free from abuse, neglect or discrimination.
- Get the care and treatment that best suits his or her needs.
- Be enabled to lead as fulfilling a life as possible

Our work

- We find out whether individual treatment is in line with the law and practices that we know work well.
- Challenge those who provide services for people with a mental illness or learning disability, to make sure they provide the highest standards of care.
- We provide advice, information and guidance to people who use or provide services.
- We have a strong and influential voice in how services and policies are developed.
- We gather information about how mental health and adults with incapacity law are being applied. We use that information to promote good use of these laws across Scotland.

Why we conducted this investigation

This investigation was conducted under section 11 of the Mental Health (Care and Treatment) (Scotland) Act 2003. Section 11 gives the Mental Welfare Commission (the Commission) the authority to carry out investigations and make related recommendations as it considers appropriate in a number of circumstances. Among these circumstances are those set out in sections 11(2) (d) and (e).

Section 11(2) (d) relates to circumstances where an individual with mental disorder "may be, or may have been, subject, or exposed, to-

(i) Ill-treatment;
(ii) Neglect; or
(iii) Some other deficiency in care or treatment."

Section 11(2) (e) concerns situations where, because of the individual's mental disorder, their "property-

(i) May be suffering, or may have suffered, loss or damage; or
(ii) May be, or may have been, at risk of suffering loss or damage."

The Commission's Investigation and Inquiries Group initially considered a report in December 2009 and the decision was taken subsequently to formally investigate the circumstances surrounding the management of the Ds' care and treatment, with specific reference to the management of the continuing and welfare power of attorney and the local authority's response to these concerns. The Commission wished to explore why the local authority did not use powers available to it to intervene at an earlier point. We also wished to explore why it was not felt possible or appropriate for the Office of the Public Guardian (OPG) to undertake an investigation into possible financial mismanagement of the continuing powers of attorney.

This investigation is into the response of statutory services and professionals to concerns they had about Mr and Mrs D. It is not an investigation into the actions of any private person.

We sought to examine, in particular, a number of different areas of practice:

- The way in which the local authority responded to the concerns about Mr and Mrs D before a power of attorney was granted;
- The role of the solicitor in the granting of the power of attorney;
- The role of the GP in the granting of the power of attorney;
- The response of the OPG to concerns brought to their attention about the management and use of Mr and Mrs D's funds;
- The way in which the local authority dealt with concerns about Mr and Mrs D following the response of the OPG; and
- The circumstances surrounding the ultimate resolution of the case and the revoking of the power of attorney.

We consider that social work and health care staff across the country may face similar difficulties to those presented by this case as, at the time this investigation was initiated, there had already been 170,000 powers of attorney granted across the country. The number is currently in excess of 200,000, with approximately 40,000 new powers of attorney granted each year. It is also important to note that over 90% of powers of attorney granted are for both welfare and continuing (financial) powers.

How this matter came to our attention

Mr and Mrs D came to our attention on 12 September 2008. SSW1, Council, A, sought our advice over the actions of a Welfare and Continuing Attorney in respect of this couple, who were each said to have a mild learning disability. His concerns were in relation to the attorney who had been granted welfare and financial powers by the couple; in particular, that the use of the powers was not in accordance with the principles of the legislation.

At this point we advised the local authority to hold a case conference with legal representation and that evidence be considered in relation to a possible application to the Sheriff under Section 20 of the Adults with Incapacity (Scotland) Act 2000 (the Act).

From subsequent correspondence with the couple's GP and Mrs D's consultant psychiatrist when this case again came to our attention in May 2009, we noted that the local authority had not taken any action following on from our advice in September 2008 and that the concerns highlighted previously had been present for a number of years. We also learned that the local authority had involved the OPG, highlighting its concerns about financial mismanagement and requesting that the OPG undertake an investigation. Ultimately, however, after initial investigations and following correspondence with the medical staff involved, the OPG did not feel that this case came within its remit as, following medical advice, the Ds were considered by the OPG to have the capacity to revoke the power of attorney themselves.

The powers of attorney were revoked by the couple on 15 June 2009 following the arrival of Mr F, another of Mr D's brothers, assuming the role of carer to the couple.

The Commission was concerned about the alleged abuse of the powers of attorney, particularly as this was during a period of prolonged and often intensive social work and health service involvement. We also had questions about the process of the granting of the power of attorney in December 2003.

Terms of Reference:

To examine:

1. The care and treatment Mr and Mrs D received prior to the granting of powers of attorney, paying particular attention to:

    - Health and local authority involvement during the period from 1999 onwards;

    - The quality of assessment and care management;

    - The multi-disciplinary supports in place to assist them in addressing concerns they brought to the attention of health, local authority and voluntary sector staff;

- The process of and contribution of all professionals to the assessment of capacity in respect of financial and Welfare matters.

2. The extent to which the local authority responded to its statutory responsibilities under the Act.

3. The internal review of the local authority into the management of this case within the social work department.

4. The response of the Office of the Public Guardian to the local authority request that it investigate the alleged mismanagement of the funds of Mr and Mrs D by the Continuing Attorney.

5. Whether or not Mr and Mrs D may have suffered any financial loss during the period covered in the investigation.

How we conducted our investigation

We reviewed copies of all relevant social work and medical case files (including primary care), focussing on the time from when the powers of attorney were granted in December 2003, but also reviewing material prior to this to place subsequent actions in context.

In addition to this, we interviewed Mr and Mrs D and Mr D's brother, Mr F, on three occasions. We also interviewed a number of staff from health and social work departments, and from the OPG, as listed below:

SSW1 - Team Manager, CLDT
Community Care Officer 1 - Community Care Officer/MHO
Investigation Officer 1 - Investigation Officer (Office of the Public Guardian)
Senior Health Care Co-ordinator, *Learning Disability* – Service Manager at the CLDT
Community Support Co-ordinator 1 - Community Support Co-ordinator
Senior Solicitor 1 - Senior Solicitor, Council A
Community Care Officer 2 - Community Care Officer
Consultant Psychiatrist 1 - Consultant Psychiatrist
MHO 1 - Mental Health Officer, AWI Co-ordinator
GP – General Practitioner
OPG 1 - Public Guardian
Day Services Co-ordinator 1 – Day Services Co-ordinator
Community Support Manager 1 - Manager of Community Support Services
Snr Manager 1 - Integrated Learning Disability Services Manager
Community Charge Nurse 1 - Community Charge Nurse, Learning Disability with an interest in epilepsy.

We also contacted a Community Care Officer (Community Care Officer 3 in this report). She had worked with the Ds at one point but is currently employed by another authority. In the circumstances, she was not interviewed. We also had a phone discussion and subsequent correspondence with another Community Care

Officer (Community Care Officer 4), who worked briefly with the Ds as Community Care Officer early in 2001.

There are also references made to other individuals in this report who were mentioned in case files.

Prior to interviewing local authority and health care staff we used a video link to speak to a group of prospective interviewees to outline the process of the investigation and to field any questions that were arising at that point. We also offered Mr E, the continuing and welfare attorney during the period under investigation, the opportunity to be interviewed by us as part of the investigation. He declined the offer.

We also shared the relevant sections of the draft report with the solicitor who drafted and arranged for the certifying and signing of the powers of attorney certificates. We received comments from the solicitor, which were considered in drafting the final report.

The investigation team

The Commission's investigation team consisted of

George Kappler, Deputy Executive Director and Chief Social Work Officer

Susan Tait, Nursing Officer

Deirdre Hanlon, Part-time Commissioner (until April 2011)

Executive Summary

Summary of findings

Assessment of need and risks and the planning of care

- For a protracted period prior to the granting of the powers of attorney, there was neither a comprehensive assessment of the Ds' community care needs nor an associated assessment of risk, despite concerns coming to the attention of local authority and health staff.

- There were, as well, significant failures in the assessment and care planning process during the period between the granting of the powers of attorney and the events of August-September 2008.

- There are a number of inter-related factors that may account for these failures, poor communication, which affected the quality of risk assessment and risk management; lack of awareness of the existence of the powers of attorney; lack of knowledge and misplaced assumptions about the functioning of the Act and the relevant sections of the Act intended to provide potential safeguards where concerns exist about the management of a power of attorney; and, poor coordination of care.

- The very serious and concerning statements made by Community Care Officer 3 about the abusive relationship between Mr E and the Ds were never formally addressed in any way. This was despite local authority senior management signing off the forms requesting funding on which these statements were made and repeated at several different points subsequently.

Case co-ordination and recording;

- Poor case recording and the lack of a lead person coordinating the assessment and care management of the Ds undoubtedly affected the quality of the communication within and between services. It also affected the quality of risk assessment and risk management.

- We believe that the absence of any detailed notes for an extended period, and the loss of potentially useful information in communication books used by Community Support Services, amount to a major deficiency in the basic governance over this area of social work activity and responsibility.

Communication between the Community Learning Disability Team (CLDT) and the primary health care team;

- The CLDT had concerns about Mr E exerting undue influence over key areas of Mrs D's and Mr D's lives for several years prior to the GP being asked to confirm their capacity to grant the power of attorney And that they were not subject to undue influence in doing so.

- The CLDT failed to more closely involve the GP in case discussions and reviews of the Ds or inform her of the outcomes of these.

- This inadequate communication between the CLDT and the primary health care team meant the GP was not aware of the nature and extent of the CLDT's views of the adverse influence Mr E often exerted in respect of the Ds. This affected the quality of the GP's assessment of the Ds' capacity to grant a power of attorney and to do so without undue influence.

- Prior to the powers of attorney being signed and registered, the CLDT was not made aware of the correspondence from Mr E's solicitors to the GP enquiring about the Ds' capacity to grant a power of attorney and whether they may be subject to any undue influence in doing so. Given the nature of the relationship and patterns of communication between the CLDT and the primary care team this is, perhaps, not surprising

- Poor communication and recording and poor coordination of care affected the quality of risk assessment and risk management following the granting of the powers of attorney.

The role of the GP in certifying the powers of attorney;

- There was ample evidence in the case file material alone for those staff involved (perhaps, aside from the GP) to realise that Mr E routinely, and for an extended period of time, exerted considerable influence, and often control, over many areas of the Ds' lives during the time they were known to statutory services. At times, and in the presence of some professionals, it appears from what we have been told that this influence could be subtle. We believe, however, that this influence which was often referred to in the case files and described by a number of staff interviewed, played a crucial role in the Ds' decision to grant the powers of attorney.

- The GP met with the Ds on their own for the purposes of preparing the certificates of capacity. This is good practice. We feel, however, it is unlikely that the Ds understood the full extent and implications of the four general powers and 26 specific powers they were granting to Mr E. While the solicitor present when the documents were signed, Solicitor 1, indicates that she did discuss the differing aspects of Continuing and Welfare Powers of Attorney with the Ds, we do not believe from our discussions with them, and from what we have learned of them from an extensive review of their health and social work files, that they would have been able to understand what was being said in any depth.

- Given what we have read about the Ds from the case files, heard from those we interviewed and learned from speaking to the Ds themselves, we feel it is very likely that, despite speaking to the Ds directly, the GP's views were influenced by Mr E. The Ds claimed he often spoke for them when they went to see the GP and that they were frightened to challenge him generally. In his presence, it was difficult for them to speak their own minds when this meant confronting or disagreeing with Mr E. In interview, the GP stated that she now appreciates the Ds, while agreeing to sign the powers of attorney, might not have felt able to express their unhappiness about doing so.

- The GP did not have any further discussion with other professionals involved with the family, did not make any other enquiry and did not consider the relevance of previous correspondence from the CLDT when considering the issues of both capacity and undue influence as they related to the granting of the powers of attorney. As we have pointed out earlier, though this was unfortunate given the consequences, it is, perhaps, somewhat understandable given the nature of the relationship and patterns of communication with the CLDT.

The role of the solicitor in the granting of the powers of attorney;

- Mr and Mrs D were unaware as to the reason for their attendance at the GP surgery on the day when they were asked to grant the powers of attorney.

- Whilst it appears that steps may have been taken by Mr E's solicitor to explain the contents of the documents to Mr and Mrs D immediately prior to their signing of the documents, given both the circumstances of this and the couple's learning disability, they would have been unlikely to challenge this or to comprehend the implications of the granting of these powers. This would

be particularly relevant in the event of the prospective attorney exerting undue influence over them at the time of the granting of the powers in his favour. This should also be considered in the context of the limited reading skills of Mrs D and Mr D's inability to read.

- The granters did not appear to have their own, separate legal advice at any time during the process, nor did they appear to have any input into the drafting of the particular powers that they were granting. Accordingly, there was no real opportunity for them to have input into the documents unless they had raised any specific objections when the powers were discussed with them at the meeting with Solicitor 1 at the surgery. We feel there must be considerable doubt that the Ds were ever effectively instructing Solicitor 1 in relation to the granting of the powers of attorney.

- When viewed in the context of the Code of Practice it is clear that the process by which these powers of attorney were granted was at considerable variance from that which the legislation intended.

- The Code of Practice for Continuing and Welfare Attorneys and the Law Society's guidance do not address sufficiently the role of those certifying the granting of powers of attorney. While we have concerns about the actions of the solicitor and the GP, we acknowledge that the nature of the guidance available to them made their task more difficult.

Assessment of capacity and undue influence;

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 incapable of:

a) acting; or
b) making decisions; or
c) communicating decisions; or
d) understanding decisions; or
e) retaining the memory of decisions.

- We do not believe that the assessment of the capacity of the Ds to grant or revoke the powers of attorney properly included a consideration of their capacity to act to protect their own interests.

- We also believe 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 to act to protect their interests in respect of the granting or revoking of the powers of attorney.

The decision by local authority not to intervene under the Act;

The relevant duties of the local authority under the Act are to:

- Supervise welfare attorneys when ordered to do so by the Sheriff

- Investigate circumstances where the personal welfare of an adult seems to be at risk
- Provide information and advice to proxies with welfare powers
- Investigate complaints in relation to those exercising welfare powers
- Consult the Public Guardian and the Mental Welfare Commission on cases or matters where there is, or appears to be, a common interest
- Apply for intervention or guardianship orders where necessary and no other application has or is likely to be made.

When we looked into how they exercised these duties, we found:

- The undue influence Mr E exerted over the Ds effectively stopped the Ds from taking action to protect their own interests.

- The local authority, together with health colleagues, put considerable effort into supporting the Ds following the events of September 2008, supported by the Care Programme Approach. They were, perhaps, oversensitive to the need to proceed at the pace the Ds were comfortable with in gaining independence from Mr E.

- While concerns and apparent risks were listed in the Adult Protection Case Conference of 16 September 2008, when a decision was taken to investigate abuse issues, there did not appear to be any subsequent clearly focussed assessment of these risks to inform the decision making and care planning process. This diminished the effectiveness of efforts in considering the protection of the Ds as vulnerable adults.

- We believe local authority and health colleagues had sufficient evidence of apparent abuse of welfare and financial powers and of undue influence by Mr E to warrant the local authority taking action shortly after the events of September 2008. This would have removed the responsibility from the Ds and offered them greater protection than they were able to manage on their own.

- We believe it is also the case that the local authority had sufficient concerns and evidence to take action at a much earlier stage. This hesitance in taking positive action to protect the Ds from the influence of Mr E helped prolong an erosion of the Ds' basic human rights over an extended period.

- We saw no evidence that all available options open to the local authority under the Act were ever discussed and debated in the various case conferences, case reviews or discussions held before or after the powers of attorney were granted and before they were revoked by the Ds. Specifically, once concerns were noted from several different sources regarding the use of the powers of attorney, an application could have been made to the Sheriff Court for directions on whether the powers should have been exercised as they were being. Alternatively, an application could have been made to the Sheriff requesting that Mr E as continuing attorney be subject to the supervision of the OPG. This could have greatly facilitated investigations undertaken by the social work department and may have even prevented the loss of some funds which allegedly took place through the actions of the

attorney. Similarly, an application under Section 20 could have made the case for the welfare attorney being subject to local authority supervision. The result was that these key options which may have afforded the Ds protection at an earlier point were never properly considered.

- Had Mr D's brother, Mr F, not arrived to offer emotional and material support to the Ds, which enhanced their capacity to take the action of revoking the powers of attorney, they would have remained at risk for an even greater period of time. There was little evidence that the local authority was preparing to make an application to the Sheriff Court under the AWI Act had the Ds remained intimidated and fearful of revoking the powers of attorney.

The utilisation of local authority legal advice

- Social work staff did not appear to fully and appropriately involve colleagues from the Council's legal department in discussing options open to the multidisciplinary team in responding to the perceived risks to the Ds from the apparent abuse of the powers of attorney.

- Despite asking for specific advice regarding revoking the power of attorney shortly before the Ds did this, social work staff did not appear to have ever requested specific advice from Council solicitors on available options open to them and the evidence required to pursue these. As a consequence, there was never a proper recorded discussion of options/actions available under the Act within the various Adult Protection Case Conferences and multidisciplinary reviews following the incidents of August/September 2008.

The role of the Office of the Public Guardian (OPG) in investigating alleged mismanagement of the continuing power of attorney.

The relevant functions of the Office of the Public Guardian (OPG) in relation to the Ds' case are laid out in section 6 of the Act. These include the duties to:

- Receive and investigate any complaints regarding the exercise of functions relating to the property or financial affairs of an adult made in relation to continuing attorneys
- Investigate any circumstances made known to him in which the property or financial affairs of an adult seem to him to be at risk;
- Provide, when requested to do so, a guardian, a continuing attorney, a withdrawer or a person authorised under an intervention order with information and advice about the performance of functions relating to property or financial affairs under this Act;
- Consult the Mental Welfare Commission and any local authority on cases or matters relating to the exercise of functions under this Act in which there is, or appears to be, a common interest.

When we looked into how they exercised these duties, we found:

- The OPG was placed in a very difficult situation in being asked to investigate the management of the continuing powers of attorney in this case given the

fact that the financial information required to take this forward was not provided and it was advised not to contact the attorney out of fear of possible repercussions for the Ds. The OPG did make considerable efforts to uncover financial details that, had they been successful, would have helped in determining whether it felt there was sufficient evidence to pursue an investigation in further depth, and it did suggest to the local authority a possible way to proceed using the Adult Support and Protection (Scotland) Act.

- While acknowledging the above difficulties and efforts, we believe that the OPG did, in fact, have authority to fully investigate the management of the continuing powers of attorney as the Ds did not have capacity to manage their finances except on a very basic level. We also believe that the local authority had established prima facie evidence of risk.

- We believe that the presence of undue influence on the Ds directly affected their capacity to act on their own to protect their interests by revoking the powers of attorney. It was only when the Ds were given the necessary practical and emotional support of Mr D's brother, Mr F, that they had sufficient capacity to act to revoke the powers of attorney. While it is a matter of medical judgement whether or not an adult has capacity and not for the OPG to determine, we believe the standard letters used by the investigation team in seeking information from medical staff on the capacity of the Ds could have been more helpful if framed differently. The letter could have asked about the presence of undue influence or other factors affecting the Ds' capacity to act freely to protect their own interests.

- The closing letter to the local authority informing them that no further action was to be taken by the OPG could have usefully pointed out other options open to the local authority under the Act – specifically the possibility of applying to the Sheriff for a supervision requirement under section 20 of the Act.

Conclusions

The local authority should have intervened at a much earlier stage to protect the welfare and property of Mr and Mrs D. Once the powers of attorney had been granted the local authority should have given proper consideration to making an application to the Sheriff under section 20 of the Act. In failing to do so, they allowed an abusive situation to continue unchecked for a number of years. Its failure to properly consider such an application ultimately resulted in the onus to terminate the powers shifting to those who were being potentially exploited by the use of these powers. It should have been clear to the local authority that the Ds would have difficulty in revoking the powers, not least because they lacked the capacity to act due to their learning disability and the effect the pressure and threats of their attorney had on their capacity to act to protect themselves.

The process by which the powers of attorney were granted appeared to us to have been significantly flawed. We believe it is extremely unlikely that the Ds would have granted all the powers in the documents of their own accord, or to have granted

them at all, to Mr E if they truly felt they had a choice in the matter. Indeed, they are now very clear that they did not understand what they were doing when they signed the documents. We also believe that the solicitors did not appropriately involve the Ds in the preparation of the powers of attorney documents, nor did they advise the Ds to seek their own separate legal advice given the involvement of Mr E in initiating and driving forward this process.

The GP should have taken greater care in signing the Certificates of Capacity that accompany the documents in terms of the 2000 Act. In particular, given the background and the Ds' diagnoses, further information about the couple's capacity to grant the powers should have been sought from Consultant Psychiatrist 1. In doing so, the GP may have reached a different view on the couple's capacity and would have alerted the CLDT to the fact that Mr E was seeking to have himself appointed continuing and welfare attorney for the Ds.

The OPG should have fully investigated to reach a more reasoned and informed conclusion. It was clear from the correspondence from the couple's psychiatrist that they lacked capacity to deal with the more complicated aspects of their finances; however, its investigation ceased as it considered that the couple retained sufficient capacity in this regard. Further, the OPG should have given clear advice from the outset about the local authority making their own application to the Sheriff for supervision in terms of section 20.

The Department of Work and Pensions (DWP) do not routinely share data with the OPG and this can impede the carrying out of its investigative functions.

Recommendations:

Council A should:

1. Make a formal apology to Mr and Mrs D for their failure to intervene appropriately on their behalf.
2. Investigate the reasons for the missing case file material and communication books relating to their involvement with the Ds and take remedial action to prevent similar occurrences.
3. Review existing guidelines and procedures in respect of the local authority's duties and functions under the Adults with Incapacity (Scotland) Act 2000 with particular reference to Sections 3, 10, 20 and 57(2).
4. Review arrangements for front-line supervision of local authority social work and care management staff to ensure concerns raised by front-line staff about vulnerable service users are acknowledged, recorded, and responded to appropriately.
5. Review access to, and use of, Council legal services by staff working in community care and adult protection within the department.

Council A and NHS Board A should together:

1. Examine the function of the Community Learning Disability team as part of the current review of community care services being undertaken by the Council A. This should include clarifying the roles and responsibilities of health and social

work staff in these teams; the relationship between the CLDT and the primary health care teams as well as the relationship with local authority staff responsible for assessment, care management and service provision and commissioning.

2. Undertake a training needs analysis of staff in respect of the Adults with Incapacity (Scotland) Act 2000 and develop targeted training to address these identified needs. Training should take place, ideally, on a joint basis.

The Office of the Public Guardian should:

1. Review and revise existing *Investigation Referral Form for Local Authorities* in consultation with the Association of Directors of Social Work.
2. Develop further information/guidance to complement its existing publications on the OPG's role and practice in carrying out its investigation responsibilities under Section 6 of the Adults with Incapacity (Scotland) Act 2000.
3. Work with the Mental Welfare Commission for Scotland in developing training for relevant members of staff on the issue of capacity and how it is assessed.

The Law Society of Scotland should:

1. Update existing guidance for solicitors in respect of powers of attorney to take account of the changes in the AWI Act. Such guidance should address situations where the process of granting a power of attorney is initiated by a party other than the granter as well as situations where there may be some question as to the granter's capacity, the presence of undue influence, or other vitiating factors. Guidance should also address the fact that the delegation of welfare powers raises ethical issues different from those in the delegation of financial management matters.

The Scottish Government should:

1. Review and revise existing guidance and Codes of Practice to ensure they address in greater depth:

    - The need for medical practitioners, in assessing an adult's capacity, to consider, in particular, whether the adult is capable of acting. This is in addition, but related to, whether the adult may be capable of making a decision, or communicating a decision or understanding a decision or of retaining the memory of a decision.
    - The issues faced by individuals who initiate and/or take forward the process of the granting of welfare and continuing attorneys on behalf of another individual.
    - The practice issues faced by medical practitioners, solicitors and practising members of the Faculty of Advocates who are completing the prescribed certifying forms, especially when the process is not being

initiated by the prospective granters of the powers of attorney. This should include the particular cautions and safeguards that need to be closely considered in such circumstances to ensure that the Act is implemented as intended. In conjunction with this, develop concise guidance for GPs who are approached to certify the granting of powers of attorney. This should complement existing BMA and GMC guidance.

2. Review the following provisions of the Adults with Incapacity (Scotland) Act 2000:

    - Section 15(3)(b) as amended by the Adult Support and Protection (Scotland) Act 2007 states that where the continuing power of attorney is exercisable only if the granter is determined to be incapable in relation to decisions about the matter to which the power relates, the certificate has to state that the granter has considered how such a determination may be made. The Commission recommends that in such cases the granter should state in the document how the determination of incapacity is to be made, not merely that it has been considered. We also believe this determination as to the incapacity of the adult should be in respect of actions as well as decisions.
    - Section 16(3)(b) as amended by the Adult Support and Protection (Scotland) Act 2007 states that a welfare power of attorney shall be valid and exercisable only if it is expressed in a written document that the granter has considered how a determination as to whether he is incapable in relation to decisions about the matter to which the welfare power of attorney relates may be made for the purposes of subsection (5)(b). The Commission recommends that in such cases the granter should state in the document how the determination of incapacity is to be made, not merely that it has been considered. We also believe this determination as to the incapacity of the adult should be in respect of actions as well as decisions.
    - Section 16(3)(c)(ii) allows for the views of the certifier being informed either by their knowledge of the granter **or** from consultation with other persons who must be named on the certificate. It should be reviewed whether it was the intent of Parliament that the views of the certifier could be solely informed by information obtained from the attorney to whom the powers are being granted.
    - Section 19(2)(c) requiring the Public Guardian to notify local authorities and the Mental Welfare Commission of the registration of welfare powers of attorney in order to clarify if the law needs amending to achieve its intended effect in a more efficient and effective manner.

3. Approach the DWP to request that information be shared by the DWP with the OPG when the OPG is carrying out investigations involving moneys which were paid as benefits.

4. Raise with the UK Government the need to revise the Interpretation Act 1978 such that "an enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament and thus permitting the Department for Work and Pensions to release to Scottish regulatory authorities information that would otherwise be withheld as confidential.

Statements of Mr and Mrs D

(The following is based on the information we obtained from the couple in the course of our visits to them. Mr D's brother, Mr F, was also present during our meetings with the Ds.)

The couple met in School 1, a school for students with special needs. Mrs D was a resident at Hostel 1, a residential hostel for people with learning disability, at the time and Mr D was living at home with his father, step-mother, four siblings and five step-siblings. Following the couple's marriage in 1982, Mr D and Mrs D moved in with Mr D's father and step-mother. Mr D stayed on at the day centre at School 1 but Mrs D said she was discharged from there because she was married and she was offered no alternative day care provision. After six months the couple were given a council house in Village 1, five miles outside of City 1. Mr D and Mrs D had difficulties in this first house as neither had lived on their own before and the only support they had came from Mr D's father. Mrs D had come directly from a twenty-four hour staffed institution and Mr D from a family home where he had been protected and looked after.

After around fifteen months they secured a tenancy in City 1, which is where they continue to live to this day. Following this, things went fairly well, with Mr D's father supporting them, helping them with money management, shopping etc.

The situation changed dramatically, however, following the death of Mr D's father around 1997. The day that the family told Mr D his father had died was the same day that his brother, Mr E, immediately took upon himself to take over managing their affairs. Mr D and Mr F said the family often felt threatened by Mr E. Shortly after becoming so involved in the Ds' affairs, Mr E ordered other family members out of Mr D's and Mrs D's flat.

Once Mr E took over the management of the household and of Mr and Mrs D, the extent of this intrusion and its impact on the couple was quite dramatic. While, undoubtedly, he did provide considerable practical support at times, for example, helping with shopping, and ensuring they kept doctors' appointments, it is now evident that this was at considerable cost to them emotionally as well as financially. The following is a list of some of the quotes from Mr D and Mrs D during our discussions with them. While their recall of exact dates was not good, their quotes

generally cover the entire period during which Mr E was involved in their lives, not just the period after the powers of attorney were granted.

Speaking generally, Mr D stated,

"We were treated bad and taken a loan of … he tried to split me and Mrs D up … he said he would be happy with Mrs D out … he called me a fool and slapped me in the face … he would make fun of how I speak (Mr D is profoundly deaf and his speech is affected) … he told me you are not to open the mail, bring the mail down to me." When speaking of when he learned that they had significant debts, Mr D said, "I thought we had savings."

When speaking of Mr E, Mrs D stated:

"It's taken me a long time to get Mr E out of my head … he used to be quite nasty … he was capable of anything …he is capable of anything … everything Mr E did was for himself – not us … Mr E said she would send me to a home if I did not behave … one time he told me I have control over your medication. I have the power whether you live or die … Mr E would take me to the doctors and speak like I wasn't there. I was never told what my medication was for … I was scared to go against him … I thought if I speak I'll get into trouble … he wouldn't let us out of the house alone at night."

The following is a list of the restrictions Mr D and Mrs D said that Mr E placed upon them both before and after the granting of the powers of attorney:

1. They were not allowed to have friends unless Mr E had approved them. He had to meet them before they were allowed in their house.

2. They were not allowed in to town on their own and were not allowed out of the house after 9pm at night. Mr E never took them out anywhere socially.

3. They were not allowed to open and look at their own mail. They had to take it all down to Mr E.

4. They had to go to Mr E's house to ask for toilet rolls as he kept their supply after purchasing; he said they were using too much.

5. They did none of their own shopping. Mr E would buy groceries and then give them what he deemed appropriate. They were not asked what they wanted. Often he bought things for himself with their shopping money, such as cat food, cigarettes and cleaning materials.

6. They were not allowed pudding. Mr E said that they were overweight.

7. They got their clothes once a year, which Mr E bought and wrapped up as Christmas presents though they were bought with their money. These were described by Mr F as cheap rubbish. They did not have suitable winter clothing according to Mr F.

8. Mr E did not allow Mrs D to ride in Mr D's motability car.

9. Mr E made Mr D run errands for him, including when Mr D had a bad hip.

10. Both Mr and Mrs D think that he tried to split them up.

11. They were not allowed an answer phone. Mr E took away the one they had.

12. At one time Mrs D was told by Mr E's nephew that she was to go and sit in the 'naughty chair.'

13. Mr E came into the house whenever he wanted, even at night or when they weren't there.

In terms of Mr E's involvement with their money and finances, both before and after the powers of attorney were signed, both Mr and Mrs D highlighted a number of actions by Mr E which they did not feel were right. They claimed that Mr E used their names to open credit cards and they ended up £10,000 in debt; he opened up accounts with catalogue companies in their name and purchased items for himself, including clothes and a new TV set; and, he had borrowed money from a money lender and used their money to repay it. Mr E told Mr and Mrs D that he was entitled to their money for looking after them. They were not allowed to keep their own bank books. They also told us that Mr E used Mr D's motability car for his own purposes and very rarely took them anywhere in it.

Mrs D has epilepsy. Both she and Mr D said that Mr E managed her medication and would not allow her to do it herself by using a dosette box as she had in the past on the grounds that it was too expensive. Mrs D stated that Mr E took her to the GP and said she was pretending to have fits, following which her medication was changed. Mr F said that Mr E took Mr D to the GP and told her Mr D was crying a lot and needed medication. The doctor prescribed an anti-depressant. Mr F said that Mr D was also prescribed a tablet for a heart problem, which was discontinued after Mr E was no longer involved.

We also asked Mr D and Mrs D about their signing of the powers of attorney. Mr D advised that Mr E told them that they had an appointment at the doctor's surgery but didn't tell them why. Mr D said that the GP expressed surprise that he and Mrs D did not know why they were at the surgery. Mr E, however, told the GP that they might not have come if he had told them. They went through to another room and a lady was sitting there who said she was Mr E's solicitor. She asked whether they knew why they were there and Mr D replied that they did not know. The solicitor advised the couple that it was not to take the couple's money away but it was just to help them make sure they did not get into debt. The solicitor showed them the forms. This was the first time they had seen them. Mr and Mrs D were told to sign them. Mr D does not read and Mrs D has very limited reading skills. They, however, signed the documents and Mr E and the solicitor retained copies of these. Mr D said Mr E was in complete charge then.

Narrative of events and background prior to the signing of the powers of attorney

(The following details were obtained from both case notes and the interview process. We felt it was important to look at past events to see how the situation had come to deteriorate even prior to the powers of attorneys being granted. By examining the history of the relationship between the Ds, and between the Ds and statutory services, we were able to view the actions of the Ds, the statutory services and individual professionals in respect of the response to the granting and use of the powers of attorney in their proper context.)

Mrs D was born and brought up in City 1. Her parents died when she was 20 years old and she went to live with her married brother in England. She subsequently returned to City 1 where her two brothers still lived but they were unable to care for her. She was admitted to a learning disability hospital in January 1985 for assessment and was discharged five months later to Hostel 1.

Mr D was the youngest of 5 siblings. He is also from City 1. His mother died when he was three. He was sent to a special school in City 2 when he was about five. He boarded at the school. His father remarried a woman who herself had five children. Mr D was brought back to City 1 shortly after, reportedly because of the expense. He was then sent to School 1 in City 1.

Mr and Mrs D married in 1982 and moved to their current house in 1984. Both have a diagnosis of mild learning disability and Mrs D has epilepsy.

Prior to 1997 there is little of note in social work records. The information contained in health records indicates that the couple appeared to live relatively independently, with support provided by Mr D's father. Clinicians involved with Mrs D noted that the couple coped well despite her complex medication regime and managed their own budgeting and shopping with limited support. They were described as a happy and pleasant couple who were clearly fond of each other. It did not appear that Mr E was very much involved in their life at that point.

As recorded earlier, Mr D's father, who had been supporting them, died in 1997. There is little mention in social work or health files, other than for specific physical/medical investigations and treatment, until October 1997, when the GP referred Mrs D to the mental health team requesting support "in the way of anger management for Mrs D" due to her "angry outbursts which are of concern to her husband and brother-in-law.'' Further referral was made to a consultant neurologist in October 1997 regarding Mrs D's seizure activity. He saw Mrs D in the company of Mr E. The consultant subsequently described Mr E in correspondence as "forceful and eloquent."

May 1998

There were a number of reviews held from 1998 onwards which document some of the issues that were emerging. In May 1998, one entry, in what appears to be a note for a community support worker, states that 'Mr E, Mr D's brother, is very supportive

and willing to work with us.' A multidisciplinary review meeting was held in July 1998 where the couple and Mr E were present. Whilst there was nothing untoward noted at this meeting, Mrs D admitted to lacking in confidence and to finding it hard to communicate her feelings. Mr E stated that they needed extra help at this time due to some marital disputes.

February 1999

Another review attended by all three of the family was held in February 1999. This meeting focussed on how to reduce the couple's dependency on Mr E. A note from the community support worker at that time states, "Mr D still quite adamant that he does not wish any input for himself and was happy with the arrangements with his brother Mr E regarding benefit books, money, shopping etc." This review agreed to the introduction of a new support worker on the proviso that all involved would have to be clear about their role and that they all needed to be comfortable with each other. It appears there was considerable deference to Mr E by all parties at this meeting.

June1999

This review, again with all three present, recorded that the couple did not want a support worker. It was agreed that a financial review would take place to allow Mrs D the opportunity to participate jointly with Mr D with budgeting, as she had expressed a wish to do so. The inference here, supported in interviews with Mr and Mrs D, was that Mr E had complete control over their finances at this point.

We noted that subsequent to this, Mrs D was seen by a consultant psychiatrist, following allegations made by Mr E that she was violent to her husband, had poor personal hygiene, was exhibiting difficult behaviour and induced fits to attract attention. The consultant psychiatrist concluded that any behaviour was likely to be due to the couple residing with Mr E, a situation which, he noted, Mrs D found difficult. No change was made to her medication and the hope was that the situation would resolve itself when the couple moved back to their own house.

In mid-October, Community Charge Nurse 1 reported an incident that took place when he brought Mrs D home late one evening after a group recreational outing. He described Mr E as verbally abusive and threatening when he had dropped Mrs D off late.

March 2000

Despite the above, a review in March 2000 recorded there were no real difficulties.

April 2000

In April 2000, Mr E wrote a strong letter to Associate Specialist Learning Disability 1, accusing him of unprofessional conduct as he would not agree to more frequent blood tests for Mrs D. Snr Manager 1 responded in July 2000 to a letter from the social work team at Psychiatric Hospital 1, which seemed to have been precipitated by a complaint made by Mr E about the level and quality of support Mr and Mrs D

were receiving from the Community Learning Disability Team (CLDT). In it, Snr Manager 1 said that community nursing and psychology input had been severely limited by Mr E's insistence on being present and that other attempts to support Mr and Mrs D had been thwarted by Mr E. This same pattern of behaviour by Mr E was apparent on subsequent occasions. Snr Manager 1 expressed willingness to allocate a worker to complete assessments on Mrs D's and Mr D's needs, on the proviso that Mr E be willing to allow the care officers time with the couple alone so that a true picture could be gathered of their needs and wishes. She also offered to have the worker meet separately with Mr E and assess his own needs as a carer.

September 2000

In September, Mr E wrote to the Community Care Team saying that from that date, 4 September 2000, he would no longer be responsible in any form for the care of Mrs D. This frustration with, and rejection of, Mrs D was also a theme that would re-emerge from time to time throughout the period under investigation.

November 2000

A review meeting for Mrs D was held on 6th November. Unusually, Mr E was not present. Present were Consultant Psychiatrist 1, Community Charge Nurse 1 and Community Care Officer 4. Mrs D again mentioned that she would 'like a chance to be more involved with her money.' The minutes record that she was, however, 'very clear that whilst this was her right, she knew this would cause problems with her brother-in-law.'

The plan was to introduce a home-maker to assist with her budgeting. Mrs D was at pains to say that this had to be presented as their idea, not hers. It was recorded that, 'overall it was obvious that throughout the meeting, Mrs D was very sensitive about her relationship with her brother-in-law. She did not want any further trouble, but recognised that she was in a difficult situation. She would clearly benefit and she would enjoy the support offered to her, but realised that her relationship with both her husband and her brother-in-law may be affected by decisions made today.'

The following day Mr E sent a hand-written letter addressed "To whom it may concern" and copied it to Community Care Officer 4. It was signed by both Mr and Mrs D, stating that they were to have no more contact with Community Charge Nurse 1, Consultant Psychiatrist 1 or Senior Health Care Co-ordinator, Learning Disability.

On 10 November, the Senior Health Care Co-ordinator, Learning Disability, Service Manager at the CLDT, wrote to Snr Manager 1 highlighting her concerns over Mr E denying members of the care and support team access to the couple. She wrote, "As you will be aware, several attempts to support Mr and Mrs D had been made through our multi-disciplinary approach, and you will be equally aware of the problems we have had in the past providing care through our community support services … we are therefore increasingly concerned that Mr and Mrs D, receiving no health or social input presently, are being denied the chance to have support to enable them to choose and decide what they want as a couple. They are also being left exposed to emotional and financial exploitation."

May 2002

Despite the above serious concerns highlighted by the CLDT, little is recorded in the files until 18 months later in May 2002. Then, Associate Specialist Learning Disability 1 wrote to Clinical Psychologist 1, referring Mrs D for “anger management and counselling in relation to some of her emotional difficulties.”

Associate Specialist Learning Disability 1 goes on to state that ‘Mrs D, although is able to make decisions for herself, that I feel with a mild degree of learning disabilities, is emotionally quite immature being institutionalised at an early age. She is terrified of going back to an institution that is a learning disability hospital which is frequently threatened to her in the family group if her behaviour becomes difficult.’

Associate Specialist Learning Disability 1 also wrote to Mrs D’s GP following a consultation with Mrs D, Mr D and Mr E, intimating that Mrs D was showing signs of clinical depression. In this letter he stated, "She has been threatened with being admitted to a learning disability hospital and any establishment that would take her and unfortunately Mrs D believes that these individuals have the power to do this to her.” Associate Specialist Learning Disability 1 described Mr E as dominating the domestic scene and “although kind in a material way” is “unable to cope with Mrs D’s emotions.” Mrs D, he said, was “under intolerable pressure.”

July 2002

Associate Specialist Learning Disability 1 wrote to the GP in July 2002 stating that whilst Mrs D had improved, the social difficulties around Mrs D persist:

“Mr E has control of Mrs D’s money. He has no legal authority to do this but unfortunately Mrs D consents to this. At present, psychology are trying to talk through the issues with Mrs D and the possibility of Guardianship has been discussed within the team… there is a degree of emotional coercion which Mrs D’s immaturity means she cannot deal with. If Mrs D does not understand the implications of consent, then the fact that Mr E holds her money means that he would have to apply under the Incapacity Act to become either Welfare Guardian or Attorney for Mrs D in which case he would be accountable to both the Sheriff and the Public Guardian.” He said that following psychology input they would “reach some decision as to the legalities of the situation which confronts Mrs D.” There is no other record of such a discussion taking place about the possible use and benefit of welfare guardianship or power of attorney.

In July 2002, Mr E contacted Community Care Officer 5, following receipt of an appointment letter addressed to Mr and Mrs D. He declined a home visit on their behalf, stating that neither wished to return home at present.

November 2002

There was a Care Programme Approach (CPA) meeting for the Ds in November 2002 which was said to be very heated, with Mr D and Mr E both leaving the

meeting. Mr D and Mrs D were said to be back in their own home and managing well. It was not possible to tell from the case files when the Ds came off the CPA.

April 2003

In April 2003, Mr D turned down support due to the cost. This concern about the costs of care was also an underlying recurrent theme, apparently due to concerns expressed by Mr E. Community care staff offered to do a benefits check on them both to see if they could afford the service contribution but this was turned down as 'Mr E does it all.'

June 2003

On 17 June, Community Care Officer 3 requested funding for additional support for Mrs D. In completing details of the client's circumstances on the funding request form she states, "The relationship between Mr and Mrs D is very strained. Mr E can be emotionally very abusive to Mrs D which results in her becoming increasingly distressed and angry. This abusive situation has caused tension between her and her husband and has resulted in Mrs D becoming increasingly anxious and low in confidence."

In recommending the additional four hours, Community Care Officer 3 concludes:

"I have rarely come across such an unhealthy and abusive situation which has caused clients such anxiety. All previous interventions from the CLDT to support Mrs D's situation have failed." It was marked 'approved FB' on 21.07.03. We assume this was signed by Snr Manager 1.

The granting of the powers of attorney

On 16 July 2003, a solicitor wrote to Mr and Mrs D's GP, stating,

"We have been consulted by Mr E, brother of Mr D, concerning his brother and sister-in-law granting Powers of Attorney in his favour. We understand that Mr E had previously consulted another firm of solicitors in this respect, but has now consulted with ourselves as he is anxious that matters should now proceed as soon as possible.

We have advised Mr E that this very much depends on medical assessment of his brother and sister-in-law as to whether they are capable of understanding and giving instructions for the granting of the power of attorney."

The letter goes on to state that under the Act "...Continuing and Welfare Powers of Attorney are required to include certificates in prescribed form to certify that the granter understands the nature and extent of the Power of Attorney, and that the certifier has no reason to believe that the granter was acting under undue influence in granting the Power of Attorney. This certificate can be signed either by a solicitor or registered medical practitioner. However, where there is any element of doubt as to whether an individual has capacity to grant a Power of Attorney, we would prefer that the certificates are signed by the granter's doctor....We should be grateful if you

would please confirm whether or not you are of the opinion that Mr and Mrs D are capable of understanding and granting Powers of Attorney and, if so, that you would be happy to sign the appropriate certificates."

The GP responded in a letter of 4 August 2003 that she felt Mr and Mrs D were capable of understanding and granting continuing and welfare powers of attorney, but that she would need to see them to confirm that this was still the case.

This solicitor responded on 28 August 2003 explaining that "the Certificates will form an integral part of the Powers of Attorney that this firm will be preparing, and are required to be signed at the same time that Mr and Mrs D sign the Power of Attorney. One of our solicitors proposes having a meeting with Mr and Mrs D and yourself so that she can go through the terms of the Powers of Attorney with Mr and Mrs D and yourself and you can then sign the Certificates accordingly. We would normally arrange to meet the clients at their home address in this respect, however, the meeting can be held either at this office or at your surgery....We note that you feel that Mr and Mrs D are capable of understanding and granting Continuing and Welfare Powers of Attorney, but that you would need to see them again to confirm this. Your assessment will require to be carried out prior to our preparing the Powers of Attorney for Mr and Mrs D to sign."

On 22 September 2003, Senior Healthcare Co-ordinator, Learning Disability, wrote to Mr D's GP requesting information on medical/health issues as Mr E was preventing Mr D from receiving services, deeming they were unsuitable due to underlying medical problems. On 1 October 2003, the GP responded to this letter stating that she did not feel there were any significant underlying medical problems that would preclude the provision of any services.

On 9 October 2003, the solicitors wrote again to the GP informing her that their solicitor would be unable to attend a meeting before the week commencing 3 November due to holiday commitments. "This would result in the meeting being held two weeks after your proposed assessment. The solicitor believes it would be best if the assessment and meeting are held as close together as possible. Is it possible for both the assessment and the meeting to be rescheduled for the week commencing 3rd November 2003? Can you please suggest some dates as we will need to ensure that Mr and Mrs D are available to attend."

On 20 November the continuing and welfare powers of attorney were signed by Mr and Mrs D in the GP's office. In signing the statutory form of certificate to certify the Powers of Attorney, the GP stated that she was satisfied that at that time, both Mr and Mrs D understood the nature and extent of the welfare and continuing powers granted to Mr E and that she had:
"no reason to believe that the granter was acting undue influence or that any other factor vitiates the granting of the power of attorney."

During our interview with her, the GP confirmed that she had not written much in the patients' notes about the assessment and certifying for the powers of attorney. She also pointed out that she had not been used to dealing with powers of attorney at that point. She said she recalled speaking to Consultant Psychiatrist 1 about this and said that the solicitor was present when she signed the certificate. When asked

whether she believed that the solicitors had been approached by Mr E to prepare the certificate, the GP said that she had presumed so. The GP said that she had spoken to the solicitor before meeting the Ds to ask her about the process. She said the solicitor was accompanied at the meeting by a colleague and by Mrs D, Mr D and Mr E. She said she spoke with the Ds on their own before signing the certificate.

The GP said that she had checked with the Ds that they were content for Mr E to look after their financial affairs and their welfare and that Mr E was not present in the office when this was discussed. The GP said that both Mr and Mrs D had some level of understanding and that she was happy as she could reasonably be at that stage. When asked about possible undue influence being exerted by Mr E, the GP said that when she saw Mr D and Mr E together, the relationship appeared to be very positive and Mr E always appeared to have Mr D's best interests at heart." She said she now recognised that the Ds might not have felt able to say that they were unhappy.

These powers of attorney were registered by the Office of the Public Guardian on 17 December 2003, when they were forwarded to the social work department mental health services at Hospital 1 and marked 'received' on 22.12.03.

We shared the above account with the solicitor who was present at the GP's office when the Ds signed the power of attorney documents. The solicitor's account is at odds with that recalled by the Ds. In her letter she states,

"My file note from 20 November 2003 confirms that I had a lengthy meeting separately with Mr and Mrs D which lasted approximately 45 minutes. During that period I read over Mr D's Power of Attorney to him and confirmed to Mrs D that the document she was to sign was in exactly the same terms. I advised regarding the differing aspects of Continuing and Welfare Power of Attorney. I have noted on my file that Mr and Mrs D confirmed that Mr E was already seeing to most of their affairs and that they were happy to grant the Powers of Attorney in his favour. I also advised Mr and Mrs D at that time that the Power of Attorney need only be utilised if they were not able to handle their own affairs and as long as they could do so they could continue in this way. I have no recollection of discussing that they were told a Power of Attorney would help them avoid getting into debt.

Although Mr E was present at the meeting, he did not intervene and made no comment in respect of the Powers of Attorney. I was at no time under the impression that Mr and Mrs D were under any undue influence and obviously the GP was of a similar view. Had I been under the impression that Mr and Mrs D were under any undue influence, I would not have had the Powers of Attorney signed. I am in no doubt that having gone over the terms of the Powers of Attorney with Mr and Mrs D and them having answered my questions in relation to the granting of the Powers of Attorney that I did have specific instructions from them to proceed with the Powers of Attorney.

As stated above my meeting with Mr and Mrs D was very much restricted to comments between myself and Mr and Mrs D and at that meeting Mr E had no input. Indeed they stated at the meeting that Mr E had been seeing to their needs informally already and they wished to formalise his position."

Events after the granting of the powers of attorney

January 2004 – January 2006

On 12 January 2004, Community Care Officer 3 made another request for community care funding, repeating all information previously given in June 2003. This includes her statement that Mr E can be "emotionally very abusive to Mrs D which results in her becoming increasingly distressed and angry."

She also repeats the same statement about rarely having come across such an unhealthy and abusive situation. This request was marked 'approved FB 24-02-04.'

On the same day the social work department received a letter from Mr E's solicitor stating, "We have been consulted by Mr E... concerning his brother and sister-in-law for whom he has been appointed Continuing and Welfare Attorney." They reported allegations made by Mr E against Mrs D regarding violence and threats of violence against her husband and their client. The letter goes on to state that Mrs D was "clearly unable to look after herself" and that "Mr E believes that Mrs D requires specialist care and feels that a further assessment of her requirements is needed … It is not an option for Mr and Mrs D to continue to reside with Mr E indefinitely."

This letter further highlighted concerns that Mr E had in connection with the social work department not recognising his authority. They requested that urgent contact be made with their client to discuss matters further. This apparently was the first the CLDT learned about the granting of the powers of attorney.

Although we could not locate a specific response to this letter, it appears as though the lines of communication between the CLDT and Mr E remained open. In April, the social work department provided a respite placement for Mrs D at a training flat for a weekend when Mr D and Mr E attended a wedding in City 3. Community Support Worker 1 reported that Mrs D initially was very unhappy about the arrangement 'as she felt she was being pushed out into some sort of residential care.' Once there, however, she said she was quite happy with the accommodation. It is of interest that over the weekend she was assessed as demonstrating 'a fairly high level of skills in general household tasks.' There was an incident reported where Mrs D expressed fear that her brother-in-law (Mr E) would discover newly bought clothing and DVDs and she needed to be reassured that these were sensible purchases. Community Support Worker 1 also observed that 'Mrs D is a very gentle courteous woman and once she was relaxed in your company, proved she had a good sense of humour. She talked fairly knowledgeably about current events in the news and expressed her opinions articulately.'

On 9 April 2004, the GP referred Mr D to Consultant Psychiatrist 1. She mentioned "ongoing marital difficulties" and that Mr D was "very tearful and feeling very down." The GP was wondering whether a change of medication or dosage was appropriate.

Consultant Psychiatrist 1 responded on 18 May and proposed no change to the medication. She did not find any evidence that Mr D was experiencing any depressive disorder which could be treated with medication. Consultant Psychiatrist 1 noted that Mr E had advised that he was not keeping well himself at the moment

and “we like to make sure that Mr D and Mrs D have a care package that would mean they could manage without him.” Whilst stating that the learning disability team intended to re-launch case conferences regarding Mr D and Mrs D, Consultant Psychiatrist 1 did add that “the history of this, however, is that we can only get so far working within the ongoing family dynamics.”

Mr and Mrs D thereafter returned to their own home. Community Care Officer 3 put in another request for community support services to support them to live independently. In this request she states that the relationship between Mr D and Mrs D was very strained and reiterated that, “Mr E can be very abusive to Mrs D which results in her being increasingly distressed and angry.”

Community Care Officer 3 further stated that “if Mr E feels that the couple are not managing in their own home, he insists they move back into his house where the abuse starts again.” This request was marked ‘approved FB 05.07.04.’

On 15 October 2004, Mr D reported to his community support worker that Mrs D had broken a table in temper. On 23 November, Council A Employment Support Services contacted Community Care Officer 3 to say that due to Mr E cancelling the ESS (Employment Support Service) input on two occasions, they were closing Mr D’s file. It is not clear how long this had been in place.

Following this, the next significant recorded contact came on 6 August 2005. The community support worker recorded that ‘Mr D asked her to say that the money he had spent on a sandwich and going to the City 1 Museum was actually spent on going to the swimming pool, otherwise he would need to give Mr E the money back.’

In September 2005, Community Support Services Co-ordinator 1, raised with Community Care Officer 3 her concerns that the couple were unhappy with Mr E’s managing of their finances. Both Mr D and Mrs D had asked her for mini reviews and to hold them at Community Support Co-ordinator 1’s office so Mr E did not find out. Community Support Co-ordinator 1 expressed concern that if action was taken, Mr E would stop the support workers attending the home.

Community Care Officer 3 responded that now she understood why, when she mentioned annual reviews, ‘it seems to put the fear of God into them.’ She said that although Mr E has the power of attorney for them both, this is only for when/if they lose capacity to make decisions for themselves. “All we can do is empower and support them to speak up if they wish things to change – but it has to come from them.” She added that while noting these concerns “things service wise are better than they have been and yes, you are right, Mr E would probably attempt to pull all support out.”

The chronology provided by the social work department lists a Community Support service note entry from 25 November 2005. This referred to the embarrassment of a community support worker who, on arriving to see Mr D and Mrs D, observed that Mr E ‘was very rude to Mrs D and treated Mr D and Mrs D like children.’ Mrs D was sent to the ‘naughty chair’ in the lounge and had to stay there until Mr E told her she could come back into the kitchen.’ The community support worker reported that Mr D appeared ‘hurt’ by these actions.

Again on 6 January 2006, a community support worker arrived at Mr D's and Mrs D's flat to find Mr E there along with another support worker discussing plans for the coming year; it was said by the community support worker that Mr E 'laid into' Mr D and Mrs D. Mr E pushed Mr D out of the room. Mrs D asked Mr E to get out as she was fed up with him. Mr E and Mrs D were swearing at each other. Mrs D also asked Mr E to stop smoking in her house and he refused. There is no indication of how social work responded to this incident, although it was evident that everybody involved was quite upset.

There is a note in the social work chronology dated 30 January 2006, referring to a 'review meeting' but we found no other mention of this meeting. A review meeting on 23 February 2006 was also held with the only note being: 'no different issues. Very good review. Mr D was very distressed and anxious. Further relaxation needed to be noted as a future goal.'

There is, in fact, a large gap in the social work notes at this point, with virtually nothing being reported for over two and a half years. No-one interviewed was able to account for this gap. They could not confirm whether files went missing; whether there was no recording during this period, although there should have been; or, whether there was nothing significant to record over this period. We do know that Mrs D was, during this period, still attending day centre 1 on Tuesdays and Thursdays and had support in her house to help develop her cooking skills on Mondays and Fridays. She also attended the recreational activities supported by a community nurse.

Similarly, aside from medical notes relating to physical health care issues, there is scant recording during this time from health colleagues in the CLDT.

August 2008 – June 2009 (revocation of powers of attorney)

On 29 August 2008, Mr D had a fall and sustained a fractured left shoulder. Mr E took his brother to live with him and wrote to the Social Work Department requesting assistance and support for his brother and additional support for Mrs D who remained in the couple's home.

Following this request a joint assessment visit was made on 4 September 2008 with Occupational Therapy. A subsequent e-mail on 9 September 2008 from Community Care Officer 1 to SSW1, Snr Manager 1 and Senior Healthcare Co-ordinator, Learning Disability confirmed that Mr E was the continuing and welfare attorney. Community Care Officer 1 also raised her concerns that she was unsure whether or not the Ds lacked capacity to make their own decisions. Community Care Officer 1 advised of a number of steps that could be taken in the event of concerns about financial mismanagement; referring to the Office of the Public Guardian's duty to investigate as well as the local authority's powers to investigate under the 2000 Act.

Community Care Officer 1's e-mail concludes by advising that an application could be made to the Sheriff to vary/revoke the powers in the event of "both…. being considered incapacitated." She also gives advice about other forms of legislation being used in the event that the couple are considered capable.

Events following alleged assaults of 9 September 2008

On the evening of 9 September 2008, the Council A out of hours service took a call from Mr E who reported that 'Mrs D had wrecked her room,' He is recorded as saying, "I am not putting up with that and you will have to come NOW and take her into care." Arrangements were made to move Mrs D to temporary emergency accommodation at the local authority training flat.

When Out of Hours social worker (who took the call) visited, he found 'a frightened, confused, lost woman sitting on the edge of her bed, hunched over – clearly frightened by my coming into her room.' The Out of Hours social worker could see no sign of any damage in the room. Mr D was not seen during this visit.

The next morning, Community Support Manager 1 wrote to Community Care Officer 1 and SSW1 to say that they could keep Mrs D at the local authority training flat until that Friday. She proposed they undertake an independent living assessment on Mrs D with a view to her going home to her own house with an appropriate package of care. She added, however, that "this all depends on Mr E staying out of the picture … Mrs D will need reassurance that Mr E is not going to bully/interfere with her if she goes to her own house. Money will have to be made available to Mrs D but Mr E says he has power of attorney and holds the purse strings tight. Ideally, Mr D should go home and the two of them live independently of Mr E who they are both fearful of."

SSW1 responded directly by e-mail and copied it to Senior Healthcare Co-ordinator, Learning Disability. He stated "We agree best he goes back home with support to show Mr E he cannot dictate what will happen. In the longer term we will need evidence for vulnerable adults' meetings so staff need to record how he works – or does not work with us."

On 11 September, SSW1 wrote to MHO 1 (copied to Senior Healthcare Co-ordinator, Learning Disability). He said that Mr and Mrs D are married, live in their own flat with support and both are under the 2000 Act with the welfare power of attorney having been granted to Mr D's brother, Mr E. He informed her that they had had concerns over the years and attempts to deal with these concerns had failed due to lack of evidence and both clients seemingly agreeing to take no action. Things, he said, "had come to a head and I am investigating it as we feel there is an abuse of powers, both clients have capacity but have been bullied into going along with Mr E."

SSW1 said he intended to contact the "Welfare Commission to inform them that we will hold a vulnerable adults' meeting and will challenge Mr E and start to look at clients' views away from his control. This will provoke a strong reaction from Mr E and there will be confrontation. However we will follow through."

MHO 1 responded that the Actual Protection Orders under the Adult Support & Protection Act were to come into effect at the end of October and offered to meet to discuss.

SSW1 concluded this series of e-mails by informing MHO 1 that he would talk to Snr Manager 1 the next day but stated "we are so concerned that we will start an investigation under Vulnerable Adults' policy now as to wait much longer puts both at risk, also I am speaking to the Mental Welfare Commission in relation to his abuse of powers and the fact that they can consent so in effect he has no powers at all but acts as if he has to the detriment and abuse of both anyway. The new Act may help along the way later but we feel we have enough concerns and power as a local authority under the Incapacity Act to start now."

Following this, SSW1 did contact the Mental Welfare Commission and spoke with one of our social work officers. The information passed to us was essentially that outlined above. Our social work officer suggested that a case conference be held involving local authority legal representatives, which should consider evidence in respect of a possible application to the Sheriff Court under Section 20 of the Act, where various options existed for local authority and/or Public Guardian supervision of the attorney.

On 12 September 2008, the Supporting and Protecting Adults from Abuse reporting forms (OR1) were completed separately by both SSW1 and the Project Manager at day centre 1. SSW1 reported that Mrs D had told him that Mr E 'put his hands around her neck and pushed her to the bed and then she pushed him off. Then he went to phone OOH (the social work out of hours' service). saying he wanted her out of the house. When Mrs D was subsequently questioned about this she said she did not want him to be part of her care any more.

The Project Manager at day centre 1 reported that 'Mrs D had a conversation with Day Centre Worker 1 at Day Centre 1 on 11 September, witnessed by Day Centre Worker 2. Mrs D had said that she had a falling out with her brother-in-law Mr E and he had put his hands around her neck and she was very scared. She also said that she is worried about physical violence if she returns to her home, that Mr E will sneak into her house when the support staff are not around because he will be very angry with her if he no longer has control of her money or their car. She is also stressed about the amount of control that Mr E has over Mr D, and that Mr D will want Mr E to be a part of their lives. She also said that when they go shopping they are not allowed to choose their own food, Mr E makes them get the same food as he eats.'

A brief multi-disciplinary case discussion was held the next day (12 September) where all agreed that Mrs D had capacity at that moment in time to 'make decisions in relation to her general health, well-being and financial position.' It was added, however, that this might need to be assessed by medical colleagues 'as we are going down the vulnerable adults' route.' Under the heading 'Legislation' it was recorded, 'we need to be very clear in relation to the legal status of what powers Mr E actually has and how it is being interpreted to both Mr and Mrs D.'

On 16 September, Council A officer 1 sent an e-mail to SSW1 following a carer's assessment on Mr E that had just been carried out. While Mr E said he felt unsupported, he as well as Mr and Mrs D were not assessed as requiring any additional services. Council A officer 1 added, however, "The thing that did alarm me was that he felt because he had power of attorney for both of them he was entitled to

a say. I did explain to him that power of attorney can only be enforced if the people who it was for no longer (had) capacity. He is aware that questions have been asked in the past about his role as carer and how he deals with finances for the couple."

On 11 September SSW1 e-mailed Senior Solicitor 1, asking for advice. In this he states, "to date we have managed to get one client (Mrs D) out of his house (he still has Mr D) and into the local authority training flat and are likely to get her back to her flat with community support. She wants this and does not want Mr E to have anything to do with her. Mr E is insisting she cannot see her husband (I even offered to have staff come to be with her to visit). He has also made an appointment with her GP and insisted staff can take her there, hand her over to him and he will see the GP with her only and then staff can take her home. (I am afraid what he will say and she may be put on inappropriate medication. He said he has got her husband on tranquillisers and sleeping pills already this week.) He has insisted all her mail must be given to him to open and read, he will hold all her money, etc. She has said that she is afraid of him, does not want to be alone with him at any time."

SSW1 asked whether, if the multi-disciplinary team at the meeting on the following day agreed that Mrs D had capacity, the welfare powers no longer applied or was it the case that they did apply if "the attorney reasonably believes she lacks capacity." He added that Mrs D had said that "she only agreed to what he said because he bullied her and was afraid," and that "he withheld her medication in the past (we did suspect this)." She wanted to know if they were able to respect her wishes and ignore Mr E's as welfare attorney. It is not evident she ever received a clear answer to this question. It did not appear that the concern about Mr E influencing the prescribing of inappropriate medication was ever addressed directly with the GP.

SSW1 ends the e-mail by saying "we cannot wait while the department thinks about this too long ... I need to make her safe first, then see how we can make her husband safe... Mr E has been for years trying to split them up and this is only one incident in a long line over many years but I intend to sort this out."

A memo from SSW1 of 16 September was issued advising staff "please be aware that a full investigation is taking place into concerns raised in respect of the (Ds) who are a married couple living in their own supported flat." However, at that time, Mr D was staying with his brother, Mr E, and Mrs D was in the respite unit at the local authority respite/training/flat. He also informed staff that "currently all CLDT staff go to his flat in twos and never alone so as to avoid any unfounded allegations against staff."

An adult protection case conference was held on 16 September. The stated purpose was to discuss the role of Mr E in the lives of Mr and Mrs D. At this case conference it was recorded that 'reports show abusive powers and interventions that restrict clients' independence … from past and recent information there were concerns that Mr E does not act in the best interests of both clients, there are indications of emotional abuse. Also there may be financial abuse.'

Everyone at the case conference had concerns that Mr E would try to split up the marriage of Mr and Mrs D. It was decided that both Mr D and Mrs D were to be allocated to the CLDT and both had emergency CPA meetings. (It is not clear from

the notes exactly what the status of the Ds' case was with the CLDT before this allocation.) Mr D was to be referred to the Advocacy service; Mrs D was to refer the assault complaint to the police and they were to consult the solicitor regarding power of attorney; SSW1 was to obtain more money for Mrs D to prolong her stay at the training flat; and, an investigation to be carried out under the Act.

On 17 September, the GP practice manager was advised by SSW1 that Mr E was not to be given any information regarding Mrs D. This was the first recorded instance of the local authority taking direct action to counteract the perceived misuse of welfare powers by Mr E.

SSW1 then sent a letter to Mr E outlining decisions made and actions to be taken in respect of Mr and Mrs D. In this letter he confirmed that Mrs D had capacity in areas of her own welfare and was able to make her own choices, including the fact that she did not want Mr E to have keys to her flat; he could only visit when pre-arranged; she would like access to her benefits and monies; she wanted support staff to accompany her to the GP; and, she would like to see her husband. He also added they needed to look at Mr D returning to his flat. In this letter he seeks Mr E's co-operation with the multi-disciplinary team in working with Mrs D to achieve her objectives as well as in assisting Mr D to return to his flat with the necessary support.

The police interviewed Mr E on 18 September about the alleged assault but he was released without charge due to insufficient evidence. Mr D was taken into the local authority training /respite flat when Mr E did not return to the house by early evening.

On 22 September, Community Care Officer 2 wrote to a debt recovery agency regarding an invoice for £2,167.71 that Mr D had passed to him for clarification and investigation as he had no knowledge about the account. At the same time he passed to him another letter which he followed up relating to an invoice from debt recovery agency 2 in which it was stated he owed £2,044.73.

On 29 September, SSW1 wrote to Mr E to inform him that Mrs D did not want him to be present at CPA meetings. An advocate was working closely with her to articulate and record her views and wishes for consideration at these meetings.

In a letter to Community Support Co-ordinator 1 from Mr E regarding financial assessment for Mr D, it was indicated that a payment was being made to a woman by the first name of G of £100 per week. There is no indication as to who this woman might be and why regular payments were being made to her. It is also noted that over £250 per month was being paid out in utility bills.

In early October, Mrs D expressed concern that Mr E was planning to decorate their living-room without asking them or discussing this with them. Mr E was still dispensing Mrs D's medication. Mr D expressed concern that Mr E said he was going to have Mrs D arrested for assault. Mr E was still cooking for Mr D and Mrs D even though they had returned to their own house. Community Support Co-ordinator 1 recorded that "Mr D is buying lots of shopping but the bulk of the food is staying at Mr E's." Mr D was distressed at one point and concerned as Mr E was saying that he was going to take over all his care and support needs again.

It was also in early October that Mr E lodged a formal complaint with the social work department against the community support worker, Community Support Co-ordinator 1.

A CPA meeting was held on 7 October to review recent events. Mrs D was reported as saying she was glad to be managing her own money again and felt safe and happy in her flat as Mr E was not allowed to come in. Mrs D was recorded as saying she did not remember signing the power of attorney papers but was afraid of the consequences of revoking it. She feared that Mr E 'would make her life hell' and that her husband would get angry with her as well. Mrs D, it was said, would like to learn to cook as she had never been given the chance. Again, advocacy was very helpful to Mrs D in articulating and recording her views for consideration at the meeting.

The decision was taken to seek an update on Mrs D's medication, to undertake a financial assessment for Mrs D and to assist her in talking to her bank about statements being sent directly to her. It was left for Mrs D to decide when she wanted to revoke her power of attorney. It was also decided that they would need to work out her support needs in future for help with her finances. Finally, it was also agreed that there was a need to have an updated assessment on the issue of Mrs D's capacity. This was a very thorough meeting dealing with all relevant aspects of Mrs D's care and support needs. It was evident, however, that Mr E was still very much involved in managing her finances.

On 10 October, Snr Manager 1 responded to a letter of 6 October from Solicitors Firm 1. We were not able to find a copy of the letter of 6 October in the case file material we reviewed. Snr Manager 1 confirmed that a police investigation had taken place in relation to the alleged assault by Mr E. She further added that "while Mr E does indeed hold continuing and welfare powers of attorney and it is agreed that the continuing power permits Mr E to manage all financial aspects of his brother's, Mr D's, estate, in statute, the welfare power is only applicable should Mr D cease to have capacity to make decisions about his welfare. It is the assertion of all professionals involved with Mr D that this is not the case and that he currently has capacity to make decisions about certain aspects of his welfare including where he will reside."

On 13 October, SSW1 completed and forwarded a complaint/concern form to the investigation team at the Office of the Public Guardian in respect of Mr and Mrs D. This was accompanied by a letter giving background information outlining his concerns. In this he states that he believes Mr E is "misusing their monies" and that he "has abused his power of attorney." He goes on to state, "in my investigation to date Mrs D has told me she is not aware of her full income, she has felt scared to buy things due to the reactions she gets from Mr E and she said she thinks he buys things for himself from their money. She has said she would like to have more control over her money but agrees this would have to be with support. Mr E handed a piece of paper with income details from Mrs D to a support worker but did not explain what the '£100 loan per week was for. Mrs D does not know … In addition Mrs D did hand to support staff two separate notices from debt recovering companies requesting payments of a total of £4,212.44. Both Mr and Mrs D did not know what it was for or that they were in any debt … I have been unable to clarify with Mr E my concerns. In addition I am finding it hard to get more evidence due to

the fact that Mr E insists that all mail going to Mr and Mrs D's flat remain unopened and passed to him to deal with … based on what I have been able to find out to date and the fact that Mr E is unwilling to discuss any more financial issues with me, I am asking if you would please start an investigation into how Mr E is managing their financial affairs."

SSW1 ended by requesting a meeting with the investigating officer. He also asked that no direct contact be made with Mr and Mrs D due to the sensitive nature of this case. He also pointed out that any correspondence directed to either of them would be opened by Mr E.

There is reference by Community Support Worker 2 in a note of 16 October to use of the communications book. This appears to indicate that the communications book was kept in the Ds' house at that time. There is reference to Mr D saying Mrs D had hit him in the chest. Mr D said he was 'torn between his brother and his wife and is feeling sick.' Community Support Worker 2 reported a phone call from Mr E in which he said that all appointments for Mr D had to be approved by him and that she (Community Support Worker 2) was not to go back to see him as planned on the next day. Community Support Worker 2 responded that "her bosses would decide on that," at which point, she said, Mr E "started threatening me with the power of attorney documents he has and that he has control of Mr and Mrs D."

In response to SSW1's letter, Investigations Officer 2 with the OPG, wrote to the GP. This letter stated that in order to carry out an investigation, it was first necessary to establish Mrs D's and Mr D's capacity to manage their own affairs both now and in the recent past. If they are considered capable, she said, they would take no further action. She did not specifically ask if they had capacity to revoke the power of attorney.

On 5 November, the GP responded stating, "I feel they have the capacity to make day to day decisions and the medical decisions that have come up within the surgery. I do not feel able to comment on their capacity to manage their own financial affairs both now and in the recent past. On this issue I would defer to more specialised colleagues in the learning disabilities team and suggest that you contact Consultant Psychiatrist 1 in this regard."

The OPG followed this up with a letter to Consultant Psychiatrist 1 dated 7 November 2008, framed in exactly the same terms to the letter sent to the GP. A file note from a community support worker on 7 November stated that Mr D had indicated that both he and Mrs D wanted control back of their money from Mr E.

Meantime, there was a further CPA meeting on 18 November. A statement was produced by Mrs D's advocate on her behalf indicating that she "felt she had no control over her money; her husband has told her not to sign the revocation of the power of attorney form; and she would like to have more outings with her husband as a couple but Mr E does not allow them 'up the street on their own,'" It is clear from this that Mr E continued to exercise both continuing and welfare powers.

Consultant Psychiatrist 1 responded to the OPG's letter on 21 November stating that the Ds: "… may be deemed to have capacity in relation to simple financial matters

e.g. they would understand that they need to have money in their pockets to purchase a newspaper, cigarettes or magazines, etc. They would be deemed to not be capable whenever financial issues became more complex, for example they would not understand everyday household bills without support. They would not have capacity to enter into credit agreements."

Consultant Psychiatrist 1 said that she knew Mrs D better and that she "would have only the vaguest understanding regarding debt" and "would see debt as something frightening and to be avoided. Beyond this, however, her understanding would be very limited. I suspect the situation would be the same for Mr D." She also stated that their capacity had not changed over recent times. She was not asked about their capacity to revoke the order.

On 2 December, the community social work notes indicated that Mr D and Mrs D were very distressed. Mrs D said Mr E told her they were receiving too much input from social services and community support staff and that the council would take all their money, they will no longer have a car and they would be split up and put into different residential care homes. Mr E was also said to be getting angry with Mr D about the amount of money he had been spending.

On 5 December, Mr D and Mrs D were very upset as they received a letter from the gas company saying their supply was to be cut off. They thought Mr E paid their bill 'on a weekly basis by card.' The following day, Mr D is recorded as saying he wanted to control paying his own bills and shopping so he knows they are paid.

In response to an earlier letter from Solicitors' Firm 1, the GP's correspondence of 9 December states, "I do not feel able to comment as to whether he is able to make full and reasoned decisions in respect of his own welfare." She again refers them to Consultant Psychiatrist 1.

At a CPA review meeting on 17 December 2008, Mr D's advocate compiled a list of issues that Mr D wished to be addressed at the meeting. She stated that Mr D wanted all information discussed to be kept confidential from Mr E. He appears at this stage to be giving conflicting messages from those previously expressed where he had stated that he was happy with Mr E managing his finances on his behalf.

On 19 January 2009, Solicitor's Firm 1 again wrote to Council A's CLDT referring to a letter from Snr Manager 1 of 10 October. They said that Mr E was still looking for information regarding decisions being made in relation to his brother's welfare. They further stated that contrary to what Snr Manager 1 said about the welfare attorney only being able to act once Mr D ceased to have capacity to make decisions about his welfare, under Section 16(5) of the Act the powers could be exercised as long as the welfare attorney reasonably believes that the granter is incapable in relation to decisions about the matter to which a welfare power of attorney relates. The letter stated that "Mr E believes that his brother is not capable of making decisions in relation to his welfare." They affirmed that he was entitled to receive information and be involved in decisions made in relation to his brother's welfare. The letter ended, "We wish to point out that Mr E has been exercising his authority under the power of attorney without difficulty since 3 November 2003 when it was granted. Only now

that he finds he is not being provided with information in relation to his brother's welfare."

Following this letter, SSW1 suggests to Snr Manager 1 (in a memo dated 26 January 2009) that legal advice be taken to clarify the capacity issues. Reference is made to a case conference held on 16 September 2008, when it was concluded by the CLDT and Consultant Psychiatrist 1 that Mr and Mrs D had capacity in regard to welfare decisions but not financial. SSW1 further refers to the difficulties both he and the OPG were having obtaining further financial details, in particular benefits information. Mr E, he states, "continues to hide all correspondence and financial matters but we are to undertake a financial assessment to see how he reacts."

He concludes by saying "if we divulge further information to Mr E against clients' wishes we will make them increasingly vulnerable and open to abuse. The next step is to get Mr E removed from power of attorney either voluntarily or we go down the legal route. I would like to have a report from OPG first as it will help this procedure."

A further CPA review for Mrs D was held on 27 January. It decided that staff would take their lead from Mrs D when she felt confident enough to take steps to rescind the power of attorney.

On 29 January, Mr D reported that Mr E started shouting at them both, telling them they had to decide who they supported 'was it community support or Mr E,' Mr D also reported that he wanted to take up a place at the learning disability training shop on a Tuesday but Mr E was trying to stop him from doing so as he thought it was too much for him.

At a CPA review for Mr D on 4 February 2009, Mr D makes clear through his advocacy worker that he did not want any discussions or letters to be sent to his attorney without his prior knowledge. This followed a letter that had been sent to Mr E from Community Support Co-ordinator 1 regarding Mr D's finances. Mr D advised that this letter had caused difficulties between himself and Mr E. The meeting was further informed by the advocacy worker that Mr E had been angry with Mr D using the services of an advocate without asking him beforehand. Mr D requested that all staff involved in his care package should respect his wishes in such matters to maintain his right to privacy and confidentiality. He further asked that if staff were in doubt about what to share they should discuss it with him first.

On 19 February 2009, Mr D received a letter from Motability Operations saying that they had been informed by the DWP that he was now taking full responsibility for his own affairs.

On 4 March, Snr Manager 1 responded to Solicitor's Firm 1's letter of 19 January regarding a request for provision of information in respect of Mr and Mrs D. In this she stated, "Following consultation with the professionals within the CLDT, I confirm that it is our view that both Mr D and his wife have the capacity to make decisions regarding their welfare. Furthermore, it is our view that their capacity has not changed since the granting of the power of attorney. One would therefore conclude that if they had the capacity at the point of granting the order they still have capacity now … the wishes of the individuals must be paramount, as dictated within the

principles of the Act and the new Adult Support & Protection Act. Therefore, while Mr D and Mrs D have capacity, we will continue to respect their wishes with regard to any information which is shared."

On 13 March, SSW1 contacted the OPG Investigation Officer 1, providing details of the couple's benefits acquired through the financial assessment which had been undertaken. The information was incomplete and the OPG was advised by SSW1 that his enquiries had been hampered by Mr E, the DWP appointee, who refused to take part. (We corresponded with the DWP and were informed that Mr E was not an appointee for the Ds. He was their agent. The distinction here is that the appointee is made by the DWP following a full application by the appointee where they believe someone lacks capacity to collect and manage their benefit on their own behalf. Agents are chosen by the individual receiving the benefit to allow the person to collect their benefit on their behalf. This arrangement is made with the Post Office.)

Investigation Officer 1 returned an e-mail to SSW1, requesting additional information about the Post Office account that was apparently in the couple's name. He said that he had previously contacted the Post Office and they were unable to find accounts in Mr and Mrs D's name with the information that the OPG had been able to provide. The e-mail continues, "given there is no specific evidence of misappropriation of funds in this case, I am loathe to approach the attorney for accounting with current information … given the sensitive nature of this case and that you have indicated that further inquiry may have a detrimental effect on Mr and Mrs D in terms of their relationship with Mr E, I feel it is important that further investigation does not simply serve to make matters worse for your clients."

There is a CPA review meeting for Mrs D on 24 March. Mrs D's advocate advised the meeting on her behalf that, "I would like to have more control of my money but I do not feel confident enough to do so."

This meeting was also told that Mrs D had not received certain letters and that she was unclear as to whether or not certain bills were being paid. At that meeting, under the heading 'Capacity', it was again recorded that 'the level of capacity that Mrs D had was to be reviewed/confirmed.' (A multi-disciplinary meeting held on 12 September agreed that Mrs D had capacity to make choices on how her support needs are to be met and who she would like involved in meeting them). Under the column 'How this need will be met', it is recorded that 'Mrs D to consider keeping a copy of her CPA minutes at home although there is a risk of these being found … to collect evidence and maintain file for any further vulnerable adult investigation.'

The CPA minute also records that 'Mrs D would like to handle her own mail and not give it to Mr E, she would like staff to help her deal with letters.' Under 'How this would be met', it simply stated that Mrs D was not receiving as much mail as previously.

It was also recorded that 'Mrs D does not wish to see or speak to her brother-in-law (Mr E) at this time.' This was to be achieved by 'all involved to respect Mrs D's wish for confidentiality.'

Under ‘PoA status’, it was recorded, once again, that ‘Mrs D to inform CSS staff when she wishes to contest (Mrs D said she wanted to do this but was still afraid of what Mr E would do and what Mr D, her husband, may say).’

In addition to this, considerable attention was paid to Mrs D’s support needs – including daytime activities and the development of daily living skills.

A CPA review meeting for Mr D was held on 1 April 2009. He, too, had a statement prepared for the meeting in consultation with an independent advocate. He stated that he was happy with Mr E doing his shopping on Tuesday. He had questions about charges for different elements of his support package.

The care programme updated on 1 April noted that a financial assessment was still needed but would be held off until Mr E was discharged from hospital. (Mr E was in hospital for a short period at that time.)

It also stated that while Mr D required assistance in managing outgoings on a weekly basis, he was to be supported by Mr E.

Under the heading ‘Power of Attorney’, it was recorded that Mr E had requested Council A inform him of all welfare matters and that Mr D was to consider if he wants a copy of these minutes to go to Council A. In response to this it was recorded ‘Mr D does not want a copy of his CPA minutes to go to Council A.’ Under ‘Capacity’ it is recorded that ‘Mr D has capacity to make choices in how his support needs are to be met and who he would like involved in meeting them.’ This was said to be under ongoing review by the CLDT. Regarding his capacity, the minute records that ‘Mr D stated again he has capacity over his care support and to remind all to consult him first before any communication with Mr E.’

OPG closure of investigation into mismanagement of finances by continuing attorney – April 2009

The OPG wrote to SSW1 on 1 April (received by Council A on 2 April and therefore unable to be considered at the CPA meeting on 1 April). The letter refers to an earlier telephone conversation with SSW1 on 17 March (of which we could find no record). In this letter Investigation Officer 1, on behalf of the Office of the Public Guardian, states that:

“*Having taken advice on this matter from my manager, I would advise that this office is unable to pursue your concern any further at this time." As such, the investigation has been concluded and no further action will be taken meantime.*

As discussed during our telephone conversation on 17 March 2009, the difficulties with pursuing this matter under the Act chiefly boil down to a lack of substantive evidence indicating financial mismanagement and a capacity view which indicates that Mr and Mrs D retain some capacity. However, as the information you provide suggests a level of vulnerability on behalf of these adults, there would appear to be scope to investigate and potentially take action in this matter under Adult Support & Protection legislation.

As noted, at present there is no evidence of financial mismanagement of funds belonging to Mr and Mrs D. Debt letters you have had sight of pertaining to Mr D give rise to understandable concern, but at present there is no verification to clarify when this debt was run up, by whom and whether or not this debt is being or has been appropriately addressed. Further evidence provided would appear to indicate that Mr E has been non-compliant with social services and is controlling in terms of how he manages the funds of Mr and Mrs D. This I can see has been a source of some considerable frustration to you but in itself is not evidence of misappropriation of the adults' funds.

Another difficulty in this case in terms of the remit of the Public Guardian is the capacity statement received by us from Consultant Psychiatrist 1 which indicates Mr and Mrs D have capacity to revoke power of attorney if they wish to do so. As you will be aware, we may only intervene when an adult is incapable both in managing their own financial affairs and of competently instructing a Proxy to act on their behalf. Information provided by you appears to indicate that both Mr and Mrs D at various times have expressed that they may wish to revoke powers held by Mr E but fear possible repercussions, so have refrained from doing so. If Mr and Mrs D are capable of revoking their powers but are choosing not to do so, for whatever reason, this means the Public Guardian has no locus to investigate their financial affairs. That said, if they are genuinely intimidated by their attorney, this then raises the possibility of undue influence or more specifically conduct causing psychological harm; a factor which is not covered under the Act but is addressed by Adult Support and Protection legislation."

One of the benefits of dealing with this matter under the Adult Support and Protection Act, suggested Investigation Officer 1, is that it would give "authority to require relevant records from benefits agencies in order to assess any possible financial mismanagement and would also have the power to require Mr E to provide financial information to you."

The OPG made clear to the local authority at this point that they would be taking no further action.

A note from Community Support Co-ordinator 1 to SSW1 refers to Mr D having had a meeting with his brother, Mr F, whom he said he hadn't seen in over a year. He was reportedly very happy to see his brother.

On 22 April, SSW1 received a letter from Mr D giving permission for him to speak with his brother, Mr F, about issues concerning his care package. He also expressed a wish that his brother attend a future CPA meeting.

An e-mail was sent on 5 May 2009 by SSW1 to the Ds' advocates. SSW1 stated that he "had a chat with the brother, Mr F, who will record incidents etc. He has grave concerns and is apprehensive himself as are other family members as to what Mr E may do to them (the Ds) … however, I had a call today from him to say he had taken them out at the weekend and they told him how much Mr E had been threatening them to comply with his wishes. Both now feel it is too much and Mr D has told him he is now ready to sign the paper to revoke the powers Mr E has. However, they are both concerned about how their finances will be dealt with."

SSW1 proposed offering the Ds (and presumably Mr F) “a meeting with CLDT and CSS to talk through what the issues are and how he can support them.” He ends by saying, “I want to do this now as they may again pull back if they feel Mr E will get hold of them.”

Council A’s out of hours social work team was advised by the CLDT of these developments and alerted to fears of possible reaction by Mr E. The CLDT provided emergency contact numbers and the number for Mr F should they need it.

An emergency CPA meeting was held on 13 May 2009. A statement was prepared by Mr D, via his advocacy worker, in the following terms:

- Health - Medical appointments to be supported by Mr F (brother). I will be requesting more information about the medication I am currently prescribed and would like to come off anti-depressant.
- Capacity – I have spoken to my GP and told him I do not want an assessment to be carried out as requested by power of attorney. GP has said this will not be carried out.
- Power of attorney – I want to revoke the power of attorney powers and will be happy to sign the paperwork.
- Finance – I want to take back control of my money/benefits. I will require support to carry out this process. I will also require support with my finances/budgeting and shopping.
- Bills – I am worried about the letters we have received about outstanding bills; the electric, gas and items from club books. Who is responsible if we are in debt?
- Mail – We will open our mail (previously done by power of attorney) and will need support for managing this.
- Mobility car – Power of attorney has returned the car to the garage showroom. I do not want to keep the car and will need support to look into the contractual agreement. I will also need support to claim for taxi and bus cards.
- Protection issues – To help me feel safe and free from possible harassment from Power of Attorney I would like to request that:

    - We receive extra support from CCS team during this difficult period;
    - Our house locks are changed;
    - Our landline phone number is changed;
    - Our bank/savings account details are changed;
    - A community alarm is fitted to the house;
    - We have a phone number to contact in an emergency;
    - To have a joint meeting with Mrs D and CLDT and CSS to talk about our issues and concerns.

These concerns and issues all appear to be acknowledged in the CPA minutes.

At this point on 14 May, Mr E got in touch with the Mental Welfare Commission independently via our advice line. He was asking for information on how he could secure an independent medical assessment of the Ds’ capacity as he thought that they were not able to do as much as people expect. We agreed to write to the

couple's GP regarding how to make a referral for psychiatric assessment outwith the health board area and did so on 14 May 2009. This letter was copied to Consultant Psychiatrist 1.

A meeting on 21 May was held to look at the support and actions required once the powers of attorney had been revoked. This was attended by SSW1, Community Support Co-ordinator 1, and Community Support Services Co-ordinator 2.

Consultant Psychiatrist 1 responded to the Commission's letter of 14 May on 20 May giving her views on what she said was 'a very complicated tale.'

Consultant Psychiatrist 1 wrote that both Mr and Mrs D "under Mr E's encouragement" signed for him to become their Welfare and Financial Attorney. "Since this time Mr E has, according to Mr D and Mrs D, bullied them in all aspects of their life using the fact that he is their 'Guardian' and threatening them that they will be put into a home if they do not comply with his wishes."

Consultant Psychiatrist 1 pointed out that "clearly there are two sides to each story and my senior social work colleagues have been very thorough in their investigation of this matter." She added that "Mr D's older brother, called Mr F, has recently become involved in all this and is strongly advocating on behalf of Mr D and Mrs D that they should rescind their appointment of Mr E as their Attorney … In all this it is probably important to note that Mr D and Mrs D probably do have some limited capacity in relation to having mild learning disabilities. However, this capacity has not altered at all since the time that they originally signed the power of attorney i.e. if they were sufficiently capable to sign the power of attorney in the first instance they would now be judged to have equal capacity to rescind the power of attorney … They live as a couple and could manage with a moderate package of care and some guidance around financial planning, budgeting, shopping etc. Historically they have always been easy to engage and accepting of help...I believe that the most up-to-date chain of events is that the advocacy worker together with Mr F (the other brother) are aiding Mr D and Mrs D towards proper legal advice with a view to them signing that they no longer wish Mr E to act as their power of attorney in either financial or welfare matters."

SSW1 wrote to a Medical Officer at the Mental Welfare Commission on 21 May 2009 giving an overview of the case and the council's past and current contact. He said that he was "in the middle of investigating and collecting information to Mr E's conduct of their financial affairs and the undue pressure and emotional harm towards Mr and Mrs D. We have now reached a point that both Mr and Mrs D are actually looking to revoke the power of attorney over them as they no longer want Mr E to be involved in their care or manage their finances. I hope that once Mr and Mrs D have revoked their powers we can support them to manage their finances and clear the debt that has incurred by Mr E as power of attorney."

The Commission responded by requesting to be informed when the power of attorney was revoked as well as of any other information relating to future community support arrangements.

SSW1 responded to the Commission by letter dated 10 June 2009. He confirmed that both Mr and Mrs D had seen a solicitor and GP to revoke the power of attorney and he had planned a meeting on 11 June with the Ds, Mr F, the senior health co-ordinator at the CLDT, community support staff, advocates and a police officer from the Family Protection Unit. He said that the purpose of this meeting was two-fold:

"First to give Mr and Mrs D the opportunity to ask questions of a legal nature and to be assured by the police that they have rights as citizens to protection and the right to see or not see who they want. Next for all to agree what steps need to be taken to insure their safety and mental/emotional well-being. Then we will look at the implementation of the agreed support needed to insure that they can have confidence to be in control of their care and finances. My other concern is that it has come to light that Mr and Mrs D have further debts incurred against their name by their former PoA."

He reported that, to date, the OPG had not been able to assist as they could not get any information from DWP. All their income had been going into the account of the former attorney and the OPG could not get any information about this account to gather evidence as to how the money had been spent, "Therefore despite evidence of Mr and Mrs D incurring debt they feel they can no longer assist in this matter and have closed the case."

SSW1 concluded by stating that "This has been a long and frustrating investigation for me and I feel that people like Mr and Mrs D are put at a disadvantage by current legislation and the inability of organisations to act in their interest. Another example is that had it not been for Mr D's brother, Mr F, agreeing to fund their solicitor's bills, they would not have been able to revoke the PoA."

On 11 June, SSW1 wrote to Council A Revenues Department explaining the background to the Ds' financial problems and explaining that any existing debts were incurred by the Ds' continuing attorney. He requested that arrears for Council Tax be pursued with the attorney rather than the Ds. The Revenues Department responded sympathetically saying that they could apply for an exemption from the Council Tax if a consultant could confirm in writing that they both had a learning disability.

On 11 June, Community Charge Nurse 1 wrote to Investigating Officer 1 at the OPG, following Community Charge Nurse 1's attendance at the review meeting earlier that day. He stated, "I have never been at a review where there have been so many alleged abuses carried out by my patient's power of attorney."

He then provided information about the nature of the allegations which for the most part had already been brought to the attention of the Public Guardian. Community Charge Nurse 1 pointed out that the police officer present advised that Mr and Mrs D have their locks changed immediately "as they express fear of the PoA who refuses to hand over keys and may enter their home without permission."

Community Charge Nurse 1 explained how Mrs D had tried in the past to stand up to her attorney. "She struggled to admit how much she feared her PoA and her determination that she had to, at last, stand up for her rights and refuse to be further bullied in the situation as she, today, admitted had gone on for so long. She admitted

that it is not in her nature to confront her PoA and she would find it extremely hard to put down the phone or not answer the door. She feels guilty that all this has happened and she never stood up to him before. At times when she did attempt to confront her PoA she always ended off worse. She today admitted her fear of contradicting her PoA as he has constantly told her that he could put her in an institution if she crossed him." Community Charge Nurse 1 concluded that he finds it "hard to comprehend anything other than this is a direct abuse of the powers given to the power of attorney. I from many hours attending and delivering talks on the role of Financial and Welfare Guardians and in particular the role of the Office of the Public Guardian, see it as my duty to raise concerns with your office."

Revocation of powers of attorney – June 2009

On 15 June 2009, the Ds revoked the power of attorney. In doing so they engaged the services of a solicitor from a different firm from that involved in the granting of the powers of attorney.

On 17 June, Investigation Officer 1 responded to Community Charge Nurse 1's letter explaining the OPG's role and why its involvement ended.

On 18 June, a Mental Welfare Commission Medical Officer wrote to SSW1 explaining that we felt that, while Mr and Mrs D had capacity to grant the power of attorney, they did not have the capacity in respect of relevant matters while the powers were being operated. He also stated that we understood Mr and Mrs D were not aware that they could revoke the powers of attorney until professionals engaged them in this discussion. Even after learning this information, they felt intimidated and lacked the capacity to be able to take the actions necessary to address this problem by revoking the powers of attorney.

On 23 June, SSW1 contacted the Department of Work and Pensions to update them on the revocation of the powers of attorney and the fact that the Ds were now deemed to have capacity to manage their own finances.

Consultant Psychiatrist 1 wrote to Investigation Officer 1 on 23 June 2009 saying that she thought that the OPG would have "a proper interest" in the matter of the attorney abusing his powers under the Act. She said that the issue of the Ds' specific capacity to revoke their powers "is rather more subtly defined." She said that "during that period when they were being very influenced by Mr E … they did not have the knowledge to know that they had the power to revoke the powers of attorney which they had previously signed. This is because Mr E would have chosen not to inform them of their rights in this matter and were therefore being unfairly influenced by him. In fact they were feeling very intimidated and threatened by this person."

On 2 July, the Mental Welfare Commission's Medical Officer wrote to Investigation Officer 1 outlining the Commission's views and concerns. He said that we felt the case could be made that, although Mr and Mrs D were considered to have had capacity to grant the power of attorney, they lacked capacity in respect of relevant matters while the powers were being operated. He also explained, as had Consultant Psychiatrist 1, that for much of the time the power of attorney was in place, the Ds were not aware they could have revoked the powers of attorney and once it was

explained to them, lacked the capacity to take a direct course of action due to apparently feeling intimidated.

On 3 July, Investigation Officer 1 wrote back to Consultant Psychiatrist 1 explaining that as the Ds had revoked the power of attorney they were now free to instruct a solicitor to take any action they wished against their former attorney regarding alleged abuse of the power of attorney. He further added that "it is plain in this case that, in fact, Mr and Mrs D have the capacity to take steps to protect their own financial affairs and indeed have done so, albeit with support."

Investigation Officer 1 also said that the Ds' lack of knowledge of their options regarding the powers of attorney they granted would not be covered by the Act. "The solicitor involved should certainly have discussed the powers Mr and Mrs D were granting at the time of instructing the document and should have been satisfied that both Mr and Mrs D were fully aware of the breadth of the powers they were granting to Mr E."

Mr and Mrs D: Their life following the revocation of the power of attorney

Since the revocation of the powers of attorney Mr and Mrs D have gone from strength to strength. They both feel freer in their lives. Their movements are no longer restricted and they have regained their privacy. They often go on social outings together as husband and wife. Mrs D attends the hairdressers and beauticians on her own and Mr D is able to go out running on a regular basis. They have completely redecorated their flat to their own taste; they go shopping and are able to choose their own food and clothing. Their relationship with each other and with Mr F is also much better. All in all, without the influence of someone using powers of attorney to exert control over their lives, they no longer fear being punished and are no longer afraid of making decisions about their own lives. They are active participants in discussing the care and support they feel is helpful.

Positive aspects of service input:

Despite the comments which will follow on where we feel there could have been better standards of practice in working with the Ds over the years, it was evident that there were a number of positive aspects to the care and services delivered. Throughout the period we examined there was evidence of significant input from day and home support services. It was apparent that the Ds were able to forge good links with a number of individual staff. Those interviewed all appeared genuinely fond of the Ds. The Ds also appeared to benefit from the day and home support services provided. Informal social contacts were formed with Mrs D in particular. Mr D's involvement with a football team supported by CLDT staff, which was and remains extremely important to him, might not have been possible were it not for certain staff going the extra mile and volunteering their time to organise and support the team. Latterly, there was excellent use of Advocacy services on an individual basis for both Mr and Mrs D. An excellent example of this was the manner in which the views of Mr and Mrs D were presented at case conferences and review meetings.

Despite our concerns about some decisions taken and the lack of a clear plan to protect the Ds from the actions of their continuing and welfare attorney, there is no

doubt that, following the events of August/September 2009, considerable effort went into working with the Ds to try to help them negotiate a way out of their situation with Mr E. SSW1 is to be commended for ultimately making the protection of the Ds a priority amidst other work once he had a greater appreciation of the nature and extent of the apparent abuse of the powers of attorney by Mr E. He led the investigation which gathered further evidence on the abuse of the powers of attorney. He also coordinated the subsequent actions and support which helped, in part, to resolve this difficult situation. And, once the scale of the debt run up in the Ds' name became apparent, he and other social work staff put a great deal of effort into having these debts written off.

The social work department, as well as the legal services department in the council, are to be commended for putting together a timeline and using this for discussions/training within the social work department. We are not aware that this process articulated any specific learning points but it is likely to have raised awareness and sensitivity to the issues among staff.

Relevant legislation in place during period under investigation

1. The Mental Health (Scotland) Act 1984 was in effect until October 2005 when it was replaced by the Mental Health (Care & Treatment) (Scotland) Act 2003. In addition to setting out criteria and procedures for compulsory detention, the 1984 Act also set out criteria, procedures and powers in respect of Guardianship. All Guardianship Orders granted three powers: access, attendance and residence. These were all granted to the guardian who could be a private individual or the local authority. These were almost exclusively used by local authorities. Capacity under the 1984 Act was seen as an all or nothing concept: the adult either had capacity or did not.

2. The Adults with Incapacity (Scotland) Act 2000, Part 2, relating to continuing and welfare powers of attorney, came into effect on 1 April 2001. Part 6, relating to Financial and Welfare Guardianship, came into effect on 1 April 2002. Capacity is now defined as relating to specific decisions and/or actions. Of particular interest to this investigation are the powers of the sheriff under sections 3 and 20 of the Act.

   Under section 3, anyone with an interest can apply to the sheriff who has power to "make such consequential or ancillary order, provision or direction as he considers appropriate." This includes:

   - Making any order granted by him subject to any conditions and restrictions he feels appropriate
   - Ordering that any reports relating to the person who is subject of the application or proceedings be lodged with the court
   - Ordering that the person be assessed or interviewed and that a subsequent report be lodged with the court
   - Making further inquiry or calling for such further information as appears to him appropriate
   - Making an interim order pending the disposal of the application or proceedings

- Appointing a safeguarder or representative for the person who is the subject of the application where it is felt by him to be necessary.

Under section 20, anyone with an interest in the property, financial affairs or personal welfare of the granter of a continuing or welfare power of attorney can apply to the sheriff who can, where the matter relates to the adult's lack of capacity to safeguard or promote his interests in, his property, financial matters or personal welfare, exercise the following powers:

- Ordaining that the continuing attorney shall be subject to the supervision of the Public Guardian to such extent as may be specified in the order
- Ordaining the continuing attorney to submit accounts in respect of any period specified in the order for audit to the Public Guardian
- Ordaining that the welfare attorney shall be subject to the supervision of the local authority to such extent as may be specified in the order
- Ordaining the welfare attorney to give a report to him as to the manner in which the welfare attorney has exercised his powers during any period specified in the order
- Revoking any of the powers granted in the continuing or welfare power of attorney
- Revoking the appointment of the attorney

3. The Adult Support and Protection (Scotland) Act 2007 came into effect on 28 October 2008.

Why the law regarding powers of attorney was changed in the development of the 2000 Act

It is important in placing this investigation in its proper context to consider the development of the law concerning powers of attorney, especially welfare powers of attorney, in the Adults with Incapacity (Scotland) Act 2000. There are several important factors to consider. Prior to the 2000 Act, the legal status of an attorney with powers over welfare matters was unclear. The Act established the right to grant such powers and set out various safeguards in relation to both welfare and continuing (or financial) powers of attorney. It was the need for such safeguards that was the impetus for many of the changes that found their way into this Act. The need to modernise the legislation was originally articulated in *The Scottish Law Commission's Discussion Paper No 94 – Mentally Disabled Adults – Legal Arrangements for Managing Their Welfare and Finances* issued in 1991. It is interesting that there was still debate at that point as to whether delegation of personal welfare matters should be permitted. It was acknowledged that the delegation of welfare powers raised ethical issues which were different from those in the financial management field.

The paper emphasised the need for greater supervision and control in relation to powers of attorney than existed at that time. The reasons for this were straight forward and were argued along the following lines:

"As long as the granter retains capacity he or she can monitor the actings of the attorney under a power of attorney and revoke the attorney's appointment if

dissatisfied with the way in which the duties have been carried out. After the granter becomes mentally incapable of carrying out these functions there may be no-one to monitor the attorney's performance. This lack of monitoring may lead to abuse and mismanagement remaining undetected. Furthermore, the knowledge that they are not being monitored may lead some attorneys into temptation. But many elderly or infirm granters of powers of attorney do not exercise any effective controls over their attorneys."

Although the above sounds as though it refers more to situations involving continuing powers of attorney, this is because the law at that time was unclear about attorneys having welfare powers.

Following the response to the consultation on their discussion paper, the Scottish Law Commission issued their report, *Scottish Law Commission Report on Incapable Adults (No 151),* recommending legislative changes. Again, it reflected the widely accepted belief that there was the need for greater oversight and supervision of attorneys. It stated that,

"The main disadvantage is that the attorney, unlike a court appointed guardian, is not supervised and monitored by some public official. As long as the granter remains mentally capable he or she can keep an eye on the attorney's actions. Once the granter becomes incapable he or she cannot monitor the attorney's actions or recall the power of attorney. The satisfactory operation of powers of attorney depends to a large extent on the honesty and integrity of the attorneys appointed. Sadly but inevitably a small minority of attorneys take advantage of the lack of supervision and abuse their position. We consider that powers of attorney which have effect after the granter's incapacity should be encouraged as they promote personal autonomy and prevent legal proceedings. However, there must be adequate protection for granters if powers of attorney are to continue to play a useful role in this area."

The report again asserts that "the delegation of personal welfare decisions raises ethical issues which are absent from the financial management area." The report goes on to recommend a number of safeguards which ultimately found their way into the legislation. These include the formal registration of powers with a central body, welfare powers only being able to be exercised upon the loss of the adult's capacity in relation to specific areas affecting their welfare, an extension of the powers of the courts in respect of powers of attorney, the investigative roles and powers of local authorities and the Mental Welfare Commission and the tightening up of procedures for granting and certifying powers of attorney.

In respect of the latter, the report stated that, "Granters should be fully aware of what they are doing in signing a document conferring a continuing power of attorney or a welfare power of attorney. They are handing over the future management of their affairs or personal welfare to individuals they will be unable to supervise and if necessary dismiss. There may well be no-one sufficiently interested to monitor the attorney...and take steps to terminate the appointment if the attorney acts improperly. We consider that proper measures of protection should be introduced at the earliest possible stage – when the document conferring the power of attorney is signed. The formalities of execution should be such as to ensure that granters are

fully aware of the consequences of creating a continuing or welfare power and that they are not subject to any pressure to do so."

The SLC recommended that the solicitor or other certifying individual should be satisfied that the granter understood the nature and effect of the document conferring the power and that they "had no reason to believe that the document was being signed as a result of anything (such as undue influence) which would vitiate the granting of the power." It was further stated that while a certificate attesting to the granter's capacity should not be mandatory, "if there were doubts as to the granter's capacity an assessment of the granter's capacity by a medical or other specialist should be sought."

The Government's policy statement in advance of the Incapable Adults (Scotland) Bill, *Making the Right Moves,* endorsed most of the SLC's recommendations.

The above is mentioned in some detail to emphasise the intention of the Scottish Parliament in passing the 2000 Act. A core reason for modernising the legislation in respect of powers of attorney was the realisation that there was the need to establish, in statute, fundamental safeguards over their use. These are key to the Act's safe and effective operation. We believe this case clearly and starkly illustrates what happens when sufficient attention is not paid to these safeguards by all those involved.

Analysis, Findings and Recommendations:

We are aware that Council A has taken action to improve its procedures more recently. The implementation of the Adult Support and Protection (Scotland) Act 2007 was the precipitant for many of these changes. Despite this, we believe the particular problems highlighted in this case continue to provide challenges to these services, as well as others across Scotland.

In addition to the recommendations we make to Council A and NHS Board 1, we also direct recommendations to the Office of the Public Guardian, the Law Society of Scotland and the Scottish Government. We think these recommendations, if acted upon, could enhance the existing safeguards in the legislation in respect of Part 2 of the Act which deals with continuing and welfare powers of attorney. They could assist front line practitioners in carrying out their protective functions in respect of adults with mental disorder who risk exploitation as a result of the abuse of this part of the Act.

In respect of the recommendations directed to the Public Guardian, as part of the process of this investigation we have had productive discussions with the Public Guardian about these issues and how they might be addressed. We have been involved with the OPG in providing training to OPG staff on the issue of assessment of capacity and have been liaising closely over changes the OPG is making in respect of standard letters sent out in respect of potential investigations. We will continue to work closely with the OPG, as we have in the past, to ensure that we share our views on areas of mutual interest under the Act to effect best practice.

We have also had preliminary discussions with the Law Society of Scotland and shared a draft report with them. Coincidentally, the Law Society's Update department and the Mental Health and Disability Sub-Committee and the Professional Practice Committee were in the process of arranging a training seminar focussing on good practice guidance on the drafting and execution of powers of attorney and have invited the Commission to contribute to this. We have welcomed this opportunity and hope we can contribute to similar such events in the future.

Key areas of concern

The major areas of concern arising out of our investigation are listed below:

- Assessment of need and risks and the planning of care;
- Case co-ordination and recording;
- Communication between the CLDT and the primary health care team;
- The role of the GP in certifying the powers of attorney;
- The role of the solicitor in the granting of the powers of attorney;
- Assessment of capacity and undue influence;
- The decision by local authority not to intervene under the Act;
- The utilisation of local authority legal advice; and
- The role of the Office of the Public Guardian in investigating alleged mismanagement of the continuing power of attorney.

Assessment of need and risk and the planning of care

Prior to the granting of the powers of attorney

For the purposes of this investigation we were primarily interested in looking at the extent to which the local authority discharged its statutory responsibilities under the Act. To better understand the decisions taken in this respect, we sought to explore the nature of the involvement of statutory services, the quality of assessment and care management, and the process and contribution of all professionals to the assessment of capacity in respect of financial and welfare matters.

We felt it was important to place the early local authority and health service response to the problems experienced by the Ds in the context of the involvement with statutory services prior to when the Act came into effect. We therefore primarily examined the period from 1999 onwards. It was at this point that it was reported that Mr E started to exert a stronger influence over the lives of Mr D and Mrs D and concerns began to emerge as to his impact on the couple.

We also looked closely at that period between when the powers of attorney were granted in 2003 and when they were revoked in 2009.

There is very little recording of the involvement of statutory services prior to 1998. What little there is, aside from notes regarding medical care for physical disorders, is mostly in the form of correspondence. In early correspondence from the psychiatrists who visited Mr and Mrs D following their marriage, there is no indication of significant support from either health or social work. Reports indicated that the Ds appeared to be functioning well with very limited support. Mr D and Mrs D as well as Mr D's

brother, Mr F, said that Mr D's father played a key role in their support up until his death. There is absolutely no evidence that either Mrs D or Mr D has deteriorated cognitively during the years following their marriage until the present day.

Early work focussed to some degree on anger management for Mrs D. There was some mention but no evidence of focused work on relationship difficulties. Some of the focus from the medical side was on the management of Mrs D's epilepsy which was fairly well controlled.

From 1999, however, it was evident from the material we have examined that certain themes began to emerge. These related to Mr E's strong influence on both Mr D and Mrs D; his volatility; his over-critical, at times verbally abusive, approach to Mrs D; his interference with and, at times, withdrawal of Mr D and Mrs D from supportive services; his rejection of Mrs D at times; his interference with medical assessments; his control of their finances; and, his intimidation of Mr D and Mrs D, threatening Mrs D, in particular, with going into an institution if she did not go along with his wishes.

Associate Specialist Learning Disability 1 did moot whether Guardianship or power of attorney should be considered for Mrs D as early as in 2002, when the Act was in its infancy. There is no evidence, however, that this was ever the focus of discussions either within or outside the multi-disciplinary reviews at that point. We could find no evidence of a comprehensive community care assessment at this point in time. The first point at which we came across a 'Single Shared Assessment' was not until 30 June 2004 when it was completed by Community Care Officer 3. Even though the assessment form used for this purpose asked the question whether the person had granted a power of attorney, this section was not completed, despite it being six months after the power of attorney had been granted. It was evident that a care manager was not appointed to co-ordinate the Ds' care throughout most of their involvement with the local authority. It was not possible to trace accurately from case notes when they had an allocated care manager and when they did not.

In interview, Snr Manager 1 said that there was "no care management as such", because of the difficult family dynamics that existed. She said that it was not unusual where community support services provided the main input for there to be no care manager, though she acknowledged that, where such concerns exist, a care manager would normally be appointed. The reason they did not do so in this case for such a lengthy period, she said, was because the Ds "wanted things to be low key, at a distance", due to their concerns about the reaction of Mr E to the involvement of social work. As a result, reviews were often informal, where cases were discussed within the CLDT at weekly team meetings. These often included the community support manager. The recording of these discussions was sketchy at best, with large gaps over extended periods at time. The apparent concerns and possible risks to the Ds were never formally assessed during this period. We discuss recording later in the report.

The concerns for the Ds noted above culminated in Community Care Officer 3 requesting funding for four additional hours of support shortly before the power of attorney was granted. She wrote in the request form that 'The relationship between Mr and Mrs D is very strained; Mr E can be emotionally abusive to Mrs D which results in her becoming increasingly distressed and angry. This abusive situation has

caused tensions between her and her husband and resulted in Mrs D becoming increasingly anxious and low in confidence.' She concluded, 'I have rarely come across such an unhealthy and abusive situation which has caused clients such anxiety. All previous interventions from the CLDT to support Mrs D's situation have failed.' It was marked 'Approved by FB' on 21 July 2003.

Community Care Officer 3's statement was so strong that we sought to find out what the response of her line managers and others was to the statement; one which is repeated in several subsequent requests for funding. It was signed off by senior management without comment and there was no indication of any discussion about Community Care Officer 3's views evident in any case notes or records of multi-disciplinary meetings.

Community Care Officer 3, herself, did not wish to be interviewed. She had moved some years ago to work in another authority. In telephone conversations, she suggested she was using information first recorded by her predecessor, Community Care Officer 4. We contacted Community Care Officer 4 and while he could not recall using the above phrases exactly, he said he felt it did reflect information that was coming to him from a variety of sources at that time and he was not surprised about the wording in the document. He said these forms were forwarded to Snr Manager 1 and there would have been an opportunity to query the assessment; he was not aware that this had happened.

We raised Community Care Officer 3's quote with those we interviewed. None recalled the exact wording. A few felt it was over-emotive and was related to the fact that she was an inexperienced worker and not professionally trained. We were unaware at the time that the quotes from Community Care Officer 3 were likely to have originated with Community Care Officer 4, but no-one mentioned his involvement. Community Care Officer 4 was only involved for a short period in 2000-01.

The fact remains that the strongly held views expressed in this written statement, which alleged significant abuse, were never challenged. It is also the case that it represented, to a great degree, the views of all involved several years later. Community Care Officer 3's statement also closely reflects how the Ds themselves characterised their relationship with their attorney.

Following the granting of the powers of attorney

It was evident that there was a breakdown in the information flow within the social work department once they were notified about the registration of the powers of attorney for Mr and Mrs D. Under Section 19(2) of the Act, the OPG has a responsibility to notify local authorities of the existence of all powers of attorney in their area once they are registered with it. At the time the Ds' powers of attorney were registered, a copy of the entire document was forwarded to the local authority. As stated above, this was done and the document marked as received by the social work department on 22 December 2003. MHO 1 was responsible for receiving and storing these papers at the time. She said that the procedures in place called for her to check to see if the adult was an open case to a social worker or community care officer, and then contact them to see if they wanted a copy of the certificate which

included the powers. She could not confirm that this happened in this case. One explanation for this was that the case might not have been open to an individual worker at that point. Present practice is for staff to take the initiative and enquire about the existence of a power of attorney when they are undertaking a Single Shared Assessment. It is concerning that once the local authority had been made aware of the existence of the powers of attorney, key staff did not appear to be aware of its existence. It is not clear whether the current process ensures this could not happen again.

As a related piece of work in carrying out this investigation, we sought to ascertain how local authorities across the country handle the management of the information forwarded to them by the OPG on registration of powers of attorney. We found that while practices varied across the country, Council A was not, and is not, out of step with many other councils in respect of how they have dealt with, and continue to deal with, information forwarded by the OPG. Many councils need to examine their practice to ensure that staff know how to access this information quickly when they have need of it. Some councils double-check the information against open cases and alert relevant staff accordingly. This is an area which would benefit from a national policy review on the dissemination of this information to local councils, as well as procedures within councils as to how they manage the information once received. The law itself may have to be reviewed to see whether it achieves its purpose in the most efficient and effective manner.

As a consequence of this breakdown in transferring this information to those involved in the Ds' care, key people involved in regular meetings and discussions about the Ds were unaware that the powers of attorney had been granted until some time after the fact. Senior Healthcare Co-ordinator, Learning Disability, for instance, was not aware of it until 2008. Consultant Psychiatrist 1 said she was not aware until some time after they were granted. SSW1, however, apparently was aware of it in 2004. Community Support Co-ordinator 1 was aware of it in September 2005 and possibly earlier than this. Snr Manager 1 said she was not aware of the power of attorney until Mr E lodged a formal complaint with the Council in 2008. Aside from the notification received by the social work department in December 2003, a letter was sent to Council A by Mr E's solicitors in February 2004 concerning the fact that Mr E did not feel the Council was taking sufficient cognisance of his role as welfare attorney. The importance of this still failed to register with those involved with their care.

Some of those interviewed expressed the view that they did not feel the granting of the powers of attorney made a material difference in the way Mr E related to the Ds or in the way the CLDT managed the case.

It was also evident that there was a basic lack of knowledge about the legislation and some confusion on the part of some of the key players. Snr Manager 1 was not aware of the process by which the local authority was notified. A couple of those interviewed confused guardianship with powers of attorney, assuming that the OPG, for instance, would supervise a continuing power of attorney. Snr Manager 1 herself was of this view. (This would only be the case if ordered by the Sheriff following an application under section 20 of the Act.)

Consultant Psychiatrist 1 did not think the welfare powers could be exercised by Mr E until the Ds lost capacity, which they had not done. Community Care Officer 3 echoed this view in September 2005 when she is reported as saying that although Mr E had power of attorney for the Ds, she could not act until they lost the capacity to make decisions for themselves. This is not the case as the welfare attorney may act, unless otherwise specified in the order, when they reasonably believe that the adult is incapable in relation to decisions or actions about the matter to which the welfare power of attorney relates. In respect of continuing powers, the attorney can act as soon as the power is registered unless specified otherwise in the order. It is not surprising that some confusion emerges here given the way the law is framed. At present the granter only has to stipulate that they considered how their incapacity is to be established before welfare powers (and continuing powers in the case where continuing powers are only to be triggered by the granter's incapacity) can be used by the attorney – they do not need to state exactly how they would wish their incapacity to be established.

Findings:

For a protracted period prior to the granting of the powers of attorney, there was neither a comprehensive assessment of the Ds' community care needs nor an associated assessment of risk, despite concerns coming to the attention of local authority and health staff.

There were, as well, significant failures in the assessment and care planning process during the period between the granting of the powers of attorney and the events of August-September 2008.

There are a number of inter-related factors that may account for these failures, which we discuss further below: poor communication, which affected the quality of risk assessment and risk management; lack of awareness of the existence of the powers of attorney; lack of knowledge and misplaced assumptions about the functioning of the Act and the relevant sections of the Act intended to provide potential safeguards where concerns exist about the management of a power of attorney; and, poor coordination of care.

The very serious and concerning statements made by Community Care Officer 3 about the abusive relationship between Mr E and the Ds were never formally addressed in any way. This was despite local authority senior management signing off the forms requesting funding on which these statements were made and repeated at several different points subsequently.

Case co-ordination and recording

Poor case recording and the lack of a lead person coordinating the assessment and care management of the Ds undoubtedly affected the quality of the communication between primary care and the CLDT. It also affected the quality of the assessment and established patterns of response which were influenced by certain assumptions that were made and not subsequently challenged. Those involved appeared to have made a fundamental assumption that was key to the management of the Ds' case before and after the powers of attorney were granted. This was the belief that had

statutory services taken a more interventionist approach, this would have resulted in Mr D having to make a choice between his brother, Mr E, and Mrs D, and that he would have chosen Mr E. They also believed that Mrs D feared this as well and she was making a conscious decision not to rock the boat.

What was evident from the interviews of the staff involved was the difference in views as to the relationship between the Ds and Mr E. Some thought there was no benefit to the Ds in this relationship, that it was always one of bullying, to a greater or lesser degree. Others thought that Mr E was helpful and supportive at times, "a positive link" to Mr D's family and that they were often seen in town, "having a bit of banter." Others saw it as a bit of both, pointing to Mr E's volatility - "sometimes benign, sometimes pathological" as one interviewee put it. Some thought that the Ds, particularly Mrs D, were fearful of Mr E. Others did not believe there was an element of fear. Most staff interviewed seemed to be aware that Mr E used the threat of having Mrs D returned to an institution to keep her in line. The Ds, however, in discussion with us, deny that there were ever any positive aspects to the relationship and were quite clear about the fact that they did fear Mr E. There is little doubt that the Ds appeared to give mixed messages to staff at times about their views on Mr E's continued involvement. While we believe this was as a result of the great pressure they felt in trying not to provoke an angry response from Mr E, there is little doubt that it affected the assessment of social work and the CLDT.

The approach of those working with the Ds was based, to some extent, on a limited knowledge of them as individuals. This was more the case, it appears, prior to the events of September 2008. The lack of an articulated assessment of concerns that had emerged over the years meant that the real nature of the relationship between the Ds and Mr E was never properly explored. This was true in respect of the management of their finances and the control Mr E exerted over many actions and decisions concerning basic aspects of their personal welfare. These decisions concerned such matters as who they could associate with; their freedom of movement; their right to privacy and family life; and, their choice of food, clothing and other personal effects. Fundamental to this detached, hands-off approach by statutory services was the deference to apparent choices being made by the Ds and their perceived ambivalence towards Mr E. The approach was one that started early on in the involvement of statutory services and persisted well into 2008, when efforts began to be made to address the perceived abuses of the powers of attorney. A significant factor affecting the management of the case which resulted from the above was, we believe, an assessment of the capacity of the Ds which was fundamentally flawed. We deal with the assessment of capacity later in the report.

The most significant failure in respect of the recording of the involvement of statutory services is evident in the large gap in case notes between January 2006, when a community support worker witnessed a worrying confrontation between Mr E and Mrs D, and the next substantive case note entry in August 2008. There is no other mention of the above incident and there were only two entries found during this period of over 30 months in the social work chronology produced by Council A. This was for 30 January 2006 and 23 February 2006. The former simply referred to a 'review meeting', but there is no other information about this meeting. The latter referred to another review meeting and only noted 'no different issues. Very good review. Mr D was very distressed and anxious. Further relaxation needed to be

noted as a future goal.' Similarly, in health records, aside from a few entries relating to physical health care issues, very little else is recorded during this period.

Another concerning matter relating to the recording of information on the Ds' care is the apparent loss of communication books that had been kept by Community Support Services. We heard various accounts about how and where these books were kept. They were used by community support worker staff to keep each other abreast of any significant news relating to their work with the Ds. Snr Manager 1 said it was standard practice that the coordinator reviewed the communications books regularly. She confirmed that these would have held useful information and have provided evidence which might have been of use in taking the matter to court subsequently. She confirmed the books could not be found.

We have been told that Community Support Worker 5 kept the communication books herself as Mr D did not like them in the house. Community Support Co-ordinator 1 told us in interview that Community Support Worker 5 had handed in one of the books and that she had gone off sick and subsequently retired, but might have handed in other books. Community Support Manager 1, told us in interview that they have contact sheets for each service user and, usually, a communications book in people's houses. She said they didn't have a communications book in the Ds' house, at least latterly, because it upset Mr and Mrs D if Mr E read it.

When asked in interview what happened to the communications book, Community Support Manager 1 said that they were normally stored in their archive but that they had moved three times and that three boxes of communication books had disappeared. When we followed up on this issue subsequently, we were told that Community Support Worker 5 did not keep a communications book in the Ds' house in 2004. She kept a book for recording notes following some visits and these were photocopied where appropriate and retained. Other significant information, she said, was recorded in contact sheets, which were in the files we read.

As stated above, there was very little that was recorded during a 31 month period between January 2006 and August 2008. Mr D says they did keep books but that he destroyed the one that had been left with him. While it has been difficult to ascertain the recording practice and procedures of the Community Support Services during this period, one thing that is obvious was that, again, there were large gaps in recorded information. There is also the possibility that communication books containing details about the Ds' care were among the three boxes of material lost from the archives. Given the central role played by Community Support Services in the care of the Ds, the loss of these notes, and the lack of other substantial recording, is concerning. It is also concerning as this involves the loss of confidential client information.

Findings

Poor case recording and the lack of a lead person coordinating the assessment and care management of the Ds undoubtedly affected the quality of the communication within and between services. It also affected the quality of risk assessment and risk management.

We believe that the absence of any detailed notes for an extended period, and the loss of potentially useful information in communication books used by Community Support Services, amount to a major deficiency in the basic governance over this area of social work activity and responsibility.

Communication between the CLDT and the primary health care team

Prior to the granting of the power of attorney

The real significance of this, when viewed in the context of the subsequent granting of the powers of attorney, lies in the fact that the concerns about Mr E's relationship with the Ds as they emerged were not, for the most part, brought to the attention of the GP. When the GP received a letter from Mr E's solicitor on 16 July 2003 asking her views on whether Mr and Mrs D had capacity to grant continuing and welfare power of attorney to Mr E, and whether they would be subject to any undue influence in doing so, she was lacking this vital information to inform her assessment.

The communication between the CLDT and the GP appeared to be minimal. When we asked the GP about the nature of the relationship between primary health care and the specialist social work and health care staff, she said that if she ever had a problem it was easy for her to speak with someone. She added, however, that she was not aware that they held formal case conferences until she received notes of these recently. She added that as she was part-time, not all the correspondence might have come to her attention at the time. The GP said that GPs at the practice are not involved in multi-disciplinary meetings where they meet with people regularly, so she does not always know what is going on with a couple such as the Ds. She acknowledged that communication could be improved but pointed out that the Ds were only two of the 11,500 patients in the practice.

The GP could not recall the correspondence from Associate Specialist Learning Disability 1 in which he referred to the possibility of 'emotional coercion' by Mr E. She had no knowledge of Community Care Officer 3's statement and could not recall receiving a letter from Senior Healthcare Co-ordinator, Learning Disability from the CLDT informing her that Mr E wanted to stop community support services for Mr D because of a perceived medical condition. The GP had, in fact, seen this letter and had responded that there was no medical reason for stopping services, but she could not recall this correspondence.

Consultant Psychiatrist 1, in interview, expressed surprise that the GP did not ask for a specialist opinion at the time she was approached re the granting of the powers of attorney because of the issues raised in correspondence around 2002. She did add, however, that the Act was very new at that stage. While Consultant Psychiatrist 1 felt that the Ds had capacity to grant the powers of attorney, she said the question of whether Mr E exerted undue influence over the Ds in relation to the granting of the powers of attorney was a little more difficult. She said she would have had some qualms, although she had no actual evidence on which to base an opinion.

Following the granting of the powers of attorney

There was undoubtedly a key failure in communication regarding the granting of the powers of attorney. There were fault lines running between Community Support Services and the CLDT that impaired the regular sharing and analysis of information to allow for a proper reassessment of risk and associated care needs, and the development of new care plans to respond to these changes. (It appears the keeping of separate files by Community Support Services is still an issue in the department.) As a result, the multidisciplinary team involved in the care of the Ds never discussed the implications of the granting of the powers in any case reviews until September 2008. This allowed for the false assumptions made by many staff about the implications of the granting of these powers to persist for an extended period.

During a time when concerns about the adverse influence of Mr E on the welfare of the Ds and the management of their finances were repeatedly documented, there was no discussion within the multidisciplinary team about whether the social work department should intervene, nor was there an examination as to what legal mechanisms might assist them in managing these risks. The first occasion the Council's legal services heard of this case was in 2008. This is discussed in more detail later.

Communication was further hampered by very poor recording and lack of co-ordination of what was recorded. There were large gaps in the record keeping in this case which the social work department could not explain. Recording after the events of September 2008, however, seemed much more thorough and co-ordinated. As outlined above, concerns about the Ds existed for a number of years and were recorded on an intermittent basis over a number of years.

Findings

The CLDT had concerns about Mr E exerting undue influence over key areas of Mrs D's and Mr D's lives for several years prior to the GP being asked to confirm their capacity to grant the power of attorney and that they were not subject to undue influence in doing so.

The CLDT failed to more closely involve the GP in case discussions and reviews of the Ds or inform her of the outcomes of these.

This inadequate communication between the CLDT and the primary health care team meant the GP was not aware of the nature and extent of the CLDT's views of the adverse influence Mr E often exerted in respect of the Ds. This affected the quality of the GP's assessment of the Ds' capacity to grant a power of attorney and to do so without undue influence.

Prior to the powers of attorney being signed and registered, the CLDT was not made aware of the correspondence from Mr E's solicitors to the GP enquiring about the Ds' capacity to grant a power of attorney and whether they may be subject to any undue influence in doing so. Given the nature of the relationship and patterns of communication between the CLDT and the primary care team this is, perhaps, not surprising

Poor communication and recording and poor coordination of care affected the quality of risk assessment and risk management following the granting of the powers of attorney.

The granting of the powers of attorney

The role of the GP:

Although Part 2 of the Act relating to the granting of powers of attorney had been in effect since April 2001, the difficulties surrounding the granting of the powers of attorney in November 2003 were undoubtedly made worse by the relative newness of the legislation. The law changed significantly in some aspects with the introduction of welfare powers of attorney and the creation of continuing powers of attorney in respect of financial matters. The effective role of the medical practitioner when being consulted about the ability of an adult to grant a power of attorney, however, remained essentially the same as it would have been under previous legislation in respect of the task of assessing the capacity of the adult. As well as making an assessment of the adult's ability to understand the nature and extent of what they were agreeing to, however, the medical practitioner would now have to consider the question of 'voluntariness' of the person granting the power of attorney. Care had to be taken in case a person close to the granter was having an unhelpful influence over the patient and may have been exerting pressure to consent.

What appears clear is that while most of those involved in the Ds' care and treatment would accept that Mr E had been exerting an undue influence on the Ds re the granting of the powers of attorney (excluding, at that time, the GP), they all believed as well that the Ds had the capacity to grant the powers of attorney. There did not appear to be any consideration as to whether the learning disability of each of the Ds might have affected their capacity to withstand any undue pressure that may have been put on them. That said, the GP has stated that she did not feel at the time that they were being unduly influenced and that they did understand the nature and extent of what they were agreeing to. She acknowledged in interview that, in retrospect, they might not have felt able to express their true feelings about signing the powers of attorney.

The Ds, in interview, said that they had not been informed by Mr E about his wish for them to grant powers of attorney in his favour in advance of the meeting on 20 November 2003 at the GP's surgery. They said they were told at the meeting it was to help sort out their bills. They did not recall any discussion about welfare powers. There is very little recorded in the medical notes regarding this.

There is an entry in Mrs D's notes on 31 July 2003 stating, "Brother-in-law looking for power of attorney. Needs letter. I am unable to do today and will find out." There is a further entry on 13 November which states, "Discussion re power of attorney. Able to sign." There is no indication of who this discussion was with. The GP thought that she had discussed this with Consultant Psychiatrist 1 at the time but Consultant Psychiatrist 1, in interview, had no recollection of this. There is no entry in the GP's notes for the day when the meeting re the granting of the powers of attorney took place.

The GP had known both Mr E and Mr and Mrs D since around 1997, although she said she knew Mr D better than Mrs D. In interview, the GP said that she spoke to Mr D and Mrs D on their own before signing the certificate, but after first speaking to the solicitor about "what she needed and what they were doing." She said she recognises now that they may not have felt free to say that they were unhappy about signing the certificates. She did check with them, she said, that they knew what the power of attorney meant and that they were content for Mr E to look after their financial affairs and their welfare.

The GP said that she did not have any concerns about Mr E exerting any undue influence at that point. She said that when she saw Mr D and Mr E together, the relationship appeared to be very positive and Mr E always appeared to have Mr D's best interests at heart. The GP said that with her knowledge of the case now and her greater experience of the legislation, she would approach the matter differently. She said she would probably be less comfortable signing the certificate in the same circumstances now. She would take more care to obtain background knowledge on the adult(s) by speaking to a wider range of people including health and social work to ascertain whether there were any concerns. She added that while she sees a number of people with early dementia in relation to the granting of powers of attorney, she seldom has such requests for people with a learning disability.

When asked about guidance that existed then or at present to assist her in these assessments, the GP said she was not aware of any. Most of the information she receives comes from speaking to colleagues. She added that neither she nor her colleagues in the primary care team are happy about dealing with powers of attorney because of the pressure which lawyers and others involved in the process exert. The GP said that guidance on GPs' certifying powers of attorney would be very welcome if it were in a format and place that could be easily accessed.

There are relevant publications by the General Medical Council and the British Medical Association covering this general area of practice. Unfortunately, they do not go much beyond merely stating the basic requirements of the legislation. The OPG also publishes a *Quick Guide for Registered and Licensed Medical Practitioners,* focussed on the medical practitioner's role in relation to powers of attorney. Again, while helpful in itself, this is a very basic guide which gives links to other practice guidance, none of which addresses the ethical and practice issues faced by GPs placed in the GP's position in this type of situation.

Findings

There was ample evidence in the case file material alone for those staff involved (perhaps, aside from the GP) to realise that Mr E routinely, and for an extended period of time, exerted considerable influence, and often control, over many areas of the Ds' lives during the time they were known to statutory services. At times, and in the presence of some professionals, it appears from what we have been told that this influence could be subtle. We believe, however, that this influence which was often referred to in the case files and described by a number of staff interviewed, played a crucial role in the Ds' decision to grant the powers of attorney.

The GP met with the Ds on their own for the purposes of preparing the certificates of capacity. This is good practice. We feel, however, it is unlikely that the Ds understood the full extent and implications of the four general powers and 26 specific powers they were granting to Mr E. While the solicitor present when the documents were signed, Solicitor 1, indicates that she did discuss the differing aspects of Continuing and Welfare Powers of Attorney with the Ds, we do not believe from our discussions with them, and from what we have learned of them from an extensive review of their health and social work files, that they would have been able to understand what was being said in any depth.

Given what we have read about the Ds from the case files, heard from those we interviewed and learned from speaking to the Ds themselves, we feel it is very likely that, despite speaking to the Ds directly, the GP's views were influenced by Mr E. The Ds claimed he often spoke for them when they went to see the GP and that they were frightened to challenge him generally. In his presence, it was difficult for them to speak their own minds when this meant confronting or disagreeing with Mr E. In interview, the GP stated that she now appreciates the Ds, while agreeing to sign the powers of attorney, might not have felt able to express their unhappiness about doing so.

The GP did not have any further discussion with other professionals involved with the family, did not make any other enquiry and did not consider the relevance of previous correspondence from the CLDT when considering the issues of both capacity and undue influence as they related to the granting of the powers of attorney. As we have pointed out earlier, though this was unfortunate given the consequences, it is, perhaps, somewhat understandable given the nature of the relationship and patterns of communication with the CLDT.

The role of the solicitor:

On or around July 2003, Mr E consulted and instructed a firm of solicitors in connection with Mr and Mrs D granting welfare and continuing powers of attorney in his favour. According to the letter from the solicitors to the GP, Mr E had previously consulted another firm of solicitors in this respect. Mr and Mrs D did not have a solicitor.

The firm wrote to Mr and Mrs D's GP on behalf of Mr E, seeking confirmation as to whether they were capable of understanding and granting continuing and welfare powers of attorney. Although the letter also mentioned that the Ds must be seen not to be acting under any undue influence, the GP was not asked expressly in that letter for her views on the presence of any undue influence. The letter goes on to state that while a certificate can be signed by either a solicitor or a registered medical practitioner, where there is any element of doubt as to whether an individual has capacity to grant a power of attorney they would prefer the certificates are signed by the granter's doctor. Implicit here is that they did have some doubt as to their capacity. It is not clear why they would have had this doubt but it was not based on having seen the Ds prior to this.

The actions of the solicitors were, in this respect, in keeping with the relevant aspect of the guidance (section c) issued by the Law Society of Scotland's Professional Practice Committee:

"The Professional Practice Committee reminds solicitors (a) that a solicitor must have instructions from his or her client (b) that the client is the granter of the Power of Attorney and (c) that solicitors are not the judges of mental capacity. That is for the medical profession from whom advice should be sought if there is any doubt as to a client's capacity."

The GP responded stating that she felt that the Ds did have capacity, but she would need to see them for this purpose. She did not comment on the question of undue influence.

The solicitor subsequently advised that the certificates required to be signed by the GP at the same time that the power of attorney documents were being signed by Mr and Mrs D. She said one of the firm's solicitors would meet with the couple to go through the terms of the power of attorney. A meeting was arranged at the GP surgery for both this purpose and for the GP to complete the relevant Certificates of Capacity.

Solicitor 1 met with the couple at the GP's surgery. Solicitor 1 is quite clear that she did discuss the details of the continuing and welfare powers with the Ds and that they both were happy to agree to these powers. She did state, however, that this discussion, which appears to have been the first time she actually met the Ds, took place in the presence of Mr E who was said not to have contributed to the discussion.

The solicitor stated in the power of attorney certificate granted by Mr D that he was unable to sign the document but that the document had been "read over" to him by his solicitor. This is confirmed in Solicitor 1's correspondence with us. The document listed 4 general powers, 17 specific continuing powers and 9 specific welfare powers. Mrs D's certificate did not contain a similar statement as she was able to sign it. She is noted, however, as having limited reading skills. The Ds said they had never seen this paperwork before or discussed its contents before the meeting at the surgery. It appears that the powers were drafted in advance without the Ds having been involved in any previous discussion with Solicitor 1 or anyone else from the firm. The Ds only recollection of what they were told was that this would help them avoid getting into debt. They said they were advised to sign the power of attorney documents.

The GP completed the relevant statutory Certificates of Capacity to accompany the power of attorney documents certifying that she was satisfied both that the couple had the relevant capacity to grant the powers of attorney and that they were not subject to any undue influence.

As stated, the solicitor did follow the guidance of the Law Society of Scotland by seeking the GP's view on the capacity of the granters in this case as there was some doubt as to their capacity. We have some concern, however, that it is not at all clear

that they were taking instructions from the Ds, despite the assurances given by Solicitor 1 in her correspondence with us.

The Law Society of Scotland's guidance, despite being useful on a very fundamental level, is, nevertheless, very scant and does not address a number of key questions and practice issues of relevance in this case for solicitors. This guidance was developed prior to the passage of the 2000 Act and does not take account of the fundamental changes in the legislation, especially in relation to welfare powers of attorney and the need to determine whether the granters are being subjected to undue influence.

Although it was evident that the solicitor knew that the question of undue influence had to be addressed and had asked the GP for her opinion as to whether the Ds may be acting under undue influence, it is not clear whether the solicitor herself had any view on this. Guidance from the Law Society of Scotland is silent on this matter. The statement in its Professional Code of Conduct for Solicitors that is of direct relevance here is the statement that, "A solicitor should accept instructions only from the client and not from a third party on behalf of a client." The question of undue influence or other 'vitiating' factors is not addressed.

We believe that there is a professional obligation on the part of the solicitor to get competent instruction from their client and to assure themselves that these instructions are not affected by any undue influence of a third party or any other factors which may impact upon the granter's freedom to make an informed choice. While we have no reason to believe that the solicitor suspected any undue influence, it was evident that they did have some question as to the Ds' capacity to grant the power of attorney. As with the GP, we feel it is likely that Solicitor 1's views of the Ds' position in this matter were heavily influenced by their client, Mr E.

We have a certain amount of sympathy for Solicitor 1 in this process and it is clear that she rightly sought a medical view on capacity and undue influence. She, herself, was not in a position to appreciate how the Ds' learning disability may have affected their ability to comprehend what was being explained to them. She would also have had no reason to believe that the relationship between Mr E and the Ds was anything other than what Mr E presented and the Ds appeared to confirm. We do, however, have concerns that the Ds had not been seen separately before the meeting at the surgery and even during the meeting at the surgery. It is not at all clear that they were given the necessary time and support to assist them in more fully understanding what they were agreeing to. Solicitor 1 saw the Ds in the presence of Mr E. While Solicitor 1 may have had no reason to believe that this would have influenced the Ds in their decision to agree to the granting of the powers of attorney, we are clear that it is very likely they would have been fearful of objecting in the presence of Mr E. It would have been prudent for Solicitor 1 to have seen them on their own. One thing that appears very clear is that the idea of granting powers of attorney was not one that originated with the Ds. There is no evidence that they knew anything about it before the meeting at the doctor's surgery when the documents were signed.

The Law Society (England and Wales) has a quite extensive practice note on Lasting Powers of Attorney which addresses this and other practice issues. Specific caution

is urged in respect of the granting of welfare powers in this practice note as a welfare (lasting) power of attorney "could be a very powerful document because of the wide ranging decisions that could be made on behalf of the donor and therefore clients need to make an informed decision about the scope of the power." The Ds recalled no discussion about welfare powers even though the document was read to them by the solicitor.

It is also of interest that The Law Society (England and Wales) practice note also states that, "When advising clients of the benefits of LPAs (lasting powers of attorney), the solicitor should also inform them of the risk that the attorney(s) could misuse the power." The practice note also outlines questions the solicitor should address with the granter as to how they might wish to frame the powers of attorney.

The practice note further advises that "Solicitors should discuss with the donor appropriate measures to safeguard against the power being misused or exploited. This could include notifying other family members or friends (who are not named on the prescribed form as someone to be notified) of the existence of the power, why they have chosen the attorney(s) and how the donor intends it to be used. This may help to guard against the possibility of abuse by an attorney and may also reduce the risk of conflict between family members at a later stage."

There is very little in the Act's *Code of Practice for Continuing and Welfare Attorneys* that offers any guidance to a solicitor or medical practitioner certifying the granting of a power of attorney, other than a few statements which paraphrase the legislation. The Code is written for those granting the power of attorney and for those who are or will be acting as attorneys. It is based on some key assumptions, such as the granter being an informed, capable individual who is initiating the action. Another assumption is that the granter and the prospective attorney are operating on the basis of trust. It is worth looking a bit more closely at the Code of Practice to truly appreciate how far the reality of this process veered from that which the law and the associated Code of Practice envisaged.

Chapter 2 of the Code of Practice addresses the involvement of the prospective attorney at the time of granting. It actually places the onus of good practice on the granter, stating, "...it is good practice for you to discuss with the person what being an attorney involves." The purpose of such a discussion is "to ensure:

- You and the prospective attorney have the same understanding about what you want to happen in the event that you become unable to make decisions or act for yourself at some point in the future;
- You offer sufficient powers to ensure that your attorney can do what you would wish
- It is clear whether you want a continuing power of attorney to be exercisable immediately (i.e. before incapacity) or only to start at the onset of capacity."

The Code goes on to state that "if you are appointing a welfare attorney you should ensure that he/she knows your likes and dislikes and personal welfare concerns fairly thoroughly." It then proceeds to list 11 different issues relating to the granter's views and preferences and relevant information that he/she would wish the attorney to know "in the course of building up your relationship of trust."

The Code of Practice and the Law Society of Scotland's guidance are each, in fact, less than helpful when it comes to the reality of the way in which many powers of attorney originate. Solicitors and medical practitioners are often approached by concerned relatives on behalf of the granter to certify the granting of a power of attorney certificate. In many cases, this may well be a legitimate way to proceed as the adult may have the capacity to understand the reasons for and implications of granting a power of attorney but wish their relative to make arrangements on their behalf. The fact, however, that this is often the way that powers of attorney are initiated underscores the need for guidance that specifically addresses the particular cautions that practitioners need to take when approached in such circumstances. It is not the case that they can simply always assume the relative, as prospective attorney, has the adult's best interests at heart.

Findings

Mr and Mrs D were unaware as to the reason for their attendance at the GP surgery on the day when they were asked to grant the powers of attorney.

Whilst it appears that steps may have been taken by Mr E's solicitor to explain the contents of the documents to Mr and Mrs D immediately prior to their signing of the documents, given both the circumstances of this and the couple's learning disability, they would have been unlikely to challenge this or to comprehend the implications of the granting of these powers. This would be particularly relevant in the event of the prospective attorney exerting undue influence over them at the time of the granting of the powers in his favour. This should also be considered in the context of the limited reading skills of Mrs D and Mr D's inability to read.

The granters did not appear to have their own, separate legal advice at any time during the process, nor did they appear to have any input into the drafting of the particular powers that they were granting. Accordingly, there was no real opportunity for them to have input into the documents unless they had raised any specific objections when the powers were discussed with them at the meeting with Solicitor 1 at the surgery. We feel there must be considerable doubt that the Ds were ever effectively instructing Solicitor 1 in relation to the granting of the powers of attorney.

When viewed in the context of the Code of Practice it is clear that the process by which these powers of attorney were granted was at considerable variance from that which the legislation intended.

The Code of Practice for Continuing and Welfare Attorneys and the Law Society's guidance do not address sufficiently the role of those certifying the granting of powers of attorney. While we have concerns about the actions of the solicitor and the GP, we acknowledge that the nature of the guidance available to them made their task more difficult.

Assessment of Capacity and the Presence of Undue Influence

One decision, in particular, had significant consequences for the subsequent management of this case and the associated risks. This was the decision to defer to

Mrs D on whether to seek revocation of the power of attorney. The reasoning behind this, we assume, was the previously stated belief that Mr and Mrs D had capacity in respect of any decisions relating to matters concerning their personal welfare. Furthermore, those working with the Ds held the view that their capacity had not changed since the granting of the powers of attorney. And, as Snr Manager 1 in a letter to Mr E's solicitors stated, "One would therefore conclude that if they had the capacity at the point of granting the Order they still have capacity now." We believe that while the capacity of the Ds may not have changed over time since the granting of the powers of attorney, there remains a question as to whether they had capacity to grant these powers to begin with. This has to be viewed in respect of our previously stated concerns about the lack of information which the GP had before certifying that the Ds had capacity to grant the powers of attorney and were doing so without being subject to undue influence.

Consultant Psychiatrist 1 first wrote to the OPG's Investigation Officer 1 in November 2008, in response to his request for her "informed opinion as to this couple's capacity to manage their own financial affairs both now and in the recent past." Consultant Psychiatrist 1 expressed her views about the extent of their impaired capacity in relation to financial matters. She also said that "while in every respect she (Mrs D) has the capacity to rescind her original agreement, she is nevertheless easily stressed and feeling under threat. She is fearful that the person concerned will "take it out on" her husband, Mr D and indirectly on her."

In a subsequent letter to Investigation Officer 1 sent in June 2009 after the power of attorney had been revoked by the Ds, Consultant Psychiatrist 1 drew a distinction between the Ds' capacity to grant the power of attorney and their capacity to revoke it. She was somewhat more circumspect when it came to the question of the Ds' capacity to revoke the powers of attorney. She said that, "During that period when they were being very influenced by Mr E (to whom they had granted powers of attorney) they did not have the knowledge to know that they had the power to revoke the powers of attorney which they had previously signed. This is because Mr E would have chosen not to inform them of their rights in this matter and they were therefore being unfairly influenced by him. In fact, they were feeling very intimidated and threatened by this person...It is fortunate that since that time, and with additional information being given to both Mr and Mrs D, and more specifically an intervention from Mr D's other brother, they felt able to revoke the powers of attorney (without the fear of being somehow punished by being "sent to a home" by Mr E)."

Essentially there are two separate but inter-related issues here. The law states that not only must the adult granting the power of attorney have the capacity to understand the nature and extent of the powers being granted, but that there must also be no reason to believe that "the granter is acting under undue influence or that any other factor vitiates the granting of the power." Leaving aside the question of the capacity of the Ds to grant the powers of attorney in the first place, of which we remain doubtful, it would appear that there is little doubt they were subject to undue influence both at that point and following the events of September 2008. It also is likely that the presence of other factors such as misrepresentation and duress played a part in the Ds' signing of the power of attorney documents.

There was no reference to the issue of capacity in the notes or action plan from the 16 September meeting. Later reference, however, by SSW1 in a memo of 26 January 2009, stated that at this meeting it was concluded by the CLDT and Consultant Psychiatrist 1 that Mr and Mrs D had capacity in regard to welfare decisions but not financial. This view was fundamental in limiting available options for the management of the care of Mrs (and Mr) D.

Although we believe it remains doubtful that Mr D and Mrs D ever fully understood the nature and extent of the powers of attorney they were granting, this was the decision taken by both the GP and subsequently supported by Consultant Psychiatrist 1. The GP obviously was questioning her original assessment when asked subsequently by the Office of the Public Guardian about the Ds' capacity and she deferred to the judgement of Consultant Psychiatrist 1. Consultant Psychiatrist 1 did discuss this within the multidisciplinary team and there appeared to be a clear consensus that both of the Ds were able to make decisions in respect of their own welfare, though not, perhaps, in relation to management of finances, except at a basic level.

The definition of incapacity under the Act:

Before discussing any further the assessment of capacity, 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 incapable of:

f) acting; or
g) making decisions; or
h) communicating decisions; or
i) understanding decisions; or
j) retaining the memory of decisions.

Consultant Psychiatrist 1 in interview said that, in absolute terms, Mrs D must be said to have capacity. We discussed with Consultant Psychiatrist 1 the complexity of determining to what extent Mrs D's learning disability would impair her ability to withstand being "bullied". Consultant Psychiatrist 1 said this could have been as much a factor of her personality as her learning disability, but added that her personality did not evolve without the influence of her learning disability. She felt that her experiences in growing up with a learning disability probably led to her having poor self-esteem and she probably expected to be bullied by others to some extent. This, she felt, was not directly related to her level of learning disability, but was a secondary experience of growing up as a person with a learning disability at a time when society held much less enlightened attitudes towards people with a learning disability.

It is very important to consider the elements of having the capacity to act here when making a determination about an individual's capacity. Considerations of capacity by medical practitioners too often rest almost solely on the person's ability to comprehend the nature and implications of decisions or actions that need to be taken. It appears that Consultant Psychiatrist 1 did not believe that Mrs D's learning disability directly affected her capacity to act in relation to granting or revoking the power of attorney. We believe that it is a very difficult and potentially confusing and

unhelpful construct to completely separate the issue of capacity due to a learning disability from that of undue influence.

As Consultant Psychiatrist 1 states, the personality of someone with a learning disability does not evolve independent of the influence of that learning disability and the response of the world around the person to their learning disability. The individual's personal resources, their confidence, their feeling of self worth, the quality of their judgement and the presence of personal and material supports and their ability to call on these supports as needed, will all be related in some way to their learning disability. It is also the case that as a consequence of the individual's learning disability, they may often be more dependent on the advice, guidance and support of others than those without a learning disability.

All these factors may well affect the vulnerability and susceptibility of the individual with learning disability to undue influence. And this undue influence directly affects the capacity of the person to act as someone not so affected by a learning disability would act in such circumstances. It is the inclusion of the "acting" component in the definition of incapacity in the Act which ties the concepts of incapacity and undue influence together. Except in cases where an individual is profoundly cognitively impaired by their mental disorder, capacity has to be seen as a dynamic concept. Just as emotional and practical support can enhance an individual's capacity to make a decision or take an action, undue influence can impair an individual's capacity to make these decisions or take these actions.

Undue influence

Despite the above it is useful to look at what should be considered in determining whether the actions or decisions of a person with learning disability (or, indeed, other mental disorders) are being compromised by the presence of undue influence. While the concept of undue influence may be complicated by various legal interpretations which derive more from decisions relating to the signing of wills and contracts, for example, it might be helpful for medical practitioners and others certifying certificates granting powers of attorney to step back and take a more basic, common sense approach to this issue rather than one dictated by case law. The National Committee for the Prevention of Elder Abuse in the US in writing on *Mental Capacity, Consent and Undue Influence* says, "Simply stated, undue influence is when an individual who is stronger or more powerful gets a weaker individual to do something that the weaker person would not have done otherwise." They go on to state that, "The stronger person uses various techniques or manipulations over time to gain power and compliance. They may isolate the weaker person, promote dependency, or induce fear and distrust of others." They further comment that "Diminished capacity may contribute to a person's vulnerability to undue influence."

The IDEAL model is a widely used model in the US for determining the presence of undue influence. It examines those psychological and social factors which commonly exist in situations of undue influence. These factors are:

Isolation, Dependency, Emotional manipulation and/or exploitation of vulnerability, Acquiescence and Loss.

It is clear that the factors outlined above have a resonance in this case and their close consideration may have prevented some of the abuses of power that came about as a result of the granting of the powers of attorney.

Findings

We do not believe that the assessment of the capacity of the Ds to grant or revoke the powers of attorney properly included a consideration of their capacity to act to protect their own interests.

We also believe 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 to act to protect their interests in respect of the granting or revoking of the powers of attorney.

Decision by local authority not to intervene under AWI Act

One of the key questions we sought to answer in this investigation is the extent to which the local authority responded to its statutory responsibilities under the AWI Act. Section 10 of the Act outlines the local authority functions. As far as they relate to this investigation, these functions are to:

- Supervise welfare attorneys when ordered to do so by the Sheriff
- Investigate circumstances where the personal welfare of an adult seems to be at risk
- Provide information and advice to proxies with welfare powers
- Investigate complaints in relation to those exercising welfare powers
- Consult the Public Guardian and the Mental Welfare Commission on cases or matters where there is, or appears to be, a common interest
- Apply for intervention or guardianship orders where necessary and no other application has or is likely to be made.

The Code of Practice points out that these functions build on the general welfare and protective functions of local authorities. They provide a set of tools by which welfare and protective functions can be more systematically and successfully carried out where mental capacity is an issue in a particular case.

There are other actions available to the local authority under the legislation which may assist them in carrying out their duties under the Act. Among these are Section 3 and Section 20. Section 3 grants any party with an interest the right to apply to the Sheriff to seek directions from the Sheriff on the exercise of a proxy's functions under the Act and the taking of decisions or action in relation to the adult which the Sheriff considers appropriate. Section 20 gives any person with an interest the right to apply to the Sheriff to:

- Order supervision of a welfare attorney by the local authority or a continuing attorney by the Public Guardian

- Order that the welfare attorney furnish a report to the Sheriff as to the manner In which a welfare attorney has exercised his powers during any period specified in the order; and/or
- Revoke any of the powers granted by the continuing or welfare power of attorney.

From the point where the powers of attorney were registered up until August 2008, it is not clear that the local authority properly considered its responsibilities under the Act in relation to the Ds.

There is no doubt that SSW1 put considerable time and effort into the ensuing investigation after the events of September 2008. He quickly uncovered that Mr and Mrs D were in considerable debt, about which they had been unaware. As stated above, he completed and submitted a complaint/concern form to the Office of the Public Guardian seeking an investigation into the perceived mismanagement of the continuing powers of attorney. (We discuss the response of the Office of the Public Guardian separately.) Subsequent meetings reinforced previous concerns. A further Adult Protection Conference on 18 November noted the continuing concerns and added that there seemed to be evidence that Mr E was exerting "undue pressure" on Mr D. Support to Mr and Mrs D was increased. It was also decided that the question of Mrs D's capacity should be reviewed/confirmed. Unfortunately, some of the actions taken by social work actually resulted in Mr D and Mrs D feeling more under threat from Mr E, as correspondence they had asked to be kept confidential had been forwarded by social work staff to Mr E.

There are a number of factors which contributed to the social work department not taking the initiative in applying to the court to revoke the powers of attorney or, alternatively, to request that the Sheriff order their supervision by the OPG and/or social work department. Another option would have been to initiate guardianship procedures. Foremost among these reasons was the view taken on the capacity of the Ds. It is clear that the social work department and the CLDT firmly believed that the Ds had capacity to make decisions in respect of their own welfare. Actions then taken were made within the context of respecting their wishes about whether and when to revoke the powers of attorney.

A second factor, as SSW1 pointed out, was that they were sensitive to the fact that Mr and Mrs D were at different points in the process given the different and more complex nature of the relationship between Mr D and his brother, Mr E. While Mrs D still feared that Mr E might put her into residential care (as he had threatened in the past) if she sought to revoke the power of attorney, she gradually started to become bolder and more assertive. All were clear Mr E exerted much more influence over Mr D than he did over Mrs D. After they were able to assist Mrs D in avoiding any contact with Mr E, he was still in contact with Mr D on a regular basis.

We were told that Mrs D's main concern was preserving her marriage. There was a common belief that any intervention by social work to secure independence for the couple would have resulted in Mr E forcing Mr D to make a choice between his brother and Mrs D and it was felt that, despite the D's being married over 25 years, Mr E's influence over Mr D was so strong that he would have chosen to stay with his brother. SSW1 and others interviewed were of the belief that Mr E was actively trying

to split the couple up and had been doing so for some time. They felt it was important to go at Mr D's and Mrs D's pace to establish trust and build up their confidence.

Another reason given for taking no action prior to the revocation of the powers of attorney was the fear that after initiating any action and before the matter could be resolved by the court, they might expose the Ds to greater risk from Mr E.

SSW1 in interview said that one of his main concerns was that things had been tried in the past and failed and that if they failed this time, they would completely lose the trust of Mr and Mrs D. He said he needed a cast iron case to take to the Sheriff. This required sufficient evidence. He admitted, however, that he was completely unclear as to what constituted sufficient evidence. This underscores the consequences of not clearly requesting the advice of the legal section to outline available options for consideration at the case conferences held. SSW1 could not recall ever discussing any options with the principal solicitor. Senior Solicitor 1 has said that it would have been standard practice to discuss the nature of the evidence that would have been required in pursuing the various options had advice been formally sought.

SSW1, himself, did not appear to have an in-depth understanding of the Act at this time. To his credit, he did seek advice from some quarters both within and outwith the department. He said, however, that he found this advice contradictory. What the Commission suggested as possible options was dismissed locally, he said, "because the local authority was not signed up to it." Senior Solicitor 1, as stated above, could find no record of any advice being given on this case. SSW1 said he didn't feel he got any practical advice from the Office of the Public Guardian, either. They said they needed details of bank accounts before they could take any action. They needed evidence to initiate an investigation, he said, and he could not get at the information they needed to gather evidence. He found the whole process "very, very frustrating" and felt in a "catch-22 situation" as he put it. He said that "the more and more I hear of power of attorney, the more I hate it...people could become someone's power of attorney and neither he nor his colleagues would know anything about it...There is no monitoring of it as there is with guardianship." He acknowledged that a letter from the OPG might go to Headquarters notifying the council of the registration of the PoA but then just sit there. He said in the case of Mr and Mrs D they (the social work staff involved with the case) were never informed. This underscores the difficulties which are still evident in local procedures. This, unfortunately, is replicated, as we found, across the country.

SSW1 thought that the real breakthrough came when he went to see Mr D's brother, Mr F, who had re-established regular contact with Mr D and Mrs D. It was evident to ourselves that Mr F began to provide (and continues to do so) both emotional as well as practical support. SSW1 said that he was very quick in moving from being primarily an emotional support to providing very helpful practical support for the couple. It was at this time that both Mr D and Mrs D came together in their wish to revoke the power of attorney. SSW1 explained the further dilemma that this presented.

While immediately seeing the benefits in the Ds revoking the powers of attorney themselves, on the basis that it could be done much more quickly than the council

making an application to the Sheriff court (which could then be opposed), he soon ran into problems as to how this would be paid for. He could not secure Legal Aid as information on their finances would be required from Mr E. He asked the legal department whether he could pay this out of his budget and reclaim the costs from the Ds at a later date. He was told that this may appear that they had coerced the Ds and/or been party to the action. (This advice, in itself, could be questioned given the local authority's responsibilities under the AWI and AS&P Acts). Ultimately, Mr D's brother, Mr F, agreed to pay for it with his credit card. SSW1 said he does not know where they would be today had he not done so.

It was very evident that the key practitioner who was leading the efforts to resolve this case found it exhausting and frustrating, being presented with obstacles at several different points, and receiving advice which he found to be contradictory and impracticable. As he put it, "I feel like I was stumbling around in the fog."

Findings:

The undue influence Mr E exerted over the Ds effectively stopped them from taking action to protect their own interests.

The local authority together with health colleagues put considerable effort into supporting the Ds following the events of September 2008, supported by the Care Programme Approach. They were, perhaps, oversensitive to the need to proceed at the pace the Ds were comfortable with in gaining independence from Mr E.

While concerns and apparent risks were listed in the Adult Protection Case Conference of 16 September 2008, when a decision was taken to investigate abuse issues, there did not appear to be any subsequent clearly focussed assessment of these risks to inform the decision making and care planning process. This diminished the effectiveness of efforts in considering the protection of the Ds as vulnerable adults.

We believe local authority and health colleagues had sufficient evidence of apparent abuse of welfare and financial powers and of undue influence by Mr E to warrant the local authority taking action shortly after the events of September 2008. This would have removed the responsibility from the Ds and offered them greater protection than they were able to manage on their own.

We believe it is also the case that the local authority had sufficient concerns and evidence to take action at a much earlier stage. This hesitance in taking positive action to protect the Ds from the influence of Mr E helped prolong an erosion of the Ds' basic human rights over an extended period.

We saw no evidence that all available options open to the local authority under the Act were ever discussed and debated in the various case conferences, case reviews or discussions held before or after the powers of attorney were granted and before they were revoked by the Ds. Specifically, once concerns were noted from several different sources regarding the use of the powers of attorney, an application could have been made to the Sheriff Court for directions on whether the powers should have been exercised as they were being. Alternatively, an application could have

been made to the sheriff requesting that Mr E as continuing attorney be subject to the supervision of the OPG. This could have greatly facilitated investigations undertaken by the social work department and may have even prevented the loss of some funds which allegedly took place through the actions of the attorney. Similarly, an application under Section 20 could have made the case for the welfare attorney being subject to local authority supervision. The result was that these key options which may have afforded the Ds protection at an earlier point were never properly considered.

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Had Mr D's brother, Mr F, not arrived to offer emotional and material support to the Ds, which enhanced their capacity to take the action of revoking the powers of attorney, they would have remained at risk for an even greater period of time. There was little evidence that the local authority was preparing to make an application to the Sheriff court under the AWI Act had the Ds remained intimidated and fearful of revoking the powers of attorney.

Utilisation of Council Solicitors by Social Work Staff:

Recording on the case files of the Ds following the previous substantive entry in January 2006 only really started up again in July 2008, when Mr D sustained a fractured left shoulder and was taken to live with his brother, Mr E. It was following an altercation between Mrs D and Mr E not long afterwards that an Adult Protection Case Conference was held on 16 September 2008. SSW1 saw this as the "official springboard" for subsequent action.

The stated purpose of the meeting was to discuss the role of Mr E in the lives of Mr and Mrs D. The right people were invited to attend this meeting and all were able to do so, save the GP. The Council's Principal Solicitor was present as were Consultant Psychiatrist 1 and a Family Protection Officer from the police. The Council is to be commended for involving advocacy services at this crucial stage. Advocacy played a very significant, active and helpful role during this entire period for both Mr D and Mrs D.

The note of the meeting stated as fact the existence of an abuse of power and interventions that restricted the independence of Mr and Mrs D. While a decision was taken to start an investigation to look at abuse issues, there is no recording of any advice sought from, or given by, the Council's Principal solicitor. There was no discussion of alternative courses of action which might have been available under the AWI Act. These potentially could have assisted in the investigation and offered greater protection to the Ds in the interim. This was despite the fact that when the Commission was approached by SSW1 on September 11, we suggested that a case conference be held with council legal representatives present (this had already been planned at that point) and that evidence should be considered in respect of a possible application to the Sheriff under section 20 of the Act. Potential outcomes of such action could be the Sheriff ordering that the continuing attorney be supervised by the Public Guardian and/or the welfare attorney being made subject to local authority supervision. The solicitors present from the council recorded that there was nothing for them to do at that point as it was being handled as an investigation under section 10 of the Act. One of the actions recorded as a result of the decisions taken in the case conference was that both Mr D and Mrs D were to be allocated to the

CLDT. As was the case with the question of when the Ds were open or closed to an allocated social worker or care manager, we were unable to ascertain from notes at which points this case was open to, and closed by, the CLDT.

There was correspondence between the social work department and council solicitors in October 2008 enquiring about the mechanics of removing/revoking a power of attorney. Senior Solicitor 1 could not say from her records why this was asked for or what the response was. In interview she said that up until May 2009, there was no indication that anything was communicated by the legal section to social work staff in terms of specific advice. At that point her colleague, Senior Solicitor 2, who was part of the council's legal team, had a telephone conversation with SSW1 about revoking the power of attorney and the possibility of the council funding the cost of that. Other options were discussed but there was no indication of what these were. Senior Solicitor 1 confirmed that there was nothing in the file about a discussion having taken place about the local authority applying to the Sheriff Court, although, following this conversation, Senior Solicitor 2 had e-mailed her colleague, Council Solicitor 1, asking her to look at other angles, including going to the Sheriff.

Senior Solicitor 1 said that, if asked, they always give advice and that she would outline the available options. It was her opinion that if they had been asked, they would have outlined making an application to the Sheriff under the Act as an option. She also confirmed that they would always discuss what evidence was needed for each option. Senior Solicitor 1 was not aware of advice being given in other cases concerning actions under the Act, other than for guardianship and intervention order applications.

In our file reading, we came across e-mail correspondence of 2 July 2008 between Community Care Officer 1 and Senior Solicitor 1 on a different case, involving concerns over the management of a power of attorney. It is not clear why this e-mail was among the case file papers forwarded to us in relation to the Ds. The case, however, was one in which SSW1 and his team were involved. In this instance, Senior Solicitor 1 gave quite detailed options as to possible actions available under the Act, including asking the Sheriff to make orders re the supervision of welfare powers of attorney; to call for various reports; to issue directions as to how a Welfare Attorney should exercise their powers; to vary the order; to change the welfare attorney, or, to appoint a welfare guardian which would supersede the welfare power of attorney. This is precisely the type of information which should have been discussed at the conference in September, or any of the subsequent ones that followed. Arguably, such options should have been explored at a much earlier point.

SSW1 said in interview that the decision not to take an application to the Sheriff under section 20 was because of the potential consequences, as it would alert Mr E to "something going on." He also said that one of his main concerns was that things had been tried in the past and failed, and that if they failed again they would completely lose the trust of Mr D and Mrs D. We asked SSW1 if the decision not to go to the Sheriff was a collective decision or one he took on his own. He said he took the lead on this and felt that he did not have sufficient evidence under the Act to go to the Sheriff. He said he needed a "cast-iron case" having gone through all the evidence "with a fine-tooth comb" before taking it to the Sheriff.

We asked Senior Solicitor 1 the reason for Senior Solicitor 2 asking a law student to prepare a timeline on this case in June 2009. As she understood it, the thinking was that this would make a good case study. A memo to the law student asked for a paper setting out what happened to the Ds, whether the legislation had helped or not and whether there were any identified gaps in the legislation. She suggested speaking with SSW1 and asking for copy letters and attendance notes and phone calls his department had had with the Office of the Public Guardian. Senior Solicitor 2 seemed to be suggesting that this would be of relevance to adult protection staff and could assist in acknowledging the importance of adult protection in its own right to separate it "from the umbrella of child protection." Senior Solicitor 1 was not clear what use was made of this report when completed other than it being forwarded to SSW1 for transmission to the Commission.

We asked Senior Solicitor 1 whether there was a history of the social work department engaging with the legal department in seeking advice. She said that while she could only speak from her own experience she felt there was a contrast between child protection and adult protection, with social workers from the former approaching her far more than their adult counterparts. She had, in fact, raised this point at a meeting and was told that many of the questions which she would have expected to be directed to the legal department in the past regarding adult protection matters and the use of legislation are now raised with the Adult Protection Co-ordinator.

Findings

Social work staff did not appear to fully and appropriately involve colleagues from the Council's legal department in discussing options open to the multidisciplinary team in responding to the perceived risks to the Ds from the apparent abuse of the powers of attorney.

Despite asking for specific advice regarding revoking the power of attorney shortly before the Ds did this, social work staff did not appear to have ever requested specific advice from Council solicitors on available options open to them and the evidence required to pursue these. As a consequence, there was never a proper recorded discussion of options/actions available under the Act within the various Adult Protection Case Conferences and multidisciplinary reviews following the incidents of August/September 2008.

The Role of the Office of the Public Guardian:

The relevant functions of the Office of the Public Guardian (OPG) in relation to the Ds' case are laid out in section 6 of the Act. These include the duties to:

- Receive and investigate any complaints regarding the exercise of functions relating to the property or financial affairs of an adult made in relation to continuing attorneys
- Investigate any circumstances made known to him in which the property or financial affairs of an adult seem to him to be at risk;

- Provide, when requested to do so, a guardian, a continuing attorney, a withdrawer or a person authorised under an intervention order with information and advice about the performance of functions relating to property or financial affairs under this Act;
- Consult the Mental Welfare Commission and any local authority on cases or matters relating to the exercise of functions under this Act in which there is, or appears to be, a common interest.

Following the case conference in September and the Care Programme Approach meeting in October 2008, SSW1 completed and forwarded to the Office of the Public Guardian's investigation team their complaints/concern form. This was accompanied by a covering letter in which he outlined the concerns that existed about the apparent mismanagement of the continuing power of attorney granted by the Ds, whom he described as each having learning disabilities. He pointed out the surprising level of debt (over £4000) that the social work department had uncovered, which the Ds were said to know nothing about. While he said that the CLDT believed that Mr E was abusing his powers of attorney, he had been unable to clarify any financial matters due to Mr E's non-cooperation.

SSW1 asked that the investigation officer meet with him and a support worker to first get a full picture of the situation. He also asked that no correspondence be directed to the Ds due to the fear that it would be intercepted by Mr E.

The OPG responded timeously to SSW1's letter and sought to establish a locus to investigate by seeking a view on the couple's capacity to manage their finances. Investigations Officer 2 wrote to the GP. This was essentially a standard letter, as we understand it, which is used by the investigations team in such circumstances. This letter said that the OPG has been notified of concerns in relation to the financial affairs of Mr and Mrs D. It did not specify what these concerns were. It set out the OPG's authority to investigate in terms of Section 6 of the Act. It stated that in order to carry out the investigation, it was first necessary to establish an individual's capacity. She asked specifically for "an informed opinion as to this couple's capacity to manage their own financial affairs both now and in the recent past." The letter proceeded to set out the Act's definition of incapacity and stated that, "If Mr and Mrs D are incapable we have authority to investigate and if necessary to remove any risk to their property or financial affairs. Should they be deemed incapable as described in the Act, I would be grateful if you could indicate the severity and length of time this has been present. However, if they are considered capable we would take no further action."

The GP responded that she felt they had capacity to make day to day decisions and the medical decisions that came up within the surgery but she did not feel able to comment on their capacity to manage their own financial affairs. She referred them to Consultant Psychiatrist 1. The same basic letter was then sent to Consultant Psychiatrist 1 by Investigation Officer 1.

Consultant Psychiatrist 1 responded that the Ds had capacity in relation to simple financial matters but not in relation to more complex financial matters. As an example, she said that the Ds would not have capacity to enter into credit agreements. She said that she knew Mrs D better and thought she would have "only

the vaguest understanding regarding debt", and would see debt as "something frightening and to be avoided." She suspected the same would be true of Mr D.

Consultant Psychiatrist 1 added that she did not feel the Ds' capacity had changed over time. She did express concern about their financial affairs being mismanaged by their attorney. She made a strong statement at the end of the letter where she states that, "Mrs D does not truly wish her brother-in-law to continue as their financial power of attorney and whilst in every respect she has the capacity to rescind her original agreement, she is nevertheless easily stressed and feeling under threat. She is fearful that the person concerned will "take it out on" her husband, Mr D, and indirectly on her."

There are a number of problems that are evident in this exchange of correspondence. The first thing is that it was not helpful for the standard letter from the OPG to be framed in such a way as to ask whether the Ds are capable or not of managing their own financial affairs. The question could have been more helpfully framed had it asked whether they were capable of revoking the order and whether there were any other factors such as undue influence which would affect their capacity to do so freely.

The letter went on to refer more generally as to whether the Ds are capable or incapable. This then led Consultant Psychiatrist 1 into the position of responding that the Ds' capacity had not changed over time. Presumably, however, she was referring to their capacity in respect of managing their financial affairs, not their capacity to have granted the power of attorney in the first place without the undue influence of others affecting their capacity.

There is little doubt that Consultant Psychiatrist 1 believed that the Ds were, and had been, financially exploited and were not capable of taking any action to end the influence and power of Mr E. This, of course, is why the matter was referred to the OPG in the first place. Unfortunately, the wording of the letter provoked a response which placed some doubt in the mind of those at the OPG that they had the authority to carry out an investigation.

The OPG did, however, feel from correspondence with SSW1 and Consultant Psychiatrist 1 that it had sufficient authority to undertake initial investigations and they sought further information from the local authority. The local authority was unable to provide any detailed information as to accounts, other than that Mr and Mrs D had a Post Office account into which their benefits were paid. When approached by the OPG, the Post Office could not confirm the existence of any accounts for the Ds or for Mr E.

The DWP refused to provide the OPG with information about their benefits due to their interpretation of the regulations relating to the sharing of information. The OPG then carried out a "blind trawl" of financial institutions in the City 1 area which revealed only a small account with one bank. SSW1 was able to provide some detail as to their benefits in later correspondence.

Investigation Officer 1 had been advised that there would be repercussions for the Ds if the OPG was to make an approach to the attorney. In addition, he had not been

able to uncover any evidence of risk other than what was being alleged but not, as he said, evidenced by the social work department and Consultant Psychiatrist 1.

It is difficult to know how the OPG could have proceeded without Mr E becoming aware of the investigation. The OPG was being put in a very difficult situation. Investigation Officer 1 said that if, however, they had received statements stating that the Ds were incapable, the OPG "would have had to approach the attorney blind."

Ultimately, Investigation Officer 1 wrote to SSW1 in April 2009, following an earlier telephone conversation with him seeking additional information. Investigation Officer 1 said that because of the above difficulties, they had not been able to uncover evidence of any misappropriation of the adults' funds.

Investigation Officer 1, in this letter to SSW1, added that there was another difficulty in this case in that the "capacity statement received by us from Consultant Psychiatrist 1 which indicates that Mr and Mrs D have the capacity to revoke the power of attorney if they wish to do so." He went on to state that they could only intervene where the adult is incapable of **both** managing their own financial affairs and of competently instructing a proxy to act on their behalf. As stated above, Consultant Psychiatrist 1 did feel they lacked capacity in relation to more complex financial arrangements such as entering into credit agreements. This, however, was not felt sufficient for their purposes as the Ds were said to have capacity to instruct a proxy on their behalf. The fact that Mr and Mrs D were capable of revoking the power of attorney but chose not to do so, Investigation Officer 1 said, meant that the Public Guardian had no locus to investigate their financial affairs, despite the fact that they had already put considerable effort into doing just that. Once the OPG had what they felt was a clear medical statement that the Ds were capable of revoking the power of attorney, the investigation was brought to an end.

Investigation Officer 1 added that if they were being genuinely intimidated by their attorney, that this then raised the possibility of undue influence or " more specifically causing psychological harm; a factor which is not covered under the Act but is addressed by Adult Support and Protection legislation." He suggested that SSW1 undertake an investigation under Adult Support and Protection legislation, which would afford authority to require relevant records from benefits agencies in order to assess any possible financial mismanagement. It would also give authority to require Mr E to provide financial information to the local authority. The Public Guardian confirmed that they do take into account vulnerability and external pressures in determining whether to investigate. Where these are shown to exist, the OPG would look to adult support and protection legislation but would have no powers under this legislation.

In interview with the OPG we sought clarity on the reasons for not pursuing the investigation further. Investigation Officer 1 said that the issue of capacity remained equivocal and risk had not been established. At another point in the interview he said that on the basis of Consultant Psychiatrist 1's letter, they were incapable (by this we assume he meant in respect of more complex financial matters) and that the OPG had a locus to investigate. His letter, however, did not characterise the issue of capacity as equivocal. He firmly stated that the OPG had been told by Consultant

Psychiatrist 1 that the Ds were capable of revoking the powers of attorney. This is the important distinction that the OPG made which strongly influenced their decision not to investigate in any greater depth. While the Ds may have lacked capacity in respect of the management of their finances, they had the capacity to revoke the order – based on Consultant Psychiatrist 1's letter.

We referred to the local authority's continuing concerns in this case and asked whether the OPG could have advised the local authority to apply to the Sheriff requesting the Sheriff order supervision by the OPG. Investigation Officer 1 said that the Sheriff would be looking for evidence of risk. We asked how the OPG was satisfied there was no evidence of risk. Investigation Officer 1 said that the local authority provided no evidence of financial mismanagement. They were given no details of any bank accounts their benefits were being paid into and no information as to any other accounts which may have existed. We asked about thresholds for evidence required to act. Investigation Officer 1 said that while this would differ from case to case, the OPG would "look for evidence of financial abuse, or situations where people were lacking food or whose furniture was poor for instance."

In terms of the legislation, the OPG has a duty to investigate when an incapable adult's finances are at risk.

Findings

The OPG was placed in a very difficult situation in being asked to investigate the management of the continuing powers of attorney in this case given the fact that the financial information required to take this forward was not provided and it was advised not to contact the attorney out of fear of possible repercussions for the Ds. The OPG did make considerable efforts to uncover financial details that, had they been successful, would have helped in determining whether it felt there was sufficient evidence to pursue an investigation in further depth, and it did suggest to the local authority a possible way to proceed using the Adult Support and Protection (Scotland) Act.

While acknowledging the above difficulties and efforts, we believe that the OPG did, in fact, have authority to fully investigate the management of the continuing powers of attorney as the Ds did not have capacity to manage their finances except on a very basic level. We also believe that the local authority had established prima facie evidence of risk.

We believe that the presence of undue influence on the Ds directly affected their capacity to act on their own to protect their interests by revoking the powers of attorney. It was only when the Ds were given the necessary practical and emotional support of Mr D's brother, Mr F, that they had sufficient capacity to act to revoke the powers of attorney. While it is a matter of medical judgement whether or not an adult has capacity and not for the OPG to determine, we believe the standard letters used by the investigation team in seeking information from medical staff on the capacity of the Ds could have been more helpful if framed differently. The letter could have asked about the presence of undue influence or other factors affecting the Ds' capacity to act freely to protect their own interests.

The closing letter to the local authority informing them that no further action was to be taken by the OPG could have usefully pointed out other options open to the local authority under the Act – specifically the possibility of applying to the Sheriff for a supervision requirement under section 20 of the Act.

Conclusions

The local authority should have intervened at a much earlier stage to protect the welfare and property of Mr and Mrs D. Once the powers of attorney had been granted the local authority should have given proper consideration to making an application to the Sheriff under section 20 of the Act. In failing to do so, they allowed an abusive situation to continue unchecked for a number of years. Its failure to properly consider such an application ultimately resulted in the onus to terminate the powers shifting to those who were being potentially exploited by the use of these powers. It should have been clear to the local authority that the Ds would have difficulty in revoking the powers, not least because they lacked the capacity to act due to their learning disability and the effect the pressure and threats of their attorney had on their capacity to act to protect themselves.

The process by which the powers of attorney were granted appeared to us to have been significantly flawed. We believe it is extremely unlikely that the Ds would have granted all the powers in the documents of their own accord, or to have granted them at all, to Mr E if they truly felt they had a choice in the matter. Indeed, they are now very clear that they did not understand what they were doing when they signed the documents. We also believe that the solicitors did not appropriately involve the Ds in the preparation of the powers of attorney documents, nor did they advise the Ds to seek their own separate legal advice given the involvement of Mr E in initiating and driving forward this process.

The GP should have taken greater care in signing the Certificates of Capacity that accompany the documents in terms of the 2000 Act. In particular, given the background and the Ds' diagnoses, further information about the couple's capacity to grant the powers should have been sought from Consultant Psychiatrist 1. In doing so, the GP may have reached a different view on the couple's capacity and would have alerted the CLDT to the fact that Mr E was seeking to have herself appointed continuing and welfare attorney for the Ds.

The OPG should have fully investigated to reach a more reasoned and informed conclusion. It was clear from the correspondence from the couple's psychiatrist that they lacked capacity to deal with the more complicated aspects of their finances; however, its investigation ceased as it considered that the couple retained sufficient capacity in this regard. Further, the OPG should have given clear advice from the outset about the local authority making their own application to the Sheriff for supervision in terms of section 20.

The DWP do not routinely share data with the OPG and this can impede the carrying out of its investigative functions.

Recommendations:

Council A should:

1. Make a formal apology to Mr and Mrs D for its failure to intervene appropriately on their behalf.
2. Investigate the reasons for the missing case file material and communication books relating to its involvement with the Ds and take remedial action to prevent similar occurrences.
3. Review existing guidelines and procedures in respect of the local authority's duties and functions under the Adults with Incapacity (Scotland) Act 2000 with particular reference to Sections 3, 10, 20 and 57(2).
4. Review arrangements for front-line supervision of local authority social work and care management staff to ensure concerns raised by front-line staff about vulnerable service users are acknowledged, recorded and responded to appropriately.
5. Review access to, and use of, Council legal services by staff working in community care and adult protection within the department.

Council A and NHS Board A should together:

1. Examine the function of the Community Learning Disability team as part of the current review of community care services being undertaken by Council A. This should include clarifying the roles and responsibilities of health and social work staff in these teams; the relationship between the CLDT and the primary health care teams as well as the relationship with local authority staff responsible for assessment, care management and service provision and commissioning.
2. Undertake a training needs analysis of staff in respect of the Adults with Incapacity (Scotland) Act 2000 and develop targeted training to address these identified needs. Training should take place, ideally, on a joint basis.

The Office of the Public Guardian should:

1. Review and revise existing *Investigation Referral Form for Local Authorities* in consultation with the Association of Directors of Social Work.
2. Develop further information/guidance to complement its existing publications on the OPG's role and practice in carrying out its investigation responsibilities under Section 6 of the Adults with Incapacity (Scotland) Act 2000.
3. Work with the Mental Welfare Commission for Scotland in developing training for relevant members of staff on the issue of capacity and how it is assessed.

The Law Society of Scotland should:

1. Update existing guidance for solicitors in respect of powers of attorney to take account of the changes in the AWI Act. Such guidance should address situations where the process of granting a power of attorney is initiated by a party other than the granter as well as situations where there may be some

question as to the granter's capacity, the presence of undue influence, or other vitiating factors. Guidance should also address the fact that the delegation of welfare powers raises ethical issues different from those in the delegation of financial management matters.

The Scottish Government should:

1. Review and revise existing guidance and Codes of Practice to ensure they address in greater depth:

    - The need for medical practitioners, in assessing an adult's capacity, to consider, in particular, whether the adult is capable of acting. This is in addition, but related to, whether the adult may be capable of making a decision, or communicating a decision or understanding a decision or of retaining the memory of a decision.
    - The issues faced by individuals who initiate and/or take forward the process of the granting of welfare and continuing attorneys on behalf of another individual.
    - The practice issues faced by medical practitioners, solicitors and practising members of the Faculty of Advocates who are completing the prescribed certifying forms, especially when the process is not being initiated by the prospective granters of the powers of attorney. This should include the particular cautions and safeguards that need to be closely considered in such circumstances to ensure that the Act is implemented as intended. In conjunction with this, develop concise guidance for GPs who are approached to certify the granting of powers of attorney. This should complement existing BMA and GMC guidance.

2. Review the following provisions of the Adults with Incapacity (Scotland) Act 2000:

    - Section 15(3)(b) as amended by the Adult Support and Protection (Scotland) Act 2007 states that where the continuing power of attorney is exercisable only if the granter is determined to be incapable in relation to decisions about the matter to which the power relates, the certificate has to state that the granter has considered how such a determination may be made. The Commission recommends that in such cases the granter should state in the document how the determination of incapacity is to be made, not merely that it has been considered. We also believe this determination as to the incapacity of the adult should be in respect of actions as well as decisions.
    - Section 16(3)(b) as amended by the Adult Support and Protection (Scotland) Act 2007 states that a welfare power of attorney shall be valid and exercisable only if it is expressed in a written document that

the granter has considered how a determination as to whether he is incapable in relation to decisions about the matter to which the welfare power of attorney relates may be made for the purposes of subsection (5)(b). The Commission recommends that in such cases the granter should state in the document how the determination of incapacity is to be made, not merely that it has been considered. We also believe this determination as to the incapacity of the adult should be in respect of actions as well as decisions.

- Section 16(3)(c)(ii) allows for the views of the certifier being informed either by their knowledge of the granter **or** from consultation with other persons who must be named on the certificate. It should be reviewed whether it was the intent of Parliament that the views of the certifier could be solely informed by information obtained from the attorney to whom the powers are being granted.
- Section 19(2)(c) requiring the Public Guardian to notify local authorities and the Mental Welfare Commission of the registration of welfare powers of attorney in order to clarify if the law needs amending to achieve its intended effect in a more efficient and effective manner.

3. Approach the DWP to request that information be shared by the DWP with the OPG when the OPG is carrying out investigations involving moneys which were paid as benefits.

4. Raise with the UK Government the need to revise the Interpretation Act 1978 such that “an enactment” includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament and thus permitting the Department for Work and Pensions to release to Scottish regulatory authorities information that would otherwise be withheld as confidential.