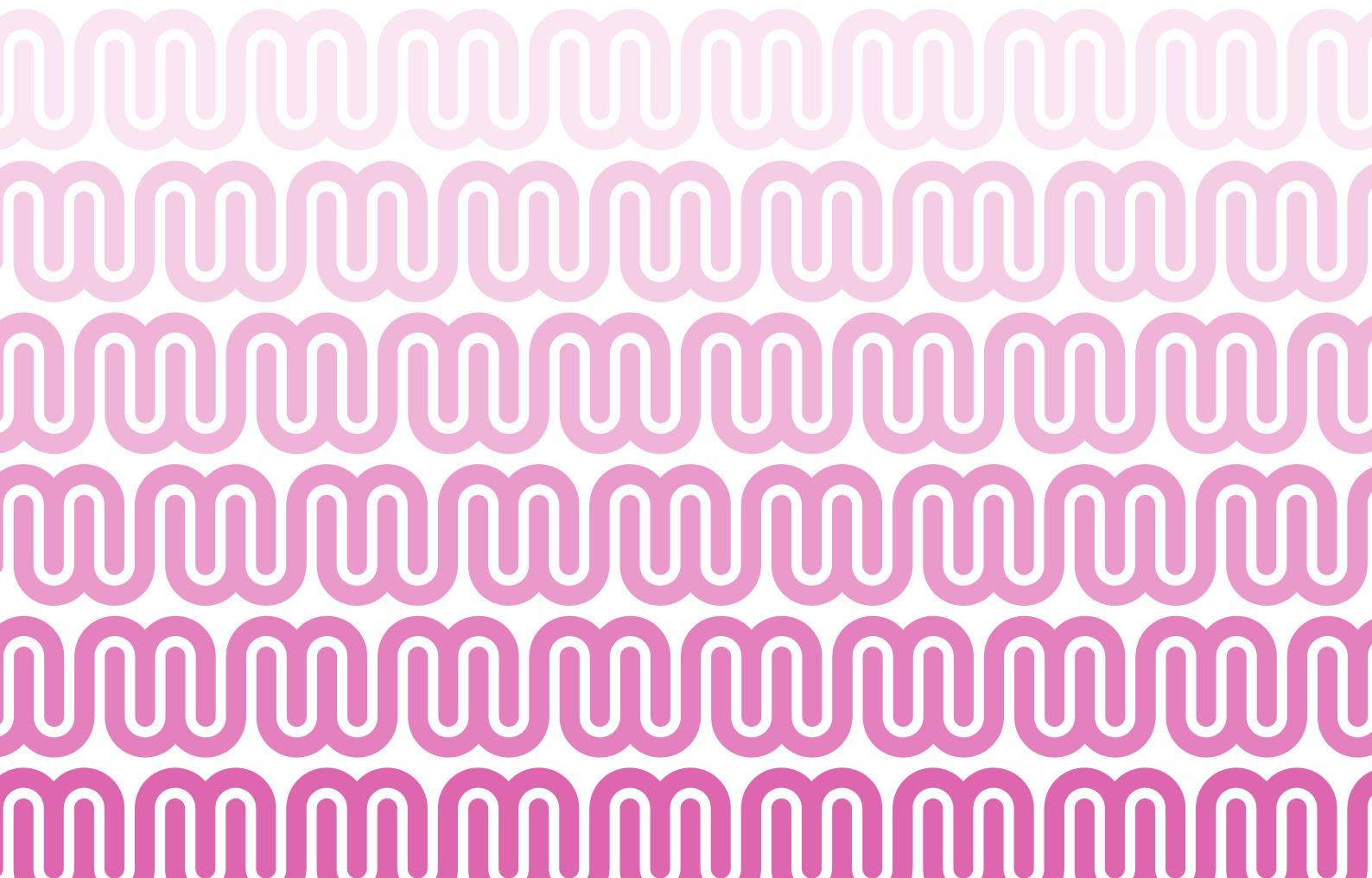


Money Matters

Good practice guide

28 January 2021



Our mission and purpose

Our Mission

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

Our Purpose

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

Our Priorities

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

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

Our Activity

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

This guidance was last published in 2015. It was reviewed and updated in November 2020. The main changes are:

- Information about the principles of the Adults with Incapacity Act
- Information about self-directed support
- New section on where to go with concerns.

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Why have we produced this guidance?

The Commission has a legislative duty to monitor the operation of the Adults with Incapacity (Scotland) Act 2000 (AWI Act). This includes visits to adults who may be subject to orders under the AWI ACT. During these visits we have come across adults whose quality of life could be significantly enhanced by effective management of their funds. The Commission is aware of cases where adults with a learning disability, for example, were leading chaotic lives, with bills unpaid, insufficient food and clothing and where they were open to exploitation.

Money Matters Guidance was initially produced in 2013. Since then there have been significant changes in ways to support adults who lack capacity to manage their finances.

In 2014 the Social Care (Self-directed Support) (Scotland) Act came into force, placing the duty on local authorities to offer people a range of choices over how they receive their social care support. This enables adults to receive money to arrange and direct the support themselves. Self-directed support (SDS) will be discussed further on in this guidance.

For an adult who is unable to manage their own finances, better management of those finances, using existing guidance and legislation, can be an integral part of providing and addressing the adult's health and welfare. A multi-disciplinary approach is required in order to safeguard the adult's finances. Where financial intervention is required under the AWI Act the principles of this Act must always be taken into consideration.

Principles

The principles of the Adults with Incapacity (Scotland) Act 2000 should govern any intervention being considered or required for the adult. This means all decisions made on behalf of the adult should be justifiable in terms of the guiding principles found in Section 1 of the Act.

These are that any intervention must:

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

An adult has a right to independent advocacy and professionals should provide support to enable access to advocacy services.

Professionals need to feel confident in their knowledge of available financial measures. Being able to give information and advice, or seek clarity about the roles and responsibilities of those dealing with the adult's financial affairs, is an essential part of the social work/care management role. For example, professionals may need to give initial advice to relatives on the possible options for managing the adult's finances, or request confirmation on powers of attorney from the Office of the Public Guardian to clarify the extent of powers when planning future care arrangements. Relatives and adults need to be aware of the duties on the local authority conferred by the AWI Act and the Adult Support and Protection Act (Scotland) 2007 (ASP), as well as the scope of Department of Work and Pensions (DWP) appointeeship and SDS.

This guidance is intended to provide a useful overview for a range of practitioners tasked with safeguarding the welfare and finances of adults who lack capacity. It should help provide professionals and relatives/adults with some confidence in understanding ways to effectively manage the finances of a person who cannot manage their finances themselves. While it is not comprehensive, the guidance does cover the main options available for financial management for an adult who has been assessed as lacking capacity.

The Acts referred to in this document are

- [Adults With Incapacity \(Scotland\) Act 2000 \(AWI Act\)](#)
- [Adult Support and Protection \(Scotland\) Act 2007 \(ASP Act\)](#)
- [Social Care \(Self-directed Support\) \(Scotland\) Act 2013 \(SDS Act\)](#)

The Office of the Public Guardian (Scotland)

The Office of the Public Guardian (OPG) was set up following the implementation of the AWI Act and has specific functions under the Act, particularly in relation to financial matters. These include:

- maintain a public register of powers of attorney that have been registered, guardianship and intervention orders granted and authorisations granted under the access to funds scheme;
- register powers of attorney;
- supervise individuals appointed to manage the financial and property affairs of adults who lack the capacity to do so for themselves; and
- investigate circumstances made known to them where the property or finances belonging to an incapable adult appear to be at risk.

Further information regarding the role of the OPG can be found here:
<https://www.publicguardian-scotland.gov.uk/>

DWP Appointeeship: to manage state benefits

Purpose

DWP appointeeship is a simple and cost-free way to manage an individual's state benefits on their behalf. It does not provide any other financial management powers.

Where a Department of Work and Pensions (DWP) claimant is 'incapable of managing their affairs' in relation to the management of their state benefits, a person or organisation can be appointed by the DWP to act as the adult's appointee. 'Incapable of managing their affairs' is not defined in the DWP regulations and executive officers from the DWP have discretionary powers in relation to the appointment of an appointee.

An appointee then has the authority to receive and manage benefits on behalf of the DWP claimant. An appointee could be required where the claimant has a severe physical disability or mental incapacity specifically in relation to management of finances. This can include consideration of his or her vulnerability to exploitation.

An appointee can be an individual such as a friend or relative, or an organisation, or representative of an organisation, e.g. the local authority, a solicitor, the manager of a care home, NHS Patients' Funds etc. A suitable appointee must be over 18 years of age and be both capable and trusted to manage the finances for the benefit of the claimant.

It should be noted, however, that the DWP appointee system lacks safeguards.

The responsibilities of this role include ensuring the DWP is provided with all relevant information about the adult's circumstances, making claims on their behalf, spending the benefits in the person's best interests and repaying overpaid benefit. The prospective appointee may be asked to provide evidence from a suitably qualified professional, for example a social worker or community psychiatric nurse, who has a personal knowledge of the claimant, to support their application.

Process

The link below explains more about how to apply to be an appointee. The DWP will visit the claimant to assess the need for an appointee and will interview the applicant. If the application is agreed the DWP will send form BF57 as confirmation.

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

There can be only one appointee for an individual.

Safeguards

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

Points for consideration

- There is no cost when applying to be an appointee.
- This is a straightforward way to manage an adult’s finances, particularly if their finances are mainly made up of DWP benefits.
- The local authority or registered support service, or an individual, can act as appointee. This extends the usefulness of this measure, particularly for adults who are vulnerable, without trusted contacts or open to exploitation.
- The DWP will not agree an appointee if the adult already has a proxy with the relevant powers, such as power of attorney or guardianship with financial powers. The DWP must be notified immediately where an appointee does not act properly under the terms of the appointment, the adult (claimant) is clearly able to manage their own benefits or the appointee becomes incapable.

Continuing Powers of Attorney (Part 2 of the Adults with Incapacity Act)

Purpose

A continuing (financial) power of attorney is a legal document by which an adult with capacity can grant powers to manage their property and/or financial affairs to an individual or individuals they trust, or to a solicitor or accountant. The powers can either start immediately or when the adult loses capacity. An individual, individuals, or a company, such as solicitors or accountants, can be appointed. More about power of attorney can be found here::

<https://www.publicguardian-scotland.gov.uk/power-of-attorney/power-of-attorney/types-of-power-of-attorney>

<https://www.mygov.scot/power-of-attorney/overview/>

All decisions and actions carried out by the CPOA on behalf of the adult must adhere to the AWI Act principles.

Application process

1. A power of attorney (POA) is a written document which sets out the precise powers that the grantor wishes the attorney(s) to have. The document must be signed by the grantor. A solicitor can draw up a power of attorney, or forms are available at stationery shops or online. It is important to make sure any form is valid for Scotland.
2. A POA may include only financial powers (CPOA), only welfare powers, or both.
3. The grantor can appoint a single attorney, joint attorneys, or substitutes in case the original attorney dies or is incapacitated.
4. Where the CPOA is only to come into effect on the grantor's incapacity, a statement should be included to that effect. This statement should identify how incapacity is to be determined. For example the grantor may wish for their capacity to be assessed by a GP or certified by two medical practitioners. This can be helpful in avoiding future disputes which may impact on the appropriate management of the adult's property or financial affairs.
5. The CPOA document must be accompanied by a prescribed certificate of capacity signed by a prescribed person (a solicitor registered to practice in Scotland, a member of the Scottish Faculty of Advocates or a registered medical practitioner) which states that:
 - She/he interviewed the grantor immediately before the grantor signed the document;

- the granter was not acting under undue influence; and
- the granter understood the nature and extent of the powers being granted.

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

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

<https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/section-b/rule-b1/guidance/b1-5-vulnerable-clients-guidance/>

<https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/section-b/rule-b1/guidance/b1-5-adults-with-incapacity-scotland-act-2000/>

To speed up the process, it is recommended that the Public Guardian's registration form be completed. This can be obtained from the OPG or downloaded here:

<https://www.publicguardian-scotland.gov.uk/docs/librariesprovider3/poa/pdf-documents/power-of-attorney-registration-form.pdf?sfvrsn=22>

The OPG will issue a certificate of registration. Attorneys have no authority to act until the power of attorney document has been registered by the OPG. A CPOA can be activated immediately if stated in the document however a welfare POA can only be activated where the adult has lost capacity.

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

A welfare power of attorney, also covered by Part 2 of the AWI Act, relates to decision making in relation to the granter's personal care and can only come into effect on incapacity. This is not dealt with in this guidance but further information can be found on the OPG website.

<https://www.publicguardian-scotland.gov.uk/power-of-attorney>

The website of the Office of the Public Guardian (Scotland) and the Code of Practice for this part of the AWI Act (Part 2) provide clear and detailed advice on creating and exercising powers of attorney.

<https://www.gov.scot/publications/code-practice-continuing-welfare-attorneys-second-edition-updated-february-2018/>

As welfare decisions often have financial implications, where both welfare and financial powers of attorney exist, it is important that they complement each other.

Safeguards

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

- maintain a register of all documents relating to continuing attorneys for inspection by members of the public;
- provide advice and guidance to continuing attorneys;
- investigate complaints or concerns about continuing attorneys relating to the property or financial affairs of a grantor with incapacity; and
- supervise and investigate the continuing attorney and audit any accounts submitted, when instructed by a Sheriff to do so. Under S 20(2) of the AWI Act any interested party can apply to the Sheriff where there are concerns about safeguarding the finances and property of the individual.
- The grantor can revoke the CPOA if he or she still has capacity.

Points for consideration

- The grantor can be open to exploitation and any concerns should be reported immediately to the OPG and local authority and to police where necessary.
- The grantor can appoint people they trust.
- The powers can be as flexible or as specific as the grantor chooses.
- Where the grantor has specified that CPOA powers are to be triggered at the point of incapacity, it may be difficult for the prospective attorney to decide when this point is reached. This should be specified to avoid any future disagreement.
- If the grantor's capacity fluctuates, then the powers can be brought into effect when required and relinquished when the person regains capacity. However, the grantor needs to consider how the point of incapacity will be determined.
- There is no provision in the AWI Act for reimbursement of expenses incurred by a continuing power of attorney. Provision for out of pocket expenses is a matter for the grantor of the power of attorney and should be written into the document.
- The attorney(s) can only act during the lifetime of the grantor.
- Once a POA is drafted and registered with OPG, lasts indefinitely unless the grantor decides to terminate it or if the attorney and grantor are married or in a civil partnership, on separation, dissolution, divorce or nullity. The CPOA

also ends if a guardian with the relevant powers is appointed. (AWI Act section 24).

Access to Funds (Part 3 of the Adults with Incapacity Act)

Purpose

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

Funds can only be accessed where they are held in an account in the sole name of the adult who has been assessed as incapable. Other arrangements can be made where money is in a joint account.

The funds can be used by the 'withdrawer' to pay for food, clothes, utility bills, care home fees and other items for the adult's benefit. Access to Funds can also be used to request a lump sum to pay off existing debts or to purchase specific items required by the adult, such as furniture or appliances.

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

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

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

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

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

Application process

1. Where the potential 'withdrawer' has insufficient information on the adult's funds, they may first need to apply to the OPG for a certificate authorising them to provide the necessary information (Form ATF 1). This application must be supported by a medical certificate and fee.

2. When the relevant information is available, but there is no suitable account, the withdrawer can apply to open a suitable account in the name of the adult as part of their application for authority to access funds (Form ATF 2). If approved, the OPG will issue a certificate giving authority to open a suitable account. Once the withdrawer supplies the OPG with the details of that account, a further certificate will be issued allowing the withdrawer to open a designated account and begin accessing the funds identified in the application.
3. Where there is already information on the adult's funds and there is a suitable account, the withdrawer can apply straightaway for authority to access funds using Form ATF 2.
4. In the application the withdrawer itemises the estimated expenditure needed for the adult's daily living expenses and the amount to be transferred from the adult's 'current account' to the designated account on a regular basis. The period of authority normally lasts for three years, so any increases that may be required over that period need to be taken into consideration. In the event of unforeseen expenditure being required after the initial authority is granted a variation may be applied for on Form ATF 5.
5. A medical certificate of incapacity must accompany the application.
6. Conditions also have to be met relating to the suitability of the withdrawer.
7. Authority to access one-off lump sums (e.g. specialised equipment or to pay off debts) can be applied for additionally with the appropriate evidence provided.

Further information is on the OPG website:

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

Safeguards

- Applications by individuals must be countersigned by a person who knows the applicant(s).
- Once satisfied of an organisation's fitness to access funds, the OPG will issue an organisation list number, which can be used for subsequent applications.
- A current medical certificate must be sent with the application.
- The OPG is required to intimate the application to relevant parties and the adult, and to examine the suitability of the applicant(s) before issuing the appropriate certificate enabling the withdrawer to act.-appeal
- Records must be kept and the OPG can request to see these to ensure the adult's funds are being used appropriately. There is a guide for withdrawers:

<http://www.publicguardian-scotland.gov.uk/docs/librariesprovider3/atf/pdf-documents/access-to-funds--a-guide-for-withdrawers.pdf?sfvrsn=2>

- The OPG can enquire into any complaints or concerns.

<http://www.publicguardian-scotland.gov.uk/investigations/about-investigations/how-to-tell-us-about-your-concern>

Points for consideration

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

Relevant links

AWI Act Code of Practice Part 3:

<https://www2.gov.scot/Resource/Doc/215749/0057713.pdf>

Management of Patients'/Residents' Funds (Part 4 of the Adults with Incapacity Act)

Purpose

Managers of care homes or hospitals, can manage residents' or patients' funds where the adult lacks capacity to do so themselves. In carrying out these functions:

- NHS hospital managers are supervised by the Health Board
- Care home managers are supervised by the Care Inspectorate
- Managers of independent and private hospitals are supervised by Healthcare Improvement Scotland
- State Hospital managers are supervised by the State Hospital Board.

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

- <https://www.gov.scot/publications/adults-incapacity-scotland-act-2000-part-4-management-residents-finances-information-leaflet/>

Regular reviews of care by the care home and the local authority should look at enhancing an adult's lifestyle and maximising their opportunities and consideration of the management of their financial resources is part of this.

Application process

To manage funds, an establishment must first be registered with its supervising body. Establishments, other than the State Hospital or NHS hospitals, may choose to opt out of Part 4 of the Act as part of their registration, or following registration.

If they consider Part 4 the best option for managing an adult's funds, the manager then obtains a certificate of incapacity for that person from a medical practitioner. The costs associated with this may be charged to the adult.

This is submitted with relevant information to the supervisory body. The application for use by care homes can be found on the Care Inspectorate website, along with instructions on how to progress the application. Applicants need to be clear how intervention under Part 4 of the Act will benefit the adult and how the other principles of the Act have been taken into account.

The supervisory body issues a Certificate of Authorisation under Section 42 to enable the manager to act. The adult should be notified when the medical certificate is completed and of the intention to manage their funds under Part 4 of the Act, though

intimation may be withheld if it is thought to pose a 'serious risk to the resident's health' (Adults with Incapacity (Scotland) Act 2000 S37(8)).

Safeguards

- Funds must be held separately from the funds of the establishment, in a single named account.
- The supervisory bodies are responsible for granting the Certificates of Authorisation, for investigating complaints and 'from time to time making inquiry' into the management of the adult's funds.
- The Care Inspectorate, or appropriate NHS Board, will inspect establishments which are managing residents' financial affairs and ensure that when a resident's financial affairs are being managed, proper financial accounting and audit measures are in place, and best practice recommended in the Codes of Practice is being followed.

Points for consideration

- It enables receipt and management of moderate amounts, from superannuated pensions and other monies, which might otherwise only be accessed by financial guardianship or by another organisation or individual accessing them by Part 3 of the Act.
- Low cost to the patient/resident – cost of medical certificate comes from their estate.
- Part 4 does not allow the manager to access money in a bank account which has accumulated from DWP benefits. Other measures under the Act may be required to access these, such as DWP appointeeship.

Relevant links

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

Code of Practice Part 4 for Supervisory Bodies:
<http://www.scotland.gov.uk/Publications/2003/07/17845/23737>

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

Financial Intervention Orders and Guardianship Orders (Part 6 of the Adults with Incapacity Act)

Purpose

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

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

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

The person(s) appointed to act as financial intervener or guardian may be a relative or friend with the expertise to manage the individual's estate or a professional such as a solicitor or an accountant.

The local authority may act as financial intervener, where it is appropriate, but may not act as financial guardian. We know that there are exceptions to this which have been approved by the sheriff court.

The local authority has a duty to apply for a guardianship or intervention order where one is needed and no-one else is applying. (AWI Act s53 (3) and s57(2))

Application process

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

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

3. There are prescribed timescales for preparation of the reports, intimation of the application, caution and notifications of the granting of an order detailed in the Code of Practice.
4. Once the order has been granted, it is registered with the OPG, who also has a supervisory role in the exercise of the powers. As part of this supervision, within three months of issue of their certificate of authority, financial guardians are required to produce an inventory to the OPG containing information about the property and finances under their control. They must send supporting information with the inventory, e.g. bank statements.

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

Management plan:

<http://www.publicguardian-scotland.gov.uk/guardianship-orders/following-a-guardianship-order/the-management-plan>

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

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

Safeguards

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

Points for consideration

- Financial guardianship enables appropriate management of larger or more complex estates.
- Advice and scrutiny are provided by the OPG.
- Costs can be recovered from the adult's estate.
- Legal aid is available for financial intervention and guardianship orders and further information can be found here:
<https://www.slab.org.uk/guidance/adults-with-incapacity-awi/>
- An application to be financial guardian must be scrutinised by the court and all interested parties must be informed by the court. This keeps the process open and transparent.
- The supplementary report comments on the appropriateness of the order and the suitability of the proposed guardian. The proposed guardian should be made aware of what is expected from them by the author of the report.
- There may be ongoing costs for the annual administration of the estate, where this is being carried out by a professional person such as a solicitor or accountant. The OPG will set the level of payment, taking into account the size of the estate. Where the adult's estate has diminished, it may be more advantageous to manage monies under a lesser restrictive measure of the AWI Act such as part 3 access to funds or via appointeeship. A multi-disciplinary discussion should take place to discuss financial measures required, based on the principles of the AWI Act.

Other relevant links

Revised Code of Practice for Local Authorities Exercising Functions under the AWI Act: <http://www.scotland.gov.uk/Publications/2008/03/20114619/0>

Revised Code of Practice for Persons Authorised to act under Intervention Orders and Guardianship: <http://www.scotland.gov.uk/Publications/2008/03/18094148/0>

OPG guardianship information:

<https://www.publicguardian-scotland.gov.uk/guardianship-orders>

OPG intervention orders information:

<https://www.publicguardian-scotland.gov.uk/intervention-orders>

OPG fees schedule:

<http://www.publicguardian-scotland.gov.uk/access-to-funds/fees>

Self-directed Support

Purpose

The Social Care (Self-directed Support) (Scotland) Act 2013 (SDS Act) allows for individuals assessed as eligible for social care services to have increased choice, flexibility and control over the support they receive.

The process used is called Self-directed Support (SDS). The Act provides four statutory principles which guide local authorities in implementation of relevant legal duties on care and support:

- Participation and dignity
- Involvement
- Informed choice
- Collaboration.

The local authority must ensure that they:

- Give people different choices to meet their care and support needs.
- Give people information and advice so they are able to choose the best things for them.
- Help people who find it hard to make decisions so they can get support with choosing and deciding.

The 4 options for self-directed support

A person can choose to have lots of control over their care and support or they can leave most of the decisions and work to the local council. Or they can have a mix.

- **Option 1 - you take a direct payment**
- **Option 2 - you decide and the local council arranges support**
- **Option 3 - after talking to you, the local council decides and arranges support**
- **Option 4 - you use a mixture of ways to arrange your care and support.**

Further information can be found here: <https://www.sdsscotland.org.uk/>

Application process

An assessment is required to be carried out by the local authority to determine how the adult will meet their outcomes, based on the SDS principles.

The adult will be supported to decide which option of SDS is best to commission the care and support they need. Where the adult lacks capacity this may be done by their guardian or attorney with the relevant powers. If there is no-one with the relevant powers, option 3 is the only possibility.

The Scottish Government provides guidance on the legal powers required to manage a social care budget on behalf of an adult who lacks capacity to take some, or all, decisions for themselves: <https://www.gov.scot/publications/managing-self-directed-support-for-adults-with-incapacity-guidance/>

The local authority will set up the chosen option and continues to monitor the assessed outcomes via the review process.

Direct Payment - option 1

Normally, a direct payment cannot be used to pay a family member to provide care. However, this is possible in some circumstances, such as where other providers are not available or where the intimate nature of the support makes it preferable to the direct payment user that it is provided by a family member.

A family member may not provide support to which a direct payment relates to if the local authority determines that either the family member or the direct payment user is under undue pressure to agree to the family member providing support; or the family member is a guardian, continuing attorney or welfare attorney with power to make decisions as regards the support to be provided through the direct payment. These measures are outlined in the Self-directed Support (Direct Payments) (Scotland) Regulations 2014:

<https://www.legislation.gov.uk/ssi/2014/25/made>

Financial concerns - where to go

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

Where there are concerns about the management of an adult's property or financial affairs by their continuing attorney or guardian, contact should be made with the OPG Investigations Team by phone, letter or email, or the referral form available on the OPG website. The complainant should outline the reasons why they think that the adult's property or financial affairs appear to be at risk, and provide any evidence which may have to support those concerns. The Office of the Public Guardian will be able to provide advice and guidance.

<https://www.publicguardian-scotland.gov.uk/investigations/about-investigations/when-can-we-act>

Where an adult has a proxy (attorney or guardian) with powers to make welfare decisions as well as financial powers it is important that this concern is also reported to the Local Authority for the area in which the person is resident, as a legal requirement in terms of section 5 (3) of the Adult Support and Protection (Scotland) Act 2007.

Local authority duties

The local authority has a duty under the ASP Act to make enquiries into the circumstances of an 'adult at risk', as defined by this Act (Section 4). The definition is:

- an adult unable to safeguard their own well-being, property, rights or interests; and
- who is at risk of harm; and
- because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected.

This would include any concerns about financial exploitation, by a proxy such as an attorney or guardian, or by anyone else.

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

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

Depending on the nature of the concerns, the local authority may give advice and guidance or make further enquiries to determine whether the person is at risk of harm and whether further intervention is required.

In most cases, the local authority will try to resolve the concerns without recourse to further use of legislation. This will obviously depend on the seriousness of the allegations and the cooperation of the attorney, guardian or others involved. There are a range of formal interventions which the local authority may consider.

The local authority also has a separate duty under the AW Act where there are concerns about a POA or guardian's decisions relating to the adult's welfare. They must investigate any complaint about how the POA or welfare guardian is exercising their powers, or investigate any circumstances where the adult's welfare is at risk (Section 10 AWI Act).

Where concerns are about both welfare and financial matters the local authority should liaise with the OPG, as investigation of financial or welfare aspects of an adult's care should not be done in isolation. If there are concerns that financial abuse has occurred, local police should be contacted.

Other useful links

http://www.alzscot.org/assets/0000/0276/Dementia_-_Money_and_Legal_Matters_-Vol_1.pdf

http://www.alzscot.org/assets/0000/0277/Dementia_-_Money_and_Legal_Matters_-Vol_2.pdf



Mental Welfare Commission for Scotland
Thistle House,
91 Haymarket Terrace,
Edinburgh,
EH12 5HE
Tel: 0131 313 8777
Fax: 0131 313 8778
Freephone: 0800 389 6809
mwc.enquiries@nhs.scot
www.mwccscot.org.uk
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