



TAYSIDE LOCAL MEDICAL COMMITTEE

The Adults with Incapacity (Scotland) Act 2000

A Guide for General Practitioners

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INTRODUCTION

The Adults with Incapacity Act came into force during 2001 and 2002, and provides people with the opportunity to plan for future mental incapacity. It also allows relatives and others to take steps to remedy the situation where someone has lost their capacity without having taken the prudent and simple steps to plan properly.

The contribution by the medical profession to the efficient working of the Act is vital. This short guide is intended to give guidance to doctors, and those who seek their advice, about the steps that can be taken at various stages. It should also be seen as encouraging those who do not have a power of attorney to ensure that they sign one, which of course can be done at any age over 16.

POWERS OF ATTORNEY

A Power of Attorney is a document which someone signs to authorise one or more people to deal with his or her financial, personal or welfare needs if that person later becomes unable to deal with matters themselves. This could be because of mental or physical incapacity. There are two types of Power of Attorney, a Continuing Power of Attorney and a Welfare Power of Attorney. The Continuing Power of Attorney relates to a person's property or financial affairs and the Welfare Power of Attorney deals with a person's personal welfare.

All modern Powers of Attorney are registered with the Office of the Public Guardian who can in certain circumstances exercise some control over how an attorney acts. The attorney is legally required to act

for the benefit of the person who has signed the document, to intervene to the minimum extent that is appropriate, and to consult with the person and with others, such as carers.

The Continuing Power of Attorney

The Continuing Power of Attorney can be brought into use when a person (in the Act always called “the adult”) is ill, or when they are unavailable, for example, out of the country, or indeed if the adult asks the attorney to start acting for them. When choosing who to appoint as a Continuing Attorney it is important that it is a person who can be relied upon: it could be a family member or a solicitor or both acting together. An advantage of having a solicitor acting is that he or she is independent, reliable, has expertise in dealing with financial matters, and has compulsory insurance. A solicitor will charge a fee for his or her work.

By granting a Continuing Power of Attorney a person knows that they have appointed someone of their choice who can look after their affairs if they become unable to do so themselves. It does not mean that they are giving up the authority to deal with their own business, but only that they are permitting someone else to do so, if necessary. It can be looked upon as being a safeguard to have in place if it is ever required.

The Welfare Power of Attorney

The Welfare Attorney is normally a family member due to the personal nature of the role. The Welfare Attorney can step in and make welfare decisions on the adult’s behalf only when the adult who granted the document subsequently becomes mentally incapable. The Welfare Attorney will make decisions on where the adult will live, what personal care should be in place, and will be able to consent to medical treatment. It is important for a person to have the confidence that a member of their family can make welfare decisions on their behalf in the event they cannot do so for themselves.

An amendment to the Social Work (Scotland) Act, passed in October 2007, allows the Social Work department of the local authority to decide where a person should live, without first having to obtain the agreement of the adult’s family. This perhaps useful, but potentially draconian power, in the view of some, may breach an incapable adult’s human rights, and is already used by some councils. The council’s power is removed if a Welfare Power of Attorney has been granted by the adult. The effect of this is to give the powers to the person who was granted them by the adult, rather than to the state.

There is no special form of certificate, and a letter is sufficient from a GP or psychiatrist to prove the adult’s incapacity. The certificate will be requested by the solicitor, a family member or the attorney. The certificate must usually be seen by the solicitor before he or she can release the Power of Attorney, and the powers cannot be used until the certificate from the doctor has been issued. Some older welfare Powers of Attorney do not stipulate that there must be a certificate, only that the Welfare Attorney is reasonably satisfied that the adult is incapable. Every prudent attorney should obtain such a certificate, and most do.

Combined Continuing and Welfare Power of Attorney

It is possible to have a Welfare and Continuing Power of Attorney in the same document if the attorneys are to be the same. This will save some expense, though some adults may not want a bank, for example, to see what welfare powers they may have granted.

Capacity

Capacity is a key issue to be considered when granting a Power of Attorney. Obviously, a person must be mentally capable of understanding and giving instructions for the preparation of their Power of Attorney. The 2000 AWI Act defines incapacity, **an adult being defined as incapable when he or she is unable to act, or to make decisions, or communicate decisions, or understand the effect of decisions, or retain the memory of decisions.** The solicitor has to make his or her judgement about the capacity of the adult. In the event of any doubt at all, the judgement becomes a medical one, although of course with important legal consequences. There are, separately, arrangements for a solicitor to sign a document for a person who has some physical infirmity (for example, blindness, Parkinson's disease, or inability to write).

If a solicitor is in doubt they will request a letter from the adult's GP or other doctor from whom the adult is receiving treatment. The request will explain the reason why the solicitor has requested the doctor's professional opinion, for example that the person has recently been diagnosed as suffering from early stage dementia. The doctor will also be asked to confirm whether, in their opinion, the adult is capable of granting a Power of Attorney or other document that is proposed. If the adult is not capable the doctor should give a description of the condition the adult is suffering from and state if the condition is likely to be lifelong. When deciding if an adult is capable the doctor must consider the definition of incapacity in Section 1 of the 2000 Act and apply this to the adult's case. It is important that the adult must have been seen recently by the doctor. If the adult is capable the doctor's confirmation will then be mentioned on a certificate that the solicitor signs and attaches to the Power of Attorney stating that the solicitor has interviewed the adult and is satisfied that the adult "understands the nature and effect" of the document.

The level of capacity that a solicitor will want to have demonstrated is not the same for all documents. Due to the nature and concept of the Power of Attorney, and the power it gives another person, a solicitor may want to see a higher level of capacity demonstrated than if the same person was consulting the solicitor about, for example, making a Will. On the other hand, even if an adult suffers from a degree of short term memory loss, he may consistently and repeatedly state, for example, that he wants his daughter "to look after my money when I can't do so myself". This may be sufficient to establish capacity for this purpose.

When a Power of Attorney should be considered

It is important that people know that they *do not* need to be ill or suffering from a disease before they think about a Power of Attorney. A Power of Attorney, like a Will, is simply a matter of prudent and routine life planning, and should *not* be left until it is too late. It must be done when the adult is capable.

Alternatively, when a person is diagnosed with an early stage of mental illness or disease it is equally important that they are made aware of the benefits of having a Power of Attorney in place, in case it may be required relatively soon. It is a relatively inexpensive document to have drawn up and it will save a great deal of difficulties, expense and additional stress to the family if a person does become incapable later. A spouse or other “next of kin” (a phrase that has little legal significance) has no automatic power to deal with an incapable adult’s finances or welfare.

What happens on incapacity?

If an adult becomes mentally incapable and they do not have a Power of Attorney in place then they will not be able to deal with their financial matters, and their assets will be “frozen” by the bank or other institution that holds the assets. If this happens the Sheriff Court may have to be asked to appoint a guardian. This is a cumbersome process which involves a great amount of legal and accounting technicalities, and is also expensive and time consuming. A guardianship is the last resort, and it is unfortunate that so many guardianships have to be applied for when the simple expedient of a Power of Attorney would render it unnecessary.

GUARDIANSHIP ORDERS

A guardianship order, issued by the Sheriff, provides legal authority for someone to make decisions and act on behalf of an adult with impaired capacity, in order to safeguard and promote their interests, either financial or welfare or both. It allows the guardian to do things such as controlling investments, paying bills for care and making welfare decisions about the adult’s care over a longer term. The powers granted under an order can relate to the adult’s money, property, personal welfare and health. The application is made for a financial and/or welfare order depending on the needs of the individual.

When is a Guardianship Order required?

A guardianship should be considered when an adult can no longer act or make decisions for him or herself, and someone else requires to have the powers to act for the incapable adult. The adult may have been incapable from birth, become incapable gradually through mental or other illness, or suddenly as a result of a stroke or accident. Particular circumstances where a guardianship order may be necessary include:

- when there are financial assets to be dealt with, or a house needs to be looked after or sold;
- when an adult has complex or significant care needs but is unable to seek help or give informed consent;
- where the parents of a young person with a learning disability who is over the age of 16 and will be unable to make decisions for that person’s future, particularly when they themselves becoming old;
- where a person already has Power of Attorney in relation to an adult but the scope of the powers is not enough to allow them to take decisions on the adult’s behalf.

A doctor will be required to confirm that the adult is incapable, as defined by the 2000 AWI Act, before a guardianship application can be started. A guardianship order is relevant only when a person is incapable.

The guardianship process

As a preliminary step, a letter from a doctor will be requested to confirm the adult's incapacity. This letter will be requested by the solicitor, a family member or the local authority. The Chief Social Work Officer of the local authority can be appointed as a Welfare Guardian and frequently is when the adult has no family or the family are not suitable to be appointed. The letter should detail the condition from which the adult is suffering, state if the condition is lifelong and must also confirm that the adult is incapable of making decisions relating to their welfare and/or financial affairs. This letter can be reasonably brief as a more detailed formal report will be required for the court, later in the process. Once this initial letter is received the solicitor can be satisfied as to the adult's incapacity. The solicitor will usually be instructed by the adult's family, and doctors will know that the judgement of family members will not always be reliable.

The solicitor will then prepare the Summary Application and will write to the Chief Social Work Officer of the local authority to arrange for a Mental Health Officer to assess the adult. When there is a date for this assessment, which can take a number of weeks, the solicitor will then request the additional reports which are required for the Court. If the application is for welfare two medical reports, usually from the GP and a psychiatrist, are required, and if the application is also for a financial guardianship an independent report, usually by a solicitor is obtained as well.

The medical reports

It is a requirement of the 2000 Act that two medical practitioners, usually the adult's GP and always a psychiatrist, complete a medical report in the prescribed form. If the incapacity is due to a mental disorder one of the medical practitioners must be approved for the purposes of section 22 of the Mental Health Act as having special experience in the diagnosis or treatment of mental disorder, i.e. a psychiatrist. If the incapacity arises from say a car accident or a stroke the medical reports can be completed by any medical practitioners. The prescribed form of the report is Form AWI [1] and these are separately completed, signed and dated by the medical practitioners, including the adult's date of birth and the date of the interview. The solicitor will provide the form or if preferred it can be downloaded from www.scotland.gov.uk/Topics/Justice/Civil/awi/forms/Medical-Report-Forms . The solicitor should also provide the doctors with a copy of the summary application which should include all the relevant information and details of the powers which are being sought.

Timing is very important when completing the reports as the application must normally be lodged in court within *thirty days* after the first assessment has been carried out. The solicitor should therefore provide a timescale by which the assessments should be carried out and when the reports should be completed and returned. If the doctor cannot carry out the interview within the timescale mentioned, the solicitor should be told of this. However since 1st April 2008 the Sheriff has the power to allow a report to be lodged late if he is satisfied that the adult's condition has not changed in the meantime.

Once all reports are obtained the solicitor can then apply to the court. The sheriff then decides if the adult needs a guardian and if the applicant is suitable. There is a hearing, in private, when the Sheriff hears the applicant for the order or his solicitor. The doctors do not have to attend. Once granted, the order is registered with the Office of the Public Guardian. The guardian should then contact everyone who needs to know about the order and should let all medical and financial authorities see and copy the certificate of appointment.

Welfare Guardians

If a doctor is advised that a welfare guardian has been appointed to an incapable adult the doctor should ask to see the guardian's certificate of appointment, and keep a copy of it. The legal effect of an appointment is to remove from the adult the power to take decisions about his or her welfare, and to transfer those powers to the welfare guardian, to the extent specified in the powers which are detailed in the certificate of appointment. These powers will typically include consenting to medical treatment on behalf of the adult. The consent is now in the hands of the guardian, but both the guardian and the doctor should consult the adult, to the extent that it is possible to do so. No other procedures are then required to be followed under the 2000 Act.

The process of guardianship can take up to six months, and can be expensive, though some solicitors may offer legal aid to some extent. The outcome of the whole exercise is usually the appointment of a guardian whom the adult, if capable, could have appointed as an attorney under a Power of Attorney. This emphasises how important it is for an adult, every adult, to sign a Power of Attorney when they are capable of doing so.

INTERVENTION ORDERS

An intervention order is appropriate where there is a need for a single decision or action. It is designed to allow someone to do something specific such as signing a document (though never a Will) for an incapable adult, or to decide what treatment is best for that adult at a particular time. The application procedure is similar to that of a guardianship. The same initial letter confirming incapacity from a doctor and the report in the prescribed form from two medical practitioners will be required.

APPLICATION FOR AUTHORITY TO INTROMIT WITH FUNDS

This is an arrangement allowing someone to use the funds in an account and to continue to pay bills and meet regular expenses for an incapable adult (this is not necessary if a person has a Continuing PoA or a Guardianship order with financial powers). A medical certificate is required from the incapable adult's own GP to confirm incapacity. An application form, available from the Office of the Public Guardian, is then completed by the person applying for the for the power to intromit with (have access to) the funds, and it is countersigned by a professional person who has known the applicant for at least two years and who also knows the incapable adult. The professional cannot be the doctor who provides the certificate of incapacity. The application is then sent to the Office of Public Guardian for approval. If it is approved the Office of Public Guardian will issue a certificate allowing the

applicant to have access to the account. The certificate will detail exactly what the applicant is allowed to withdraw and for what purpose. The applicant is accountable to the Office of Public Guardian.

It is meant to be a simple procedure for a family member to do themselves. In practice it is far from straightforward, and it is common for an applicant to seek legal advice.