

The Highland Council
Education, Children and Adult Services
8 October 2015

Agenda Item	11.
Report No	ECAS 86/15

Adults with Incapacity

Report by Director of Care and Learning

Summary

This report outlines powers in relation to the Adults with Incapacity (Scotland) Act 2000. It recommends that there is greater awareness across the community of the importance of making arrangements for Power of Attorney to ensure that measures can be put in place for the care of an adult without delay should they become incapable.

1. Background

- 1.1 The Adults with Incapacity (Scotland) Act 2000 enables decisions to be made on behalf of Adults who lack legal capacity to do so themselves because of a mental disorder or inability to communicate. The decisions concerned may be about the Adult's property or financial affairs, or about their welfare, including medical treatment or both.
- 1.2 When making a decision to intervene in terms of the Act an overarching set of principles must be followed. The intervention must be of benefit to the Adult, be the least restrictive option, be made in consultation with others, take account of the Adult's past and present wishes and encourage the Adult to exercise whatever skills they have.
- 1.3 The assessment of an individual's capacity to make decisions is undertaken by a doctor. Any decisions about capacity require expert medical advice.

2. Power of Attorney

- 2.1 An Adult may grant a Power of Attorney giving an Attorney powers over property and finance or welfare or both. A Power of Attorney is a written document giving someone else authority to take actions or make decisions on the Adult's behalf. The Power of Attorney details the names of the people who the Adult wishes to act in the event of his or her incapacity, and lists the individual powers the Attorney is to have. When granting a Power of Attorney, the Adult must have capacity to do so.
- 2.2 A Power of Attorney must be expressed in a written document. It must incorporate a certificate in the prescribed form by a practising solicitor, or registered medical practitioner to confirm they have interviewed the adult; they understand the document and are not acting under undue influence.
- 2.3 A Power of Attorney must be registered with the Public Guardian before it can be used. A Welfare Power of Attorney does not become active until the Adult has lost capacity. Medical confirmation of lack of capacity is required.
- 2.4 Power of Attorney is not only for older people. It is about an Adult having plans in place if they become unable to look after themselves owing to illness or an

accident.

- 2.5 When an Adult becomes incapable, a Welfare Power of Attorney gives power over decisions that need to be taken about the Adult's welfare and health care. For example, an Attorney can agree to where an Adult will live. This can allow Adults to move from hospital to other care settings without further legal intervention.

3. Guardianship

- 3.1 Other measures of intervention outlined in the Act are Access to Funds, Intervention Orders, Financial Guardianship and Welfare Guardianship. The Local Authority would only be involved in an application for Guardianship when no one else was applying. If this is the only way to deal with the Adult's estate, the Local Authority has a duty to apply. The Local Authority does not act as Financial Guardian; this is normally done by an independent solicitor.
- 3.2 When an Adult lacks capacity and no Power of Attorney arrangements are in place, a private individual can make an application for Welfare Guardianship. The solicitor arranges for 2 medical reports to be completed by a Consultant and the adult's GP. A Mental Health Officer is required to assess the guardian and ensure they understand their duties in relation to the Act and that the proposed guardian is suitable. The Mental Health Officer is required to submit a report to the solicitor within 21 days.
- 3.3 The Local Authority will apply for Welfare Guardianship when no private individual is able or willing to do so. As most applications relate to mental disorder, the Mental Health Officer is the lead officer. The Mental Health Officer compiles a report and ensures two medical reports are sent to the Council's Legal Services. On receipt of the reports, Legal Services will draft the application and lodge it in court. The Sheriff arranges a full Hearing within 28 days of the application being lodged. Legal Services represent the Local Authority in applications. If there is no opposition and the Sheriff is satisfied with the reports and the application, Guardianship will be granted. If the Sheriff is not satisfied, a Hearing for evidence will be arranged.
- 3.5 Once the order is granted the supervising officer, normally the social worker must meet with the Adult. There is a statutory duty to meet no more than 3 months after the order is granted and no less than every 12 months after that time. In Highland, responsibility for supervising Guardians has been delegated to Health and Social Care staff employed by NHS Highland.

4 Hospital Patients

- 4.1 Concerns have been expressed about the impact of the Adults with Incapacity Process on delaying an Adult's discharge from hospital. There is a flow chart (**Appendix 1**) which outlines the process for Adults with Incapacity. It sets out clear timetables in relation to assessing capacity of an adult within 3 days of admission to hospital. The flow chart details the need to invite Mental Health Officers and Legal Services to meetings to discuss Adults with Incapacity. It outlines the process for lodging Guardianship applications in court.
- 4.2 The Adults with Incapacity procedures in Highland have recently been updated. Legal Services and the Mental Health Officer service have agreed to deliver training on the Adults with Incapacity process and procedures to staff in NHS

Highland. Ensuring that staff are aware of the flowchart and are following this will be a key part of the training.

- 4.3 There are 2 main reasons why delays may occur in relation to the Adults with Incapacity process. The first is around people not being identified as lacking capacity at an early stage. The second is around families not following through with the legal process when pursuing Private Guardianship. This may happen for a number of reasons including disagreement between family members, relatives living abroad or families not wishing to pay for care.

5. Implications

- 5.1 There are Resource implications for the Mental Health Officer Service and Legal Services if the number of Guardianship applications continues to rise. To combat this it is important that there is greater awareness across communities of the importance of making arrangements for Power of Attorney while an Adult is capable of doing so. A Guide to making a Power of Attorney (Office of the Public Guardian) is attached for information **(Appendix 2)**
- 5.2 There are no Legal, Equalities, Climate Change/Carbon Clever, Gaelic or Rural implications

6. Recommendation

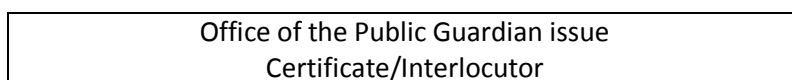
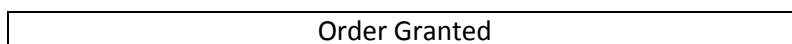
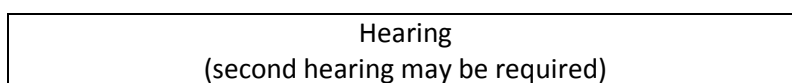
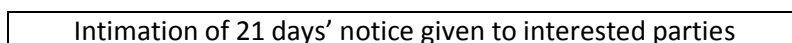
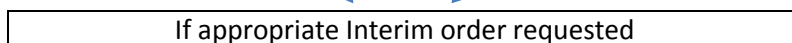
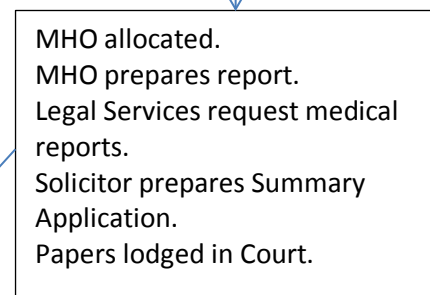
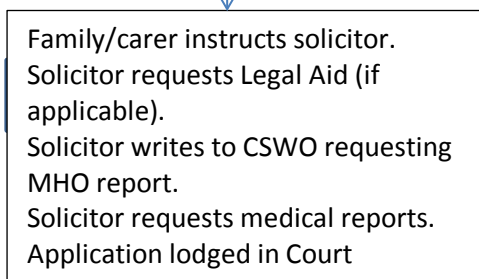
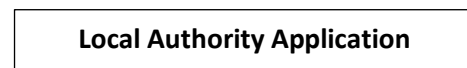
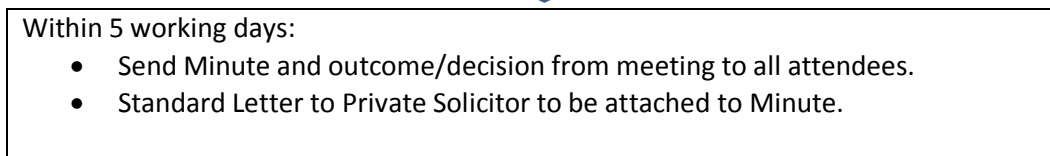
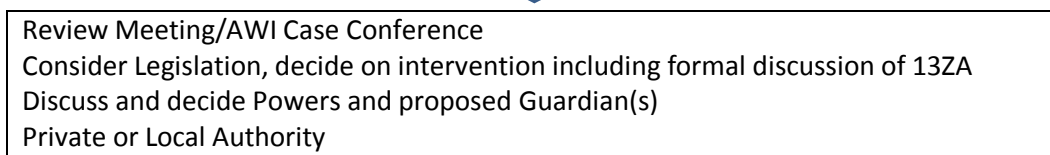
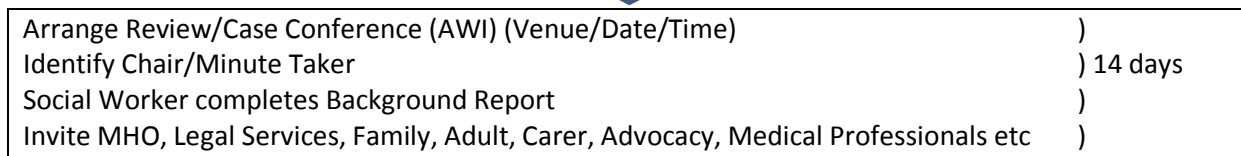
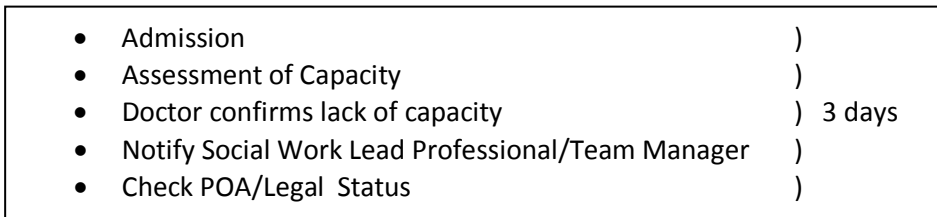
- 6.1 Health and Social Care professionals have a key role in making people aware of the importance of making arrangements for Power of Attorney when they are capable. Members are asked to consider if this is a role they can also assist with in making constituents aware of the importance of setting up arrangements for Power of Attorney.

Designation: Director of Care and Learning

Date: 28th September 2015

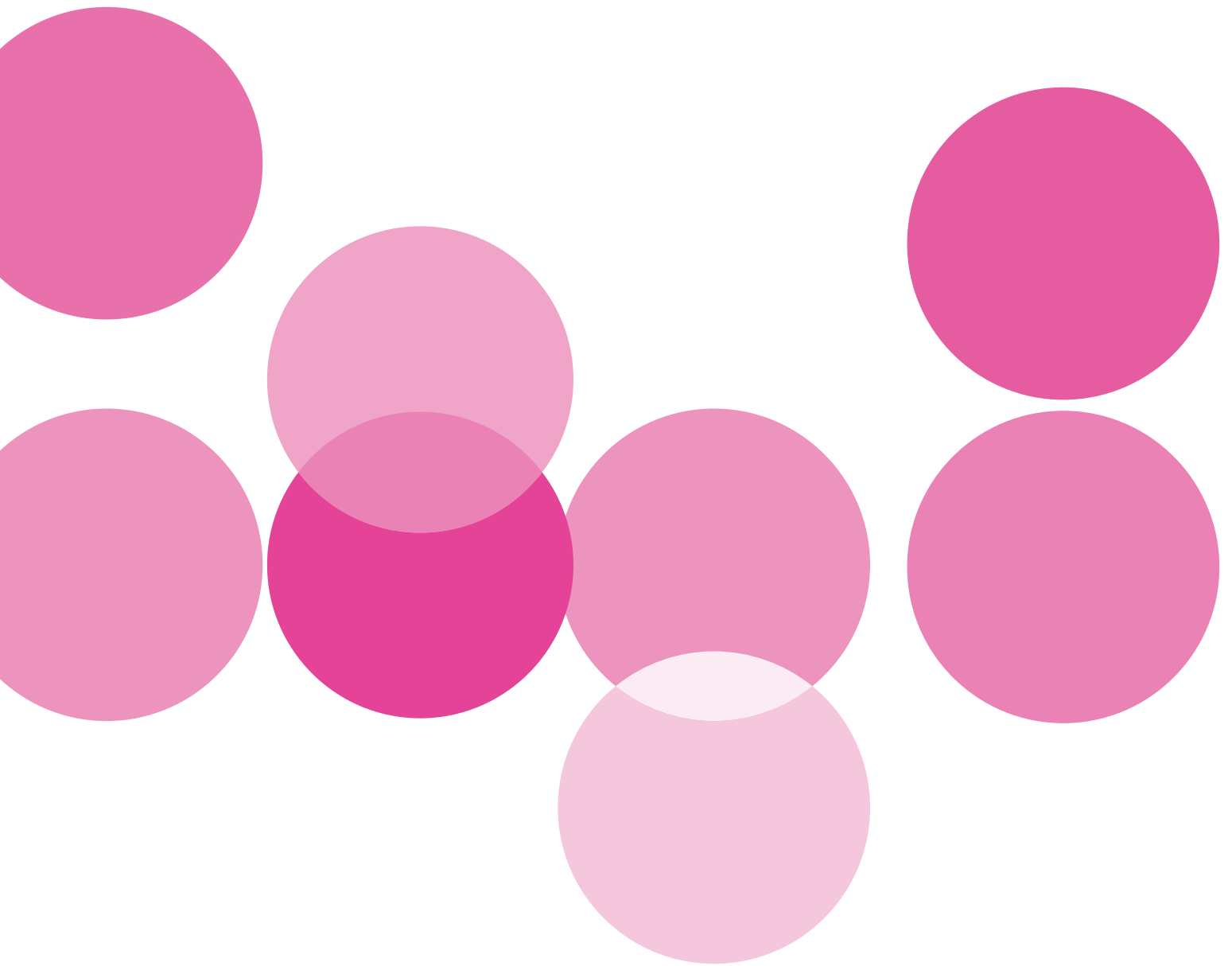
Author: Fiona Palin Head of Adult Services

SUMMARY OF AWI PROCESS – FLOWCHART



ADULTS WITH INCAPACITY
(SCOTLAND) ACT 2000

A Guide to making a Power of Attorney



Contents



1	Introduction	p3
2	What is a Power of Attorney?	p4
3	Creating a Power of Attorney	p5
4	Further Assistance	p11

1. Introduction



This guide is for individuals who wish to appoint one or more persons with Powers of Attorney which will either continue or begin in the event of incapacity.

It sets out how to create a Power of Attorney and the requirements to be met before registering the Powers of Attorney under the Adults with Incapacity (Scotland) Act 2000 (referred to as the “Act”). These requirements provide a safeguard for both you and for anyone you appoint to act for you. For information on the statutory functions and responsibilities of an attorney, please refer to the Codes of Practice for Continuing and Welfare Powers of Attorney issued by Scottish Government.

Power of Attorney is a legal document which appoints someone to act/make decisions on behalf of a granter. Powers of attorney can deal with financial and/or welfare matters.

- Continuing power of attorney gives power over the granter’s property and finances. This power may start immediately and will continue in the event of the granter’s incapacity or it may begin at a later date e.g. when the granter becomes incapable. It will be the granter’s choice when the continuing power of attorney is to begin.

- Welfare power of attorney gives power over decisions that need to be taken about the granter’s welfare and health care. This power will only begin if the granter becomes incapable.

The Office of the Public Guardian (OPG) is part of the Scottish Court Service and provides relevant free (but non-legal) advice and information. For further details consult our website at www.publicguardian-scotland.gov.uk

The Public Guardian’s responsibilities in relation to powers of attorney are to:

- register continuing and welfare powers of attorney;

Codes of Practice for Continuing & Welfare attorneys are available for download from the Scottish Government website: www.scotland.gsi.gov.uk/justice/incapacity or by telephoning 0131 244 3581.

- maintain registers of all documents relating to continuing/welfare attorneys for inspection by members of the public;
- provide advice and guidance to continuing attorneys;
- supervise and investigate the continuing attorney and audit any accounts submitted (when instructed by a Sheriff); and
- liaise with the Mental Welfare Commission and local authority on investigations.

The Public Guardian may also:

- carry out an investigation on receipt of a complaint or concern regarding the exercise of functions relating to the property or financial affairs of a granter in relation to continuing attorneys; and
- take part as a party in any proceedings before a court to initiate such proceedings where he considers it necessary to do so to safeguard the property or financial affairs of an adult who is incapable for the purposes of the Act.

2. What is a Power of Attorney?



Power of Attorney is a written document appointing someone to act on your behalf in respect of decisions that require to be made for you when you are unable to take these decisions for yourself. The person who grants the power is known as the ‘granter’ and the person appointed is the ‘attorney’.

Powers of attorney can deal with financial and/or welfare matters.

A continuing power (sometimes referred to as a financial power) of attorney relates to the granter’s property or financial affairs. A continuing power of attorney can come into effect whilst the granter still has capacity and will continue, should the granter lose capacity at some future point. If the granter wishes, the continuing power of attorney may begin at a later date. If this is the preferred option, a statement to this effect must be included in the written power of attorney document.

A welfare power of attorney relates to decision making in relation to the granter's personal and health care and can only come into effect on the onset of incapacity in relation to the powers granted.

If you wish to make plans for the future you should consider making a power of attorney. A power of attorney can be useful for someone anticipating permanent incapacity or it can be used to handle a person's affairs during periods of temporary incapacity. This could be relevant to someone with a fluctuating condition.

You may wish to engage an appropriate professional to draw up your power of attorney, such as a solicitor, or do so yourself. Your local Citizens Advice Bureau may also be able to provide advice to you. The address can be found in a local telephone book. The OPG website provides sample powers of attorney documents which cover all possible variations in terms of types, appointment/s: www.publicguardian-scotland.gov.uk

3. Creating a Power of Attorney



3.1 STATUTORY REQUIREMENTS FOR MAKING A VALID POWER OF ATTORNEY

The following statutory requirements apply to the creation of a power of attorney document:

- a power of attorney must be expressed in a written document;
- the document must be signed by the granter; and state clearly that the powers are continuing or welfare or a combination of both;
- a welfare power of attorney must include a statement which shows that the granter has considered how incapacity is to be determined. Such a statement is also required in a continuing power of attorney, where the powers are only exercisable once the granter has lost capacity; and

- it must incorporate a certificate in the prescribed form by a practising solicitor, a practising member of the Faculty of Advocates or a registered and licensed medical practitioner which certifies that he or she:

- has interviewed the granter immediately before the granter signed the document;

- is satisfied, either because of their knowledge of the granter or because of consultation with another person who has knowledge of the granter, that at the time of granting the power, the granter understands its nature and extent; and

- has no reason to believe that the granter is acting under undue influence.

The layout of the Scottish Statutory Instrument no. 56, Schedule 1 should not be amended in any way as it has been prescribed by Scottish Ministers.

The Act does not specify how the certificate should be “incorporated”, but the OPG will accept a certificate that is attached to the power of attorney document in the same manner as all other pages of the document itself. The certificate required is prescribed by the Adults with Incapacity (Certificates in Relation to Powers of Attorney) (Scotland) Regulations 2008. The certificate is known as the Scottish Statutory Instrument no. 56, Schedule 1. A copy of the certificate can be viewed on the Forms & Publications section of the OPG website.

The person being granted power of attorney cannot also be the person who signs the certificate described above. However if the prospective attorney is a solicitor in a firm, another solicitor in the same firm may sign. Where the firm itself is being appointed as the continuing attorney, it is good practice for the certifier to be someone independent of the firm.

Attorneys have no authority to act until the power of attorney document has been registered by the Public Guardian. Whether or not the powers can be exercised thereafter will depend on the terms of the power of attorney i.e. whether the granter has included a statement specifying a date or an event that must happen before the attorney can act. An example of this being when the granter specifies that a continuing attorney can only act in the event that the granter has been deemed incapable of making their own financial decisions.

3.2 WHO CAN BE AN ATTORNEY?

You are free to choose whomever you want to be your attorney. However, you will wish to bear in mind that an attorney has a position of trust and should be someone you are confident will act responsibly on your behalf, and who has the necessary skills to carry out the tasks required of an attorney.

The following indicates who you can appoint as an attorney:

- An individual can be a welfare attorney.
- An individual or a firm e.g. of solicitors can be a continuing attorney.
- You can appoint a combination of both individuals and professionals.

An individual cannot act as a continuing attorney if he/she is declared as bankrupt at the time of the appointment or thereafter. For the purposes of this Act, a person is bankrupt if their estate has been sequestrated for insolvency or a protected trust deed has been granted. However, once a person has been discharged from bankruptcy (after 1 year) they can act as a continuing attorney.

If you become bankrupt, your continuing power of attorney will be terminated until you are discharged from bankruptcy. People who are bankrupt can still act as a welfare attorney. If you become bankrupt, this will not affect your welfare power of attorney.

3.3 SOLICITORS OR ORGANISATIONS AS ATTORNEYS

A continuing attorney could be a body such as a firm of solicitors or accountants, or a financial institution or a voluntary organisation. Where the continuing attorney is not an individual, it is good practice for an individual to be identified as having particular responsibility for performing the functions of attorney.

3.4 APPOINTMENT OF JOINT OR SUBSTITUTE ATTORNEYS

You should also consider the question of whether you wish to appoint more than one attorney.

You may appoint:

- separate attorneys to exercise functions in relation to property and financial affairs and in relation to personal welfare;
- joint attorneys with similar or different powers;
- one or more substitute attorneys to take the place of an attorney who dies or resigns.

You cannot give your attorney/s the right to appoint a substitute or a successor.

If you appoint joint attorneys they will have to act together and both be involved in any decision making on your behalf. If you wish them to be able to act together or separately, you should include in the power of attorney that you are appointing them “to act jointly and severally or severally”. Inclusion of this statement then allows each attorney to act as an individual or jointly with each other.

3.5 POSSIBLE POWERS TO BE INCLUDED IN A CONTINUING POWER OF ATTORNEY

You should try to foresee all the property and financial affairs which may need to be managed in the event of your incapacity. You should discuss with the prospective attorney the extent of powers which you wish the attorney to exercise. These could include in particular power to:

- purchase or sell heritable property (land or buildings);
- open, close and operate any account containing your funds;
- claim and receive on your behalf all pensions, benefits, allowances, services, financial contributions, repayments, rebates and the like to which you may be entitled.

The attorney may not need to exercise all the powers that you grant. Either the occasion may not arise to exercise particular powers; or he/she may find that when the principles are applied the exercise of the powers would not be justified. The important point is that you try to foresee the powers which may be required to meet your needs. For further information on powers which may be included, please refer to the Code of Practice for Continuing & Welfare Attorneys.

It is advisable for you to discuss your feelings and wishes regarding the exercise of your powers with your prospective attorney. For example do you have any views about what type of investments you would wish to make or avoid? Do you have views about remaining in your own home as opposed to moving into residential care? Do you wish any particular property to be safeguarded as inheritance for a particular person? Do you attach sentimental value to any particular property?

3.6 POSSIBLE POWERS THAT MAY BE INCLUDED IN A WELFARE POWER OF ATTORNEY

You should try to foresee all the welfare decisions which may need to be taken in the event of your incapacity and discuss these with the prospective attorney. These could include power to:

- decide where you should live;
- have access to your personal information held by any organisation;
- consent or withhold consent to medical treatment for you, where not specifically disallowed by the Act i.e. your attorney cannot place you in hospital for the treatment of a mental disorder against your will; nor consent on your behalf to certain medical treatments specified in regulations. With regard to other treatments, the doctor responsible must obtain consent from your attorney, where it is reasonable and practicable to do so. Arrangements are set out in the Act for obtaining a second opinion where the attorney and doctor disagree. Even where your attorney and the doctor agree, the Act gives a right to “any person having an interest in the personal welfare of the adult” to appeal to the Court of Session about the medical treatment in question. For full details consult Part 5 of the Code of Practice relative to Continuing and Welfare Powers of Attorney.

Please note that these are only examples of powers that might be included. In any particular case, some powers may be inappropriate and others may need to be added. You may wish to refer to the Code of Practice for Continuing and Welfare Attorneys, for a fuller list of suggested powers.

3.7 DISCUSSION WITH PROSPECTIVE ATTORNEY

Although there is no requirement for you to gain the agreement of the person you wish to become your attorney, the OPG will have to be satisfied when it comes to register the power of attorney that the person named is prepared to act. Therefore, it is good practice for you to discuss with the person what being an attorney involves. It will be helpful if you keep a note of the matters discussed at this time and for the prospective attorney to have a copy. This is because there may be a long interval of time before the power needs to come into operation (if at all).

The purpose of the discussion is to ensure that:

- 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 and how your incapacity is to be determined;

- you offer sufficient powers to ensure that your attorney can do what you would wish;
- you make your wishes and feelings clear;
- you provide the prospective attorney with sufficient information regarding your financial circumstances: income, liabilities and assets; existing arrangements; where certificates, titles, records, papers, etc. are kept; particulars of professional advisers, etc; details such as national insurance number; and the people who should be consulted about the exercise of your powers;
- whether you want a continuing power of attorney to be exercisable immediately (i.e. before incapacity) or only to start at the onset of incapacity.
- If you are appointing a welfare attorney you should ensure that he/she knows your likes and dislikes and personal welfare concerns fairly thoroughly. In the course of your discussions you and the prospective attorney might cover the following issues, preferably not on a single occasion, but in the course of building up your relationship of trust:
 - views as to how you would like to be cared for if the expected arrangements break down, or if you become unwell;
 - hobbies and activities and the places you like to visit and the social groups you enjoy being part of;
 - particular dislikes and activities, places or people you would prefer to avoid.

This list is not comprehensive. It is a guide as to the kind of issues that arise in people's lives at some time and which you may wish to consider in drawing up your power of attorney. The Code of Practice for Continuing and Welfare Attorneys, issued by the Scottish Government offers further guidance on involvement of prospective attorneys at the time of making a power of attorney.

3.8 SPECIFYING WHO SHOULD RECEIVE A COPY OF THE REGISTERED POWER OF ATTORNEY

You can specify persons you wish to receive a copy of the registered power of attorney document. If you do wish to specify persons to receive a copy, this should be included in the body of the power of attorney document. Up to two people can be specified to receive a copy of the registered power of attorney document. There is no charge for providing copies to the specified persons.

If there is no reference to specified persons within the power of attorney document, and copies are required after it has been registered, a fee will be due to the Public Guardian.

3.9 GRANTING YOUR ATTORNEY SUFFICIENT POWERS

You can grant whatever powers you choose, but when it comes to legal interpretation powers are strictly interpreted. Even if you think you meant to give a specific power, unless it is clearly specified in the written document, it cannot be assumed as being given. Therefore you will need to ensure that, while capable, the powers you intend to grant are clearly specified.

If a long interval is likely to elapse between the time you grant the power of attorney, and the time of your incapacity, it will of course be possible to hold further discussions to review the powers granted. It is good practice for you to hold further periodic discussions with the prospective attorney to ensure that the powers granted remain appropriate and sufficient. For example if you acquire significant investments since you granted the power of attorney, you may want to grant a prospective continuing attorney additional powers to maintain or reinvest these investments.

3.10 COSTS OF ACTING AS AN ATTORNEY

There is no provision in the Act for reimbursement of a welfare or continuing attorney. If you wish to allow your attorney to claim fees and/or out of pocket expenses in relation to their functions as an attorney, you may make provision in the power of attorney for this. In the case of a continuing attorney who is a professional person, such as a solicitor or accountant, the power of attorney is likely to make provision for the deduction of fees and expenses.

4. Further Assistance



To find out how to register your Power of Attorney with OPG, please refer to the fact sheet on our website.

OPG focuses primarily on financial matters and staff at this office will be happy to help with your enquiry. If staff cannot assist they will point you to other agencies that will be able to help. Please note that OPG does not provide legal advice.

Office of the Public Guardian (Scotland)
Hadrian House
Callendar Business Park
Callendar Road
FALKIRK, FK1 1XR

DX: 550360 Falkirk 3
LP: LP-17 Falkirk

- Telephone: 01324 678300
- Fax: 01324 678301
- Email: opg@scotcourts.gov.uk
- Website: www.publicguardian-scotland.gov.uk

The office of the Public Guardian (OPG) is open to the public from 9am to 5pm, Monday to Friday.

This leaflet is available free of charge and available in other formats and community languages on request. The OPG subscribes to Language Line and the Text Relay Service.

If you have any comments/suggestions regarding the contents/layout of these guidance notes or ways in which we might improve them, please send these to the above noted address. Your feedback is important to us as part of our ongoing review of our services.

April 2013

