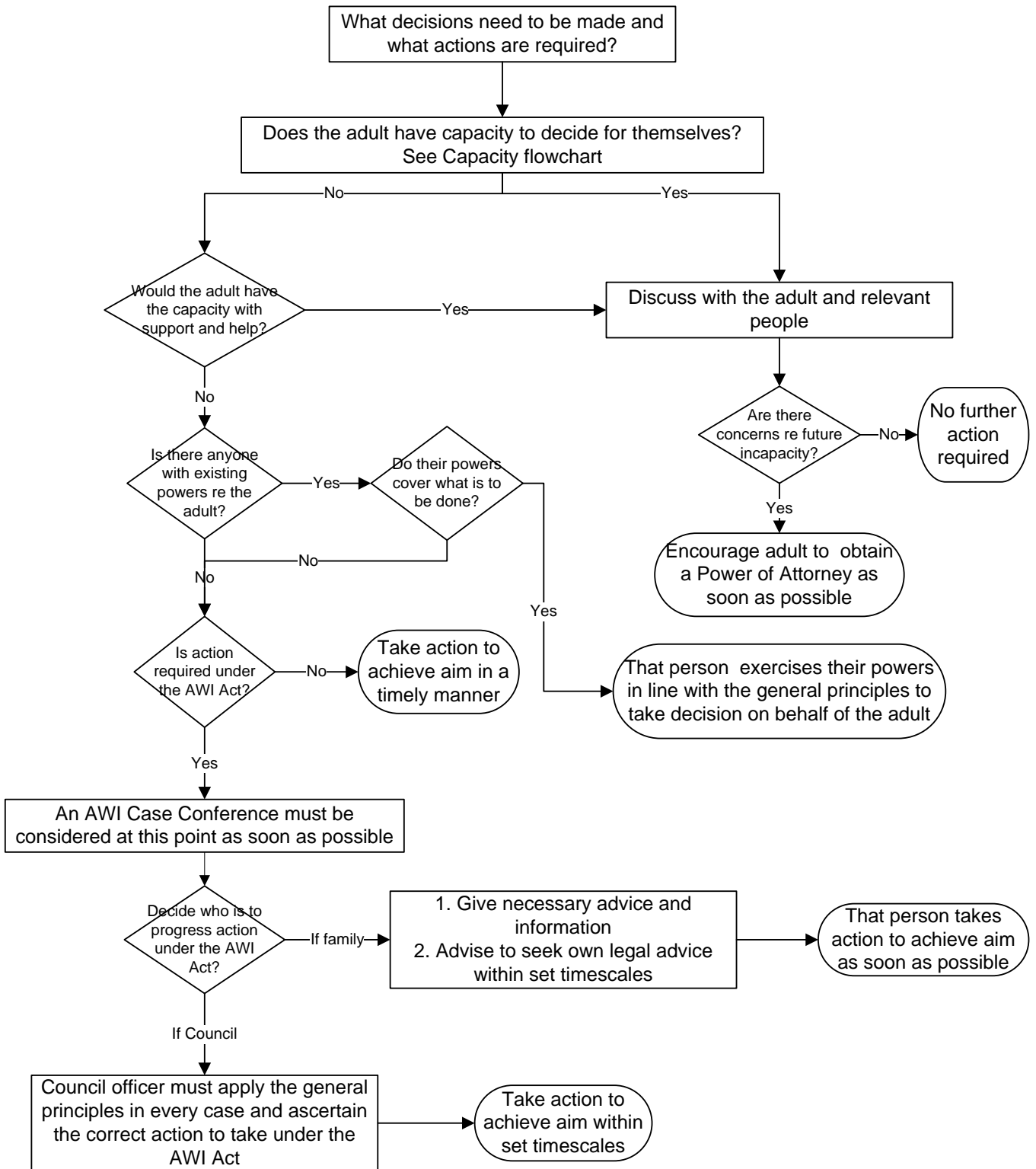


EDUCATION AND SOCIAL CARE SERVICES

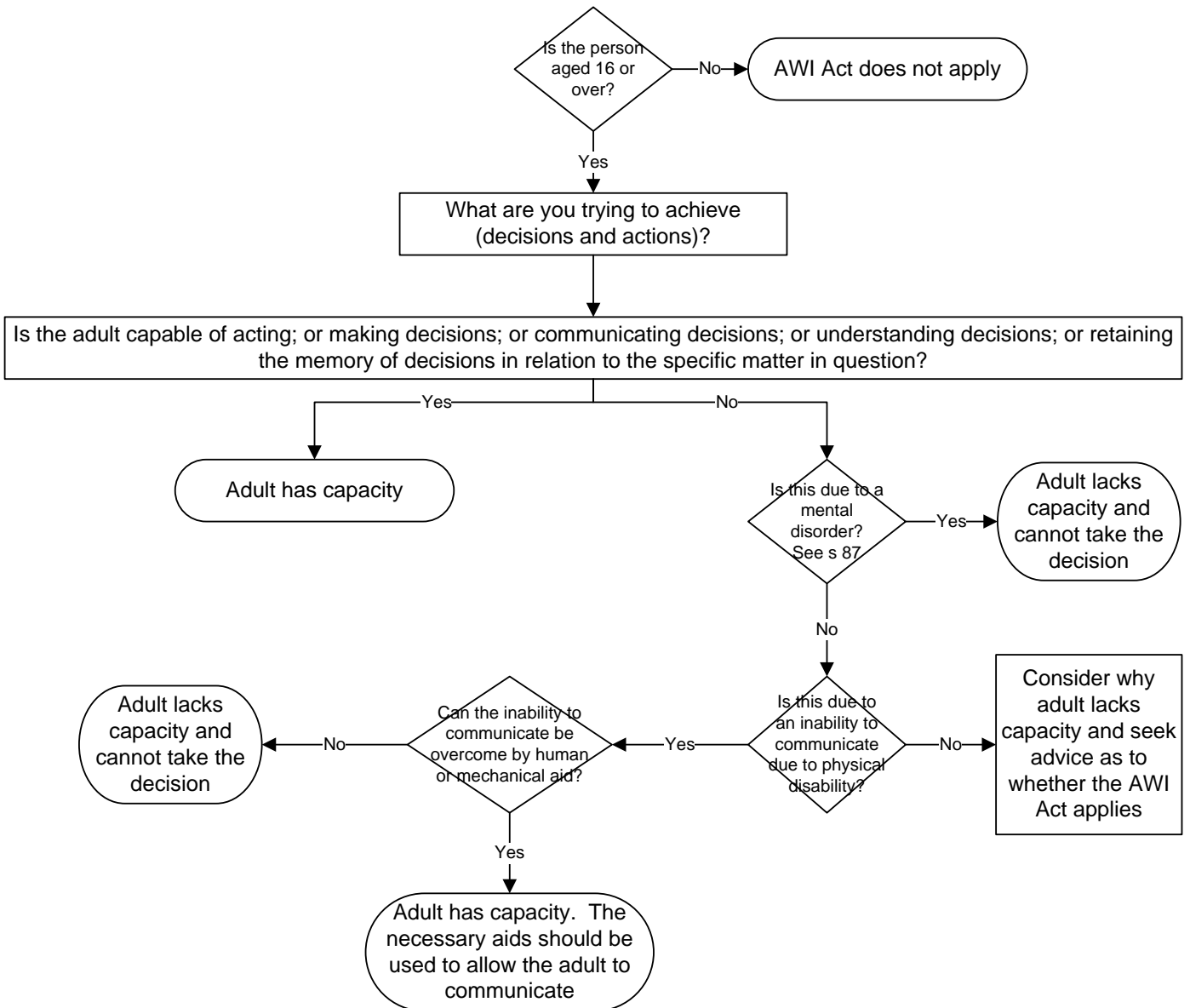
Draft Adults With Incapacity Process Guidelines

Initial Assessment of Capacity

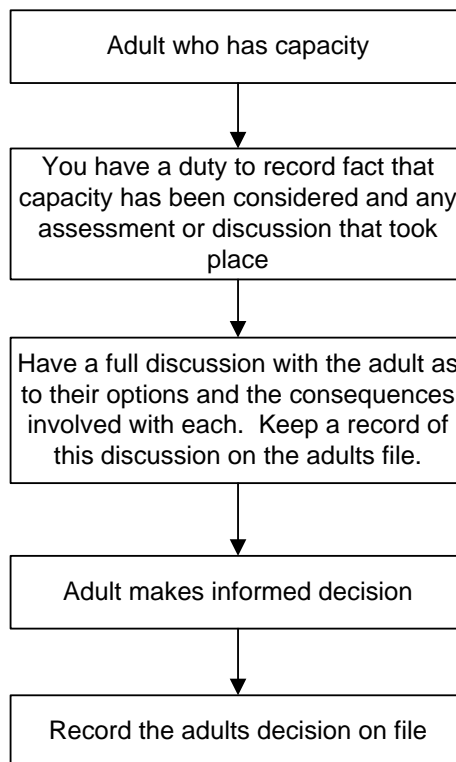
Adults with Incapacity - Process



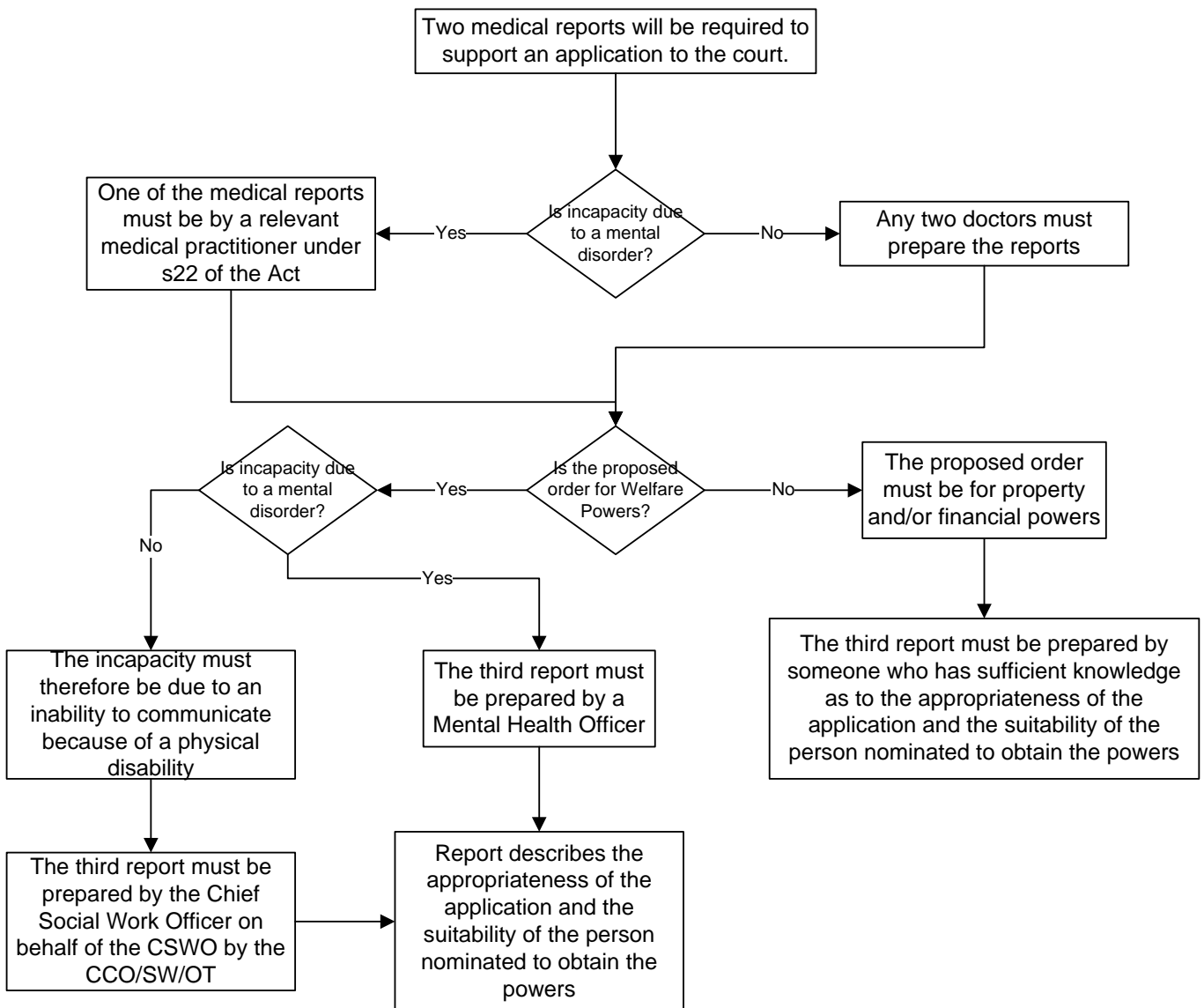
Determining Capacity



Flowchart of Adult who has Capacity



Flowchart of What Forms for Guardianship and Intervention Orders



General/Introduction

The Adults with Incapacity (Scotland) Act 2000 (herein referred to as the 2000 Act) provides a framework for safeguarding the welfare and managing the finance of adults (people aged 16 years or over) who lack capacity due to mental disorder or inability to communicate

Process Step

Introduction

Establish your aim - what are you trying to achieve

Detail

The first question to be answered when dealing with an adult is, what are you trying to achieve with the adult? In other words, what is the aim or intention with regard to the adult? It is important that you are clear on what it is you are trying to do. For example: -

- Put in a suitable care/support package to enable the adult to remain at home;
- Move the adult into more suitable accommodation;
- Ensure the adult's welfare or financial affairs are in order; etc and
- Do you need to use the 2000 Act to achieve this?

Initial Assessment of Capacity

– Does the adult have capacity to decide for themselves?

This process applies to adults with complex and/or significant care needs whose capacity is in question and where major decisions need to be made such as determining suitable accommodation

The Law of Scotland generally presumes that those aged 16 or over are legally capable of making personal decisions for themselves. In other words, the starting point for assessing someone's capacity to make a particular decision is always the assumption that the individual has capacity

Impaired capacity

In order to decide whether an individual has capacity to make a particular decision you need to consider:

- a) does the person have a mental disorder (which includes mental illness, learning disability, dementia and acquired brain injury), or severe communication difficulty because of a physical disability (such as stroke or severe sensory impairment)? and
- b) has this made the person unable to make the decision or decisions in hand?

For the purposes of the 2000 Act a person is unable to make a decision for him/herself if, due to mental disorder or inability to communicate because of physical disability, he/she is incapable of-

- (a) acting; or
 - (b) making decisions; or
 - (c) communicating decisions; or
 - (d) understanding decisions; or
 - (e) retaining the memory of decisions;
- Or a combination of some or all of these.

This is a very general guide of incapacity and means if an adult is incapable of any one of (a) - (e) in relation to the decision in question, then they have no

Detail

capacity to take that decision.

Both current and future capacity must be considered. For practical information regarding assessing capacity please refer to “Adults with Incapacity (Scotland) Act 2000: Communication and Assessing Capacity: A guide for Social Work and Health Care Staff

<http://www.scotland.gov.uk/Publications/2008/02/01151101/2>

See flowchart on adult with incapacity

The initial assessment only needs to conclude that it is likely that the adult lacks capacity to make an informed decision about their welfare and/or financial affairs for this procedure to be invoked.

You must keep a record of the information gathered, On the basis of the information gathered, you should be able to make a professional judgement as to whether this indicates the adult does or does not have capacity in relation to the decision required.

If your initial assessment concludes that the adult lacks capacity, an ASP/AWI professionals’ meeting must be convened, chaired by a team manager of the relevant community care team Decisions about any interventions under the 2000 ACT should only be taken in consultation with relevant people who have an interest in the adult and /or at a formal AWI meeting

Moray Council’s Legal Service’s should be consulted at this stage. If any application for a local authority officer to implement an intervention order relating to guardianship /financial/property matter is being considered

All relevant professional’s, the Adult, his or her relatives, carers and others having an interest in the Adults property, finances or welfare should be consulted, their views recorded and where appropriate invited to attend part of the AWI meeting

Wherever possible, professional staff who may be involved in any potential intervention under this act should have seen the adult before the AWI Meeting and should provided relevant information

The adult should be provided with all appropriate support to enable them to be involved in the process and to attend any meetings. These supports should include an advocate or other person able to ensure that the adult’s point of view is communicated to the local authority.

ADULT HAS CAPACITY

If it is clear that the adult has capacity, this procedure does not apply and an appropriate record that this had been considered should be kept on the adult’s file.

Should there be any concerns regarding the adult’s future capacity to make decisions, e.g. the adult has recently been diagnosed with dementia but it is still in its early stages, then the adult should be encouraged to seek legal advice with a view to granting a Power of Attorney while they still have the capacity to do so. For a fuller Discussion of Powers of Attorney and what is involved, see the section entitled “Powers of Attorney”.

Process Step**Detail****PURPOSE OF THE ASP/AWI MEETING**

Where the case worker¹ and their immediate supervising manager both agree some form of interventions under the 2000 Act may be necessary, a professionals meeting should be convened and chaired by the line manager. This is a multi-disciplinary agency meeting at which information regarding the adult is shared and considered with the intention of supporting the adult to manage their welfare and financial affairs. The decision to proceed or not and the type of intervention required are decided and recorded and a action plan should be established, including a time scale in which actions are to be completed, and who will be responsible for each action including making any applications to the court.

¹ In [social work](#), a **caseworker** is a type of [social worker](#) who is employed to take on the cases of individuals and provide them with [advocacy](#), information or other services

Process Step**Detail****STEP 1
ASCERTAIN WHETHER
THERE ARE ANY PRE-
EXISTING POWERS**

The Caseworker must ascertain whether there is anyone with formal powers under the Act in relation to the adult in question. It is important to remember that it may not just be the adult's relatives who could hold powers under the 2000 Act. You should also consider neighbours, friends, the adult's carer, solicitor, accountant or GP. Those holding certain powers under the 2000 Act will be registered with the Public Guardian and details of powers held can be obtained from checking on CareFirst under relationships or you can email the adult's full name, address and DOB to adultprotection@moray.gov.uk. You will be advised by email if they are registered, should you require a copy of the POA you should then request this from adultprotection@moray.gov.uk. An electronic copy can take 2 or 3 working days to be sent to you.

If someone does hold powers in relation to the adult, it is necessary to look at whether their powers cover the particular issue in question.

You should keep copies of the POA documents which set out someone's powers under the 2000 Act on the adult's file, together with a note of the decision taken and details of any discussion. It is essential that you see evidence of someone's power under the Act and not just take their word for it. This is not simply to find out if someone is attempting to deceive you, but the person may not have the powers they think they have and are acting on a misunderstanding of the Act. If necessary, you should consult with Legal for advice.

Process Step**STEP 2
NO-ONE HOLDS ANY
POWERS UNDER THE
2000 ACT****Detail**

If no-one holds any powers under the 2000 Act in relation to the adult that covers the decision to be taken, then it must be considered what action is required to be taken to achieve the desired outcome for the adult.

Option 1 – The Family / Relevant Other Is Going to Seek Formal Powers Under the Act

The first option to explore is whether the adult's family (and this includes any friend, carer, etc) wish to seek formal powers under the Act.

There is no specific duty under the 2000 Act for the Council to provide information and advice to those considering obtaining powers under the Act, but it would be good practice to provide general information and advice if requested to do so. Although the 2000 Act may not specify advice and assistance duties, the Social Work (Scotland) Act 1968 does impose duties upon us to provide advice, guidance and assistance in terms of social welfare. In particular, you should outline: -

1. The other options open to the Council should they not seek any formal powers; and
2. The different types of powers under the Act they may wish to consider and what they involve.

You must ensure that you have advised the adult's family to seek their own independent legal advice, either through a solicitor or the Citizens' Advice Bureau. The Moray Council maintains a list of solicitors who specialise in AWI work or you can e-mail adultprotection@moray.gov.uk to obtain this list.

It is then up to that person to apply for the necessary powers, having applied the general principles in deciding what action under the Act is the most appropriate.

Once the appropriate powers are obtained, that person can make the necessary decisions on behalf of the adult.

Option 2 – There Is No-one Willing To Seek Formal Powers Under The Act

If no-one holds any powers under the 2000 Act in relation to the adult, and there is no-one else suitable who is willing to do so and no one has applied for an intervention or guardianship order, the Council must decide if it needs to seek formal powers under the Act. If formal powers are required then the Council has a duty to obtain and pursue the necessary powers under the Act.

Section 13Za Social Work (Scotland) Act 1968

Detail

There are circumstances where seeking formal powers under the 2000 Act is not necessary.

Section 13ZA of the Social Work (Scotland) Act 1968 provides that where a local authority has concluded that an adult requires a community care service, but is not capable of making decisions about the service, they may take steps which they consider necessary to help the adult benefit from that service. Therefore, if what you are trying to achieve is the provision of a community care service, then you can implement the service under this section without the need to seek formal powers under the 2000 Act.

However, you should not rely on s.13ZA in the following circumstances:

1. The decision required does not relate to the provision of a community care service.
2. The proposed community care service would amount to a deprivation of liberty. The adult is resisting or objecting to the provision of the community care service.
3. Any 'interested party' objects to the provision of the community care service.
4. More information regarding the use of s.13ZA is contained in the Scottish Executive circular CCD5/2007 'Provision of Community Care Services to Adults with Incapacity'. If you are in doubt about using s.13ZA then discuss this with your line manager or consultant practitioner. The person may not simply disagree, but shows an unwillingness to remain in the care arrangements (i.e. link to anticipatory care planning)

See section 19.4 of guidance regarding assessment of financial management arrangements and add a 5. To this list

NB – the general principals of the Act must still be applied before you rely on z.13ZA and decide that no formal powers under the Act are required. A record that s.13ZA has been used should be placed on the adult's file along with a note of the factors / discussions leading to that decision.

SECTION 13Za MULTI AGENCY MEETING /RECORD KEEPING REQUIREMENTS

A multi-agency meeting can be held if Section.13ZA is being considered in order to make a **significant** decision on behalf of a person who is lacking capacity. (follow guidance in appendix 1) In this instance a significant decision would be 1) any permanent change of home address facilitated by the Council or 2) receipt of any community care services for which a care charge is made.

Remember this section cannot be used if the decision required does not relate to the provision of a community care service (See above for other exclusions).

Multi-agency meetings can be held if s.13ZA is to be used for other relevant decisions, but this will be at the discretion of the Team Manager in discussion with the allocated social worker /CCO. Whenever a meeting to discuss 13ZA is held, a copy of the letter should go to all interested parties and be maintained on the adult's file

The adult's next of kin should receive a letter outlining the decisions taken, even if a multi-agency meeting is held and they are present. This will give them the chance to comment / object.

If Section.13ZA or other powers are to be used to move an adult who lacks capacity, see section at the end 'Moving Adults On

When considering the use of s.13ZA the Team Manager must always be consulted and they can, in turn, take advice from Legal. If a multi-agency meeting is to be held, the views of the Team Manager and/or Legal must be fed into it, but they will normally only attend if the case is particularly complex.

Process Step

Whenever s.13ZA is either considered or its use agreed this must be recorded in the adult's file and on CareFirst6 under observations. If a case conference is held, the minutes will be sufficient in the case file so long as they clearly record the decision made in respect of s.13ZA. (See appendix 2 guidance and agenda) and outcome of the meeting recorded on the meeting screen on CF6. If a case conference is not held a file note should be made and counter-signed by the relevant team manager and outcome recorded on CF6.

Detail

WHEN 13ZA IS NOT APPROPRIATE

Where s.13ZA is not considered appropriate, then the Council must decide on the appropriate form of action under the 2000 Act. The general principles must be applied.

There will be two situations where you will have to consider what action is appropriate under the Act.

1. Providing advice to relatives/carers/friends of an adult who lacks capacity to help them decide on the appropriate action to take.
2. Deciding what action the Council is required to take as there is no-one willing to progress any action under the Act.

Below are some common examples of situations you may encounter with adults who are incapacitated and the actions under the Act that should be considered.

| Issue | Options |
|---|---|
| Someone is required to manage the adult's day to day living expenses. | <ul style="list-style-type: none"> • Financial Guardianship • Management of Residents Finances • Access to Funds • DWP Appointee* |
| Someone has to manage the adult's savings, investments, property. The adult has substantial assets. | <ul style="list-style-type: none"> • Financial Guardianship |
| A substantial one off payment is required on behalf of the adult. | <ul style="list-style-type: none"> • Financial Guardianship • Intervention Order |
| Adult requires to sell property. | <ul style="list-style-type: none"> • Financial Guardianship • Intervention Order • May be about ATF/DWP |
| Adult holds money in a joint account with someone else - e.g. a partner or parent. | Provided the terms of the account does not prevent it, the other account holder can continue to operate the account without any formal action under the Act. |
| Adult requires to sign or | <ul style="list-style-type: none"> • Intervention Orders* |

| | |
|--|--|
| terminate a tenancy agreement. | |
| Adult requires to be moved to meet care needs. | <ul style="list-style-type: none"> • Welfare Guardianship • Intervention Order • Social Work Power—s.13ZA • DWP appointeeship or ATF |
| Adult requires a care package and support. | <ul style="list-style-type: none"> • Welfare Guardianship • Intervention Order • Social Work Power—s.13ZA |
| Adult's welfare requires to be safeguarded | <ul style="list-style-type: none"> • Welfare Guardianship • Intervention order if only one action required |
| Adult requires medical treatment. | <ul style="list-style-type: none"> • Welfare Guardianship • Medical Treatment Certificate s47 |

Powers of Attorney

| Process Step | Detail |
|--------------|--------|
|--------------|--------|

PART 2 OF THE 2000 ACT

| | |
|--|---|
| 1. INTRODUCTION | <p>A power of attorney is authority given by an individual (known as the Granter) to another person(s) (known as the Attorney/s) to make decisions in relation to the Granter's financial affairs and/or their health and personal welfare.</p> <p>The Act makes it possible for an adult to create three types of power of attorney: -</p> <ol style="list-style-type: none"> (1) Continuing Power of Attorney - Gives power over the granter's property and financial affairs (2) Welfare Power of Attorney. - Gives power over the granter's personal welfare (3) Continuing and Welfare Power of Attorney - joint welfare & continuing power of attorney <p>A power of attorney is essentially a document drawn up by a solicitor on behalf of an adult who has capacity, which sets out what the adult wants to happen with regard to his or her finances, property and welfare should they become incapacitated at a later date in the future. It can also cover decisions that may need to be made on an adult's behalf whilst that adult is out with the country. Remember that the Council cannot obtain a power of attorney on behalf of an adult.</p> |
| 2. WHEN YOU NEED TO KNOW ABOUT POWERS OF ATTORNEY | <p>There are 2 situations where Council staff will need to know about powers of attorney and how they operate.</p> <ol style="list-style-type: none"> (a) If you are dealing with an adult where there are concerns that they may lose capacity sometime in the future then you should be advising them to seek their own independent legal advice to create powers of attorney. You should also be able to give them general advice and information as to what is involved in obtaining a power or attorney and how they operate. The Office of the Public Guardian has published two useful documents which are available on their website, the first is an information leaflet entitled "What is a Power of Attorney" and the second is a checklist to ensure that everyone has been completed correctly when a Power of Attorney is created. (b) You may have to work closely with someone claiming to be an attorney on behalf of an adult who lacks capacity. Initially you will need to obtain evidence of the power of attorney to ensure that they have the necessary powers to deal with the adult's affairs. You should also be able to give them general advice and information as to how they should be exercising their powers. |
| 4. HOW A CONTINUING POWER OF ATTORNEY OPERATES | <p>A continuing power of attorney can operate in 2 ways: -</p> <ol style="list-style-type: none"> i. It may be used before capacity is lost and will continue after the granter is incapacitated. I.e. the attorney may exercise his/her powers over the granter's property and finances whilst the granter still has capacity and will continue to do so after capacity is lost. ii. It can be used only once capacity is lost. I.e. the attorney may exercise his/her powers over the granter's property and finances only once the granter has lost capacity. |

A solicitor will prepare the continuing power of attorney on behalf of the adult and it must be a written document which sets out the precise powers that the Granter wishes the Attorney to have. The Granter must sign the document. It must also state clearly that the powers are continuing, welfare or a combination of both. A certificate of capacity is required to be signed by a registered and licensed medical practitioner or a practising solicitor in Scotland or a legal advocate. It must contain a statement by the solicitor (or other authorised person) that he or she: -

- (a) Has interviewed the granter before he/she signed the power of attorney;
- (b) Is satisfied that the granter understood the terms of the power of attorney; and
- (c) Is satisfied that the granter is not being influenced in any way.

5. WHO CAN BE A CONTINUING ATTORNEY

A continuing attorney can be: -

- A private individual such as a relative, partner, carer, friend, etc.
- A professional body such as a firm of solicitors, accountants or voluntary organisation.

6. HOW TO CREATE A WELFARE POWER OF ATTORNEY

A welfare power of attorney grants power over the granter's personal welfare which can only be used when the granter becomes incapable. Good practice suggests that this should be - pre determined between granter and attorney A solicitor will prepare the welfare power of attorney on behalf of the adult and it must be a written document which contains the information outlined above at section 4.

7. WHO CAN BE A WELFARE ATTORNEY

Only an individual can be a welfare attorney, such as a relative, partner, carer, friend, etc.

8. WHEN DOES A POWER OF ATTORNEY BECOME EFFECTIVE

A power of attorney will only be effective once it is registered with the Public Guardian. The power of attorney must be sent to the Public Guardian with a registration form and relevant fee. The granter's solicitor will ensure that this is done.

9. PROOF OF AN ATTORNEY'S POWER

If you are dealing with someone who claims to hold powers under a power of attorney, you should request to see evidence of their appointment as attorney. When the power of attorney is registered with the Public Guardian, the Public Guardian authenticates a copy of the power of attorney and sends that to whoever registered it. The attorney must ensure he or she receives a copy of the authenticated power of attorney as that is what is required to establish that they have the authority to act on behalf of the granter.

10. KEY POINTS FOR A CONTINUING ATTORNEY

- (a) Check the decision/action is covered by the powers granted in the power of attorney.
- (b) Apply the general principles of the Act to the exercise of powers.
- (c) Remember the funds and assets managed under a power of attorney still belong to the adult and should be kept separately from the attorney's.
- (d) If the attorney acts reasonably, in good faith and in accordance with the general principles then he/she will not be liable for any breach of duty.
- (e) The Public Guardian may supervise a continuing attorney if the Sheriff orders it.
- (f) A continuing attorney must keep records of their actions & decisions.
- (g) A continuing attorney does not need to keep formal accounts but should keep clear records in case it is necessary, we should encourage POAs to keep such records further advice on powers of attorney are available in the Code of Practice for Continuing and welfare attorneys at <http://www.scotland.gov.uk/Resource/Doc/216725/0058106.pdf>

11. KEY POINTS FOR A WELFARE ATTORNEY

- (a) Check the decision/action is covered by the powers granted in the power of attorney.
- (b) Apply the general principles of the Act to the exercise of powers.
- (c) If the attorney acts reasonably, in good faith and in accordance with the general principles then s/he will not be liable for any breach of duty.
- (d) The Council may supervise a welfare attorney if the Sheriff orders it.
- (e) The Council has a duty to give advice and guidance to a welfare attorney on how they should be exercising their powers.
- (f) A welfare attorney may wish to obtain advice from the Mental Welfare Commission.
- (g) A welfare attorney should keep records of their actions and decisions. Further advice and guidance is contained in Code of Practice For Local Authorities Exercising Functions under the 2000 Act Chapter 8 Supervision of non –local authority Proxies
<http://www.scotland.gov.uk/Resource/Doc/216923/0058136.pdf>

12. JOINT WELFARE & CONTINUING POWER OF ATTORNEY

Solicitors can prepare one document which covers both a continuing power of attorney and a welfare power of attorney. There is no need to create and register two separate power of attorney documents.

13. REVOKING A POWER OF ATTORNEY

If the granter wants to revoke (cancel) a power of attorney

The Granter can revoke a continuing or welfare power of attorney or any of the powers granted in it once it has been registered with the Public Guardian. The granter must give notice of the revocation in writing. If a Granter wishes to revoke either some of the powers or all of the powers in the power of attorney, a certificate completed by the prescribed person (registered and licensed medical practitioner or a practising solicitor or a legal advocate) must be attached to the letter informing of the revocation. The date when the granter subscribes the revocation notice must be the same day he/she is interviewed by the prescribed person. A Notice of Revocation must be completed and sent to the Public Guardian. The Notice of Revocation contains similar information to what is required to create a power of attorney.

14. LOCAL AUTHORITY DUTIES IN RELATION TO POWERS OF ATTORNEY

(I) TO PROVIDE INFORMATION & ADVICE

As stated previously, the Council is under a duty to provide a welfare attorney with information and advice in connection with the performance of his or her powers under the power of attorney. Any advice or information given should be recorded.

(II) TO INVESTIGATE COMPLAINTS

The Council is under a duty to receive and investigate complaints about the exercise of powers by a welfare attorney. S.10 (1) (c) of the 2000 Act Relating to the welfare of an adult this includes welfare attorneys, guardians or persons authorised under intervention orders. There is also a duty to investigate any circumstances made known to Moray Council in which the personal welfare of an adult appears to be at risk.

If it is apparent that an investigation under S10 is required refer to section investigating concerns and complaints later in this document.

(III) SUPERVISION

The Council is only under a duty to supervise a welfare attorney where ordered to do so by the Sheriff. For more information on this, Chapter 8 refers to the Social Work Guidelines entitled “Supervision of Proxies”.

15. NOTIFICATION OF POWERS OF

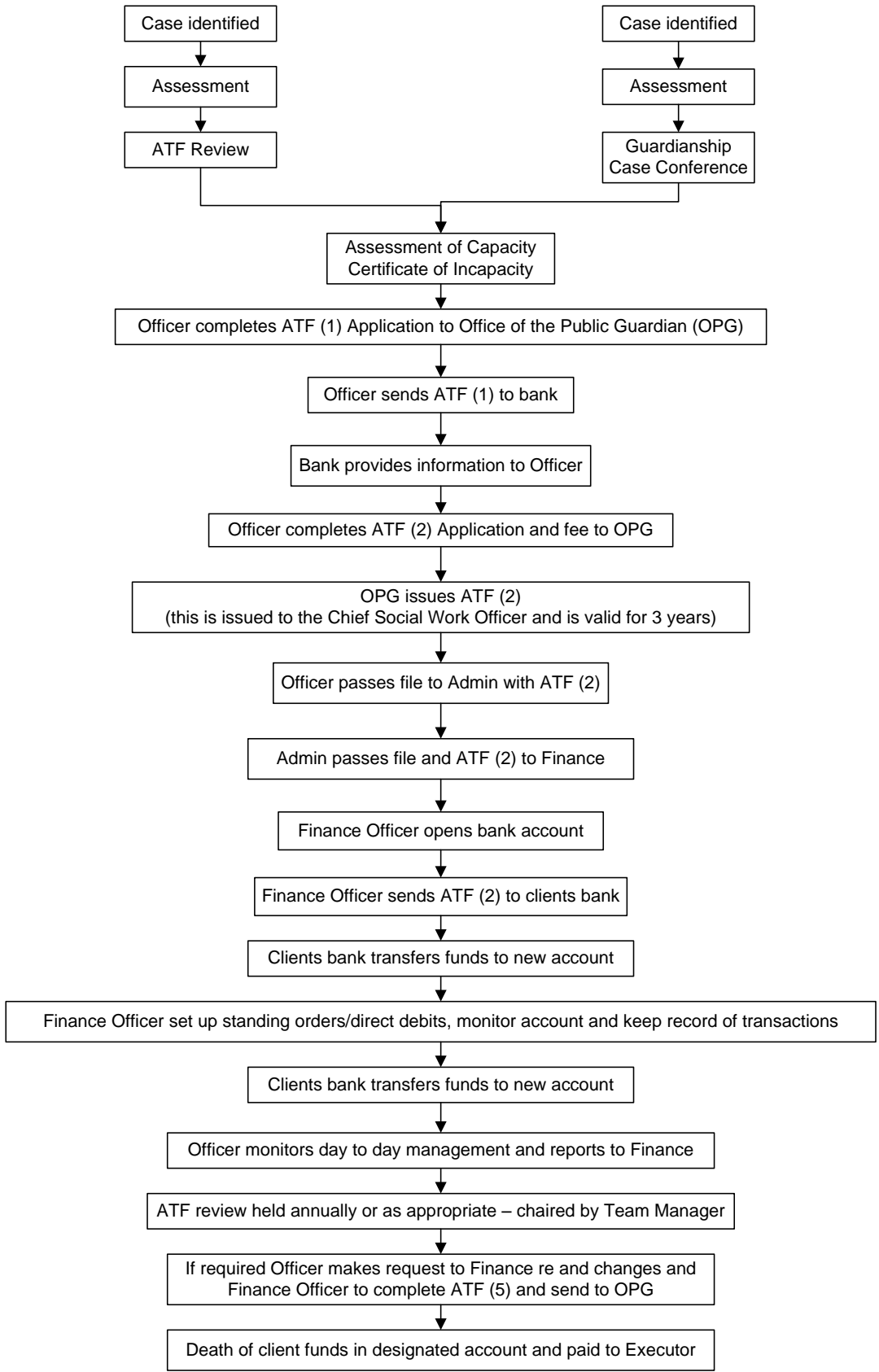
All continuing and welfare powers of attorney must be registered with the Office of the Public Guardian (OPG) who maintains a Public Register. The Public Guardian also has a statutory obligation to notify the appropriate local authority and Mental Welfare

Commission (MWC) of any welfare powers of attorney, The Public Guardian gives notice to Social Work of any Welfare Powers of Attorney that are registered by granters residing in Moray.

Social Works / CCO may wish to confirm the existence of a power of attorney. Initially the Council Officer involved should ask the person they are dealing with to produce an authenticated copy of the power of attorney before they accept it is in existence or by checking on CareFirst6 under Relationships or you can email the adult's full name, address and DOB to adultprotection@moray.gov.uk

Access to Funds

Access to Funds procedure



Detail**ACCESS TO FUNDS****Process Step****1. INTRODUCTION**

The 2000 Act introduced a procedure called “Access to Funds” or “Intromission with Funds” which allows individuals and organisations access to the money held by an adult who is incapacitated – i.e. the adult is unable to manage their own financial affairs.

This process is designed to enable the applicant to manage the adult’s general daily living expenses.

This procedure should be read in conjunction with the [Codes of Practice for Access to Funds](#) and the Office of the Public Guardian [Access to Funds Guide for Organisations](#)

<http://www.scotland.gov.uk/Resource/Doc/215749/0057713.pdf>

2. WHAT YOU NEED TO KNOW ABOUT ACCESS TO FUNDS

Council staff should be familiar with what is involved with the Access to Funds Scheme so that they can advise families who are contemplating obtaining powers under the 2000 Act of how the scheme works and what is involved. Council staff may also have to assist families to complete the application form by providing them with information and figures in relation to the adult’s care needs.

Alternatively, Council staff may have to consider whether it is appropriate for the Council to apply to gain access to the adult’s money to ensure it is used for his/her benefit. Before proceeding down the access to funds process please refer to Moray Councils Managing Service User’s Money Policy to see if informal measure can be applied.

If it is apparent that informal arrangements are insufficient or unsatisfactory, An Adult With Incapacity - access to funds meeting should be convened following discussion and agreement with your line manager (See appendix 3 for paper work)

If a recommendation has been made to apply for Access to Funds, from the Adult With Incapacity - access to funds meeting, it should have determined who takes responsibility for the application. This will normally be a Social Worker /CCO, known as the main proxy throughout this procedure

The minutes of the Adult With Incapacity access to funds meeting and a memo, completed by the team manager (Chair), recommending the application to access to funds should be sent to the Service Manager of the community care service for approval

Once approval has been gained from the service manager the application should be completed by the main withdrawer with support from the councils solicitors

3. COMMON TERMS

| TERM | MEANING |
|--------------------|---|
| FUNDHOLDER | The bank or building society holding the money in an account in the adult’s sole name. |
| WITHDRAWER | The person or organisation authorised by the Public Guardian under the scheme to manage the adult’s finances. |
| SPECIFIED ACCOUNT | The account belonging to the adult. |
| DESIGNATED ACCOUNT | The account held in the name of the withdrawer on behalf of the adult. |

| | |
|-------------------------|---|
| INTROMISSION WITH FUNDS | Another name for the Access to Funds process. |
|-------------------------|---|

Process Step**Detail**

Before dealing in more depth with the Access to Funds Scheme, there are some terms used in connection with the Scheme that Council staff should be familiar with.

4. HOW DOES IT WORK?

The applicant completes the necessary forms and budgets for how much money they will require to meet the adult's needs over a 3 year period. This budget will include all the adult's daily living expenses and extras such as holidays. If the application is granted, that sum of money required for 3 years can be withdrawn from the adult's bank account and put into another bank account to be managed by the applicant (the withdrawer). The process is repeated every 3 years. The application does not have to be completed by a solicitor and does not involve a decision by the Sheriff.

5. WHO CAN APPLY?**(i) Individuals**

Any individual can apply. This may be a relative, friend or neighbour of the adult. It may also be a professional person such as an accountant or solicitor.

More than one individual (joint withdrawers) may be appointed at the time of the original application, or at some later stage if necessary. This allows the sharing of responsibilities and the tasks involved.

(ii) Organisations

An organisation can apply. This is appropriate for statutory, voluntary and private organisations providing services to adults with disabilities and their carers. The Public Guardian must assess whether the organisation is a fit and proper applicant.

Advice must be sought from Legal Services before applying on behalf of the Council.

6. THE APPLICATION AND WHAT IS REQUIRED?**STEP 1 – Is there enough Financial Information?**

To complete the access to funds application form, information is required about any account(s) held in the adult's name, how much money is in each account and about any regular income & outgoings. The Council Officer must have some knowledge about which banks etc to approach

A request should be made to the finance officer to check if any details can be obtained regarding the adult's bank accounts for the purpose of the application, if it is not possible to obtain details and the bank or building society is unable or unwilling to release this information or where information about the adult's income and assets is not known then you can apply to the Public Guardian to request account information (ATF(1))

The Public Guardian can authorise banks/building societies to release information about the adult's account/s so that a decision can be made as to the best way forward, an application must be made for a certificate authorising fundholder(s) to provide the necessary information. This is done using the form **ATF 1**, available from the Public Guardian's website:-

www.publicguardian-scotland.gov.uk/docs/atf1guidancenotesandform.pdf

A request should be made to the adults GP/Psychiatrist for the relevant **Certificate of Incapacity** to be completed. Any charge will be recuperated from the adult's funds

through and should be noted in the application form.

<http://www.publicguardian-scotland.gov.uk/docs/ssi%2051%20web.doc>

The form and accompanying medical certificates must be submitted to the Public Guardian along with the appropriate fee.

| Process Step | Detail |
|---|--|
| STEP 2 – Making the Full Application | <p>Once you have the necessary financial information to progress the application process (either through gathering information from the adult and/or their family or by using form ATF(1) above), the application to the Public Guardian must be made on form ATF2</p> <p>An application using form ATF (2). is suitable in the following circumstances:-</p> <p>(i) If the adult does not have an account or has an account which is not suitable for the purpose (e.g. a 90 day notice account), the applicant should apply to open an account in the name of the adult within the application for authority to access funds.</p> <p>(ii) If the adult already has a suitable account in place (e.g. an account which allows regular withdrawals to be made) and there is enough financial information available. Form ATF(2) is available from the Public Guardian's website</p> |
| STEP 3 – Completing the Application Form | <p>The applicant does not require a solicitor to complete or submit the application on form ATF (2), although family can use a solicitor or CAB to assist them. The Council is under no duty to assist an individual in this process, although good practice would suggest that Social Worker may feel it is appropriate to offer advice and guidance. Detailed notes and the application form are available from the Public Guardian: www.publicguardian-scotland.gov.uk/docs/atf2guidancenotesandform.pdf</p> <p>Please note that a Certificate of Incapacity is required at the time of the first application. A further Certificate is not required to accompany an ATF2 application if one was already obtained for the ATF1</p> <p>.</p> |
| STEP 4 – Submission of the Application | <p>The application form must be lodged with the Public Guardian within 14 days of the date of the countersignatory signing the form where required, or within 14 days of the applicant signing the form. The applicant must send the:-</p> <ul style="list-style-type: none"> • completed application form. • medical certificate (unless one was completed as part of a form ATF (1)). • Appropriate fee. |
| 7. ONCE THE APPLICATION IS SUBMITTED | <p>The Public Guardian will check the application and notify any relevant parties that the application has been received. 21 days are allowed for someone who has been sent a copy of the application to object to it being granted. The Public Guardian will then consider the application and provided there is no objection from those who have been notified, and there is no cause for concern, the Public Guardian will grant the application. It will take a minimum of 25 days for the OPG to grant authority and issue a certificate of authority</p> |
| 8. ONCE THE APPLICATION IS GRANTED | <p>The Public Guardian will send the applicant a certificate (Certificate of Authority) which gives the applicant (withdrawer) the authority to instruct the bank to set up an account and transfer the sum of money asked for from the adult's account into this new account (termed in Moray a designated account) to be managed by the applicant (withdrawer).</p> <p>It is advisable to arrange for an appointment with the bank or building society where the new account is to be opened. The bank or building society will need to be satisfied</p> |

that you are the person named in the Certificate of Authority.

The new account is in the applicant's name on behalf of the adult. The certificate will allow regular funds from the adult's current account to be deposited into this new account and from there the applicant will have direct access to use the funds to pay for the goods and services specified in the application. It is up to the applicant which bank s/he uses to open a new account.

Process Step
9. NOT ENOUGH
MONEY!

Detail

If the applicant finds that they have not estimated enough to cover the adult's costs, or an unexpected expense (e.g. an urgent repair bill) has arisen, the applicant should apply to the Public Guardian for a variation of the budget. This is done using form

ATF5 www.publicguardian-scotland.gov.uk/docs/atf5guidancenotesandform.pdf

10. KEEPING
RECORDS

The applicant (withdrawer) must keep records of how the adult's money has been used.

It is expected that standing orders and direct debits will be set up to meet the purposes of the designated account wherever possible.

The appointed main proxy will monitor and oversee the bank accounts and keep a record of transactions. The finance officer will receive statements of financial activity quarterly. This will include statement of income and expenditure from the main proxy, signed by the team manager and bank statements

The main proxy is responsible for monitoring the day-to-day management of the scheme, for the adult, and will report concerns and variations to the Finance Officer.

None of the accounts over which the proxies have authority must be allowed to become overdrawn. If you suspect that this may happen the withdrawer must notify their line manager and seek advice from the OPG immediately.

A level of cash may be required for smaller purchases and services. This money is likely to be required by a number of people who are not named in the third part mandate (proxies) i.e. home carers, volunteer befrienders, family of the adult. Therefore a service user cash box should be set up. The proxies will be responsible for agreeing who can access funds and the level of funds they can be withdrawn through this process. A record of any transactions, and where possible receipts, will be kept by (proxies). Any proxies can withdraw cash from the designated account to enable the cash box to have appropriate funds.

The main proxy is responsible for monitoring the day-to-day management of the scheme, for the adult, and will report concerns and variations to their line manager and finance officer.

All financial transactions made under the scheme will be audited by the finance officer quarterly/Annually. Any unexplained discrepancies or unusual activity will be reported to the appropriate service manager for the adult to enable an investigation to occur.

An adult with Incapacity review should be held at least annually to monitor how the Access to Funds scheme is operating for the benefit of the adult but can also be called anytime if there are major concerns or significant changes in circumstances the team manager will be responsible for chairing and recording this meeting on CF6 meeting screen.

Minutes of the review should be completed and sent by email to the Service Manager to enable a record of any amendment to the application to be approved.

The council is accountable to the OPG who can ask for the provision of records and bank statements, etc, at any time. All documentation including bank statements should be kept by proxy with a copy to the finance officer. All information being kept in the adults file. All records should be retained for a period of five years.

The Public Guardian sends all applicants (withdrawers) a booklet entitled "A Guide for Withdrawers" which has a useful record section that can be used.

Process Step

Management of Residents' Finances

Detail**1. INTRODUCTION****MANAGEMENT OF RESIDENTS FINANCES**

This section should be read in conjunction with Codes of Practice: For Manager of Authorised Establishment under Part 4 of the 2000 Act. Management of residents' funds only allows the care home to manage private income up to £10 000, not DWP monies.

<http://www.scotland.gov.uk/Publications/2003/07/17846/23738>

Part 4 of the Act is concerned with adults who live in authorised establishments and who lack the capacity to manage their financial affairs. It provides a mechanism for managers of those establishments to manage those finances on the adult's behalf. This scheme can only operate where there are no other arrangements in place regarding the adult's finances e.g. DWP Appointeeship, financial guardian order, intervention order, continuing attorney, access to funds

"Authorised Establishment" is a term defined in the 2000 Act and includes

- Health service and state hospitals(unregistered establishments)
- Independent and private psychiatric hospitals, care homes and limited registration services (registered establishments)

2. WHEN DO YOU NEED TO KNOW ABOUT MANAGEMENT OF RESIDENTS FINANCES

Council staff will need to be aware of how this operates in case they are dealing with an adult who is in residential care and there is no-one willing to take on any kind of role to manage the adult's day to day financial affairs. Being aware of how the scheme works will allow staff to decide if it is an appropriate option, bearing in mind the general principles of the 2000 Act.

3. HOW MANAGERS OBTAIN AUTHORISATION**(i) The establishment must be authorised**

The manager of the establishment should be able to advise whether or not it is an authorised establishment in terms of the Act. See "Authorised Establishments" above. Authorisation should always be thoroughly checked out with the manager.

(ii) Doctor's Certificate of Incapacity

If the manager of the establishment agrees to use the scheme having applied the general principles, he/she must arrange for a doctor to come and examine the resident's capacity. If the doctor is of the opinion that the resident is incapable of managing his or her finances then the doctor will issue a certificate of incapacity.

(iii) Section 42 Certificate

A manager must obtain a Section.42 Certificate before he can spend or deposit a resident's cash or withdraw/spend funds from a resident's account. This certificate is obtained from the establishment's supervisory body and it is a matter for their discretion whether or not they issue one. The supervisory body must be satisfied that it is appropriate to issue the certificate.

Managers may also request that other members of staff within the establishment also obtain the authority to manage a resident's finances. Only those named on the Section.42 Certificate will have authority to manage a resident's finances.

A Section.42 Certificate is proof that the scheme has been properly put into place and Council staff should ask to see this so that they are satisfied the adult's finances can be properly dealt with.

Application forms for notice of intention to Manage the Financial Affairs of a resident Under Section 37 and application of authority under Sections 42 can be accessed at:

http://www.scswis.com/index.php?option=com_docman&task=doc_details&gid=527&Itemid=719

Process Step

Detail

4. WHAT CAN BE MANAGED

Once authorised, managers can: -

- Claim, hold, receive and spend any pension, benefit, etc. EXCEPT those benefits covered by a DWP Appointee.*
- Claim, hold, receive and spend any money the resident is entitled to.
- Hold any other moveable property the resident is entitled to.
- Dispose of the resident's moveable property.

* See section "DWP Appointee" for an explanation.

5. WHAT MANAGERS CANNOT MANAGE

Managers cannot: -

- Manage residents cash or funds over £10,000; or
- Dispose of residents' movables if it would realise more than £100.

In certain circumstances, the managers can receive authority from their supervisory body to do these things on behalf of a resident.

Application by Moray Council authorised establishments

This procedure applies where a member of staff becomes aware of an adult, residing permanently in a Moray, Authorised Establishment, whose capacity is impaired and where there are concerns about the adult's ability to manage their financial affairs.

Efforts should be made at this stage to establish whether the adult's finances are being, or could be, managed informally with the adult's consent, either with the help of family members or carers, or with the assistance of professional carers. Appointeeship, Intervention Orders and Guardianship should be considered and the least restrictive option applied.

If it is apparent that informal arrangements are insufficient or unsatisfactory, and/or the adult cannot give consent to such arrangements, an Adult with Incapacity Case meeting should be convened following discussion with the relevant Team Manager.

When an AWI Meeting is held to discuss an application to Management of Residents Funds Appendix 2 agenda should be followed

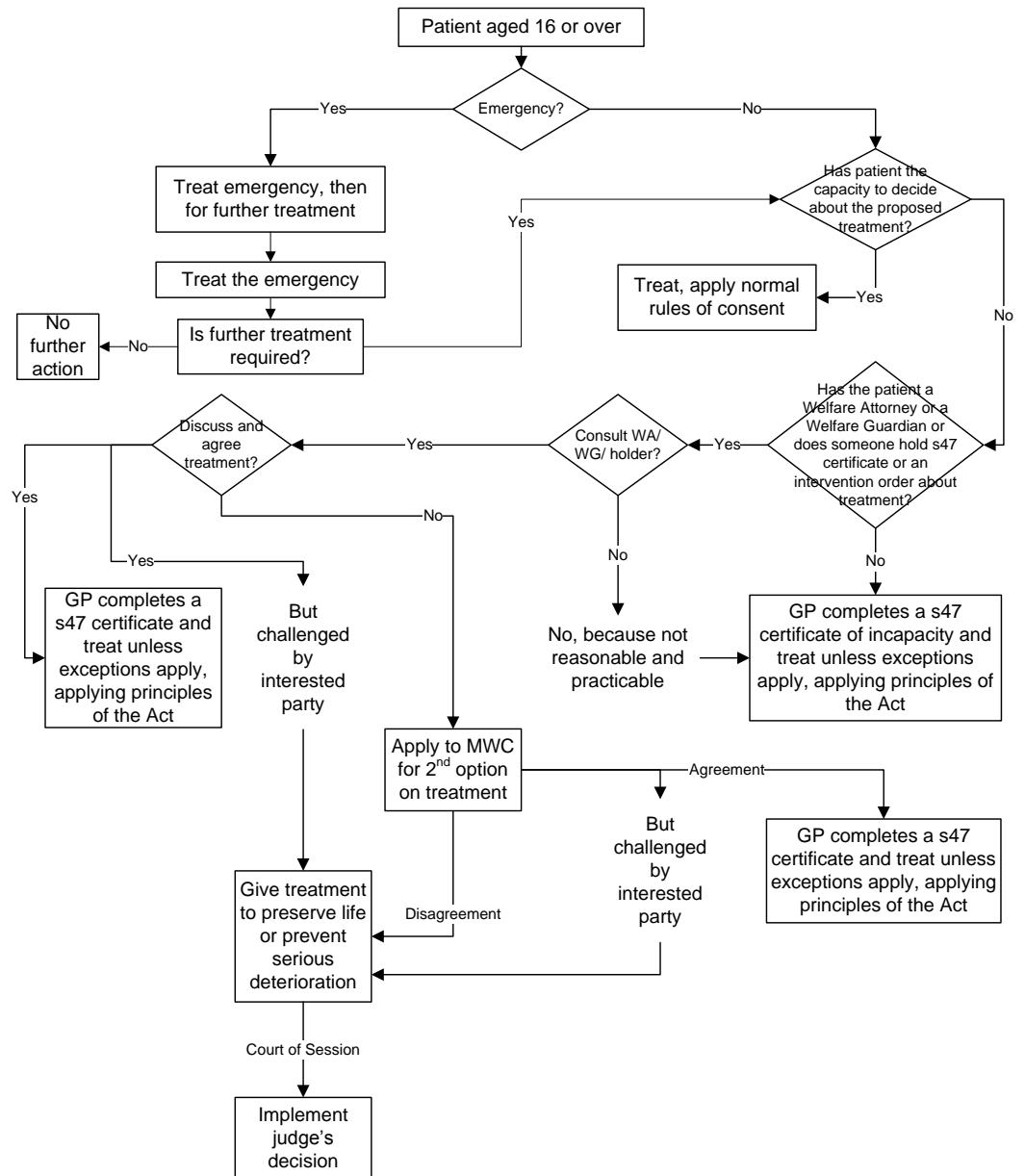
Will be made to the Care Inspectorate following the completion of [Schedule 1](#) and [Schedule 2](#) medical reports

<http://www.legislation.gov.uk/ssi/2003/266/schedule/1/made>

<http://www.legislation.gov.uk/ssi/2003/266/schedule/2/made>

Medical Treatment Certificates

Part 5 – Medical Treatment – Flowchart
Adapted from AWI (Scotland) Act 2000



Detail**MEDICAL TREATMENT CERTIFICATES**

[Under Part 5](#), medical practitioners are given a general authority to treat adults where there is a certificate of incapacity in relation to specific treatments or medical treatment plan. In deciding whether to issue such a certificate, the doctor must apply the general principles of the 2000 Act.

In addition, certain other health care practitioners, if accredited to do so, have authority to provide treatments which they are qualified to administer to patients who are incapable of consenting to the treatment in question. .e.g. dentists, opticians and nurses (relevant professionals)

It should be noted that proxies with welfare powers which, include the power to consent or withhold consent to medical treatment, have the right to be involved in treatment decisions (where practicable and reasonable). The principles also require that others with an interest in the person should be consulted, again, where practicable and reasonable.

Relevant professionals can still give immediate treatment in emergency situations where the adult cannot consent. Therefore, it is not necessary to go through the process of obtaining a medical treatment certificate in emergency situations.

Process Step**1. INTRODUCTION**

It is the relevant professional's responsibility to ensure that s/he has the proper authorisation to treat a patient who lacks capacity to consent to the treatment in question. However, Council staff should be aware that relevant professionals must have medical treatment certificates in place for adults who lack capacity and ensure that these have been obtained.

2. WHEN DO YOU NEED TO KNOW ABOUT MEDICAL TREATMENT CERTIFICATES

"Remember that medical treatment certificates must be used whenever the adult lacks the capacity to consent to the proposed medical treatment. The adult may be able to make informed choices about other areas of their life. Total incapacity is not required before a medical treatment certificate is necessary, only incapacity in relation to the proposed medical treatment."

3. WHO CAN USE A MEDICAL TREATMENT CERTIFICATE

It is the relevant professional who is primarily responsible for the medical treatment of the adult who should complete the certificate of incapacity and will thereafter be authorised to treat the adult. That relevant professional may authorise someone else to treat the patient on his or her behalf.

4. THE CERTIFICATE OF INCAPACITY

A medical treatment certificate is essentially a certificate stating that the relevant professional who is primarily responsible for the medical treatment of the patient is of the opinion that the patient is incapable in relation to making a decision about the treatment in question.

The medical treatment certificate has to be in a certain form and a copy can be accessed from the following link:-

www.scotland.gov.uk/Resource/Doc/1097/0000581.pdf

The medical treatment certificate (or certificate of incapacity) must specify the period during which the authority to treat remains valid. That period must be appropriate in the circumstances and must not be longer than one year. A medical certificate can be valid for up to 3 years where the following circumstances are applicable:-

(a) the adult is suffering from -

- A severe or profound learning disability;

- Dementia; or
 - A severe neurological disorder
- Such that the adult is incapable in respect of decisions about medical treatment. **AND**

| | |
|---------------------|---------------|
| Process Step | Detail |
|---------------------|---------------|

(b) what the adult is suffering from above is unlikely to improve.
Before completing the certificate, the relevant professional must consider:-

- What treatment the adult requires and whether it is acute or continuing.
- That the adult is incapable in relation to a decision about the treatment.
- Treatment is consistent with the general principles of the Act.

5. TREATMENT PLANS

For adults who require multiple or complex healthcare interventions, the relevant professional may draw up a treatment plan which could outline the healthcare interventions necessary and attach it to the medical treatment certificate. It is up to the relevant professional to decide whether or not a treatment plan is necessary and what it contains. In the case of epilepsy, a format is available from the Community Learning Disabilities Nurse. There is no obligation to have one.

6. CONSULTATION WITH OTHERS WHO HOLD POWERS UNDER THE ACT

Even if someone else holds powers under the Act in relation to the adult, a medical treatment certificate should still be completed by the relevant professional. When completing the certificate the relevant professional should ascertain if it is reasonable and practicable to seek the consent of someone who holds welfare powers:-

- A welfare guardian
- A welfare attorney
- Someone authorised with welfare powers under an intervention order.

Therefore, Council staff may be approached in connection with these certificates in two circumstances:-

1. To give advice to the person exercising their welfare powers.
2. The Chief Social Work officer may be the person holding welfare powers on behalf of the Council and may therefore be consulted by the doctor for their view about the proposed treatment. In practice, these powers are delegated to the CCO/SW on behalf of CSWO. CSWO or head of community care can be consulted on occasion,

7. KEY POINTS TO REMEMBER

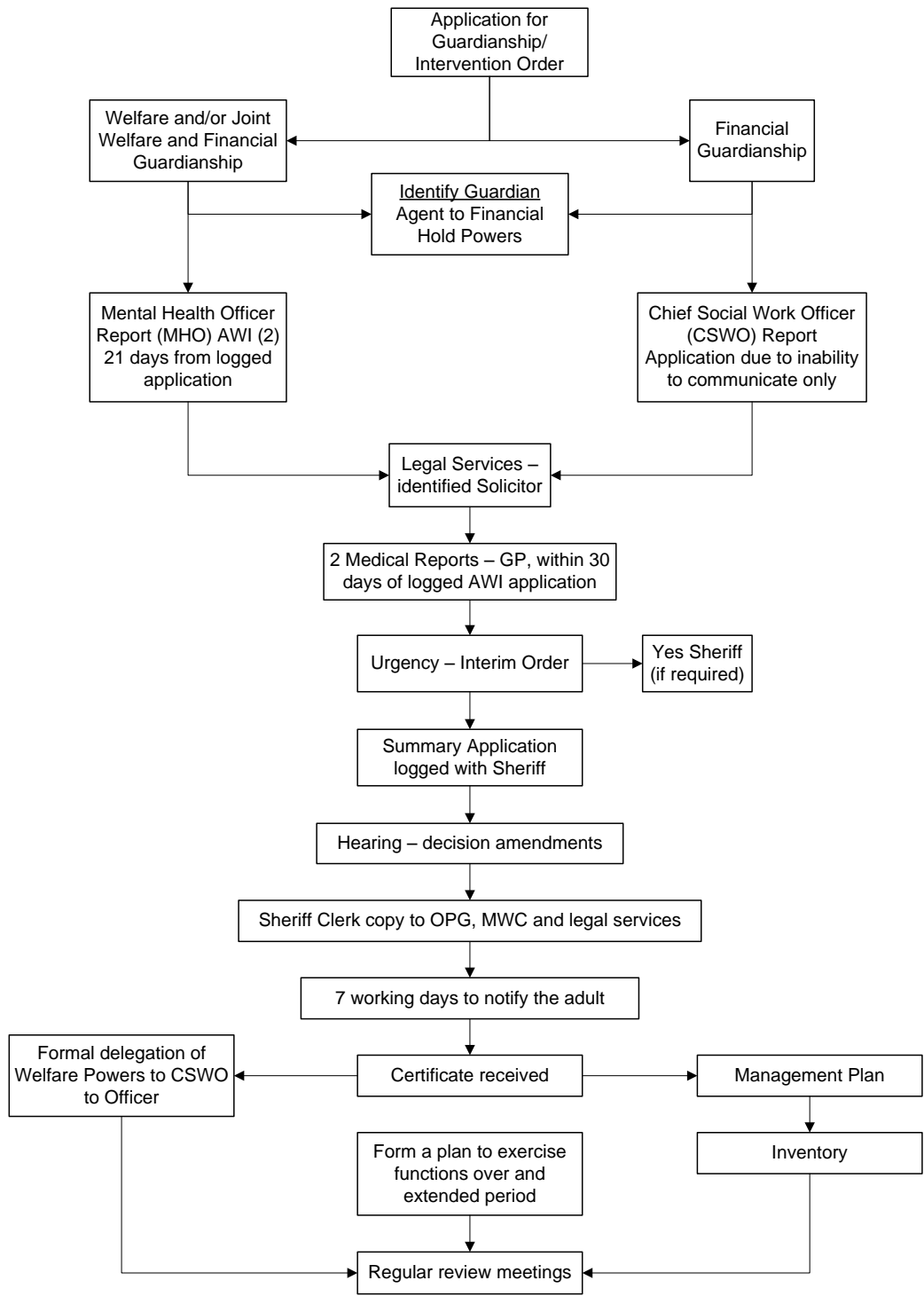
- (1) Medical treatment certificates (or certificates of incapacity) give a relevant professional the authority to treat a patient who is incapable of consenting to the treatment in question.
- (2) The relevant professional must still apply the general principles of the Act.
- (3) The relevant professional can still treat patients in an emergency situation without a certificate.
- (4) The relevant professional should consult with those who hold welfare powers in relation to the patient and seek their consent.
- (5) There are exceptions and certain treatments are not covered by a medical treatment certificate.

Adults with Incapacity (Scotland) Act 2000: Code of Practice (Third Edition): For Practitioners Authorised to Carry Out Medical Treatment or Research Under Part 5 of the Act <http://www.scotland.gov.uk/Publications/2010/10/20153801/0>

Please see flowchart Part 5 – Medical Treatment

Intervention Orders

Application for Guardianship/Intervention Order



Process Step**Detail****INTERVENTION ORDERS****1. INTRODUCTION**

An intervention order may be granted by the sheriff where s/he is satisfied the adult is incapable in relationship to decisions about his/her property, financial affairs or personal welfare. The issue will, therefore be, one of capacity in relation to specific activities or types of activity rather than one of general capacity. An intervention order is an order which can:-

- Direct the taking of any action specified in the order; or
- Authorise the person nominated in the order to take the necessary action or decision specified in the order.

An intervention order is suitable for dealing with one-off situations where a matter needs to be dealt with and long term guardianship is not required. Examples of actions which might be directed or authorised by an intervention order include selling a house, signing a tenancy agreement on behalf of the adult or agreeing settlement of a compensation claim. An intervention order would not be suitable for a situation where the adult has ongoing care needs and constant decisions about their situation will be required. An intervention order is seen as less restrictive than guardianship.

The decision to apply for an intervention order should only be considered following an AWI Case conference chaired by the SW/CCO line manager and an agreement is reached at that case conference that an intervention order is required (See Appendix 3 for guidance agenda and action plan).

2. WHEN DO YOU NEED TO KNOW ABOUT INTERVENTION ORDERS

Consideration of an intervention order by Council staff will be appropriate in several situations:-

- a) In advising the family/friends of options they may consider taking for dealing with an incapable adult's affairs.
- b) In advising and/or liaising with someone who holds authority under an intervention order in relation to them exercising their powers. Remember to ask to see the intervention order and keep a copy on the adult's file.
- c) In considering what is the most appropriate action for the Council to be taking where there is no-one else willing to progress an action under the Act.

3. WHAT POWERS CAN BE OBTAINED UNDER AN INTERVENTION ORDER

Basically, in an application for an intervention order, you are asking for the powers to deal with the situation that is an issue.

Intervention orders can be used where the need for action is time-limited or to deal with one-off decisions or single issue concerning the adult's property, finance or personal welfare. The local authority should only be considered as the nominated financial interveners in exceptional circumstances where there is an assessed need and there is no one else to act., e.g tenancy agreement

4. WHO CAN HOLD THE POWERS UNDER AN INTERVENTION ORDER

Applications for an intervention order can be made by anyone claiming an interest in the property, financial affairs or personal welfare of the adult, including the adult himself. Only the person specified in the order will be permitted to carry out the action or actions stipulated by the order. The person specified in the order may be someone involved with the adult, such as a relative, carer or friend. It may also be a professional person or a named officer of a voluntary body.

In terms of section 53(3) of the 2000 Act the Moray Council must apply for an intervention order where it appears that the adult is incapable in terms of the 2000 Act, no one else is applying or is likely to apply for an order, and an intervention order is necessary for the protection of the property, financial or personal welfare affairs of the adult.

Process Step**Detail****5. WHAT MUST BE SUBMITTED TO COURT**

An application for an intervention order is made by summary application. ([S.2 \(2\) of the 2000 Act](#)) to the sheriff court in the area in which the adult is habitually resident. The application must be accompanied by 2 medical reports. In addition to the medical reports, where the application relates to the personal welfare of the adult a “suitability” report should be prepared by the adult’s mental health officer. Where the application relates to the property and financial affairs of the adult a report based on an interview and assessment of the adult carried out by a person who has sufficient knowledge of the adult.

Staff should liaise with Legal to ensure that all the necessary paperwork is in place should the Council have to progress an application for an intervention order. Legal will prepare the application which is lodged at court, but there are several reports which must be submitted along with the application that Social Work staff will have to arrange

The reports required to support an application for an intervention order are as follows;

(i) Medical Reports

There must be two medical reports prepared by doctors who have examined the adult based on an assessment of the capacity of the person in relation to the decision-making powers requested. The medical examinations should take place no more than 30 days prior to the application being lodged in court. Where incapacity is by reason of mental disorder one of the reports must be by a relevant medical practitioner, usually an approved medical practitioner under section 22 of the Mental Health (Care and Treatment) (Scotland) Act 2003. The other medical report is usually from the person’s own general medical practitioner; AND

(ii) Application for Welfare Powers

If the application is for welfare powers then a suitability report containing an opinion on the general appropriateness of the order sought in relation to the needs of the adult and the suitability of the applicant requires to be completed by an MHO or the Chief Social Work Officer (in practice, completed by SW/OT on behalf of CSWO)([link to copy of Moray form](#))

Suitability reports must be prepared by a Moray Council’s Mental Health Officer where the cause of incapacity relates to mental disorder ([Schedule 4](#)). If however the adult is incapacitated because s/he cannot communicate then the Chief Social Work Officer prepares the report. ([Schedule 7](#)) (in practice this is delegated to a Social Worker)

(iii) Applications for Property/Financial Powers

If the application is for property/financial powers then a report must be prepared by someone who has assessed the adult no more than 30 days before the application is lodged with the court and that person must have sufficient knowledge to make a report on the appropriateness of the application and the suitability of the person nominated to hold the powers under the intervention order.

Where the application is solely for financial powers by a private individual there is no duty on the Moray Council to provide a report to a private applicant

In addition to the supporting evidence for the intervention order there must be adequate resources available to carry out the intervention order once granted.

The summary application containing the detailed powers has to be made to the sheriff court in the area in which the adult is habitually resident. Habitual residence is a tricky concept. It is not defined in law. Despite this it is largely accepted that habitual

Process Step

residence refers to the place in which the adult has a substantial and stable residence as distinguished from residence which is occasional and impermanent. For example, an adult who had been in hospital for seven months may have his place of habitual residence elsewhere.

If the Council is making an application for an intervention order, the MHO or person with sufficient knowledge who completes a report is required to request the medical reports so that they can co-ordinate the timings of their report and submit these to the Council's solicitor. It is, in practice, the CCO's responsibility to co-ordinate this. Sometimes the MHO can do so on the CCO's behalf. The MHO or person with sufficient knowledge who completes a report for the application will also be required to give the Council's solicitor the nearest relative's address so that a copy of the court application can be sent to them. If the intervention order application is to terminate or sign a tenancy agreement, the addresses of each tenancy will need to be given to the Council's solicitor as well.

Detail

The reports have to be concurrent and lodged with the sheriff court within 30 days of the first date of assessment of the adult. (Code of Practice for Local Authorities Ch 5, 5.23)

The "person nominated" to be the "intervener" for the Moray Council should be the line manager of the staff member writing the suitability report. In terms of the legislation, any member of staff for Moray Council could be named as the intervener but it is suggested as good practice that the line manager of the staff member writing the report should be the intervener. The adult with incapacity should be advised about who is being proposed as the intervener and the line manager's agreement to act as Intervener should be sought to ensure that they are willing to undertake the tasks in the intervention order.

All of these reports must be in a certain form set out by the Public Guardian and the forms are available from the Public Guardian and on their website. Staff should liaise with Legal to ensure all the timescales are met.

The Which Forms flowchart will show you what reports are required to support an application for an intervention order.

6. WHAT IS THE EFFECT OF AN INTERVENTION ORDER

- a. Anything done under an intervention order has the same effect as if it was done by the adult had s/he had the capacity.
- b. Authority granted under the Access to Funds Scheme will come to an end when an intervention order is granted in relation to money or accounts covered by the Scheme.
- c. Authority granted to Managers under the Management of Residents Finances Scheme will come to an end when an intervention order is granted in relation to money or accounts covered by the Scheme.
- d. If the intervention order relates to medical treatment, doctors should not give that treatment until the intervention order is granted. However, they may still give treatment in an emergency.

7. REIMBURSEMENT OF OUTLAYS

A person authorised under an intervention order may recover from the adult the amount of outlays reasonably incurred in doing anything authorised by the intervention order. Records and receipts should be kept so that the amount can be requested from the person who has authority to deal with the adult's finances.

8. ONCE THE APPLICATION IS LODGED IN COURT

Once the sheriff has received the application, s/he will direct that copies of the application and supporting reports are to be sent to interested parties, including the adult, so that they are aware of the application. The application can ask that the papers are not sent to the adult, but only if there is a serious risk to his or her health. This should only be done in exceptional circumstances. Interested parties who should receive the papers may be the:-

Process Step**Detail**

- Adult
- Nearest Relative
- Primary carer
- Public Guardian
- Mental Welfare Commission

Legal Services will arrange for the appropriate copies to be sent to those listed by the sheriff. At that point the court will also fix a date for hearing the application and notice of this date must also be sent to interested parties when they get copies of the application. A representative from Legal will attend the hearing and, if necessary, arrange for a further date to be fixed if the sheriff requires to hear evidence from witnesses.

9. THE SHERIFF'S OPTIONS

At the court hearing, the sheriff has a number of options when considering whether or not to grant the intervention order. He/She may:-

- Grant the application
- Request further reports or evidence
- Make an interim order whilst He/She gives more consideration to the matter
- Grant the application but impose certain conditions or restrictions; or
- Refuse the application

10. ONCE THE APPLICATION IS GRANTED

Once the sheriff has granted the application, the sheriff clerk will send a copy of the intervention order to the Public Guardian who will register it and notify:-

- The adult (unless the sheriff has directed not to)
- The Local Authority
- The Mental Welfare Commission if incapacity is due to a mental disorder. The person authorised by the Intervention Order may then take the decision or action authorised in the order.

Moray Council is advised by the OPG, a copy of the certificate is then held by the Adult Protection unit who will advise appropriate staff accordingly

11 ONCE THE INTERVENTION IS COMPLETED

The person nominated to be the intervener will once the intervention is completed advise the OPG and the Adult Protection Unit. The OPG will confirm in writing to the Adult protection Unit that the intervention is complete and a copy of the certificate will be held by the unit.

11. SUPERVISION BY THE PUBLIC GUARDIAN

The Public Guardian must supervise those authorised under an intervention order where it relates to property and/or financial matters. This is to ensure that the powers are used properly and those authorised under an intervention order will have to account for their actions. Therefore, records of actions taken and receipts should be kept.

12. SUPERVISION BY THE LOCAL AUTHORITY

There is no specific provision to order supervision of a person authorised under an intervention order. However this may be done by the sheriff under his/her general powers. The Council may therefore be required to supervise someone authorised under an intervention order where it relates to the adult's personal welfare.

Guardianship Order

| Process Step | Detail |
|--------------|--------|
|--------------|--------|

OBTAINING GUARDIANSHIP

1. INTRODUCTION

Where there is an evidenced need for decisions or actions to be made or taken on a continuing basis to protect an Adult's welfare and/or property and finances; and the adult lacks the capacity to take actions or make informed decisions in relation to their welfare, property and finances there may be grounds for a Guardian to be appointed.

It is the duty of the Moray Council to make an application for Guardianship where this measure is required to safeguard the adult's welfare, finances or property, and where there is no one else who is making or likely to make an application ([S.57 2000 Act](#)).

Where no one is likely to be making an application for guardianship and it is the decision of the AWI Case Conference that this measure is necessary to safeguard the Adult's welfare, the Moray Council makes the application to appoint the Chief Social Work Officer as the adult's Welfare Guardian. The Chief Social Work Officer cannot be appointed Financial Guardian

A guardianship order will be granted by the sheriff where s/he is satisfied that:-

- The adult is incapable in relation to the issues outlined in the application; and
- The adult is likely to continue to be so incapable; and
- There are no other means under the Act which will be sufficient to deal with the adult's affairs.

It is clear that guardianship is viewed as the most restrictive means of dealing with an adult's affairs and should only be used when there is no other option. Guardianship's should be used when an adult has complex and ongoing needs that require flexibility to deal with a variety of issues as and when they arise.

Consideration on whether to apply for Guardianship should be made at an AWI Case Conference. You should also consider whether an interim guardianship should be sought when a guardianship application is being made. An interim guardianship will allow the guardian to use the powers sought until the full guardianship application has been considered by the sheriff. Interim guardianship orders are usually sought in urgent situations for example, if the adult requires urgent medical treatment and guardianship powers are required in order to facilitate this treatment. When an AWI Case Conference is held to discuss a Guardianship applications please refer to appendix 3 for Guidance /agenda /actions to be taken.

2. WHEN DO YOU NEED TO KNOW ABOUT GUARDIANSHIP

Consideration of a guardianship order by Council staff will be appropriate in several situations:-

- a) in advising the family/friends of options they may consider taking for dealing with an adult's affairs who lacks capacity.
- b) in advising and/or liaising with someone who holds authority under a guardianship order in relation to them exercising their powers. Remember to ask to see the guardianship order and keep a copy on the adult's file.
- c) in considering what is the most appropriate action for the Council to be taking where there is no-one else willing to progress an action under the Act.

3. WHAT POWERS CAN BE OBTAINED UNDER A GUARDIANSHIP ORDER

An application for guardianship must specify the powers that are sought. The general principles must be satisfied for each power that is applied for. The powers sought can be very general, e.g. the power to manage the property and financial affairs of the adult. The powers sought could also be more specific, e.g. the power to pursue a divorce on behalf of the adult.

There are two types of guardianship that can be applied for:-

- (1) A Guardianship order relating to the adult's property and financial affairs - which relates to the adult's property and finances.
- (2) A Guardianship order relating to the adult's welfare - which relates to the adult's personal welfare.

Process Step Detail

4. WHO CAN HOLD THE POWERS UNDER A GUARDIANSHIP ORDER

A guardian must be an individual, unless the guardianship order is only in relation to the personal welfare of the adult, in which case the Chief Social Work Officer can be the guardian. An officer of a Local Authority cannot be a guardian over an adult's property and financial affairs.

An individual may include:-

- A private individual
- A professional, e.g. a solicitor or accountant
- A member of a voluntary organisation

Therefore, if the Council is progressing an action under the 2000 Act because there is no one else willing to do so, they may have difficulty in finding a suitable financial guardian. In this instance, staff should liaise with Legal to discuss the options open to the Council. Joint or substitute guardians can be appointed and you should also discuss this option with Legal.

5. WHAT MUST BE SUBMITTED TO COURT

An application for a Guardianship order is made by summary application. ([S.2 \(2\) of the 2000 Act](#)) to the sheriff court in the area in which the adult is habitually resident. The application must be accompanied by 2 medical reports. In addition to the medical reports, where the application relates to the personal welfare of the adult a "suitability" report should be prepared by the adult's mental health officer. Where the application relates to the property and financial affairs of the adult a report based on an interview and assessment of the adult carried out by a person who has sufficient knowledge of the adult.

Staff should liaise with Legal to ensure that all the necessary paperwork is in place should the Council have to progress an application for an intervention order. Legal will prepare the application which is lodged at court, but there are several reports which must be submitted along with the application that Social Work staff will have to arrange

The reports required to support an application for an intervention order are as follows

(i) Medical Reports

There must be two medical reports prepared by doctors who have examined the adult based on an assessment of the capacity of the person in relation to the decision-making powers requested. The medical examinations should take place no more than 30 days prior to the application being lodged in court. Where incapacity is by reason of mental disorder one of the reports must be by a relevant medical practitioner, usually an approved medical practitioner under section 22 of the Mental Health (Care and Treatment) (Scotland) Act 2003. The other medical report is usually from the person's own general medical practitioner; AND

(ii) Application for Welfare Powers

If the application is for welfare powers then a suitability report containing an opinion on the general appropriateness of the order sought in relation to the needs of the adult and the suitability of the applicant requires to be completed by a Mental Health Officer ([Schedule 2](#)). or where the person is incapacitated because s/he cannot communicate then the Chief Social Work Officer prepares the report ([Schedule 5](#)) (in practice this is completed by Social Worker /Occupational Therapist on behalf of CSWO)

Reports must be prepared by a Moray Council's Mental Health Officer where the cause of incapacity relates to mental disorder ([Schedule 4](#)). If however the adult is

incapacitated because s/he cannot communicate then the Chief Social Work Officer prepares the report. ([Schedule 7](#)) (in practice this is delegated to a Social Worker)

(iii) Applications for Property/Financial Powers

Process Step

If the application is for property/financial powers then a report ([Schedule 8](#)) must be prepared by someone who has assessed the adult no more than 30 days before the application is lodged with the court and that person must have sufficient knowledge to make a report on the appropriateness of the application and the suitability of the person nominated to hold the powers under the guardianship order.

Where the application is solely for financial powers by a private individual there is no duty on the Moray Council to provide a report to a private applicant

In addition to the supporting evidence for the guardianship order there must be adequate resources available to carry out the guardianship order once granted.

The summary application containing the detailed powers has to be made to the sheriff court in the area in which the adult is habitually resident. Habitual residence is a tricky concept. It is not defined in law. Despite this it is largely accepted that habitual residence refers to the place in which the adult has a substantial and stable residence as distinguished from residence which is occasional and impermanent. For example, an adult who had been in hospital for seven months may have his place of habitual residence elsewhere.

6. WHAT IS THE EFFECT OF A GUARDIANSHIP ORDER

- a) The adult has no capacity to enter into any transaction which is within the scope of the guardian's powers unless the guardian has authorised the adult to do so.
- b) Authority granted under the Access to Funds Scheme will come to an end when a guardianship order is granted in relation to money or accounts covered by the Scheme.
- c) Authority granted to Managers under the Management of Residents Finances Scheme will come to an end when a guardianship order is granted in relation to money or accounts covered by the Scheme.
- d) If the guardianship order relates to medical treatment, doctors should not give that treatment until the guardianship order is granted. However, they may still give treatment in an emergency.

7. REIMBURSEMENT & REMUNERATION

A guardian can recover from the adult the amount of outlays reasonably incurred in doing anything authorised by the guardianship order.

If the Chief Social Work Officer is the Welfare Guardian, outlays cannot be recovered if it was for services that would normally be provided free to those who do not have a guardian.

A Local Authority cannot recover the cost of making an application for welfare guardianship. A Local Authority can recover the cost of making an application for financial guardianship from the adult.

A welfare guardian who is not an officer of the local authority can only receive remuneration for being a welfare guardian in exceptional circumstances. An officer of the local authority who is appointed as welfare guardian cannot receive any remuneration for being a welfare guardian.

A financial guardian is entitled to remuneration for being a financial guardian. Remuneration and the amount of outlays allowed will be fixed by the Public Guardian and his/her advice should be sought if you want to know more about remuneration or recovery of expenses in relation to guardianship orders.

8. ONCE THE APPLICATION

Once the sheriff has received the application, he/she will direct that copies of the application and supporting reports are to be sent to interested parties, including the

IS LODGED IN COURT

adult, so that they are aware of the application. The application can ask that the papers are not sent to the adult, but only if there is a **serious** risk to his or her health. This should only be done in exceptional circumstances.

Interested parties who should receive the papers may be the:-

- Adult
- Nearest relative
- Primary carer
- Public Guardian
- Mental Welfare Commission

Legal will arrange for the appropriate copies to be sent to those listed by the Sheriff. The Sheriff will also fix a date for hearing the application in court and notice of this date must also be sent to interested parties when they get copies of the application. A representative from Legal will attend the hearing and if necessary arrange for a further date to be fixed if the Sheriff requires to hear evidence from witnesses.

Process Step**Detail****9. THE SHERIFF'S OPTIONS**

At the court hearing, the Sheriff has a number of options when considering whether or not to grant the guardianship order. He/she may:-

- Grant the application
- Request further reports or evidence
- Make an interim order whilst he/she gives more consideration to the matter
- Grants the application but impose certain conditions or restrictions; or
- Refuse the application

The sheriff can grant guardianship for a period of 3 years, or such other period (including an indefinite period) he may determine. The application for guardianship should specify why a period beyond 3 years is necessary.

10. ONCE THE APPLICATION IS GRANTED

Once the sheriff has granted the application, the sheriff clerk will send a copy of the guardianship order to the Public Guardian who will register it and notify:-

- The adult (unless the sheriff has directed not to)
- The Local Authority
- The Mental Welfare Commission if incapacity is due to a mental disorder The Public Guardian will then issue a certificate of appointment to the guardian who can then begin to exercise his powers. Council staff should ask to see a guardian's certificate of appointment so that they are satisfied the guardianship is properly in place if they are dealing with someone who claims to be an adult's guardian.

11. SUPERVISION BY THE PUBLIC GUARDIAN

A financial guardian will be supervised by the Public Guardian. The complexity of the accounting requirements and record keeping will depend on the size and complexity of the adult's financial affairs. A financial guardian will receive advice on this from the Public Guardian.

12. SUPERVISION BY THE LOCAL AUTHORITY

A welfare guardian will be supervised by the local authority. Supervision should be seen by the welfare guardian as help and support in exercising their powers. Supervision must be carried out within 3 months of the welfare guardianship being granted, and thereafter at intervals of not more than 6 months.

The Practice Guide, "[Supervising and supporting welfare guardians](#)" published by the Social Work Inspection Agency and the Mental welfare Commission informs the procedures to be followed in the Moray Council. The Practice Guide contains official guidance and must be referred to by any person appointed to carry out a supervisory role under the Act.

Advice and guidance regarding supervision is detailed in Part 7 of the Local Authority Code of Practice and in Part 5 of the Code of Practice for Persons Authorised under Intervention Orders and Guardianships.

<http://www.scotland.gov.uk/Resource/Doc/216923/0058136.pdf>

Process Step

Detail

SUPERVISION OF A WELFARE ATTORNEY

The supervision of welfare attorney is only required when an issue of concern has been brought to the notice of the court. Any person including the adult themselves may bring a matter of concern to the notice of the court and request that the sheriff makes an order requiring supervision.

It is usually the adult's Community Care Officer/Social Worker who would be the appointed supervisor as required by the Sheriff. If the adult has no Community Care Officer / Social Worker, or if the Team Manager considers that the worker concerned should not be responsible for supervision, then the Team Manager shall appoint another worker to be the supervising officer.

Joint visits may be made to the adult and the Welfare Attorney. Or the Visits can be made to the adult and the holder of the power of attorney separately, especially when there appears to be any conflict between the Welfare Attorney and the adult.

13. GUARDIANSHIP APPLICATIONS FOR YOUNG PEOPLE

It is possible to submit a guardianship application with the sheriff three months before a young person is 16 years old. The guardianship (if granted) will only commence from the young person's 16th birthday. This provision is designed to avoid a gap between the young person becoming 16 years old and the guardianship order being in place.

Financial Guardianship

DWP Appointee procedure

The Council has the power to hold a corporate DWP Appointeeship to manage a person's DWP pensions & benefits when that person does not have the ability to manage their own finances and there is no one else willing or suitable to do so.

The need for an appointeeship should be established during the Single Shared Assessment. Subsequently it can be picked up at reviews if the person's needs change. Whenever the need arises it must be well documented in the service user's file.

If it is agreed that Moray Council is the most appropriate holder of the DWP appointeeship, the process will be as follows:

1. Open a new bank account in the name of the establishment e.g. "Moray DWP Account" or "ILP DWP Account".
2. Apply to the DWP for corporate DWP appointeeship, nominating that account for the monies to be paid directly into.
3. Keep clear and separate records for each service user whose monies get paid into that one account.

If the bank requires official confirmation a form is available from the Chief Social Work Officer entitled 'Confirmation of arrangements in respect of corporate DWP appointeeship'.

If the service user is living in a care home, consideration should be given to implementing Part 4 of the Adults with Incapacity Act – see separate procedure. This will only be applicable if the person lacks capacity, it will not apply if there are other reasons for seeking a corporate DWP appointeeship, such as physical frailty.

Detail**BEING A FINANCIAL GUARDIAN**

This section is intended to provide a brief summary of what is involved in being a financial guardian. This will be useful information for Council staff in the following situations:-

- a) Finding someone willing to take on the role of financial guardian since an officer of the Council cannot take on that role if the Council is having to progress action under the Adults with Incapacity (Scotland) Act 2000.
- b) Liasing with someone who is a financial guardian to achieve a particular aim on behalf of an adult. Remember to ask for proof of appointment as a financial guardian and retain a copy on the adult's file.

Process Step

A financial guardian must be aware of the following factors:-

1.
INTRODUCTION
2. KEY POINTS
OF FINANCIAL
GUARDIANSHIP

- i. A financial guardian must apply the general principles when s/he is exercising his/her powers.
- ii. A financial guardian must check that what they are proposing to do falls within the scope of their powers.
- iii. A financial guardian should keep the adult's funds and assets separate from his/her own, unless they are held jointly. The financial guardian must remember that the adult's funds and assets still belong to the adult.
- iv. A financial guardian must observe the accountancy and supervisory requirements of the 2000 Act and Public Guardian. The record keeping and paper work required can be complicated. A financial guardian (or someone thinking about it) should discuss what is involved with the Public Guardian and/or may wish to use the services of an accountant.
- v. If a financial guardian acts reasonably, in good faith and in accordance with the general principles of the Act then they should not get into trouble!
- vi. (vi) The Public Guardian has powers to obtain information when carrying out investigations into the exercise of authority relating to financial and property matters. The Public Guardian can take part in or initiate court proceedings.

3. CHIEF
SOCIAL WORK
OFFICER AS
WELFARE
GUARDIAN

When the Chief Social Work Officer is appointed as a Welfare Guardian, the Chief Social Work Officer will delegate their duties to the most appropriate Social Worker and/or other Council officer. This delegation should be confirmed in writing to the adult, the family and any other relevant person. If the Welfare Guardianship Order includes powers over medical treatment, then a copy of the order and the contact details of the appropriate Social Worker should be sent to the adult's GP so that they are aware who they should contact to discuss any health issues. This is the responsibility of the allocated social worker ([See Letters](#)).

RENEWAL, REPLACEMENT, TERMINATION AND TRANSFER OF GUARDIANSHIP

1. RENEWAL OF
GUARDIANSHIP

A guardianship will usually be granted for 3 years although the sheriff has the discretion to grant it for a longer or shorter period on cause shown. Guardianship orders, if not granted for an indefinite period, may need to be renewed once the period specified in the order has passed. Therefore, it is important that if you are dealing with a guardian, you must check their certificate of appointment to ensure it is current and has not expired.

An application for renewal of guardianship must be submitted to the Sheriff before the existing guardianship ends. The existing guardianship will then continue until the Sheriff makes his or her decision.

Unlike for first time guardianship applications, renewal applications need only be accompanied by one medical report. Where the renewal application relates to the

personal welfare of the adult the application should also be accompanied by a "suitability" report should prepared by the adult's mental health officer. Where the application relates to the property and financial affairs of the adult, it should be accompanied by a report based on an interview and assessment of the adult carried out by a person who has sufficient knowledge of the adult.

Detail

The Public Guardian will send a reminder to the guardian and local authority about one month before the guardianship is due to end. A Social Work review system should be set up to deal with renewals as reports are required to support the renewal application and it may take longer than one month to arrange for these to be prepared. Currently, practice suggests that at 6 months prior to expiry date, discussions re renewal should take place. Only two reports are required to supports a renewal application. One medical report is required and where the incapacity is due to mental disorder, a relevant medical practitioner must prepare the report. Where the application relates to person welfare, a Mental Health Officer must prepare the second report. Where the application relates to property or finance, the Public Guardian must prepare the second report.

The sheriff can renew a guardianship for 5 years or for a period he sees fit, which could be indefinitely.

2. REPLACEMENT OF A GUARDIAN

An application can be submitted to the court nominating someone else to be an adult's guardian. This could be appropriate because:-

- The original guardian has died or moved away
- The local authority or Public Guardian is dissatisfied with the original guardian.

3. REMOVAL OF A GUARDIAN

A guardian may be removed by the sheriff where another guardian exists who is prepared to take over or continue to act. This can only happen where there is either a substitute or joint guardian. This will usually happen because the guardian is no longer willing or able to continue as guardian or because the guardian was failing to exercise his/her powers properly.

4. RESIGNATION OF A GUARDIAN

Whilst a guardian can resign at any time, resignations do not become effective until a new guardian is approved by the sheriff. So a guardian who is considering resigning should give as much notice as possible and ensure that there is someone willing to take over.

5. A GUARDIAN IS TEMPORARILY UNAVAILABLE

If a guardian is temporarily unavailable, e.g. due to hospitalisation or being abroad, and there is no joint or substitute guardian, there are several options:-

- Apply to the sheriff for someone to be an additional guardian.
- Check and see if the guardian left instructions with someone like a solicitor to cover the period whilst s/he was going to be unavailable.

6. RECALL OF A GUARDIANSHIP

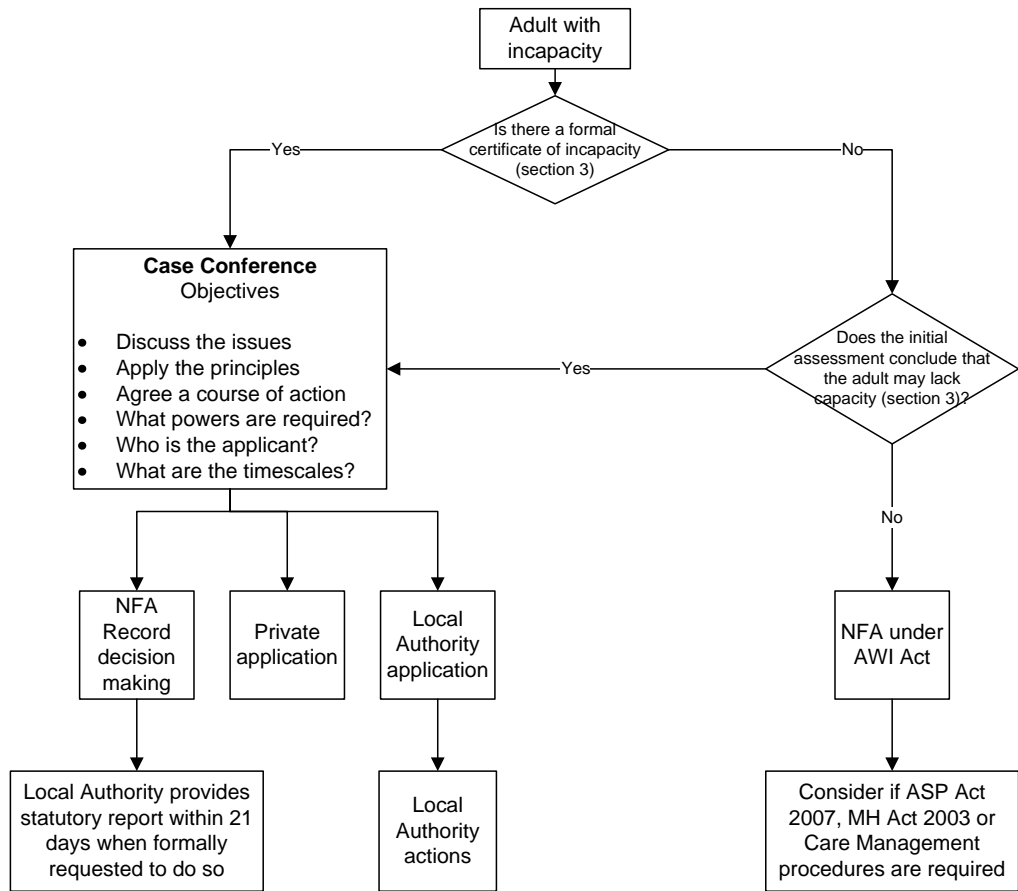
The sheriff, Public Guardian, Mental Welfare Commission and local authorities all have various powers to recall a guardianship if they feel that a guardianship is no longer required or that the adult's needs can be met in another way.

7. TRANSFER OF GUARDIANSHIP

If an adult is under a local authority guardianship and the adult moves into another local authority area, the Chief Social Work Officer must inform the Chief Social Work Officer of the receiving authority that this is happening. The receiving authority must notify the Public Guardian within 7 days of transfer and if appropriate the Mental Welfare Commission. The receiving authority within a further 7 days must notify the adult, the Public Guardian and if appropriate the Mental Welfare Commission of the name of the officer carrying out the powers of welfare guardian.

Moving Adults on With Incapacity?

Case Conference Process



Detail

MOVING ADULTS ON WITH INCAPACITY

Process Step

Once the decision has been taken, either at a case conference or through a multi-agency discussions, that an adult needs to be moved on to a more appropriate care setting and that the adult capacity to consent to such a move is in doubt Council staff need to arrange to carry out a formal assessment of the capacity to consent to the move. Examples of when this situation may occur:-

INTRODUCTION

- a move from home into supported accommodation.
- a move from home into residential care.
- a move from supported accommodation into residential care.
- a move within supported accommodation units.
- a move within residential care properties.

[See appendix for guidance agenda minutes template](#)

DOES THE ADULT HAVE CAPACITY TO CONSENT TO THE MOVE?

Whether or not the adult has the capacity to consent to the move is the first question that must be answered. A formal assessment of the adult's capacity to consent to the move must be arranged by the Social Worker / Community Care Officer in line with the agreed procedures for carrying out such an assessment.

An assessment of the adults needs should be undertaken and should involve staff who know the adult and have worked closely with him/her. If appropriate, relatives and carers should also be involved in these discussions to ensure that they are aware of what is happening and the outcome of the assessment. This will give them the opportunity to voice any concerns about the assessment and the outcome.

THE ADULT HAS CAPACITY TO CONSENT TO THE MOVE

If the outcome of the assessment is that the adult has the capacity to consent to the move, the assessment process and final outcome must be clearly documented. Those involved in the assessment should all be in agreement as to the outcome and this should be recorded. The adult's decision should also be clearly documented. The adult can then be moved in accordance with his/her decision taken.

THE ADULT LACKS CAPACITY TO CONSENT TO THE MOVE

If the outcome of the assessment is that the adult lacks the capacity to consent to the move, the assessment and final outcome should be clearly documented. Those involved in the assessment should all be in agreement as to the outcome of the assessment report.

Is the adult compliant?

The next stage is to ascertain whether or not an adult will comply with the move even though they lack the capacity to make a formal decision. An AWI case conference should be held and involve the appropriate individuals. Case conference should discuss the proposed move and the adult's compliance with that move. You will need to consider s13ZA at this point.

No concerns are raised, the family are not seeking formal powers

Where there are no concerns raised and the family have indicated that they are not going to seek formal powers under the AWI Act, a detailed minute of the case conference and the decisions taken should be filed with the assessment of needs. The assessment of needs and the minute and any appropriate advice from Legal should be presented at any allocations meeting. A record should be made following allocation of resources that there is consent to the move going ahead without formal AWI powers in place on the basis that the adult is compliant, no concerns have been raised and that the move complies with the AWI Principles.

Process Step**Detail**

A letter should then be sent to the family, outlining the proposed move, that no powers are being sought, that the move is in line with the general principles and stressing that they have the right to seek their own independent legal advice. Essentially this letter gives the family one final chance to oppose the move before it happens.

Once a decision has been reached that the adult is likely to be compliant with the move and the move is to go ahead without formal AWI powers then a transitions plan should be developed to introduce the adult to their new home. The issue of compliance should be discussed regularly, particularly at reviews to ensure that any signs of non-compliance are highlighted at an early stage.

The adult can then be moved under section 13ZA of the Social Work (Scotland) Act 1968 which provides that where a local authority has concluded that an adult requires a community care service, but is not capable of making decisions about the service, they may take any steps which they consider necessary to help the adult benefit from that service

Is the adult non compliant?

Where the decision is that the adult lacks the capacity to consent to the move, and they may not be compliant with the move. In these circumstances, it is not recommended that the adult is moved until formal powers are obtained under the AWI Act.

An AWI case conference should be held involving appropriate individuals in line with the procedures contained in this policy (see appendix guidance and agenda). The cases conference should discuss the proposed move and the adult's non-compliance. There should be a discussion around the need to seek formal powers to move the adult

Legal and the appropriate MHO will then work together to obtain the necessary reports and progress the application to Elgin Sheriff Court for powers under the AWI Act to move the adult. The CCO/SW will be required to complete a referral form to Legal Services to draft this application. The adult can only be moved once the Sheriff has granted the appropriate powers.

Where there are objection to the move

Where the family or other professionals raise concerns about the proposed move, this must be disused in detail at the AWI Case Conference.

A full minute of this discussion and the outcomes should be recorded and the family notified of the outcome. The adult can then be moved or wait until formal powers are obtained.

Deprivation of Liberty

If the outcome of the case conference is that there are concerns that the proposed move will amount to a deprivation of liberty under Article 5 of the ECHR, there should be a discussion around the need to seek formal powers to move the adult. A full minute of this discussion and the outcomes should be recorded and the family notified of the outcome.

Heritable Property

If the adult owns heritable property, then there must be a financial guardianship in place to deal with that property. The Council cannot hold such powers and therefore a member of the family or appropriate professional would have to hold such authority .A full minute of this discussion and the outcomes should be recorded and the family notified of the outcome. Legal and the appropriate MHO will then work together to obtain the necessary reports and progress the application to Elgin Sheriff Court for powers under the AWI Act to move the adult.

The adult can only be moved once the Sheriff has granted the appropriate powers.

Investigations or Concerns or Complaints under the 2000 Act

| Process Step | Detail |
|--|---|
| INTRODUCTION | <p data-bbox="351 302 1514 369">INVESTIGATIONS OF CONCERNS OR COMPLAINTS UNDER THE 2000 ACT</p> <p data-bbox="351 376 1514 504">S.10 (1) (c) of the Act places a duty upon Moray Council to receive and investigate complaints about the exercise of functions relating to the personal welfare of an Adult. This includes welfare attorneys, guardians or persons authorised under intervention orders.</p> <p data-bbox="351 510 1514 638">If any member of staff receives a complaint or has any concerns about the exercise of powers by a welfare attorney, or they have concerns that an adult may be at risk of harm a referral should be made to adultprotection@moray.gov.uk . Adult protection procedures should be followed at this point.</p> <p data-bbox="351 683 1514 817">Where it appears the concern relates to an Adult's funds not being used for their benefit, to meet their needs, or in line with their wishes or in connection with their property and the adult lacks capacity in this area the duty to investigate is the responsibility of the Public Guardian</p> |
| COUNCILS DUTY TO INVESTIGATE CONCERNS | <p data-bbox="351 851 1514 978">Under Section 10 of the Act Moray Council discharges it responsibility to receive and investigate complaints relating to personal welfare to Social workers /Community Care Officers thereafter known as the "investigating officer. Investigating Officer needs to be a Council Officer, in relation to the Act.</p> <p data-bbox="351 1023 1514 1220">Where an investigation under the 2000 Act is being considered the facts and circumstances of the case must be reported to the Adult Protection Unit without delay in order that the necessary arrangement can be made to enquire it to the concerns any investigation will be in line with the attached guidance for carry out such investigation. ". Guidance and support to carry out any investigation should be sought from the Adult Protection Unit LINK.</p> <p data-bbox="351 1265 1514 1332">The following outlines the responsibilities of local authorities with regards to investigations under section 10 (1) (c) (d) of this act.</p> <p data-bbox="351 1366 1514 1456">(S10 (1) (c) Receiving and investigating complaints relating to the way in which welfare attorneys, welfare guardians or persons authorised in relation to welfare intervention orders carry out their functions under the Act</p> <ul style="list-style-type: none"> <li data-bbox="446 1467 1021 1500">S10 (1)(c) (i) in relation to welfare attorneys <li data-bbox="446 1500 1308 1568">S10(1) (c) (ii) in relation to guardians or persons authorised under intervention orders <p data-bbox="351 1568 1514 1635">(S10d) Investigating any circumstances made known to them in which the personal welfare of an adult seems to be at risk</p> <p data-bbox="351 1668 1514 1870">Where it appears that an investigation is required in to welfare concerns under the 2000 Act. An AWI case conference should be held and involve the appropriate individuals. The cases conference should discuss the</p> <ul style="list-style-type: none"> <li data-bbox="351 1769 670 1803">i)the need to investigate <li data-bbox="351 1803 766 1836">ii) what is to be investigated and <li data-bbox="351 1836 638 1870">iii) who will investigate <p data-bbox="351 1904 1514 1998">Detailed minute of the case conference and the decisions taken should be filed with any appropriate advice from Legal within the restricted section of the adult's case notes.</p> |

**INVESTIGATION
BY THE OPG
CONCERNING
PROPERTY OR
FINANCES**

Where it appears an Adult's funds are not being used for their benefit, to meet their needs, or in line with their wishes, a referral can be made to the Office of the Public Guardian to investigate. Efforts should be made at this stage to establish whether the adult's finances or property are being managed appropriately by the Attorney/guardian if it is apparent that an investigation is warranted before considering making such a referral your Team Manager and the Adult Protection Unit must always be consulted

Process Step

Detail

An AWI meeting should be held involving the relevant team manager the adult protection unit and they can, in turn, take advice from Legal. The minutes and any appropriate advice from legal should be clearly documented and those in attendance should be in agreement as to the need to contact the Public guardians office the consent of the Service Manager must be sought before completing the [Investigation Referral Form for Local Authorities](#). OPG also has primary duty to investigate, duty of LA is to liaise with OPG regarding concerns re finance/property.

Best practice would see the Social Worker./ CCO making reference to [S.12](#) of the Act in any communication with the Public Guardians office

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

**FORMAL
INVESTIGATION
PROCEDURES**

A letter should then be sent to the Family Welfare Attorney / Welfare Guardian, Welfare Intervener to alert them that an investigation is being carried out Unless this action would compromise the adult and put them at further risk

Once the investigation is complete the "Investigations Officer " will compile a report incorporating recommendation for future action A copy of the report and any minutes of meetings held must be sent to the MWC and the Public Guardian offices.

ADULTS WITH INCAPACITY MULTI DISCIPLINARY MEETING (AWI MDM)

Guidance for Chairs

1. Calling a Multi Disciplinary Meeting (MDM)

Any professional can request a MDM regarding an Adult who has, or is thought to have, incapacity, where they have serious concerns about their welfare, finances, or property of that person.

If the 'line manager' of the relevant team agrees that a MDM should be held, the team manager concerned would normally organise the meeting, inviting appropriate people. A list of possible invitees for the meeting would be ; Adult and/or Advocate, Nearest Relative, Primary Carer, Local Authority Solicitor, MHO, Existing Guardian/Attorney, RMO, GP and any other relevant parties. In complex cases it is always advisable to call a case conference, as it may be the only opportunity to discuss a case fully with all the relevant people present. Usually the chair would be a Community Care Team Manager or Consultant Practitioner.

2. Chairing the meeting

The Chair at the MDM should:

- Prepare for the meeting by obtaining as much information as possible in advance
- Give consideration to a protected period without family when there are serious concerns about a conflict of interest between the Adult and/or family members.
- Begin the meeting with a specific statement about the purpose, i.e. to discuss the necessity or otherwise of Guardianship.
- Explain the process to relatives
- Ensure that everyone present or invited has an opportunity to air their views.
- Ensure that the Adult's wishes and feelings are represented, either by themselves or by an advocate.
- Try to ensure, as much as possible, that consensus is reached, and to reconcile disagreements.
- Ensure that a clear decision is reached at the end, and that decisions are properly recorded.
- Allow enough time for a proper discussion without prolonging matters
- Make one of the following decisions:
 1. Apply for an intervention under AWI Act
 2. Not to apply
 3. Not to apply, but consider alternative arrangements,
 4. Defer decision until a further review
 5. Section 13ZA

ASP/AWI MULTI DISCIPLINARY MEETING AGENDA

1. **Assessment of capacity-** is the adult “incapable” within the meaning of the ACT.
2. **Current arrangements to manage the adult’s welfare, property and finances, SW/CCO** assessment report to include view of adult /Nearest relative/ Primary Carer/ other relatives/ professionals / existing guardian/attorney
3. **Concerns and risks relating to the adult’s welfare, property and finances.**
4. **What interventions within the 2000 Act are being considered**, are they considered to be the only measure appropriate in the circumstances; what will be the benefit to the Adult
5. **What specific powers are needed and why–** (if an intervention is required)
6. **Who should make the application;**
7. **Appoint the Day-to-Day Guardian, if required**
8. **Complete the action plan**
9. **Set date for review /case conference**

Guidance for Social Worker Community Care Officer on completing a report for the ASP/AWI Multi-disciplinary meeting

The Social Worker or Community Care Officer (CCO) who has completed their community care assessment of needs with the adult will attend the AWI Multi-disciplinary meeting. The social worker or CCO must prepare and present a short report to the ASP/AWI Multi-disciplinary meeting draw from the adult's assessment of need care plan and risk assessment.

ASSESSMENT REPORT

The assessment should also include the views of the adult /nearest relative/ Primary Carer/ other relatives/ professionals / existing guardian/attorney [Section 1\(4\) \(a\) of the 2000 Act](#) gives the adult the right to have their present and past wishes taken into account.

INDEPENDENT ADVOCACY

The 2000 Act has now been amended to give the sheriff powers to consider the wishes and feelings of adult as expressed by a person providing independent advocacy services. An independent advocate is a person who can help an adult express his/her wishes about care and treatment. "Independent advocacy services" in intervention or guardianship cases has the same meaning as it has in [S.259 \(1\) of the 2003 Act](#). This section states that it is the right of every person with a mental disorder to have the right of access to independent advocacy and it is the duty of each local authority and health board in collaboration with each other to ensure the availability of independent advocacy and to take appropriate steps to ensure that the individual has the opportunity of making use of advocacy services. It is therefore incumbent on the Social Worker or CCO taking the case to the Multi-disciplinary meeting to carry out these functions. This would be good practice, ensuring that the adult's views can be represented at the case conference, thus facilitating the application process consistent with the principles of the Act.

AN ADULT WITH INCAPACITY MEETING ACCESS TO FUNDS

When an AWI Access to Funds Meeting is held to discuss an application to Access Funds the following areas should be addressed:

AGENDA

1. Assessment of capacity
2. Current arrangements to manage the adult's finances
3. Concerns and risks relating to the adult's financial affairs
4. Complexity of the adult's financial affairs. Where assets exceed £20,000, and/or where heritable property is an issue, Financial Guardianship should be considered.
5. Items of expenditure such as food, fuel, rent, care charges etc. which could be considered under the Access to Funds scheme.
6. Alternative ways of managing the adult's financial affairs, including other possible informal arrangements.
7. How Access to Funds will be managed locally for the adult
8. Determine whether or not the adult is in agreement to any proposed financial arrangements
9. How the adult will be enabled to maintain their skills

The adult with incapacity meeting access to funds can make the following decisions:

1. Apply on behalf of Moray Council to manage the adult's finances under Access to Funds
2. Determine whether or not notification of the decision to apply for Access to Funds should be dispensed with if notification may be detrimental to the adult's health
3. Assist relatives/carers or another organisation to make an application
4. Recommend an application for Financial Guardianship, Financial Intervention Order or DWP Appointeeship.
5. Draw up an informal financial plan with the agreement of the adult follow the Managing service user's Money procedure
6. Take no further action

GUIDANCE ON AWI CASE CONFERENCE

When an AWI Case Conference is held to discuss an application for guardianship the following areas should be addressed within the context of the principles of the Act:

- Assessment of capacity
- Current arrangements to manage the adult's welfare, property and finances
- Concerns and risks relating to the adult's welfare, property and finances
- Whether guardianship is considered to be the only measure appropriate in the circumstances;
- If so, what powers will be necessary;
- Who should make the application;
- Appoint the Day-to-Day Guardian, if required
- Advocacy

The Community Care Officer or Social Worker should complete a complex Assessment of Need with the adult. They will attend the AWI Case Conference. The Community Care Officer or Social Worker must prepare and present a short report to the AWI case conference draw from the Adult's Assessment of Need (see attached format of report).

[Section 1\(4\) \(a\) of the 2000 Act](#) gives the adult the right to have their present and past wishes taken into account. The 2000 Act has now been amended to give the sheriff powers to consider the wishes and feelings of adult as expressed by a person providing independent advocacy services. An independent advocate is a person who can help an adult express his/her wishes about care and treatment. "Independent advocacy services" in intervention or guardianship cases has the same meaning as it has in [S.259 \(1\) of the 2003 Act](#). This section states that it is the right of every person with a mental disorder to have the right of access to independent advocacy and it is the duty of each local authority and health board in collaboration with each other to ensure the availability of independent advocacy and to take appropriate steps to ensure that the individual has the opportunity of making use of advocacy services. It is therefore incumbent on the professional taking the case to a case conference to carry out these functions. This would be good practice, ensuring that the adult's views can be represented at the case conference, thus facilitating the application process consistent with the principles of the Act.

GLOSSARY OF TERMS

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| “advocacy project” | Advocacy projects provide independent advocates to stand alongside the adult, to support the adult, to have his or her voice heard or to speak for the adult and promote the adult’s rights, views and wishes. |
| “the Act” or “the 2000 Act” | Means the Adults with Incapacity (Scotland) Act 2000 |
| “the 2003 Act” | Means the Mental Health (Care and Treatment) (Scotland) Act 2003 |
| “assessment and management procedures” | Refers to procedures in place in local authorities to assess adults for community care and to manage the care that they receive |
| “the adult” | A person who has attained the age of 16 years and is incapable in terms of section 1(6) of the Act. |
| “community care services” | Are service provided by local authorities and others to enable users to support themselves in their own homes. |
| CCO/SW Community Care Officer Social Worker | Social work / Community Care Officer are professionals employed to improve the quality of life and wellbeing of an individual, especially those who are disadvantaged, by assessing their needs, providing, guidance, and assistance, especially in the form of community Care services, |
| “continuing attorney” | An attorney with powers over the granter’s property or financial affairs which are intended to continue, or start, if the granter becomes incapable in relation to matters to which the powers relate. |
| “court” | Generally means the sheriff court, which deals with most matters under the Act that require a judicial decision. A few matters, including some sensitive issues about medical treatment, are dealt with by the Court of Session (the supreme |

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| | court). |
| “DWP” | Department for Work and Pensions |
| “duty of care” | Means a duty to exercise due skill and care in exercising the powers one has been given in relation to another person. |
| “financial guardian” | Means guardian with financial powers (see guardian below) |
| “heritable property” | Land or buildings |
| “guardian” | Means a person appointed by the sheriff to act or make decisions for an adult, under Part 6 of the Act. |
| “intromit” | Deal with/access to funds. |
| “interlocutor” | Document setting out decision of the court. |
| “intervener” | Person who acts on behalf of an adult. |
| “intervention order” | Means an order made by the sheriff, under Part 6 of the Act, that something should be done, or a decision made, on behalf of an adult. |
| “mental disorder” | Is defined in the 2003 Act and in section 87(1) of the 2000 Act. In the 2000 Act “mental disorder” means mental illness (including personality disorder) or mental handicap however caused or manifested; but an adult shall not be treated as suffering from mental disorder by reason only of promiscuity or other immoral conduct, sexual deviancy, dependence on alcohol or drugs, or acting as no prudent person would act. |
| MHO mental health officer | Means a social work officer with special training and experience in working with mental disorder. MHOs are appointed by local authorities under the 2003 Act. |

Mental Welfare
Commission”

Is an independent body set up originally in 1984 and continued under the 2003 Act to protect the welfare of people who are vulnerable through a mental disorder who may be unable to protect themselves or their interests adequately.

“nearest relative”

Means the person defined by the Act and the 2003 Act as having the closest degree of kinship to the adult. An unmarried partner of the opposite sex and a same sex partner for a period of not less than six months may be treated as the nearest relative under the Act.

“proxy”

Means a person appointed under the Act to act for an adult with incapacity. The term includes continuing and welfare attorneys, guardians and persons authorised under intervention orders.

“primary carer”

Means the person or organisation mainly engaged in looking after the adult.

OPG
Office of Public Guardian”

Means the officer within the Scottish Court Service, who keeps public registers of those with functions under the Act, grants authority in some cases, and supervises those with financial powers.

“reimbursement”

Means refunding expenses incurred in the exercise of functions under the Act.

“statutory authorities”

Means the Public Guardian, local authority and Mental Welfare Commission. Depending on the context it may also include the sheriff court.

“trustee”

Means someone entrusted with the management of money and property under a legal arrangement.

“welfare attorney”

An attorney with powers over the granter’s personal welfare which can only be exercised if the granter becomes incapable in

relation to matters to which the powers relate.

“welfare guardian”

Means guardian with welfare powers. (see guardian above).

“withdrawer”

Means a person authorised under Part 3 of the Act to have access to funds of an adult with incapacity to meet daily living expenses.