



# CairnLegal

## **FACTSHEET: THE ADULTS WITH INCAPACITY ACT**

### **What is 'incapacity'?**

The law assumes that anyone over the age of 16 is capable of making decisions and managing their own affairs. For people with certain disabilities, injuries or illnesses, that may not be possible. Where someone is unable to act or make, communicate, understand or remember decisions then they are considered to lack capacity.

When a child turns 16 or an adult loses capacity, families often feel there should be an 'easy' way for them to take over decision making for that person. The thought of having to make a formal application can be daunting. However, the procedures are there to protect everyone's rights and with good support the process is normally straightforward.

The Adults with Incapacity (Scotland) Act 2000 offers a range of options to give others authority to act or make decisions for another adult...

### **Powers of Attorney**

In general, a Power of Attorney (POA) is used to provide for the situation where someone might become unable to make decisions in the future due to illness or injury.

People often assume that important decisions about money, care or medical treatment could be taken by their partner or 'next of kin'. However, they will have no automatic right to make decisions on your behalf unless they've been legally appointed.

The key thing to remember about a POA is that you can't 'take out' a POA in relation to someone else. It's something that must be granted by the individual at a time when they have capacity to understand the document they are signing. For that reason, they're often not suitable to take decisions for people with learning disabilities. An exception to that would be where someone is fairly able and recognises that they need support with money.

### **The Access to Funds Scheme**

If you want to manage the finances of an adult whose affairs are fairly straightforward, the Access to Funds Scheme might be more appropriate than financial guardianship.

This scheme allows you to operate a bank account in the adult's name which helps families keep their finances separate, which is important. It's more

transparent and helps avoid any questions about what should be included in financial assessments for means-tested benefits or contributions towards care - or what forms part of someone's estate when they die.

To use this scheme, you should complete a standard application form - available from [www.publicguardian-scotland.gov.uk](http://www.publicguardian-scotland.gov.uk). The application includes a medical certificate and asks for details of: the adult's account(s) or proposed account(s); income; and expenditure – both regular and lump sums payments.

## **Guardianship**

Where someone has never had capacity or they've lost capacity to make decisions for themselves and they haven't previously granted a POA, they might need a Guardian to make decisions on their behalf.

Guardianship Orders can be granted to authorise someone to be responsible for property, finances and/or matters relating to an adult's personal welfare. Sometimes an application will be triggered by a certain event (for example, someone needs authority to sign a tenancy agreement on the adult's behalf) and sometimes it's simply because the adult's carers or relatives want to have a central role in the decisions being made for the adult.

An application has to be made to the Sheriff Court (which is nowhere near as daunting as it sounds!) and is based on two doctors' reports and a report by a mental health officer.

If you think you need or want to apply for guardianship, bear in mind that applications that include welfare powers are automatically eligible for Legal Aid (with no means-test).

## **Intervention Order**

Similar to Guardianship except it's for one-off, or a short series of, decisions or actions.

## **Section 47 Certificate**

This is a form completed by a doctor (or other health professional) to authorise treatment for a patient who does not have capacity to consent. You might be asked to sign this form in your capacity as either a guardian, attorney, nearest relative or carer.

## **More Information**

There's loads more information on our website: [www.cairnlegal.co.uk](http://www.cairnlegal.co.uk)

Alternatively, get in touch with Nicola or Sophie...

☎ 0141 221 7948

@ [info@cairnlegal.co.uk](mailto:info@cairnlegal.co.uk)

✉ Regent House, 113 West Regent Street, Glasgow, G2 2RU