

Legal options for someone who has lost capacity



Who we are

Age Scotland is the national charity for older people. We work to improve the lives of everyone over the age of 50 so that they can love later life.

Our vision is a Scotland which is the best place in the world to grow older.

Our mission is to inspire, involve and empower older people in Scotland, and influence others, so that people can make the most of later life.

Our three strategic aims are to:



Help older people to be as well as they can be



Promote a positive view of ageing and later life



Tackle loneliness and isolation

How we can help

We know that growing older doesn't come with a manual. Later life can bring changes and opportunities to your life and you may need to know about rights, organisations and services which are unfamiliar to you.

That's why we provide free information and advice to help you on a range of topics including benefits and entitlements, social care, legal issues such as Power of Attorney, housing and much more. All of our guides are available to download for free from our website, or you can contact our helpline team to have copies posted to you for free.

The Age Scotland **helpline** is a free, confidential phone service for older people, their carers and families in Scotland looking for information and advice.

Later life can bring times when you just need someone to talk to. Our **friendship line** is part of our wider helpline and older people can call us for a chat. We're here to listen, provide friendship and offer support.

For information, advice and friendship



Call us free on: 0800 12 44 222
(Monday – Friday, 9am - 5pm)



Visit agescotland.org.uk
to find out more.

What is mental capacity?

In Scotland, if somebody is incapable of managing their finances or making decisions about their welfare, the Adults with Incapacity (Scotland) Act 2000 provides protection for them.

The Act says that someone may not have mental capacity if they are unable to:

- make or act on decisions
- communicate decisions
- understand decisions, or
- remember decisions.

Mental capacity can vary throughout the day, from day to day or over a longer period of time. It may affect some decisions but not others, for example someone may not have the capacity to make complex decisions about their finances or welfare but know exactly what they want to eat and wear, and who they want to spend time with.

People may not have mental capacity because of severe dementia or a brain injury, or because they cannot communicate as a result of a stroke.

If someone has not set up a Power of Attorney while they have capacity, which covers what needs to be done if they no longer have it, different legal arrangements have to be made to allow someone else to make decisions on the individual's behalf. See Age Scotland's **Guide to Power of Attorney in Scotland** for information about Power of Attorney.

For the legal powers described in this guide, the decision about whether someone has mental capacity is made by a doctor.



Legal options

The Adults with Incapacity (Scotland) Act 2000 provides three options for formally supporting someone who does not have mental capacity and has not set up a Power of Attorney that covers what needs to be done.

A **Withdrawer** can apply to the Office of the Public Guardian (Scotland) to be appointed to manage someone's day-to-day finances under the **Access to Funds Scheme**.

An **Intervener** can be appointed by the Sheriff Court to make a one-off decision about welfare, finances or property matters.

A **Guardian** can be appointed by the Sheriff Court to make ongoing decisions about welfare, financial and property matters, or both.

Acting on someone else's behalf is an important responsibility. Before making a decision to apply for any formal role you should think about whether:

- the person has the capacity to make the decision themselves
- they are they likely to regain capacity in future
- you could use high standards of care and skill when making decisions
- you could show that you would not use your position to benefit yourself
- you could keep information confidential
- you would manage to keep accurate, complete and up to date records of your actions, so you can report on what you have done.



Legal options for someone who has lost capacity

The Act has three basic principles which apply to all legal options:

- don't take action unless it will benefit the person you care for, and only if the benefit cannot be reasonably achieved without the action
- take account of their past and present wishes
- take account of the views of their closest relatives, unpaid carers, anyone with legal powers and others who are interested in their welfare.



Access to Funds Scheme

The Access to Funds Scheme gives a person, more than one person or an organisation the authority to access and manage someone's finances, usually money in bank or building society current accounts (but not joint accounts). It lets them handle day-to-day expenses such as paying bills, buying food and clothes, and paying debts.

The person who is given this authority is called the **Withdrawer** and their role has to be authorised by the Office of the Public Guardian (Scotland).

The application form asks for details including:

- why you need to access funds and how much needs to be spent on each expense
- which accounts you need to access
- confirmation that you will set up a new bank account to manage the money of the person you care for
- the signature of someone who has known you for at least a year, who agrees you are a fit and proper person to manage someone else's money
- details of close relatives, unpaid carers and others who are interested in the person you care for
- the certificate (SSI 51) from a doctor (who will probably charge for this) stating that the adult is incapable of taking decisions and safeguarding their money.

The Office of the Public Guardian (Scotland) has a code of practice which explains what a Withdrawer needs to do, including keeping proper records of how money has been spent.

Once the application has been processed, the Withdrawer is given a certificate that allows them to open a new bank account to manage the money of the person they are looking after.



Legal options for someone who has lost capacity

The Public Guardian may ask to see evidence of how money has been spent, including bank statements and receipts.

You can find details of the application process, responsibilities and fees on the **Office of the Public Guardian (Scotland)** website www.publicguardian-scotland.gov.uk/access-to-funds/.



Intervention Order

An Intervention Order can help with one-off situations and only lasts for as long as it takes to complete a particular task. If longer-term powers are needed, Guardianship may be more appropriate. A Sheriff Court can grant a person or organisation, such as the manager of a care home or the council, the right to make a particular decision or take a specific action on behalf of someone who cannot do this for themselves. This may involve, for example, selling a house or deciding what medical treatment is best at a specific time. The Intervention Order ends when the action is complete.

If you want to apply for an Intervention Order it is best to consult a solicitor to ensure that you follow proper processes. Your solicitor will apply to the Sheriff Court responsible for the area where the person who has lost capacity lives. If you apply for civil legal aid for a solicitor's help with an intervention application that has a welfare component, the application will not be means tested.

You need to think about:

- what powers you need and how you will use them – financial or welfare powers or both?
- getting the details of the application correct and accurately describing the powers you need
- arranging 'Caution' (a form of insurance) in case you make a mistake
- keeping records of your actions so you can send quarterly progress reports to the Public Guardian
- how you will show that you have completed your actions so the order will end.



Legal options for someone who has lost capacity

There is guidance about the application process, fees, medical evidence required and responsibilities on the **Office of the Public Guardian (Scotland)** website, at **www.publicguardian-scotland.gov.uk/intervention-orders**.

A guide for carers which explains Intervention Orders and Guardianship is available from the **Scottish Government** website, at **www.gov.scot/publications/adults-incapacity-scotland-act-2000-guardianship-intervention-orders-making-application-guide-carers**.



Guardianship Order

A Guardianship Order is granted by the Sheriff Court and gives a person, more than one person or an organisation (sometimes the chief social work officer of a local council) long-term legal authority to act on behalf of someone who has lost capacity. This could be for finances, welfare or both. The person appointed is a Guardian.

A local council has a duty to make an application for welfare guardianship if it is needed and nobody else is making an application.

Guardianship is complicated so it is best to consult a solicitor before you apply. Full information about the processes, fees, evidence of your suitability and medical evidence required is available on the website of the **Office of the Public Guardian (Scotland)**:
www.publicguardian-scotland.gov.uk/guardianship-orders.

If you apply for civil legal aid for a solicitor's help with a Guardianship application that has a welfare component, the application will not be means tested. Your solicitor will apply by sending the application form to the Sheriff Court responsible for the area where the person who has lost capacity lives.

If you are granted financial powers, the Office of the Public Guardian (Scotland) will ask you to provide them with a detailed plan for how you will manage the assets and finances of the person you are responsible for within 3 months of being appointed. You will be asked to provide an annual account of what you have done.

If you are granted welfare powers, the local council has a duty to supervise you. You will also be contacted by the Mental Welfare Commission, who may visit to ensure that you are working in the best interests of the person you care for.

A guide for carers explaining Intervention Orders and Guardianship is available on the **Scottish Government** website, at **www.gov.scot/publications/adults-incapacity-scotland-act-2000-guardianship-intervention-orders-making-application-guide-carers**.



Useful contacts

Age Scotland helpline 0800 12 44 222

The Age Scotland helpline provides information, friendship and advice to older people, their relatives and carers.

If you need an interpreter call 0800 12 44 222 and simply state the language you need e.g. Polish or Urdu. Stay on the line for a few minutes and the Age Scotland helpline will do the rest.

You can call us for a copy of our publications list or download copies from our website at **www.agescotland.org.uk**.

Office of the Public Guardian (Scotland)

Maintains registers of powers of attorney, guardianships, intervention orders, and authorisations granted under the access to funds scheme. Supervises individuals who have been appointed to manage the financial and property affairs of adults who lack the capacity to do so for themselves.

For information, guidance and contact details for specific issues:

Telephone: **01324 678398**

www.publicguardian-scotland.gov.uk

Citizens Advice Bureau (CAB)

Your local Citizens Advice Bureau can provide you with information and advice about legally acting on someone else's behalf.

For advice, or to find your local Bureau, call **0800 028 1456** or see the Advice for Scotland website:

www.citizensadvice.org.uk/scotland/about-us/get-advice-s.



Mental Welfare Commission for Scotland

The Commission aims to ensure that care, treatment and support are lawful and promote the welfare and rights of individuals with mental illness, learning disability and related conditions.

Telephone: **0800 389 6809**

www.mwscot.org.uk

The Scottish Legal Aid Board

The Scottish Legal Aid Board is responsible for managing legal aid in Scotland. It is worth checking their website to see if you qualify for help if you are applying to be an Intervener or Guardian for personal welfare matters.

www.slabb.org.uk

Disclaimer

While we aim to ensure that the information in this document is factually correct at the time of production, Age Scotland cannot be held liable for any errors or omissions. Please ensure that you have an up to date guide and that it clearly applies to your situation.

No leaflet can ever be a complete guide to the law, which also changes from time to time. Legal advice should always be taken if you are in doubt.

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How you can help

Our vision is a Scotland which is the best place in the world to grow older.

All the information and advice we provide is free and completely impartial and in helping people access their rights and entitlements, it can be life changing.

We are an ageing population and more people than ever are coming to us for support. You can help us be there for those that need us most.



Make a donation

No matter how small or large, donations make a massive difference and help us continue our important work.

- ▶ Call **03330 15 14 60**
- ▶ Visit **age.scot/donate**
- ▶ Text **LATERLIFE** to **70085** to donate £5.*



Fundraise

Whether it is having a bake sale, running a marathon or knitting small hats for the Big Knit, there are so many ways to raise vital funds to support our work. To find out more, call **0333 323 2400** or visit **age.scot/fundraise**.



Leave us a gift in your Will

By choosing to leave us a gift in your Will, you can help Age Scotland to continue being there for vulnerable older people in the years to come. To find out more, call **0333 323 2400** or visit **age.scot/legacy**.

* Texts cost £5 plus one standard rate message

Let's keep in touch



Sign up to our newsletter

Our regular newsletters by email contain details of our campaigns, services and how you can support our work.

Sign up today by visiting [**age.scot/roundup**](https://age.scot/roundup)



Follow us on social media

Our social media channels are a great way to keep up to date with our work and issues that affect older people.



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[**/AgeScotland**](https://www.linkedin.com/company/AgeScotland)

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