

Being an Attorney: Understanding the role



Who we are

Age Scotland is the Scottish charity for older people. We work to improve the lives of everyone over the age of 50 and promote their rights and interests.

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 enjoy better later lives.

We have three strategic aims:



We help older people to be as well as they can be



We promote a positive view of ageing and later life



We 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.

Our **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.



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



**Visit agescotland.org.uk
to find out more.**

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Introduction

Being an attorney is a big responsibility and requires a time commitment. If someone you know has asked you to be their attorney, it is important you understand what this means before deciding whether to accept.

This guide provides an overview of the things it might be helpful to know about the role of an attorney so you can decide whether this is right for you.

For full information about the responsibilities of an attorney, you should read the **Code of Practice for Continuing and Welfare Attorneys**, published by the Scottish Government.

For a copy, search 'attorney code of practice' at www.gov.scot/publications or call the **Scottish Government Justice Directorate** on **0131 244 3581**.

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Understanding Power of Attorney

Making a Power of Attorney is the way to give another named person (or people) legal powers to act and make decisions on your behalf. The person who gives the powers is the **granter** and the person who is given the powers is the **attorney**.

The role of an attorney is voluntary and is usually unpaid. In some cases, the Power of Attorney document may allow certain expenses to be covered.

The exact responsibilities of an attorney will depend on the type of Power of Attorney, and the specific powers the grantor includes in the Power of Attorney document. Some powers can start straight away while others will only start if the grantor becomes unable to manage their own affairs. This is covered in more detail later in this section, under the heading **When do powers start and end?**

When using the powers they are granted, an attorney must always act in the best interests of the grantor and in line with the principles of the **Adults with Incapacity (Scotland) Act 2000**. More information on the Act is provided in the section **Understanding capacity and incapacity**.

Who can be an attorney?

An attorney must be 16 or over and be willing and able to take on the role. You do not need to have any legal qualifications, training or background to become an attorney. You cannot be a continuing (financial) attorney if you are currently declared bankrupt, but this does not affect being a welfare attorney.



Types of Power of Attorney

There are different types of Power of Attorney in Scotland.

- **Continuing (financial) Power of Attorney** enables one or more attorneys to look after the financial affairs of the grantor. Continuing powers could include managing bank accounts, buying or selling property, and claiming benefits on the grantor's behalf. The grantor decides whether powers start straight away, so that they can have help managing their finances, or only if they become unable to manage their finances themselves.
- **Welfare Power of Attorney** enables one or more attorneys to take actions and make decisions concerning the grantor's health and welfare. This includes decisions about where the grantor will live and what kind of medical treatment and care they will receive. Welfare powers only become active if the grantor becomes unable to make their own welfare decisions.
- **Combined Power of Attorney** grants both financial and welfare powers to the same attorney.
- **Simple Power of Attorney** applies either for a limited time or to a specific issue. For example, the grantor plans to go abroad and would like someone else to be able to make decisions and act on their behalf while they are away. A Simple Power of Attorney is only used while the grantor still has capacity to make their own decisions.

This guide will focus on continuing (financial) and welfare Power of Attorney, including combined Power of Attorney.



Continuing Power of Attorney is the name given to financial Power of Attorney in Scotland. It refers to the fact that financial powers can start while the grantor still has capacity, and will **continue** if the grantor loses capacity.

Distribution of powers

Joint attorneys

If there is just a single attorney, they are known as the sole attorney. However, there is no limit to the number of attorneys a granter can name. When more than one attorney is named in the same Power of Attorney document, this is called having **joint attorneys**.

Joint attorneys can be granted powers that are the same as or different to each other. The granter decides whether joint attorneys must make all decisions together or are allowed to make decisions without asking the other joint attorneys.

Being allowed to act alone can reduce the pressure of all attorneys needing to discuss every decision. However, any decision made by one joint attorney is also the responsibility of every other joint attorney, as if they had made it themselves. For example, if one joint attorney made a decision that was fraudulent, every joint attorney could be charged with fraud.

If you are in this position and feel uncomfortable about the actions of another joint attorney, you should seek advice from:

- For continuing (financial) attorneys: contact the **Office of the Public Guardian in Scotland** on **01324 678300** or visit publicguardian-scotland.gov.uk
- For welfare attorneys: contact the **Adult Support and Protection** department of the local authority where the granter lives



Substitute attorneys

A grantor can choose to name one or more **substitute attorneys**. Substitute attorneys will only have responsibilities if one or more of the main attorneys becomes unable or unwilling to take on the role. The Power of Attorney document will state the exact circumstances where a substitute attorney would be asked to step in.

Sharing financial and welfare decisions

Welfare and continuing (financial) attorneys will need to work together to agree how money will be spent on the grantor's welfare.

Some people choose to pay an organisation such as a firm of solicitors or accountants to act as their continuing (financial) attorney. In this case, there should be a named individual at the firm who is responsible for acting as continuing (financial) attorney.



For information on handling any disagreements about the decisions you need to make, see **If problems arise** in the **Where to get support** section.

As well as the continuing (financial) attorney, other people may have financial powers that will also need to be considered. If you are an attorney with financial powers, you will need to check whether anyone else also has powers over, or access to, the grantor's finances. For example:

- trustees of trust funds
- joint account holders
- appointees authorised to receive benefits on the grantor's behalf
- withdrawers authorised by the Public Guardian to access funds for a specific purpose

Anyone with such existing powers will usually keep them when you start acting as attorney, unless the Power of Attorney document states otherwise. You will need to consider their rights and powers when acting on behalf of the grantor.

Financial attorneys should also check whether anyone has been managing the person's finances without official powers. This could be a carer, friend or neighbour for example, who may have been helping the grantor with day-to-day tasks, such as paying for shopping, or managing their bills.

As a financial attorney, you will likely have the powers to take on these tasks. However, you should only do so if you feel the grantor is not receiving the treatment you would provide as their attorney. You should review this situation regularly as you are legally responsible for making sure this continues to be the case.

For full guidance on this situation, see the **Code of Practice for Continuing and Welfare Attorneys**. The Code of Practice is discussed in more detail in the section **Duties of an attorney: the Code of Practice**.



If there is any confusion over who should be making financial decisions for the grantor, you can ask the **Office of the Public Guardian in Scotland** for advice. Call **01324 678300** or visit **publicguardian-scotland.gov.uk**.



Powers granted by the Sheriff Court

The Sheriff Court can grant powers on behalf of a person who lacks capacity to grant these themselves. It can either grant an intervention order, providing powers to act on a particular matter, or a guardianship order, providing powers to manage the person's affairs as a whole.

Guardianship can be granted if a person loses capacity to set up Power of Attorney before doing so. However, the process is more lengthy and costly than setting up Power of Attorney.

Where a Power of Attorney has been set up, powers granted by the Sheriff Court either add to or replace the powers of the attorney:

- If an attorney needs additional powers to effectively manage the grantor's affairs, they can apply for an intervention order to add to the powers they already have. For more information, see **If your powers are insufficient** in the section **If problems arise**.
- If someone makes a complaint about an attorney and the Sheriff Court removes the attorney's powers, it can appoint a guardian to take the place of the attorney. For more information about complaints, see **If a complaint is made against you** in the section **If problems arise**.

How Power of Attorney is set up

The grantor will usually create their Power of Attorney document with the help and advice of a solicitor. It is most common for the grantor to speak to their potential attorney or attorneys before naming them in their Power of Attorney document, although they are not required to do this.

The Power of Attorney document

The Power of Attorney document will include details of the exact powers the grantor wants each named attorney to have.

A Power of Attorney document must include a certificate of capacity. This is to confirm that the grantor had the mental capacity to understand the decision to grant Power of Attorney at the time the document was drawn up. This must be signed by either a solicitor registered to practice law in Scotland, or a UK registered and licensed medical doctor.

If powers will start when the grantor loses capacity to manage their affairs, the document must also include details of how the grantor wants their incapacity to be determined. For example, they may specify they would like their incapacity assessment to be carried out by their GP. The grantor can also include any other conditions that must be met before powers become active, such as a certain date having passed.



Registration of the Power of Attorney document

Every Power of Attorney document must be registered with the **Office of the Public Guardian in Scotland** before powers can be used. The grantor's solicitor will usually do this, but the grantor can also do this themselves.

After the Power of Attorney document is registered, you will be provided with:

- a **certificate of registration** and
- a **certified copy** of the **Power of Attorney document**

You will need to show these documents to anyone you deal with on behalf of the grantor as proof you have the legal powers to do so.

Upon registration of the Power of Attorney document, you will need to sign and send back the registration form the Office of the Public Guardian will send you. This is to confirm that you are willing to act as attorney.

At the point of registration, the Office of the Public Guardian will:

- add your name to their register of individuals legally appointed to act for someone with incapacity
- for welfare attorneys only, notify the grantor's local authority and the Mental Welfare Commission that you have been appointed in principle



You can change your mind about being an attorney, even after powers begin. See the section **If you change your mind** for details of how to resign from your role.

Using Power of Attorney outwith Scotland

A Power of Attorney document created and registered under Scots law is unlikely to be accepted by organisations or bodies based in countries outwith Scotland. This includes elsewhere in the UK. This is because they have separate laws relating to incapacity that are not directly equivalent to the Adults with Incapacity (Scotland) Act 2000.

To use a Scottish Power of Attorney in England or Wales, you may need to apply to the Court of Protection to have it approved for use in these countries. For any country outside of England and Wales, you should seek advice from a professional who knows the laws and requirements of that country.



Former Public Guardian for Scotland Sarah McDonald provides more information in her **Cross Border Recognition** information guide.

Visit ex-pg.com/useful-information-and-leaflets or call the **Age Scotland helpline** on **0800 12 44 222** to request a printed copy.

When do powers start and end?

Welfare powers will only start if the grantor loses capacity to make their own welfare decisions. For **continuing (financial) powers**, the grantor chooses whether powers start while they still have capacity to manage their own finances, or only if they become unable to.

If financial powers start while the grantor still has capacity, their attorney can carry out financial transactions for them under their instructions. To do this, you will need to show the certificate of registration and the registered Power of Attorney document to banks and financial institutions.



If the grantor does not want powers to start immediately, the Power of Attorney document must include details of the condition(s) that must be met before powers can begin. This is called a **springing clause**. It may simply state that the grantor must have reached incapacity, but it could also include other conditions.

Both welfare and continuing (financial) Power of Attorney documents must include a statement from the grantor about how their incapacity will be determined. This can include having a formal incapacity assessment. More information about incapacity assessments can be found in the section **Understanding capacity and incapacity**.

Once powers are active, you will remain responsible for the affairs of the grantor unless:

- the grantor revokes powers (if they have the capacity to do so)
- the Sheriff Court revokes powers following a complaint
- a guardian is appointed
- the grantor recovers capacity
- you formally resign from your role as attorney
- you were attorney for your partner, and your partnership ends
- the grantor dies
- you or the grantor becomes bankrupt (financial powers only)
- you or the grantor is subject to a Protected Trust Deed to manage your debts (financial powers only)

As an attorney, you must notify the Office of the Public Guardian in Scotland of the last five situations listed.

Understanding capacity and incapacity

Capacity in this sense is a person's ability to make an informed decision about a specific issue. The full criteria are listed below.

Capacity can be affected by a number of factors, including dementia, brain injury, learning difficulties, mental illness or physical impairment that prevents communication of decisions.

It is a common misunderstanding that a person either has capacity to make their own decisions, or they do not. Capacity is in fact **decision specific** and **can fluctuate** depending on many factors, including overall well-being, the surrounding environment and the time of day.

To be legally considered to have the capacity to make a certain decision, a person must be able to do **all** the following:

- make the decision
- understand the decision
- communicate the decision, verbally or otherwise
- act on the decision
- remember the decision

A person who **cannot** do **all** these things for a particular type of decision is said to **lack capacity** for **that type of decision**.

It is important to remember that lack of capacity can be temporary or permanent.

When a lack of capacity is permanent, the person is said to have **incapacity** for that type of decision. A Power of Attorney document must include a statement from the grantor about how their incapacity will be determined. This may include a formal **incapacity assessment** carried out by a relevant professional. Incapacity assessments are explained further later in this section.



The presumption of capacity

It must always be presumed that a person **has capacity** for a particular decision until their incapacity for that decision is confirmed. As capacity is decision specific, a person may have incapacity for some decisions but still have capacity for others. It is an attorney's responsibility to consider for **each decision** whether the granter has capacity to make it.

It can be tempting to assume a person has incapacity for a decision if their choice seems unwise or is unexpected. Likewise, a person diagnosed with dementia, a brain injury or a mental health condition must not automatically be assumed to lack capacity. These factors may raise questions about a person's capacity, but the person must be assumed to have capacity until it is proven otherwise.

The granter must include a statement in the Power of Attorney document to tell you how their incapacity must be determined. Until the granter is shown to have incapacity for a decision in the way they have specified, they have the right to make the decision for themselves. This is the case even if their choice seems unusual or unwise.

As capacity can fluctuate, an attorney must consider whether the granter may have capacity for a decision in future if they do not have capacity currently. For example, the granter may be able to make the decision if they are asked on a different day, given extra time, provided with more information or given help to learn new skills.

Even if the granter has incapacity for the final decision, their attorney should help them to express their views about the decision and to contribute as much as possible.

Incapacity assessments

The purpose of an incapacity assessment is to formally determine whether a person has lost capacity for a particular type of decision. It will usually be carried out by a medical professional but can also be carried out by a social care practitioner or a legal professional, depending on the situation.

When a person sets up a Power of Attorney that only starts on incapacity, they must state how their incapacity is to be determined. This will often be by having an incapacity assessment. As capacity is decision specific, a separate incapacity assessment will be needed for each type of decision in question.

The Adults with Incapacity (Scotland) Act 2000

The Adults with Incapacity (Scotland) Act 2000 aims to protect adults assessed to have incapacity. It states how their interests can and should be looked after, by law. It applies to adults who lack the capacity to manage all or some of their own affairs due to:

- a mental disorder, or
- a physical impairment that prevents them from communicating their decisions.

According to the Scottish Government, the Act ‘was introduced to protect individuals (aged 16 and over) who lack capacity to make some or all decisions for themselves and to support their families and carers in managing and safeguarding the individual’s welfare and finances.’

Among other requirements, anyone with legal powers to manage another person’s affairs must follow the five principles laid out in the Act. These are explained in the section **Duties of an attorney: the Code of Practice**.



The Act also explains which organisations and bodies will make sure legal powers are used correctly. These are listed below, along with some of their specific duties:

Office of the Public Guardian in Scotland – keeping a register of continuing (financial) attorneys and investigating reports of misuse of financial powers. The Office of the Public Guardian in Scotland must also supervise continuing (financial) attorneys if ordered by the Sheriff Court.

Local authority – investigating complaints relating to misuse of **welfare powers** and supervising welfare attorneys if ordered by the Sheriff Court. It also has a responsibility to assess the needs of anyone suspected to lack capacity. This assessment aims to identify any unmet care needs and what is required to meet them. The local authority should cover the cost of any personal or nursing care they assess the person to need.

Mental Welfare Commission – protecting the interests of adults with incapacity that is due to a mental disorder, including dementia. It provides information guides and a freephone helpline, open to attorneys.

Sheriff Court – examining complaints made against attorneys. The Court can ask for an attorney to be supervised when using their powers, and reduce or remove powers if it believes they have been misused. The Court must appoint a guardian to manage a person's affairs if it removes an attorney's powers, or if an attorney resigns. For more information about powers granted by the Sheriff Court, see **Distribution of powers** in the section **Understanding Power of Attorney**.

Duties of an attorney: the Code of Practice

The **Code of Practice for Continuing and Welfare Attorneys** explains the duties and responsibilities of an attorney in full. The Office of the Public Guardian in Scotland highly recommends that all attorneys familiarise themselves with the Code. It explains the standards all attorneys must keep to, and how attorneys can protect themselves from liability.

To view a copy, search 'code of practice attorneys' at www.gov.scot or call the **Scottish Government Justice Directorate** on **0131 244 3581**.



The principles of the Act

The Code of Practice includes details of the five **principles** laid out in the **Adults with Incapacity (Scotland) Act 2000**. An attorney must follow these whenever taking any decisions or actions on behalf of the grantor. The principles are:

Benefit – any decision taken must benefit the grantor

Least restrictive option – when deciding how to meet the grantor's needs, you should always choose the option that has the least possible impact on their lifestyle, freedoms and privacy

Take account of the wishes of the adult – you must consider the past and present wishes of the grantor whenever acting on their behalf. Offer them help to communicate their current views if they are able.

Consultation with relevant others – when taking actions or decisions on the grantor's behalf, you must wherever possible ask for and take account of the views of people close to the grantor, such as family members, carers or close friends.

Encourage the adult to exercise whatever skills they have and to develop new skills – an attorney, or anyone with similar powers, must help the person they are acting for to take part in the decision-making process as far as possible

Standards of care and skill

The Code of Practice states the standards an attorney must meet when carrying out their responsibilities. As well as meeting the principles just listed, attorneys must also:

- use appropriate levels of care and skill whenever acting on behalf of the grantor
- respect the grantor's confidentiality
- keep records of decisions and actions taken
- carry out any instructions given by the grantor
- follow any directions given by the Sheriff Court

The standards also state that before acting on the grantor's behalf, an attorney must consider whether the grantor may have capacity for the decision in question. There is more information about the presumption of capacity in the section **Understanding capacity and incapacity**.

The standards also specify that attorneys **must not**:

- make decisions that fall outside of the powers they have been granted
- take advantage of their position of trust by using it to benefit themselves.

Full details of these responsibilities are covered in section 3.1 of the Code of Practice. For a copy, search 'code of practice attorneys' at www.gov.scot or call the **Scottish Government Justice Directorate** on **0131 244 3581**.



Practical responsibilities of an attorney

Prior to powers starting, an attorney should try to keep in regular contact with the grantor. This allows them to stay informed of any changes to the grantor's views or wishes.

To make sure you are clear on these, it may be helpful to encourage the grantor to write a **Statement of Wishes and Feelings**. This is an informal document that gives attorneys direction about the things important to the grantor. It can be helpful to have these wishes written down. This can be useful both for your own reference and in case anyone questions whether a decision you make is what the grantor would have chosen.

Once powers are active, an attorney's exact responsibilities will depend on the specific powers they have been granted. Regardless of their specific powers, all attorneys must follow the guidance in the Code of Practice for Continuing and Welfare Attorneys.

The Code of Practice includes instructions for attorneys to:

- regularly review the affairs of the grantor that relate to their powers
- report their findings and any planned decisions or actions to others with an interest in the grantor's welfare and finances, such as close friends and family members
- seek the opinion of these interested parties, if appropriate
- keep records of the decisions and actions taken, including: receipts or invoices of money spent, and records of discussions, emails or letters between those involved in the decision-making process.

Attorneys must not make any decisions, or take any actions, on behalf of the grantor for which the grantor still has capacity.

Supported decision-making

Even when the grantor does not have capacity to make or act on a particular decision independently, an attorney should involve them in the decision as much as possible. This is known as **supported decision-making**.

According to the Mental Welfare Commission:

'Supported decision-making maximises an individual's ability to ensure that their rights, will and preferences lead all decisions that concern them.'

It should include helping the grantor to explore and express their views around a particular decision, even if they are unable to make or understand the final decision.



The Mental Welfare Commission provides detailed guidance on supported decision-making. Search 'supported decision-making' at **mwcscot.org.uk** or call **0800 389 6809**.

Dealing with organisations on behalf of the grantor

Organisations and institutions you need to deal with on behalf of the grantor will require proof you have Power of Attorney before allowing you to act.

You will need to show **proof of ID** and the documents the Office of the Public Guardian will send to you when the Power of Attorney document is registered. These are:

- a certified copy of the Power of Attorney document
- the certificate of registration for the Power of Attorney document

For powers that start when the grantor reaches incapacity, you may need to show evidence this has happened. The grantor's incapacity must have been determined in the way described in the Power of Attorney document. For financial Power of Attorney, you will need to show that any other conditions of the springing clause have also been met.

If the Power of Attorney has not yet been registered, you will need to contact the grantor's solicitor and ask them to do this.

What to do when powers start

It is good practice for an attorney to meet with the grantor – and anyone with an interest in the grantor's welfare and finances – as soon as possible after powers become active. This is an opportunity for you to explain your role and the powers you have been granted.

If there are different attorneys for finance and welfare, attorneys should ideally coordinate so the same meeting can cover both. If a meeting is not possible, attorneys should try to meet with interested parties individually, ideally face to face. Where this is also not possible, attorneys should write a letter introducing themselves.

Initial review of the grantor's affairs

As soon as powers become active, attorneys should also carry out an initial review of the grantor's affairs. This should involve the grantor where possible, and anyone else involved with the grantor's care or finances.

The review should be carried out with the involvement of anyone who shares powers, including trustees, joint account holders and appointees, as well as other attorneys. See the section **Distribution of powers** for more information about who else may have powers.

If the grantor has a care package already in place, welfare attorneys should introduce themselves to the social care professionals responsible for this care. Likewise, if the grantor attends a daycare centre or is living in a care home, attorneys should introduce themselves to staff.

If the grantor appears to need care that they are not getting, a welfare attorney should contact the local authority to request a care needs assessment.



You can contact **Care Information Scotland** for more information about care needs assessments. Call **0800 011 3200** or visit www.careinfoscotland.scot/assessment-of-your-care-needs.

Our **Care and Support at Home** guides also provide further information on arranging care. Call the **Age Scotland helpline** on **0800 12 44 222** or visit age.scot/information.





Regular reviews

It is good practice for an attorney to be proactive in their management of the grantor's affairs and carry out regular reviews. For continuing (financial) attorneys, this should be at least once every six months, and more often if an attorney does not have regular contact with the grantor. Welfare attorneys should keep in regular contact with the grantor so they can respond quickly to any health or welfare concerns.

Your reviews should note when future actions will need to be taken, such as renewing a lease or booking check-up appointments. You may want to make a note in your calendar or diary of these. It is also a good idea to read over the powers listed in the Power of Attorney document at each review, to make sure you have not missed any responsibilities.

Keeping records and staying in touch

After each review, you should document your findings and update any interested parties. This will include the nearest relative of the grantor. If the grantor is not on good terms with their nearest relative, you may be instructed not to contact them, or to contact someone else instead. The Office of the Public Guardian in Scotland will be able to tell you if this is the case.

Interested parties can also include friends, family or carers, and the attorney(s) for finance or welfare if you do not have duties for both. Consulting with interested parties is a requirement of the Adults with Incapacity (Scotland) Act 2000 and can also provide useful insights. In some cases, you may need to arrange a discussion with interested parties to decide what action needs to be taken, if any.

Making decisions and taking action

Once you have taken all views into account, you should check that any proposed decisions or actions align with the five key principles of the act. This includes considering any wishes previously expressed by the grantor, either verbally or in writing. They may have recorded these in an advance directive, their Will, or a Statement of Wishes and Feelings.

You will then need to discuss the proposals face to face with the grantor and seek their present views as far as they are able to offer them. You should use supported decision-making to assist and encourage the grantor to contribute as much as possible to the final decision. For more information about supported decision-making, see **Practical responsibilities of an attorney** in the section **Duties of an attorney: the Code of Practice**.

Annex 1 of the **Code of Practice** is a guide to communicating with a person who has impaired capacity. For a copy of the Code of Practice, visit **www.gov.scot/publications** and search ‘continuing and welfare attorneys code of practice’ or call the **Scottish Government Justice Directorate** on **0131 244 3581**.

You may prefer to ask an independent advocate to help the grantor express their wishes during this conversation. The **Scottish Independent Advocacy Alliance** keeps a database of independent advocates across Scotland. Visit **www.siaa.org.uk** or call **0131 510 9410**.

Keeping records of actions and conversations

Once decisions are made, you should document these and provide copies to the granter and any interested parties.

You should also keep records of the actions you take and any correspondence in relation to the granter's affairs. Records could include:

- copies of emails or letters relating to the person's affairs
- a note of any important telephone calls or conversations, for example a phone call with a bank about the granter's finances, or a conversation with a health or social care professional about the granter's welfare
- records of your attempts to communicate with the granter, even if these are unsuccessful
- copies of invoices and receipts for amounts of £100 or more for purchases made on behalf of the granter; if you do not have financial powers, you will need to agree expenditure with, and request reimbursement from, someone who does.
- records of correspondence with other attorneys, particularly between a financial and welfare attorney agreeing how money is spent to meet the granter's welfare needs

Further examples and a more detailed explanation are provided in the **Code of Practice for Continuing and Welfare Attorneys**.

Where to get support

Advice about acting as an attorney

There may be situations where it is not clear which decision will best meet the principles of the act. You may also be unsure how to assess the needs of the grantor, or whether your powers cover a decision you feel needs to be made.

As an attorney, you can seek advice from the following bodies:

The **Office of the Public Guardian in Scotland** can provide information and guidance about financial matters relating to the Adults with Incapacity (Scotland) Act 2000. Visit

www.publicguardian-scotland.gov.uk or call **01324 678300**.

The **local authority social work department** where the grantor lives can provide welfare attorneys with advice and guidance about use of their welfare powers. They can also assess the care needs of the grantor and should provide free personal and nursing care if needed. You can find their contact details at **www.mygov.scot/contact-local-council** or call the **Age Scotland helpline** if you do not use the internet.

The **Mental Welfare Commission** can also provide advice on welfare queries if the grantor has a mental disorder. Call their advice line on **0800 389 6809** or visit **www.mwcscot.org.uk**.

You can also ask for advice from other independent sources. This might include your local Citizens Advice Bureau, a solicitor or a specialist voluntary organisation.



General advice on managing affairs

You may need to manage situations you have not come across before. Below are some organisations providing information that may help you to understand your options.

MoneyHelper is a government-backed service providing a wide range of information on money and pensions. Visit www.moneyhelper.org.uk or call **0800 011 3797**.

The **Care Inspectorate** regulates and inspects all Scottish care services, including care homes. Visit www.careinspectorate.com for their latest inspection reports and to search for services or call **0345 600 9527**.

Your local **Citizens Advice Bureau** can provide independent advice about a range of consumer, health, money and welfare issues. Visit cas.org.uk or call **0800 028 1456**.

The **Age Scotland helpline** can provide information and guidance on a wide range topics affecting older people. Call us on **0800 12 44 222** or visit age.scot/information.

Professional services

If you need to seek professional services on behalf of the grantee to manage their affairs in the way they would expect, this can be funded using the grantee's finances. If you do not have the appropriate financial powers to do this, you will need to agree this with the person who does. In some cases, you may need to seek additional powers from the Sheriff Court. For more information, see **If your powers are insufficient** in the next section: **If problems arise**.

The **Institute of Chartered Accountants of Scotland (ICAS)** provides a database of registered accountants. Visit www.icas.com.

The **Financial Conduct Authority (FCA)** allows you to check that finance professionals and firms are officially registered. Visit register.fca.org.uk.

The **Law Society of Scotland** allows you to search for registered solicitors if you need to seek legal advice on behalf of the grantee, for example when selling a property. Visit

www.lawscot.org.uk/find-a-solicitor or call **0131 226 7411**.

If seeking legal advice, you should explore whether the grantee may be entitled to receive legal aid. You can contact the **Scottish Legal Aid Board** on **0131 560 2164** or visit www.slab.org.uk.



If problems arise

If people do not accept your authority

While Power of Attorney is well recognised, some organisations can be cautious about allowing attorneys to use their powers. This could be due to concerns about fraud or breaching client confidentiality.

If an organisation is worried about its duty of confidentiality, it may help to ask them what other duties are listed in their contract with the granter. This could be a duty to provide timely access to services, for example. This may reassure them that they are in fact fulfilling their duty to their client, the granter, by allowing you to act on the granter's behalf.

If this does not resolve the issue, or you have any other problems with your authority being accepted, you could:

- ask the Office of the Public Guardian for guidance
- get legal advice
- apply to the Sheriff Court for an intervention order; it is advisable to seek legal advice before doing this

In some cases, you may need to make a formal complaint to the institution or organisation concerned. If you need help with this, contact your local **Citizens Advice Bureau** on **0800 028 1456** or the **Age Scotland helpline** on **0800 12 44 222**.

If your powers are insufficient

Once the granter has lost capacity to grant powers, it is not possible to add any to the Power of Attorney document. However, there are other options.

Continuing (financial) attorneys

If a transaction you need to carry out is not covered by your powers, you can apply to the Sheriff Court for an **intervention order** allowing you to carry it out. If this is granted, you will need to follow the separate code of practice for powers granted under intervention orders or guardianship. This can be found on the Scottish Government website www.gov.scot.

If you find your powers are insufficient in a number of ways, you or someone else may need to apply for **financial guardianship**. This will provide you with powers to manage any aspect of the person's finances. You should seek legal advice before doing this.

Welfare attorneys

It is likely you will need access to the granter's finances to pay for welfare-related expenses, including their everyday spending. There may be someone with powers to provide you with this access. If not, you can apply to the Public Guardian for permission to **withdraw funds** to cover these costs.

If you need to make a specific decision that your powers do not cover, you can apply to the Sheriff Court for an intervention order for this decision. If this is granted, you will need to follow the separate code of practice for powers granted under intervention orders or guardianship.

If you find your powers are insufficient in a number of ways, you should first contact the **social work department** where the granter lives. They may have general powers allowing them to intervene and arrange appropriate care or support.



If this does not help, you can apply to the Sheriff Court for **welfare guardianship**. This will provide you with authority over all aspects of the person's welfare. You should seek legal advice before doing this.

To find details of your local Sheriff Court, visit www.mygov.scot/find-court or call the **Scottish Courts and Tribunals Service** on **0131 444 3300**.

 When considering whether you need additional powers to fulfil your duties to the grantee, you should apply the five principles of the **Adults with Incapacity (Scotland) Act 2000**.

If you and another attorney disagree

There can be times when attorneys disagree about how best to meet the principles of the Act. In this situation, it may be helpful to speak to a mediator.

Scottish Mediation keeps a directory of mediators across Scotland, including those who deal with Family and Elder mediation. You can search the directory online at scottishmediation.org.uk/find-a-mediator or call **0131 556 8118**. Some mediation services are free but there may be a charge for others.

You can also seek advice from any of the organisations listed under the heading **Advice about acting as an attorney**, earlier in this section. If you are still unable to resolve the disagreement, you can ask the Sheriff Court to make a final ruling, as per section 3(3) of the Adults with Incapacity (Scotland) Act 2000.

If interested parties disagree with your decisions

To avoid potential conflicts with interested parties, such as the grantor's close friends or family members, you should let them know your proposals ahead of time. Make sure you provide a reasonable opportunity for them to express their views and opinions and ensure you consider these before making your final decision. For more detail on the process you should follow, see **What to do when powers start** in the section **Practical responsibilities of an attorney**.

There may still be times when others question what you decide. While it is part of your duty as attorney to take all views into account, you have the final say. The priority is that the decision you make fulfils your duties to the adult according to the Adults with Incapacity (Scotland) Act 2000.

It may help others to understand your reasoning and accept your decision if you explain how it meets each of the five principles of the Act. It may also help to refer to any wishes expressed by either the grantor or the grantor's nearest relative.

If you are unable to resolve the conflict, you can seek advice from any of the organisations listed under the heading **Advice about acting as an attorney** earlier in this section. If anyone is still unhappy with your decision, you can inform them of their right to raise their concerns by making a complaint against you. The next section provides more information on this.

Alternatively, you or anyone questioning your decision can ask the Sheriff Court to make a final ruling. This right is laid out in section 3(3) of the Adults with Incapacity (Scotland) Act 2000.



The **Code of Practice for Continuing and Welfare Attorneys** provides more information and guidance on managing conflicting views. See:

- section 4.41 to 4.46 for financial decisions
- section 5.41 to 5.46 for welfare decisions



The Code of Practice also covers other types of conflict. For example, section 5.48 states what must happen if you disagree with the decision of a medical practitioner.

If a complaint is made against you

If someone disagrees with your actions as an attorney, they are entitled to raise their concerns by making a complaint against you. If you are a financial attorney, they will need to contact the Office of the Public Guardian. If you are a welfare attorney, they will need to contact the local authority where the grantee lives.

Provided you have acted in good faith and in accordance with the principles of the Adults with Incapacity (Scotland) Act, there is no need to worry; the complaint should result in the relevant body confirming that you were performing your duties appropriately.

Support for your well-being

If you are acting as an attorney for someone, you will likely also have a close personal relationship with them. They may be your partner, parent, sibling, relative or friend.

It is never easy seeing someone you care about becoming less able to support themselves. It is important you have the space and support to deal with the emotions that come with this.

If you are finding it difficult to cope with life's challenges for any reason, you can speak to your GP. They may refer you for further support or suggest treatments they feel could help. There are also services that can provide support if you need to talk, including outside of normal business hours:

Breathing Space provides a free and confidential phone line manned by trained professionals, for people in Scotland who are feeling low, anxious or depressed. Open 6pm to 2am weekdays, and 24 hours over the weekend, from 6pm Friday to 6am Monday. A language line, BSL interpretation, text relay and web chat are also available.

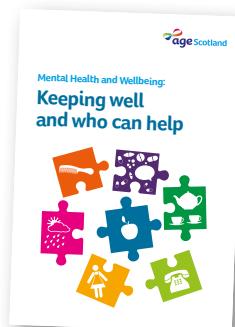
0800 83 85 87 / breathingspace.scot

Samaritans is a free volunteer-led service available 24 hours a day, for anyone who is feeling low and needs to talk.

116 123 / samaritans.org



Our **Keeping Well and Who Can Help** guide provides further information on looking after your mental health and getting support. Call the **Age Scotland helpline** on **0800 12 44 222** or visit age.scot/information.





Support for unpaid carers

If you are an unpaid carer for the grantor, or for anyone else, you can ask your local council for an **Adult Carer Support Plan**.

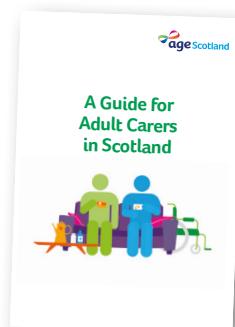
Someone from the social care department will talk to you about the impact your caring role has on your well-being and your life. You can tell them whether you are willing and able to continue caring, and the support you would need to do so.

Visit gov.uk/find-local-council to find details for your local council or call the **Age Scotland helpline** if you do not use the internet.

Your local **carer centre** can also offer advice and tell you about further support available in your area. This could include peer support groups, day centres or discount schemes for carers. To find your nearest carer centre, contact **Care Information Scotland** on **0800 011 3200** or visit careinfoscotland.scot/carer-centres.



Our **Guide for Adult Carers in Scotland** provides more information on the support available. Call the **Age Scotland helpline** on **0800 12 44 22** or visit age.scot/information.



Is being an attorney right for me?

When asked to be an attorney, some people feel reassured they will have the legal powers to act on their loved one's behalf. Others may find the thought frightening or overwhelming. For many, it will be a mix of both.

Being an attorney is a big responsibility, and one you should consider carefully. Before deciding whether to take this on, there are a few things you should find out:

- what specific powers does the grantor want you to have?
 - if you will have financial powers, you could become responsible for the grantor's investments, pensions or properties, depending on their situation
 - if you will have welfare powers, you will need to make decisions about the grantor's living arrangements, medical treatments, etc.
- will you be a sole attorney or will you be a joint attorney with someone else? (see **Distribution of powers** in the section **Understanding Power of Attorney** for more information)
- if you will have financial powers, does the grantor want these to start immediately, or only if they lose capacity to manage their finances for themselves?



There are a few other things you should also consider:

Do your values align with those of the grantor? – it is important you would feel able to make decisions that align with the grantor's values and wishes. Make sure you are familiar with these, and how they compare to your own values. Think carefully before agreeing to be an attorney if carrying out the grantor's wishes would make you feel uncomfortable.

Time commitment – managing someone else's affairs on top of your own can be time consuming. If you have financial powers, this could involve dealing with shares, pensions, tax and property. If you have welfare powers, you may need to meet with medical professionals, liaise with the local authority about care options, or make visits to care homes.

You will also need to make time to review the grantor's affairs regularly, meet and communicate with other interested parties and the grantor, and keep records of your proposals and actions.

If you believe you will not have the time to carry out the powers you would have, you should discuss this with the grantor. They may wish to ask someone else instead, or perhaps to appoint a joint attorney who could share the responsibility.

Availability to be contacted – you will need to be available to be contacted within a reasonable timeframe, in case of emergencies, or to be consulted about your views. If there are often long periods where you are unreachable, think carefully about whether you would be the best person for the role. If you will be joint attorney with someone else, they may be happy to take responsibility for decisions in your absence, if their powers allow.

Concerns about conflict of interest

As well as being an attorney for the grantor, you may also be their nearest relative, partner or closest friend, and could be a beneficiary of their Will. If this is the case, you may need to decide to spend money you would otherwise stand to inherit.

This may feel uncomfortable, but you can feel reassured it is a common situation. Being close to the grantor means you are well placed to know what decisions they would make for themselves. They will have asked you to be their attorney because they trust you to act in their best interests and believe you will do a good job.

If you are still worried or would like advice about a particular decision you need to make, you could ask:

- the Office of the Public Guardian for financial decisions
- the grantor's local authority for welfare decisions
- the Medical Welfare Commission if the grantor has a mental disorder

For contact details, see **Advice about acting as an attorney** in the section **Where to get support**.

For either financial or welfare decisions, you could also seek advice from a solicitor or an advocacy service. For details of solicitors, contact the Law Society of Scotland on **0131 226 7411** or visit **www.lawscot.org.uk**. For details of independent advocacy organisations, contact the **Scottish Independent Advocacy Alliance** on **0131 510 9410** or visit **www.siaa.org.uk**.

If you still feel unable to make the decision yourself, you can also ask the **Sheriff Court** to make a final decision. This right is laid out in section 3(3) of the Adults with Incapacity (Scotland) Act 2000. To find details for your local Sheriff Court, visit **www.mygov.scot/find-court** or call the **Scottish Courts and Tribunals Service** on **0131 444 3300**.



If you change your mind

Agreeing to be an attorney is not legally binding. You will be asked to sign and return a registration document from the Office of the Public Guardian. This confirms you have read the Power of Attorney document and are willing to act as attorney. However, you have the right to change your mind at any time, even after you have signed the form.

If you do change your mind, it is important to let the grantor know as soon as possible. If your powers are not yet active, you should simply let the grantor know so they can make other arrangements.

If your powers are already active, you will need to formally resign from the role of attorney and must give 28 days' written notice. The exact process you will need to follow depends on the situation, including whether there are any joint or substitute attorneys.

Even if the grantor has been assessed to have incapacity for some decisions, they may still have capacity to appoint another attorney. If they lack capacity to do this, the Sheriff Court may need to appoint a guardian instead.

For further information, see sections 6.5 to 6.8 of the **Code of Practice for Continuing and Welfare Attorneys**. For a copy, search 'attorney code of practice' at www.gov.scot/publications or call the **Scottish Government Justice Directorate** on **0131 244 3581**.

Useful contacts

Age Scotland helpline 0800 12 44 222

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

If you need an interpreter, simply call the helpline and state the language you need, e.g. Polish or Urdu. Stay on the line for a few minutes and we will do the rest.

Call us for a copy of our publications list or any of our guides. To read, download or order guides online, visit age.scot/information.

Office of the Public Guardian in Scotland keeps a register of Powers of Attorney that are to begin or continue in the event of incapacity. The Office of the Public Guardian in Scotland can provide advice about the use of financial powers. It also investigates complaints against individuals with financial powers.

www.publicguardian-scotland.gov.uk / 01324 678300

Mental Welfare Commission provides information and advice in relation to rights and good practice to do with mental health and incapacity law, and the care and treatment of people with mental incapacity.

www.mwcscot.org.uk / 0800 389 6809

The Care Inspectorate is the national regulator for care services in Scotland. It inspects care services to evaluate the quality of care they deliver and deals with complaints. You can use their website to search for details of every registered care service in Scotland.

www.careinspectorate.com / 0345 600 9527



MoneyHelper brings together money and pensions guidance from three Government-backed services: the Money Advice Service, the Pensions Advisory Service and Pension Wise.

www.moneyhelper.org.uk / 0800 138 1677

Citizens Advice Scotland provides free, impartial and confidential advice on a range of welfare topics, including money, housing and social security.

www.cas.org.uk/get-help / 0800 028 1456

Scottish Independent Advocacy Alliance provides a national database of independent advocacy organisations, allowing you to search for suitable organisations in your area.

www.siaa.org.uk / 0131 510 9410

Law Society of Scotland provides information on where to find solicitors and what to expect when working with a solicitor.

www.lawscot.org.uk / 0131 226 7411

Scottish Legal Aid Board provides information about applying for legal aid and maintains a searchable database of solicitors who offer this service.

www.slab.org.uk / 0131 226 7061

Financial Conduct Authority allows you to search the Financial Conduct Authority register for finance professionals or firms you have identified, to check if they are registered with the FCA.

register.fca.org.uk

Institute of Chartered Accountants of Scotland (ICAS) provides a database of registered accountants allowing you to search for professionals in your area.

www.icas.com

How you can help

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

All the information we provide is free and impartial. It helps older people access their rights and entitlements and can be life changing.

We are also a lifeline for older people who are feeling lonely and isolated. You can help us to support older people who need us most.

Together, we can make a difference.



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
- ▶ Complete the **donation form** and return by Freepost



Fundraise

Whether it's having a bake sale or running a marathon, 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, your legacy will help us to continue being there for older people for generations to come. To find out more, call **0333 323 2400** or visit age.scot/legacy.

Please donate today



Complete the form and return by Freepost to RSBS-KEHC-GBBC, Age Scotland, Edinburgh, EH9 1PR

Your details

Title: <input type="text"/>	Forename: <input type="text"/>	Surname: <input type="text"/>
Address: <input type="text"/>		City: <input type="text"/>
Postcode: <input type="text"/>	Date of birth: <input type="text"/>	

By providing us with your telephone number and email address you are consenting to us contacting you via phone, text and email.

Email: <input type="text"/>	
Home tel: <input type="text"/>	Mobile tel: <input type="text"/>

I WOULD LIKE TO DONATE

£75 £50 £25 Other (£)

Name on Card

I wish to pay by (please tick):

Card No.

MasterCard Visa CAF

Expiry date Security code

CharityCard Cheque (payable to Age Scotland)

Signature

Date

I prefer not to receive a thank you acknowledgement for this donation

I would like information about leaving a gift in my Will

I WOULD LIKE TO MAKE MY DONATION WORTH 25% MORE

I want Age Scotland** and its partner charities to treat all donations I have made for the four years prior to this year, and all donations I make from the date of this declaration until I notify you otherwise, as Gift Aid donations.

gift aid it

I am a UK tax payer and understand that if I pay less income tax and/or capital gains tax than the amount of Gift Aid claimed on all my donations in that tax year it is my responsibility to pay any difference.

Yes, I want Age Scotland to claim Gift Aid on my donations**

I do not wish you to claim Gift Aid on my donations

Date

Keeping in touch

We will stay in contact by post unless you ask us not to. We will never sell your data and we promise to keep your details safe and secure. You can change your mind at any time by emailing us on contact@agescotland.org.uk or calling us on 0333 323 2400.

You can read Age Scotland's privacy policy at age.scot/privacypolicy.

Age Scotland is the Scottish 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.

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Let's keep in touch

Contact us:

Head office

0333 323 2400

Age Scotland helpline

0800 12 44 222

Email

info@agescotland.org.uk

Visit our website

www.agescotland.org.uk

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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 at 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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part-funding this publication

