

Legal matters

power of attorney, guardianship, mental health

VOCAL - Voice of Carers Across Lothian ● August 2018

Planning for the future and assisting the person they care for to make decisions is an important consideration for many carers. This factsheet introduces some of the legal issues around capacity - see also *'Wills and Trusts: a guide for carers'*.

Adults with Incapacity

In common law all adults (anyone aged 16 and over) have a right to make their own decisions and we must assume that someone has capacity to act and make decisions unless there is evidence otherwise. No one is regarded as lacking capacity just because they make unwise, unusual decisions, or because they have a particular diagnosis, illness or condition.

An inability to make decisions in our lives can occur for a range of reasons including conditions such as a learning disability, dementia, brain injury or severe mental illness. People who have had a stroke or severe hearing impairment may lack the capacity to communicate their decisions and need someone else to act for them. The **Adults with Incapacity (Scotland) Act 2000** provides a legal framework for family members and friends to assist the person they care for with decision making regarding welfare, health care and financial decisions.

What does incapacity mean?

In an everyday context, mental capacity means the ability to make decisions or take actions affecting daily life. In a legal context, it refers to a person's ability to do something, including making a decision, which may have legal consequences for the person themselves or for other people such as making a contract with someone, buying and selling things, deciding about medical treatment or managing money.

VOCAL runs free specialist and legal surgeries. To book email centre@vocal.org.uk or call **0131 622 6666**. Appointments are 30 minutes and available for the following:

● Power of Attorney

Support to write and register a Power of Attorney, for carers and the person they care for - replacing the need to see a solicitor.

● Guardianship

Solicitor consultation on Guardianship, Wills & Trusts.

● Mental health

Consultation with a solicitor on the Mental Health Act (please indicate which area at time of booking).

Power of Attorney

A Power of Attorney is a legal document in which an individual gives authority to another person to make decisions on their behalf. This could relate to financial or property matters and/ or personal welfare.

For example, John chooses to give Janet the power to make decisions for him if he becomes unable to make his own decisions. At the point of arranging the Power of Attorney, John must understand what he is doing and be able to make a decision about it.

Powers relating to John's financial or property affairs are known as *continuing powers* and may be given with the intention of taking effect immediately and continuing upon John's incapacity, **or** beginning when John lacks capacity. Welfare powers cannot be exercised until such time as John has lost the capacity to make these decisions.

Guardianship and intervention orders

A Guardianship Order can be sought when someone is unable to make any decisions due to a mental disorder. It allows the appointed guardian to make decisions for the person with incapacity even if that person does not understand or is unable to make the decision to allow a guardian to be appointed. This has to be applied for in the Sheriff Court.

Working in partnership with a solicitor, VOCAL offers carers free 30 minute consultations about key issues such as Wills, Trusts and Guardianship. Contact VOCAL on **0131 622 6666** or email centre@vocal.org.uk for more details.

Mental Health (Care and Treatment) Act 2003

The Mental Health (Care and Treatment) Act 2003 is the legislation that supports and safeguards people with a mental health disorder. The Act covers detention in hospital and some treatment in the community.

Advanced statements

This is a statement made when a person is well, about how they wish to be treated if they become unwell. It could be regarding diet, medication or what happens to pets etc. The tribunal and others giving treatment have to take this into account when making decisions.

Office of the Public Guardian

The Office of the Public Guardian (OPG) in Scotland has a function to supervise people who have been appointed to manage the financial or property affairs of adults who lack the capacity to do so for themselves.

As well as providing information and advice, the OPG investigates concerns where the property or financial affairs of an adult seem to be at risk.

The OPG website has a range of resources and information, including a list of FAQs around Power of Attorney and Guardianship. For details visit: **www.publicguardian-scotland.gov.uk** or call **01324 678398**.