



Self-directed Support: Consent and Capacity

Consent

Consent is when an adult gives their permission for something to happen or agreement to do something.

Once a person reaches the age of 16, nobody (regardless of their relationship) has an automatic legal right to make decisions on their behalf.

A direct payment cannot proceed if the supported person does not give consent or the supported person is unable to consent (due to mental incapacity) or a Power of Attorney is not in place to consent on their behalf.

Capacity

The Law in Scotland generally presumes that adults i.e. those over the age of 16 are capable of making personal decisions for themselves and of managing their own affairs. The starting point is a presumption of capacity and this can only be overturned where there is medical evidence stating otherwise.

Incapacity is defined under the Adults with Incapacity (Scotland) Act 2000 as an inability to act, make decisions, communicate decisions, understand or retain the memory of decisions, by reason of a mental disorder or of inability to communicate because of a physical disability. A person however shall not fall within this definition by reason only of lack or deficiency in a faculty if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretive nature or otherwise).

If someone loses capacity and there is no power of attorney or guardianship order in place, it may be very difficult (and often impossible) for banks, doctors and social workers to co-operate with family members in their best interests. Without a power of attorney or guardianship order you may not be able to act on someone's behalf without legal authority, even if you are their partner or close relative. You will need to take further steps, for example, making an application to the sheriff court for an Intervention Order or Guardian to be appointed.



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What is a Power of Attorney?

A Power of Attorney is a legal document in which someone (the granter) appoints a person, or persons, of their choice (the attorney) to act on their behalf. This can be a Financial/Welfare, or a combined Financial and Welfare Power of Attorney.

A Power of Attorney states what things the granter would like their attorney to be able to do for them. A Power of Attorney can be effective right away, or can specify that it cannot be used unless the granter becomes incapable of managing their own affairs. In order to grant a power of attorney, the granter must be capable of making this decision themselves.

What is a Guardianship Order?

This is an order granted by the Sheriff which gives legal authority to an appointed person, called a guardian. The order allows guardians to make financial and/or property decisions on behalf of an adult who can't make these decisions for themselves.

A Guardianship Order allows someone to make ongoing decisions on behalf of an adult with incapacity such as paying bills, dealing with bank accounts or making decisions about care and personal welfare matters.

More information about Power of Attorney and Guardianship Orders can be found on the Office of the Public Guardianship at: www.publicguardian-scotland.gov.uk.