

ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

EXPLANATORY NOTES

THE ACT

Part 2: Continuing Powers of Attorney and Welfare Powers of Attorney

Section 16: Creation and exercise of welfare power of attorney

65. This section defines a welfare power of attorney, and describes how a valid welfare power of attorney is created. Currently the legal status of attorneys with powers over welfare matters is unclear. This section establishes the right to grant such a power, and establishes various safeguards.
66. Subsections (1) and (2) define a “welfare power of attorney” as referring to a power of attorney granted under this section. A welfare power of attorney confers the authority to make decisions about the personal welfare of the granter, and refers to the individual granted the powers as a “welfare attorney”.
67. Subsection (3) and (4) stipulate conditions for a welfare power of attorney to be valid. The conditions for validity are the same as those set out in subsections (3) and (4) of section 15 apart from subsection (3)(b) which specifies that a welfare power of attorney is being made.
68. Subsection (5)(a) limits those who may be granted a welfare power of attorney. Only individuals can be appointed as welfare attorneys; this excludes the officers of statutory organisations, including local authorities.
69. Subsection (5)(b) provides that welfare powers of attorney can only be used to make decisions on the granter’s behalf after they lose capacity to deal with the matters covered by the power.
70. Subsection (6) restricts the authority of welfare attorneys preventing a welfare attorney from consenting to the granter’s admission to hospital to be treated for mental disorder against their will. Where detention is necessary, the granter can be detained under the provisions of the Mental Health (Scotland) Act 1984. It also prohibits a welfare attorney from consenting to any of the treatments excepted from the general authority to treat, as provided in section 48.
71. Subsection (7) is necessary because powers of attorney generally terminate on the granter or attorney’s bankruptcy. Under the Bankruptcy (Scotland) Act 1985, a trustee assumes control of the bankrupt's estate and their authority must supersede that of an attorney with financial powers. The authority of welfare attorneys need not be affected by the granter’s bankruptcy. Nor need a welfare attorney who becomes bankrupt lose their powers.
72. Subsection (8) provides that a welfare attorney appointed under the law of another country to act for someone who lives in Scotland may not exercise their powers until

*These notes relate to the Adults with Incapacity (Scotland)
Act 2000 (asp 4) which received Royal Assent on 9 May 2000*

the granter loses capacity. It also provides that no foreign welfare attorney may have the granter admitted to hospital in Scotland to be treated for mental disorder against their will, or consent to any of the treatments excepted from the general authority to treat, as provided in section 48.