

# Legal Representation – Part Two

## Office of the Public Guardian

### What if no Power of Attorney exists?

A lasting power of attorney can only be drawn up if the donor/granter has sufficient mental capacity, meaning that if the person needing care has already lost this ability and can no longer make reasoned decisions on their own, then they will need to make an application to the **Court of Protection** (Sheriff Court in Scotland) for the appointment of a Deputy.

A representative of the person (relative, close friend or solicitor) aged 18 or over will need to apply to become their Deputy (Guardian in Scotland), which involves an application, associated fee and a vetting process, resulting in the representative being legally responsible for the following:

- Finances
- Property, where they live and/or whether they need to go into care
- Healthcare, including medication and surgical consent
- Personal welfare, encompassing clothes, food and general well-being

The Deputy must be able to comply with five statutory principles laid out in the Mental Capacity Act 2005:

- A person must be assumed to have capacity unless it is medically established that he lacks it
- A person is not to be treated as unable to make a decision unless all practical steps have been taken to assist without success
- A person is not to be treated as unable to make a decision merely because he makes an unwise one
- An act done or decision made under the act on behalf of a person who lacks capacity must only be done or made in their best interests
- Before the act is carried out or the decision is made, regard must be given to whether the purpose for which it is needed can be effectively achieved in a way that is less restrictive of the person's rights and freedom of action

Deputies are assessed to see what level of supervision they need by the Office of the Public Guardian and the level of support is reviewed regularly. Deputies should seek advice from financial advisers qualified in care fees planning when looking to fund care fees or investing capital to meet their ongoing needs.

