

# Adults with Incapacity (Scotland) Act 2000

## ‘Principles in Practice’

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There are a set of principles which anyone, when dealing with a person with incapacity, is required to respect. This fact sheet covers these.

The Principles are NOT in a priority order, they are ALL equally as important; one is obliged, by law, to respect them ALL; it is not sufficient to think because you meet one you do not need to look at any of the others.

### Benefit

*Every action has to benefit the incapable person AND cannot reasonably be achieved without the intervention.*

#### What does this mean?

- ❖ There are two parts to this requirement 1) that the action must benefit the person AND 2) that one cannot achieve the result without the action.
- ❖ Benefit is not defined in the Act, so it can be direct or indirect, physical or emotional for instance.
- ❖ The requirement is that the action must BENEFIT the person; specifically, the wording does not refer to ‘best interest’. Test the action you are thinking of against both benefit and best interest, to satisfy yourself that there is a benefit for the individual and not just that you think it is in their best interest.
- ❖ Occasionally it is not possible to discern a positive benefit, and in which case it can assist to look at it from the other angle, it may be possible to see a detriment without the intervention, therein lies the benefit.

#### **Examples of Benefit**

##### *Direct*

The incapable person benefits personally from the intervention, so for example, you may use their funds to pay for them to have a holiday. This too may give them a physical benefit as it may improve their health. It may also give them an emotional benefit, for example if it was to a location that they had spent many happy times with a partner and family in their younger days.

### *Indirect*

A mother goes into respite care whilst her money pays for her family to go on holiday. The mother lives with her daughter, son in law and their family, the daughter gives mum loving 24/7 care, but this is testing and she is exhausted. The holiday allows the daughter to refresh, recharge her batteries, spend precious time with her family, without the day to day demands of caring. This all means that she is able to come back and continue to care for mum at home; without which mum would have had to go into care sooner, losing all the benefits of being in the family home.

Mum does gain a benefit [from the use of her money to pay for the family holiday] but it is indirect, she herself does not gain from this holiday.

### *Physical*

The spend is on a fancy new bed for the person, one of these which is automated and where the sections all move independently. This improves the person's sleep, posture, mobility, independence – so an example of physical benefit.

### *Emotional*

The improvements in physical health and independence from the new bed may improve also the person's mental well-being ie they gain an emotional benefit as well as a physical benefit.

In the example where mum has paid for the daughter's holiday she may get an emotional benefit in that she may be so pleased she can offer this as her thanks for the family's care of her, she may get pleasure from seeing her daughter refreshed and from knowing she has spent quality time with her husband and children.

## **Least Restrictive Intervention**

*In achieving what is required the action has to be least restrictive option in relation to the freedoms of the person, consistent with the purpose of the intervention.*

### **What does this mean?**

- ❖ There is a tendency to think, “the intervention must be the least restrictive” and forget that there is more to the sentence. Yes, the intervention has to be the least restrictive, but, it has to achieve its purpose.
- ❖ Thus, a heavily restrictive option may nonetheless be the least restrictive IF it is the only way of achieving whatever is necessary.
- ❖ The intervention has to be least restrictive in relation to the person's “freedoms”. Freedoms is interpreted widely; it doesn't just relate to freedom i.e. being restricted in where one can go, it refers to freedom in any sense, for instance, freedom of expression, of will, of not being controlled, of not being restricted by circumstance.

### **Examples of Least Restrictive**

Using the above example of the daughter going on holiday with her family and funds being used from the mother's money for this. The outcome to be achieved is rest and recuperation (R&R) for the daughter. Let us say the holiday is to the theme parks in Florida. The long-haul travel and 'full on' activity may not give the R&R needed by the daughter. Even if it does, the cost of such a trip is expensive, the R&R can be achieved with a lower level of funding, so a trip to Florida is not the least restrictive way of achieving the outcome.

Let us now say, to keep spend to a minimum the cheapest possible holiday is selected by the daughter, which gets her caravanning in the UK in the autumn. Rain is likely, she has to keep the kids entertained, in a confined space, she has to still do all the cooking, in more testing circumstances than usual, the bed is a bit 'makeshift, so she doesn't get proper sleep. This holiday may offer the lowest spend but it doesn't achieve the R&R outcome required.

A holiday that finds a compromise between these two would be ideal.

The next question is, is using mum's money to pay for the whole family the least restrictive? It is only the daughter that needs the R&R, so should mum pay only for her place and the family's own finances pay the balance. This will depend on circumstances.

Do the family have sufficient funds to pay the balance? If not, this will mean they couldn't enjoy the family break, so the R&R outcome is not achieved.

Does mum have sufficient funds to pay for everybody, without leaving herself short? Is paying for everyone treating other children the mum may have equally, if they don't get a holiday paid for? There are no right or wrong answers. It does demonstrate all the things that have to be considered when deciding what is least restrictive.

## **Take account of the present and past wishes of the person, as far as these are ascertainable**

- ❖ Before taking any action you *must* take account of the wishes, past or present, of the person and give respect to these in your decision making. You may wish to read the sister leaflet to this on [Supporting Decision Making](#).
- ❖ Linked to this, the United Nations Convention on the Rights of Persons with Disability (UNCRPD) requires you also to take account of the will and preferences of the person (The word 'Will' refers to their intentions or desires not their legal bequests on death). You may wish to read the sister leaflet to this on [Respecting rights, will and preferences](#).

## **Support and Develop Skills**

- ❖ You must encourage the incapable person to exercise whatever skills they have, as well as encourage them to develop new skills; both of these are aimed at facilitating the person to make his own decisions wherever this is possible.

## Take account of the views of relevant others, as far as is reasonable and practicable

This principle/requirement can be the most problematic and difficult to comply with. This should not be a reason to overlook it.

- ❖ You must take account of the views of relevant others – BUT only in so far as is reasonable and practicable to do so. By way of example, if you think a long lost relative is a relevant person but you do not know where they are it would be unreasonable to expect you to get a Private Investigator to find this person just so you could get their views – this may sound extreme but it is drawn from a real situation.
- ❖ “Relevant others” is not defined, so you need to decide who falls into this category. It is not restricted to immediate /direct / blood family, it can include wider family, including [but not limited to] step children, adopted family, in laws and friends. A failure to include a relevant other will place you in breach of this legal requirement.
  - Estranged direct family create a lot of debate; on the one hand they are relevant others as they are a direct relative but are they relevant in so far as this requirement, to take into account their views? The other principles can help determine this, if the estranged person is likely to know the will, preference and past wishes of the person, which may assist you determining what action to now take to respect this, then they do become a relevant other. If however they have been absent for such a period, or had such a distant relationship, as to not be able to meaningfully assist then it is less likely they would be held to be a relevant other.
  - Close friends also create debate, they may not traditionally be seen as ‘relevant others’ as they are not related, so you may not think you do not have to include them, but they may know the wishes and feelings of the person more intimately than a family member, as people can be more inclined to reveal inner or true thoughts to a close friend, thoughts they may choose to keep secret from, or not burden a relative with. You should consider including these friends therefore to assist you with complying with the other principles.
  - Family or friends that you don’t like, or you think have a bad influence on the person also create a lot of debate? Do you have to include them? You may have powers to determine who the incapable person can have contact with, can you use these powers to stop a particular person having contact?

Not necessarily. Remember the decision has to comply with everything that has been said above, so if the incapable person, when capable, had an active relationship / friendship with the person you should respect that as being the wish of the individual and your first position should be to allow this relationship to continue, no matter how much it may be against your own wish. Decisions have to be those that the incapable person would have made had they been able to do so, not the decision you wish to make for them.

What if you let this relationship continue, because you are respecting what you believe would have been the person's capable wish, but you find, objectively and factually, that it is detrimental to the incapable person, can you stop the contact?

Possibly yes. But you would be advised to talk this through with the Local Authority social work team or the Mental Welfare Commission, see above, to ensure you are using your powers appropriately.

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### ***Communication and Confidentiality***

- ❖ The Code of Practice places a duty on the attorney or guardian to communicate with relevant people. It does not say about what, how frequently, what format this should take etc; a guide therefore is to follow what was the practice of the now incapable person. For instance, if they were in the habit of a weekly telephone call with someone, consider keeping this weekly update going – either facilitating this with the now incapable person or, if this is no longer possible, updating the person yourself on a weekly basis. Or, if the now incapable person was in the habit of posting on Facebook a picture of a grandchild's visit, for instance, then consider reminding them to do this, or do this on their behalf – so it keeps FB friends and family equally as up to date with things as previously.
- ❖ Things can become more problematic over more confidential matters; family (usually) may want to know a higher level of financial or medical information, for instance, than you wish to give them. Again the guide is what the now incapable person would have offered to them. If they were a private person and would not have shared this detail then there is no obligation for you to do so – indeed this could be seen as a breach of the person's confidentiality. If however they were open and would have shared this level of detail with the person now inquiring then to withhold this may be a breach of respect for the now incapable person's will and preference.
- ❖ Even if you decide not to give the level of detail, remember there is still a duty to communicate so you do need to offer a general level of information and updating to relevant others.
- ❖ If you are unsure what to do for the best, even having applied the principles to the decision, then please feel free to ask the Local Authority, Office of the Public Guardian, or Mental Welfare Commission for advice on how you should best operate your powers.

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