Scottish Law COMMISSION
Discussion Paper No 94

MENTALLY DISABLED ADULTS

Legal Arrangements for Managing their Welfare and Finances

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This Discussion Paper is published for comment and criticism and does not represent the final views of the Scottish Law Commission

The Commission would be grateful if comments on this Discussion Paper were submitted by 31 March 1992. All correspondence should be addressed to:

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In writing a later Report on this subject with recommendations for reform, the Commission may find it helpful to refer to and attribute comments submitted in response to this Discussion Paper. Any request from respondents to treat all, or part, of their replies in confidence will, of course, be respected, but if no request for confidentiality is made, the Commission will assume that comments on the Discussion Paper can be used in this way.

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Part 1 Introduction

Purpose of discussion paper

1.1 The purpose of this discussion paper is to seek comments on possible reforms of the law relating to the legal capacity of mentally disabled people and ways in which decisions about their personal welfare and financial affairs can be taken on their behalf. We would stress that the paper does not consider the provision of health care, social work and other services to this group of people by the various public bodies involved or their adequacy, funding and structure.

1.2 In this discussion paper we use the terms "mental incapacity" and "mental disability". A person who is mentally incapable or lacks mental capacity is incapable in the legal sense of entering into a transaction or making a decision. This is because the person, due to his or her mental state, cannot understand the nature of the transaction or decision or comprehend its consequences or effects. Transactions or decisions by a mentally incapacitated person are legally ineffective. Few people with a mental illness or mental handicap are so incapacitated that they are unable to make even the simplest decision. The majority have the ability to make some decisions and may be said to be disabled. We use the term "mentally disabled" as a convenient way of referring to those individuals who suffer from total or partial mental incapacity.[1]

Background

1.3 In April 1986 we received two proposals from the Law Society of Scotland. The first related to judicial factors (persons appointed by the courts to administer property in situations where judicially supervised administration is necessary) and was in the following terms:

> "To consider the law relating to the administration of the property of persons who are incapable of managing their own affairs, and the law relating to judicial factors and their supervision by the Accountant of Court, with a view to proposing appropriate reform of the law where that may appear to be necessary."

The second proposal concerned powers of attorney. A power of attorney is a document by one person (the granter) authorising another (the attorney) to administer the granter's property and financial affairs in accordance with the directions given in the document. The proposal was:

> "To consider the law relating to powers of attorney with a view to proposing appropriate reform of the law where that may appear necessary."

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[1] The Mental Health (Scotland) Act 1984 uses the term "mental disorder" which means mental illness or mental handicap however caused or manifested (s1). We prefer "mentally disabled" to "mentally disordered".

1.4 As a result of meetings with many individuals and organisations involved in the areas of law covered by the proposals, we concluded that the main concerns related to mentally disabled people. We also came to the view that the management or control of the personal welfare of mentally disabled people should also be included in the investigation. An individual's personal welfare and financial affairs are closely connected so that decisions in one area will almost inevitably have repercussions in the other. Following discussions with the then Lord Advocate the two proposals were replaced by an item in our *Fourth Programme of Law Reform*, "Judicial Factors, Powers of Attorney and Guardianship of the Incapable".[2] Within this enlarged field of enquiry we have decided to give priority to the management and control of the personal welfare and financial affairs of mentally disabled adults. This present discussion paper covers these priority matters. Powers of attorney complement a system of welfare guardians and financial managers appointed by a court or some other authority. Both are ways in which a substitute decision-maker can be appointed to a mentally disabled person. We therefore welcome the opportunity to deal with these related matters together.

The wider context

1.5 Over the last two decades there has been renewed interest in the problems of the mentally disabled. In 1988 the Scottish health Service Planning Council published a report on *Scottish Health Authorities Review of Priorities for the Eighties and Nineties*[3] which placed services for old people with dementia in the highest category followed by community care for the mentally ill and the mentally handicapped. This assessment of priority was accepted by the then Secretary of State for Scotland. The greater awareness of the needs of the mentally disabled is in part due to the increasing number of elderly people suffering from dementia and similar mentally disabling conditions. The incidence of dementia increases with age. It has been estimated that dementia affects some 3% of the population aged between 65 and 69 years old, but around 20% of those aged 80 or over.[4] The number of extremely old people (aged 80 or over) has risen considerably over the last decade or so from 113,700 in 1977[5] to 167,300 in 1989.[6] The number is expected to rise still further over the next few years[7] due to demographi8c trends and advances in medicine.

1.6 Another factor is the changing attitudes of society and those professionally caring for the mentally disabled. The policy of care in secure institutions has over the years been replaced by one of providing appropriate support and care so that the mentally disabled can so far as possible live in the community. As the recent White Paper *Caring for People: Community Care in the Next Decade and Beyond* states:[8]

> "Community care means providing the services and support which people who are affected by problems of ageing, mental illness, mental handicap or physical or sensory disability need to be able to live as independently as possible in their own homes, or in "homely" settings in the community. The Government is firmly

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[2] Scot Law Com No 126 (1990), Item 17.
[3] Edinburgh HMSO.
[4] *Data on Dementia*, Scottish Action on Dementia, October 1986.
[5] *Registrar General for Scotland, Annual Report 1977*, HMSO, Table N2.3.
[6] *Registrar General for Scotland, Annual Report 1989*, HMSO, Table N2.2.
[7] Annual Report 1989, Table N2.4.
[8] Cm 849 (1989), para 1.1.

committed to a policy of community care which enables such people to achieve their full potential.".

1.7 There is also a greater awareness of the rights of the mentally disabled. The philosophy that lies behind the new approach is one of minimum intervention in the lives of the mentally disabled consistent with providing proper care and protection and maximum help to enable individuals to realise their full potential and make the best use of the abilities they have. The United Nations *Declaration on the rights of mentally retarded persons*[9] encapsulates the new approach and is worth quoting in full.

> "1. The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings.
>
> 2. The mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential.
>
> 3. The mentally retarded person has a right to economic security and to a decent standard of living. He has a right to perform productive work or to engage in any other meaningful occupation to the fullest possible extent of his capabilities.
>
> 4. Wherever possible, the mentally retarded person should live with his own family or with foster parents and participate in different forms of community life. The family with which he lives should receive assistance. If care in an institution becomes necessary, it should be provided in surroundings and other circumstances as close as possible to those of normal life.
>
> 5. The mentally retarded person has a right to a qualified guardian when this is required to protect his personal wellbeing and interests.
>
> 6. The mentally retarded person has a right to protection from exploitation, abuse and degrading treatment. If prosecuted for any offence, he shall have a right to due process of law with full recognition being given to his degree of mental responsibility.
>
> 7. Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or should it become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities."

1.8 There is an inherent conflict or tension between the principles of maximum freedom for mentally disabled people and their protection. Giving mentally disabled people exactly the same rights as mentally normal people would often result in the disabled harming themselves and others and becoming victims of exploitation and abuse. Protection from these consequences necessarily involves some curtailment of the rights that normal people

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[9] 1971 UN General Assembly 26th Session, Resolution 2856.

enjoy. Indeed a certain level of protection may enhance the ability of the mentally disabled to enjoy their other rights to a greater extent. For example, a mentally handicapped young adult might be able to live a fairly normal life in a small hostel provided some supervision and control was available. Without this protection the alternative might have to be a very much more restricted life in institutional care. Effective and practicable legal rules have to find the appropriate balance between these conflicting principles.

1.9 In the 20 years or so since the United Nations Declaration many countries have enacted legislation embodying its principles. These include Alberta (Dependent Adults Act 1976), United States of America (Uniform Guardianship and Protective Proceedings Act finalised for adoption by states in 1982), Queensland (Intellectually Handicapped Citizens Act), Victoria (Guardianship and Administration Board Act 1986), Northern Territory Australia (Adult Guardianship Act 1988),New Zealand (Protection of Personal and Property Rights Act 1988) and West Germany (Betreuungsgesetz 1990). In preparing this discussion paper and in drawing up our proposals for reform we have been greatly helped by the experience of these and other countries. We do not attempt to set out full details of each jurisdiction's legal rules but refer to selected provisions in the context of particular issues.

1.10 The Law Commission for England and Wales is currently conducting an examination of the law relating to mentally incapacitated adults. It has recently published a Consultation Paper *Mentally Incapacitated Adults and Decision Making: An Overview*.[10] The paper reviews the civil law relating to incapacity and suggests options for the general approach to reform. Depending on the response the Commission intends to issue further detailed consultation papers in specific areas.

Scope of discussion paper

1.11 This discussion paper is not concerned with mentally disabled children. We are currently considering the law of guardianship of children and have published a separate discussion paper.[11] At present adults are people who have attained their eighteenth birthday. But if the Age of Legal Capacity (Scotland) Bill, currently before Parliament, is enacted children will become adult in the areas dealt with in this paper when they attain 16 years of age. Other topics not covered in the present exercise are compulsory admission to hospital under the provisions of the Mental Health (Scotland) Act 1984 and compulsory removal of people living in insanitary premises under the National Assistance Act 1947. We do however suggest later[12] that if a new tribunal or hearing system is set up to deal with the matters in this discussion paper it might also deal with applications for compulsory admission or removal.

1.12 The rest of this discussion paper is divided into eight parts. Part 2 deals with personal guardianship, the management of mentally disabled people's personal welfare and protection against sexual exploitation. The important issues of consent to medical treatment and participation in medical research programmes are the subject of a separate part, Part 3. Part 4 examines the management of the financial affairs and property of mentally disabled people. Continuing to enduring powers of attorney are dealt with in Part 5. As well as

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[10] No 119, published April 1991.
[11] *Parental Responsibilities and Rights, Guardianship and the Administration of Children's Property*, Discussion Paper No 88 (October 1990).
[12] Para 6.9.

powers for future management of financial affairs we discuss powers containing directions for future health care, the so called "living wills". Part 6 considers the merits of court, tribunals or other bodies as the appointing and supervising authorities for personal guardians and financial managers. Part 7 looks at the capacity of mentally disabled adults in the sphere of private law and considers the effect on capacity of having a personal guardian, curator or some such similar person appointed. The form that implementing legislation might take is the subject of Part 8. The discussion paper concludes with a list of the proposals and questions relating to changes in the law contained in Parts 2 to 7.

Research, acknowledgements and disclaimer

1.13 We have been assisted in our investigations by the results of four research projects. These are:

(1) A study of guardianship cases by Mr Huw Richards of the Mental Welfare Commission for Scotland (the "MWC Guardianship Survey"). This looked at the 81 cases of guardianship under the Mental Health (Scotland) Act 1984 in existence at some time during 1988. It examined the characteristics of those subject to guardianship and their guardians, the reasons for guardianship, the powers exercised by the guardians and the duration of the guardianship. Mr Richards is also studying, together with Mr Adrian Ward, a Glasgow solicitor, tutor-dative cases, but this study is still at a preliminary stage.

(2) A study of the use of Guardianship by Mrs Pauline Martin and Mrs Carol Moore of the Scottish Office Central Research Unit (the "CRU Guardianship Survey"). It examined the circumstances in which guardianship has been used by the local authority social work departments, the issues which have arisen in its use and the extent to which alternatives were available and adopted in cases where guardianship was a possible option.

(3) A survey of curators bonis by Mrs Helen Jones and Miss Fiona Rutherdate of the Scottish Office Central Research Unit (the "CRU Curatory Survey"). This study looked at the characteristics of a sample of people subject to curatory in 1989 and their curators, the costs of curatory and the duration of curatories.

(4) A survey of powers of attorney carried out by a ember of our legal staff. The social and financial characteristics of a sample of 100 granters of powers of attorney registered in 1977 and their mental state when they died, together with particulars of the attorneys appointed, were investigated.

It is intended that the results of these projects will be published in the near future. We are grateful to the external researchers for discussing with us their results in advance of publication and allowing us to quote from their unpublished material.

1.14 We were fortunate in having been able to discuss the issues with various people and organisations involved with the mentally disabled. We acknowledge their assistance gratefully. Three bodies deserve a special mention: the Accountant and Deputy Accountant of Court and their staff, the Convener and members of the Mental Health Committee of the Law Society of Scotland and the Mental Welfare Commission for Scotland. We wish however to make it clear that one of those who helped us bears any responsibility for any

statements not directly attributed to him or her nor for the proposals for reform put forward in this discussion paper.

Part 2 Personal Guardianship and Other Personal Welfare Matters

2.1 From time to time decisions relating to the personal welfare of mentally incapacitated persons have to be taken. For example, where they are to live, whether they should be supervised, employed or undergo training, and what sort of medical treatment they should have. In this Part we examine the law of Scotland relating to personal welfare, consider the position in other jurisdictions and put forward proposals for reform in the light of criticisms of the existing position. The important issues arising out of medical treatment, research and organ donation are dealt with separately in Part 3. We are not concerned in this discussion paper with detention under the provisions of the Mental Health (Scotland) Act 1984, compulsory removal of a person living in insanitary conditions and not receiving proper care under section 47 of the National Assistance Act 1948, or mentally incapacitated children. We do however suggest later[1] that if a new tribunal or hearing system is set up to deal with the matters in this paper it might also deal with applications for compulsory detention or removal.

2.2 Persons of full capacity may, of course, take decisions about their personal welfare themselves. People are presumed to have full legal capacity until the contrary is demonstrated.[2] The validity of a decision "made" by a person of impaired mental capacity depends on whether he or she is capable of understanding the issues involved and what the decision entails. Where the impairment is such as to render the person incapable of making any legally effective decision the law may provide some alternative means of making the necessary decision.

THE PRESENT LAW IN SCOTLAND AND CRITICISMS

Tutors-at-law

2.3 The Curators Act 1585 provides that the nearest male agnate (person related through male links) is entitled to be appointed tutor-at-law to a mentally incapacitated person, provided the agnate is aged 25 or over and fit to act. If the nearest agnate is incapable of acting, or unwilling to act, no other person can be appointed tutor-at-law.[3] The procedure for appointment was originally by way of a brieve from Chancery addressed to a judge. The judge empanelled a jury who decided whether the person was insane and who the nearest agnate was. The procedure was changed by section 101 of the Court of Session Act 1868, but

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[1] Para 6.9.
[2] *Lindsay v Watson* (1843) 5 D 1194.
[3] Fraser, *Parent and Child*, p 664.

this provision has been repealed by the Court of Session Act 1988[4] on the ground that it was obsolete.[5]

2.4 The tutor-at-law generally has complete control of the personal welfare, financial affairs and estate of the incapacitated person. He or she sup4rsedes any existing tutor-dative or curator bonis. However, custody of the incapacitated person was usually given to another relative if the tutor-at-law was also the person's heir, and guardians appointed under the Mental Health (Scotland) Act 1984 are entitled to exercise their statutory functions to the exclusion of any other person,[6] including any tutor-at-law. Tutors-at-law were unknown in current practice until June this year when a petition was lodged.

Tutors-dative

2.5 Where the nearest agnate of a mentally incapacitated person did not apply to be appointed tutor-at-law the Crown could appoint another fit person as tutor-dative.[7] This power of appointment was exercised by the Scottish Exchequer prior to 1707 and passed to the Court of Exchequer in 1707 and thence to the Court of Session in 1856.[8] Until a few years ago tutors-dative were thought to be obsolescent, the last appointment having been made in 1924.[9] There has been a modest revival recently. Several petitions have been presented since 1986.

2.6 Application is by way of petition but it is not clear whether the petition should be addressed to the Inner or Outer house.[10] The first of the recent series of petitions was heard by the Inner House,[11] but the rest have been dealt with by the Outer House. In place of the statutory procedure involving a jury for determining whether a person was insane,[12] the modern petition for appointment of a tutor-dative is supported by at least two certificates of incapacity from doctors or members of other appropriate professions who have recently examined the patient.

2.7 A tutor-dative is entitled to act on behalf of the incapacitated person in all respects. He or she manages both the personal welfare and the financial affairs of the person. However, the appointment is terminated by the nearest agnate taking up appointment as tutor-at-law, and a guardian appointed under the Mental Health (Scotland) Act 1984 exercises the statutory functions to the exclusion of any tutor-dative.[13] In modern practice tutors-dative have been confined to management of the personal welfare of the incapacitated person, the estate being dealt with in some other way.[14] It is also possible for the petition to ask for, and the tutor-dative to be grated, certain powers only and/or for the appointment to

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[4] Sch 2.
[5] *Report on the Court of Session Bill* (Scot Law Com No 111), p 34.
[6] 1984 Act, s 41(2).
[7] Fraser, *Parent and Child*, p 668.
[8] Exchequer Court (Scotland) Act 1856, s 19.
[9] *Dick v Douglas* 1924 SC 787.
[10] S 19 of the Exchequer Court (Scotland) Act 1856 which directed a petition to a Division of the Court of Session has been repealed by the Court of Session Act 1988, Sch 2. The rules of Court dealing with petitions do not mention tutors-dative as until recently they were thought to be obsolescent.
[11] *Morris, Petr* 1986 (unreported), but see "Revival of Tutors-Dative" by A D Ward 1987 SLT (News) 69.
[12] Court of Session Act 1868, s 101, repealed by Court of Session Act 1988, Sch 2.
[13] 1984 Act, s 41(2).
[14] In *Dick v Douglas* 1924 SC 787 and *Usher's* CB, *Petr* 1989 (unreported) a curator bonis had already been appointed and was left to deal with the financial affairs. The other cases involved adults who probably had little in the way of estate. A pending petition seeks to empower a tutor-dative to renounce a liferent but a decision has as yet not been made.

be limited to a certain period.[15] It remains competent to have a tutor-dative appointed without any limitation of powers. Combined personal welfare and financial management was achieved in *Usher's* CB, *Petr* by the curator bonis being appointed tutor-dative. If a tutor-dative is appointed with power to manage the estate of the patient, he or she has to find caution and is subject to the supervision of the Accountant in Court.[16]

2.8 The appointment of a tutor-dative may be recalled by the court on application by an interested person. For example, the mentally incapacitated person may recover, the tutor may wish to resign or other members of the family may wish to replace the current tutor for one reason or another. In the case of recovery the court would have to be satisfied, by way of fresh medical or other evidence, that this had occurred.

Mental health guardians

2.9 A person (called a patient in the legislation) may be received into guardianship under the provisions of the Mental Health (Scotland) Act 1984. The conditions for reception are that the patient is suffering from mental disorder of a nature or degree which warrants guardianship and that guardianship is necessary in the interest of the patient's welfare.[17] Mental disorder includes mental illness and mental handicap.[18] The procedure for appointment of a guardian may be initiated either by the nearest relative of the patient or a mental health officer.[19] Mental health officers are employed by a regional (or islands) council and are usually social workers specially trained and experienced in the field of mental health. The term mental health guardian is used in this discussion paper to denote the person appointed.

2.10 The application is made by the mental health officer to the regional (or islands) council for the area in which the patient lives. It must be supported by two medical recommendations specifying the form of mental disorder the patient is suffering from and stating that the disorder is such as to warrant guardianship,[20] together with a recommendation from the mental health officer that guardianship is necessary in the interests of the patient's welfare stating the grounds on which the recommendation is based.[21] The two doctors giving the medical recommendations must have examined the patient recently. One of the examinations has to be by an approved specialist, the other should if possible be by the patient's general practitioner or other doctor previously acquainted with the patient.[22]

2.11 Section 40 of the 1984 Act provides for judicial scrutiny. The regional (or islands) council must submit the application to the sheriff for approval within seven days from the date of the last of the two medical examinations. In disposing of the application the sheriff may make such enquiries and hear such evidence as he or she thinks fit. The patient is entitled to be heard unless it would be prejudicial to his or her health, in which case a representative is entitled to be heard.[23] The sheriff must not withhold approval without

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[15] *Morris, Petr*, discussed in 1987 SLT (News) 69.
[16] Judicial Factors Act 1849, S 25
[17] S 36.
[18] S 1(2).
[19] S 38(1).
[20] S 37(3)(a).
[21] S 37(3)(b).
[22] S 38.
[23] S 113.

giving the applicant council and any of its witness an opportunity of being heard. Proceedings are usually in private.

2.12 The mental health guardian may be the regional (or islands) council or any person chosen or accepted as suitable by the council.[24] The appointment of a guardian is notified to the Mental Welfare Commission for Scotland.[25] The guardianship order last for six months initially. It may, on application, be renewed for a further six months. Thereafter renewals are at yearly intervals. The procedure for renewal is similar to that described above except that the renewal application does not require approval by the sheriff. Instead, the patient has the right of appeal to the sheriff for discharge from guardianship.[26]

2.13 The powers of a mental health guardian are set out in section 41(2) of the Mental Health (Scotland) Act 1984. They are:

> "(a) power to require the patient to reside at a place specified by the authority or person named as guardian;
>
> (b) power to require the patient to attend at places and times so specified for the purpose of medical treatment, occupation, education or training.
>
> (c) power to require access to the patient to be given, at any place where the patient is residing, to any medical practitioner, mental health officer or other person so specified."

These powers are exercisable by the guardian to the exclusion of all other persons. The guardian has no powers in relation to the patient's financial affairs or estate[27] and must not administer corporal punishment.[28]

2.14 The power to require the patient to reside at a specified place (a hospital or residential home for example) includes the power to take the patient there, by force if necessary. But once there the guardian has no power to detain or restrain the patient. If the patient runs away he or she can be taken back by a council officer, the guardian, a police officer or anyone with written authority from the guardian or council. The guardianship order will lapse however if the patient manages to stay away without leave for more than 28 days.[29] The power to take the patient for treatment does not extend to consenting on his or her behalf to such treatment or forcing treatment on the patient.

2.15 The Mental Welfare Commission for Scotland has general oversight of patients subject to guardianship and has a duty to visit them regularly and as often as they think appropriate.[30] The regional (or islands) Council must also exercise general supervision and arrange for visits at intervals of not more than three months.[31]

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[24] S 37(2). See also para 2.22.
[25] S 41(1).
[26] S 47.
[27] S 41(3).
[28] S 41(4).
[29] S 44.
[30] S 3. The patient is normally visited soon after a guardian is appointed and on each renewal.
[31] The Mental Health (Specified Treatments, Guardianship Duties etc)(Scotland) Regulations 1984, SI 1984 / 1494.

Relatives

2.16 The relatives of mentally incapacitated persons are often closely involved in their day to day care, making decisions about their personal welfare, being consulted by doctors and other professionals and "consenting" to treatment on their behalf. The Mental Health (Scotland) Act 1984 recognises the position of relatives in many ways. For example, the nearest relative is entitled to apply for the appointment of a mental health guardian or petition for discharge of a detained patient. However, relatives of an adult incapacitated person have, by virtue of their relationship alone, no legal standing to act on his or her behalf in the field of personal welfare. The power of parents to act for and advise their children ceases when a child reaches 18[32] even if he or she is mentally incapacitated. A parent who wishes to act for his or her mentally disabled adult child has to be appointed tutor-at-law (father only) or tutor-dative (mother or father).

2.17 Parents can in their wills appoint a tutor or curator to their pupil or minor children. The entitlement of the appointees to act ceases when the children attain majority. An appointment of a testamentary tutor by a parent will be ineffective if the mentally incapacitated child is grown-up at the date of the parent's death.[33]

2.18 Although at one time a husband had a pre-eminent right to be tutor to his wife if she became insane,[34] this right, based on the husbands' powers over their wives, would not be recognised now. Section 24(1)(b) of the Family Law (Scotland) Act 1985 provides that marriage shall not of itself affect the legal capacity of the parties to the marriage. No other relatives were ever considered to have rights over a mentally incapacitated person simply by virtue of their relationship.

Personal welfare attorneys

2.19 There is no clear authority as to whether a person may in anticipation of mental incapacity appoint someone to act on his or her behalf in the field of personal welfare when incapacity occurs. This issue is connected with continuing or enduring powers of attorney and is discussed in Part 5.

Curators bonis

2.20 A curator bonis ("curator" for short) is an individual[35] appointed by the court to take over the management of the financial affairs of an incapacitated person. A curator as such has no rights to the custody or control of the incapacitated person.[36] In *Gardiner*[37] the court on application granted such additional rights to the curator, but this is not current practice. Today the court could appoint the curator bonis as a tutor-dative[38] or mental health guardian.

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[32] The age limit will become 16 for most purposes if the Age of Legal Capacity (Scotland) Bill, current before Parliament, is enacted.
[33] *Duke of Atholl's Curators* (1831) 3 Sc.Jur. 419. If the Age of Legal Capacity (Scotland) Bill is enacted tutors and curators will be replaced by guardians whose authority will end when the child attains 16.
[34] *Halliburton v Maxwell* M 16379 (1791); *Jardine v Currie* (1825) 4 S 158.
[35] *Brogan, Petr* 1986 SLT 420.
[36] *Bryce v Grahame* (1828) 6 S 425.
[37] (1869) 7 M 1130.
[38] *Usher's* CB, *Petr* 1989 (unreported).

Criticisms of the Present Law

2.21 In this section we set out criticisms of the present law relating to the guardianship and personal welfare of the mentally disabled. First, statutory mental health guardianship and common law tutory by and large fail to take account of the diverse nature of the mentally disabled. The abilities of this group vary widely from the mentally handicapped young adult with quite a high mental age to the severely demented person who is incapable of understanding even the simplest matter. On the four level scale based on IQ proposed by the World Health Organisation Expert Committee 75% of the mentally retarded are considered mildly retarded, 20% as moderately or severely retarded and 5% as profoundly retarded.[39] The law makes little or not attempt to tailor the powers and duties of guardians or tutors to the level of incapacity of the person in question. The powers of a guardian under the Mental Health (Scotland) Act 1984 are fixed by statute and cannot be added to or subtracted from.[40] A tutor-dative has full and unrestricted powers of personal control. It is true that in recent years most of the appointments of tutors-dative have been made with restricted powers, but this has been due to a deliberate intention on the part of the petitioners to limit the powers in line with the more flexible notions of guardianship found in other jurisdictions. Had full powers been sought they would very likely have been granted. The court in appointing a mental health guardian or a tutor-dative has no duty to consider whether all the statutory or common law powers are necessary or desirable in the circumstances of a particular application. Very few people are so incapable that they cannot make any decisions themselves about their own personal welfare. Certainly as far as mentally handicapped young adults are concerned it has been represented to us by the Royal College of Psychiatrists in Scotland that it is vital to their future development that they are encouraged to deal with their own affairs and run their own lives to the greatest extent possible.

2.22 Secondly, mental health guardianship, although it can be very useful in some cases, suffers from a number of limitations. These are outlined here and discussed in detail later.[41]

(a) The powers conferred on a mental health guardian, power to decide where the patient is to live, power to require the patient to attend for medical treatment, education, or training, and power to require access to be given to the patient by doctors and others, are not sufficiently flexible and may be insufficient if compulsion has to be used.

(b) Most guardians are either the local authority, its social work department or the director of social work. The functions of this corporate guardianship are delegated in an informal way so that it become unclear who should be doing what.

(c) Mental health guardianship is based on the concept of official intervention to remedy unsatisfactory situations and is not true personal guardianship.

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[39] WHO Technical Report Series, No 392 (1968).
[40] The Consultative Paper *Review of the Mental Health (Scotland) Act 1960* published by the Scottish Home and Health Department in 1982 suggested that the sheriff should be able to confer additional powers on application, but this was not implemented by the legislation.
[41] Paras 2.23 – 240.

2.23 Thirdly, there is a need for a personal guardian who guides and supervises the mentally disabled person, helping him or her to make his or her own decision, yet having the authority to make decisions on behalf of the mentally disabled person. This type of guardianship would involve a long term relationship and a close personal link between the guardian and the mentally disabled person. The guardian would have a recognised legal status which third parties involved with the mentally disabled person would have to take into account. Because of the limited powers a mental health guardian cannot fulfil all these functions. The recent revival of tutors dative is an attempt to provide a more personal type of guardianship.

2.24 Fourthly, there is at present little legal recognition of the interests of the disabled person's family or those caring for him or her. The Mental Health (Scotland) Act 1984 gives nearest relatives a role in initiating the procedure for guardianship (section 38), applying for discharge of the guardianship (section 51), or discharge from a hospital in which the person has been detained under the provisions of the Act (section 34). It is true that most of those providing accommodation, treatment or services to mentally disabled persons will consult with the family and carers and take their views into account, but there is no obligation to do so.

2.25 Fifthly, there is no legal recognition of the close relationship between looking after a disabled person's property and financial affairs and his or her personal welfare.[42] These are often inextricably mixed and almost any decision in either field has consequences for the other. For example, a decision about where the disabled person is to live is very much circumscribed by his or her ability to afford certain types of accommodation. Mental health guardians are prohibited from interfering with patients' property[43] and curators bonis have no control over the disabled person's personal welfare.[44] A tutor-at-law has full powers over both the estate and the personal welfare of the mentally disabled person. Tutors-at-law are obsolescent but a current petition may lead to their revival. Tutors-dative may be appointed to deal with both the financial affairs and the personal welfare of the disabled person, but in all the modern cases so far tutory has been confined to the personal welfare side.[45]

2.26 The final criticism is that the law is uncertain and archaic. Tutors-at-law are virtually obsolete and reflect the attitudes of a society over 400 years ago. Tutors-dative, whose revival can be seen as a temporary response to the deficiencies of the statute law in this area, are not well known and their precise powers and duties may have to be elucidated by reference to centuries-old cases and statutes. Mental health guardianship is little used, partly, it seems, because of uncertainty as to the functions of guardians and their effectiveness. The legal status of a mentally disabled person to whom a tutor-dative, mental health guardian or curator has been appointed is not clear. To what extent can the person enter into legal transactions, make financial or personal welfare decisions, give consent to treatment, get married or make a will? We return to these questions in Part 7. This uncertainty leads to confusion amongst those dealing with mentally disabled people with the danger that nothing may be done for fear of falling foul of the law.

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[42] The MWC Guardianship Survey found that 67% of patients subject to guardianship has some financial problems.
[43] Mental Health (Scotland) Act 1984, s 41(3).
[44] *Bryce v Grahame* (1832) 6S 425.
[45] Because a curator was already managing the estate or there was no estate other than welfare benefits which were managed by an appointee, see para 2.7.

PROPOSALS FOR REFORM

2.27 We turn now to consider various schemes for reform of the law of personal guardianship. Whatever else is done we think it should cease to be competent to appoint a tutor-at-law to a mentally disabled person. After the abolition of tutors-at-law the direction of reform is much less self-evident. We put forward in the following section three options.

(1) Retention of tutors-dative and mental health guardians with minor amendments to improve their usefulness.

(2) Replacement of tutors-dative by rules and practical measures to give a mentally disabled person's family and carers a recognised role, and retention of mental health guardians with minor amendments.

(3) Replacement of tutors-dative and mental health guardians by new statutory personal guardians based on recent Commonwealth models.

Abolition of tutors-at-law

2.28 No tutor-at-law has been appointed for about 100 years but this may change.[46] Tutors-at-law offer no advantages over tutors-dative and suffer from several disadvantages. The rule that the tutor-at-law must be a male and related by male links with the disabled person does not fit in with the modern concept of sexual equality. Also there is no real inquiry as to the suitability of the nearest male relative; he is entitled to office by virtue of his relationship[47] and assumed to be suitable unless the contrary is established. If the nearest male relative declines to seek appointment as tutor-at-law no-one else can seek appointment. Because a tutor-at-law supersedes a tutor-dative there is the danger that the nearest male relative could oust a tutor-dative appointed by the court after careful consideration of the tutor-dative's qualities and compatibility with the mentally disabled person. We therefore propose that:

1. It should cease to be competent to appoint a tutor-at-law to a mentally disabled person and accordingly the Curators Act 1585 should be repealed.

FIRST OPTION – RETENTION WITH AMENDMENTS OF TUTORS-DATIVE AND MENTAL HEALTH GUARDIANS

2.29 In this option both tutors-dative and mental health guardians would be retained with modifications to improve their usefulness and effectiveness. The minimum amendments that seem necessary for tutors dative are to allow applications for appointment to be made in the sheriff court, to require that the application for appointment be intimated to the regional (or islands) council social work department and to subject tutors-dative to the supervision of the Mental welfare Commission for Scotland. There are many other major changes that could be made, such as granting the tutor the minimum powers necessary or making the appointment subject to periodic review. However, we feel that if such fundamental changes are thought desirable it would be better to create a new system of

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[46] *Simpson v Simpson* (1891) 18R 1207 is the last reported case, but the prospective tutor was appointed interim curator and may never have been appointed tutor. A petition for the appointment of a tutor-at-law is currently under consideration.

[47] Curators Act 1585.

personal guardianship (such as we set out later in this Part) incorporating all the desired changes.

2.30 Apart from historical reasons there seems no reason why the appointment of tutors-dative should be confined to the Court of Session. The sheriff court has had power to appoint tutors to children in certain circumstances since 1886.[48] The Law Reform (Parent and Child)(Scotland) Act 1986[49] conferred on the sheriff courts a general power to make orders relating to parental rights. This includes power to appoint and remove tutors to children.[50] Curators to mentally disabled persons may now be appointed by a sheriff whatever the size of the person's estate,[51] and the majority of appointments are now made in the sheriff courts rather than in the Court of Session.[52]

2.31 An application for the appointment of a tutor-dative should be intimated to the social work department of the regional (or islands) council in whose area the mentally disabled person resides. This would enable the council to make representations in those cases where it was not happy with the proposed tutor or the situation of the mentally disabled person and to put helpful information before the court. The appointment of a tutor-dative should also be intimated to the council so that it is aware of the need to consult him or her.

2.32 The appointment of a mental health guardian has to be notified to the Mental Welfare Commission for Scotland. That body then has a duty to monitor the way in which the guardian exercises his or her functions and visits the person subject to guardianship regularly (usually at least annually).[53] There is however no requirement to report the appointment of a tutor-dative to the Commission nor does the Commission have any supervisory role. The powers conferred by the court on a tutor-dative are usually far more wide-ranging than those of a mental health guardian, and we think it highly desirable that tutors-dative should be monitored similarly.

2.33 Tutors-dative can be appointed with powers over the estates of mentally disabled people. But it seems unnecessary for the law to have two posts, curators (or our proposed replacement, financial managers) and tutors-dative with financial management functions. If tutors-dative are to be retained their functions should, we think, be confined to the personal welfare field. However, the person appointed as tutor-dative should be able to obtain powers over the estate by seeking appointment as the curator or financial manager as well in the same or later proceedings. We propose that:

2. If tutors-dative are to be retained:

(a) the application for appointment of a tutor-dative to a mentally disabled person should be intimated to the regional (or islands) council in whose area the person resides.

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[48] Guardianship of Infants Act 1886, s 6.
[49] S 3, see definition of "court" in s 8.
[50] 1986 Act, definition of parental rights in s 8.
[51] Judicial Factors (Scotland) Act 1880, s 4 as amended by Law Reform (Miscellaneous Provisions)(Scotland) Act 1980, s 14.
[52] 1988: sheriff court 237, Court of Session 136. 1989: sheriff court 213, Court of Session 129. Information supplied by the Accountant of Court.
[53] Mental Health (Scotland) Act 1984, ss 41(1) and 3(2)(b).

(b) their functions should be confined to the filed of personal welfare,

(c) either the Court of Session or the sheriff courts should have power to appoint tutor-dative, and

(d) all appointments of tutors-dative should be notified to the Mental Welfare Commission for Scotland by the clerk of the court making the appointment. The Commission should have the same functions in respect of tutors-dative as they have in respect of guardians appointed under the Mental Health (Scotland) Act 1984. The appointment should also be intimated to the regional (or islands) council.

If the sheriff courts are to have power to appoint tutors-dative then there would have to be rules for allocating jurisdiction to a particular sheriff court.[54]

2.34 Guardianship under the Mental Health (Scotland) Act 1984 has serious limitations and could with advantage be reformed. Very few people in Scotland are subject to guardianship[55] although it has to be said that a much greater number are considered for guardianship than are actually received into guardianship.[56]

2.35 The first perceived drawback is that the powers conferred on a mental health guardian are inflexible and often insufficient. The powers are set out in section 41(2) of the Mental Health (Scotland) Act 1984. They are:

"(a) power to require the patient to reside at a place specified by the authority or person named as guardian;

(b) power to require the patient to attend at places and times so specified for the purpose of medical treatment, occupation, education or training;

(c) power to require access to the patient to be given, at any place where the patient is residing, to any medical practitioner, mental health officer or other person so specified."

The sheriff in approving a guardianship application has no power to confer additional powers or to refuse to grant some of the statutory powers or to attach conditions or restrictions to the exercise of the powers. More flexibility would make guardianship more responsive to the need of particular patients and would enable a better "package of care" to be put together in order to keep or place patients in the community or in sheltered environments. Concern has been expressed at the guardian's lack of power to consent to medical and other treatment for the patient. This may n longer be a problem because in the English case of *F (Mental Patient: Sterilisation*)[57] it was held that non-consensual treatment

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[54] The rules of jurisdiction in Scotland set out in Sch 8 to the Civil Jurisdiction and Judgements Act 1982 do not apply to tutory, curatory and appointment of curators, Sch 9, para 3.

[55] On 31 December 1989 there were 46 patients subject to guardianship, *Annual Report of the Mental Welfare Commission for Scotland 1989*, para 12.13. In 1988 there were 81 patients subject to guardianship at some time in that year, MWC Guardianship Survey.

[56] *Considering Guardianship*, a 3 month study in Lothian found that in 12 cases in which guardianship was considered only 1 patient was received into guardianship. Anecdotal evidence suggests a 10:1 ratio is common.

[57] [1990] 2 AC 1.

can be given to a mentally disabled patient if it is in the patient's best interests. English law does not have any person capable of taking personal welfare decisions for a mentally disabled adult so the court invoked the doctrine of necessity to declare such non-consensual treatment lawful. The decision would probably be followed in Scotland even though the alternative of appointing a tutor-dative to consent to necessary treatment exists. Nevertheless some expansion of a guardian's powers in relation to treatment could be useful. Some detained patients are granted leave of absence from hospital and will not be recalled as long as they continue to take the medication prescribed to alleviate their condition. Similarly, voluntary out-patients may not need to be detained.

2.36 Secondly, there is an increasing number of dementia sufferers among the mentally disabled. We understand there was initially some misgiving about using guardianship for dementia suffers.[58] The medical ground for guardianship is that the patient "is suffering from mental disorder of a nature or degree which merits his reception into guardianship."[59] Mental disorder is defined as mental illness or mental handicap however caused or manifested.[60] It might be argued that dementia is neither a mental illness nor a mental handicap. We do not share this view. The progressive loss of brain function which occurs in Alzheimer's disease and multi-infarct dementia seems to us to be a "mental illness or mental handicap however caused". We note that guardians are often appointed to this class of people.[61]

2.37 Thirdly, there is no power to appoint an interim guardian or deal with an emergency case otherwise than via the emergency detention procedures in the Mental Health (Scotland) Act 1984[62] or a petition for appointment of a tutor-dative with interim powers. We understand that from time to time cases arise where a mentally disabled person subject to exploitation or abuse is moved out of the local authority area while the social work department is in the process of submitting a guardianship application. Another situation where emergency powers would be useful is when a mentally disabled patient is discharged from hospital at short notice.

2.38 Fourthly, the welfare criterion for appointing a guardian – "necessary in the interests of the welfare of the patient that he should be [received into guardianship]"[63] – may be unduly vague. This vagueness leads to hesitation on the part of mental health officers as to whether a guardianship application is appropriate or will be approved by the sheriff.[64] Some mental health officers take the view that a guardianship application cannot be made if, as a result of temporary emergency measures, the patient is no longer at risk. This is because guardianship cannot be regarded as "necessary". It might be helpful if the criteria were more clearly stated. These should include that the patient's welfare (in a broad sense) is at risk, that the risks will be materially alleviated by guardianship and that the welfare risks are sufficiently serious to warrant the imposition of a guardian. The balancing of the risks associated with guardianship against alternative courses of action is an important

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[58] Scottish Action on Dementia, *Dementia: Guardianship* (1987) p 20.
[59] Mental Health (Scotland) Act 1984, s 36(a).
[60] 1984 Act, s 1(2).
[61] The CRU Guardianship Survey shows about one quarter of patients are confused elderly people. The MWC guardianship survey indicates 12-15% of patients are suffering from dementia.
[62] S 24.
[63] 1984 Act, s 36(b).
[64] M McCallum and T Leckie, "Guardianship: What are the issues for practitioners and managers?", Social Work Today, 25 May 1987.

function of the mental health officer. Some risks have to be taken; a risk-free environment cannot be created except at inordinate expense and restriction of the patient's freedom of action.

2.39 Fifthly, mental health officers have a power of veto in that an application for guardianship requires a positive recommendation from the mental health officer.[65] Should the local authority through the mental health officer be entitled to block an application by the nearest relative? A mental health officer who decides not to make an application after the nearest relative has requested that guardianship be considered must give written reasons for refusal to proceed.[66] Given that a guardianship application is subject to judicial approval it would seem to be fairer if the nearest relative could submit a guardianship application which could then be considered by the sheriff in the light of any unfavourable comments from the mental health officer. On the other hand guardianship has financial and resource implications for the local authority either in acting as guardian or supervising a guardian. Moreover, if guardianship is regarded primarily as a function undertaken by local authority officials (as it is at present) then it is perhaps not surprising that a local authority official has a veto on appointment.

2.40 Sixthly, guardianship has been used to transfer mentally disabled people from their homes into long term hospital care. The MWC Guardianship Survey found that in 1988 19% of patients subject to guardianship were in hospital and a further 42% were in some other form of institutional care. While specifying hospital as a place of residence (other than for treatment for physical ailments or as a temporary refuge from abuse) is within the guardian's powers it is not within the spirit of the legislation, and has been adversely commented on by the mental Welfare Commission for Scotland.[67] Guardianship was conceived as a community care alternative to hospital.[68] If involuntary admission to hospital for mental disorder is necessary the relevant provisions of the Mental health (Scotland) Act should be used.

2.41 Finally, guardianship may have to be used in situations where coercive measures are necessary. Advice, guidance and persuasion by the guardian may be sufficient to achieve the desired results, although guardianship tends to be used after such informal methods have been tried without success. But if persuasion fails the guardian's powers are insufficient to enforce his or her decisions. Thus the power to specify where the patient is to live does not include the power to detain the patient there or take effective measures to prevent him or her absconding or straying. An absconding patient may be brought back (unless he or she is absent for more than 28 days)[69] but if preventative measures could be authorised the problem would be avoided. The power to require a patient to attend for treatment does not include the power to consent to that treatment on behalf of the patient. The power to require doctors and others to be given access to the patient does not include the power of forcible entry to the patient's home or even having an extra key cut for a social worker or home help. In short, it can be argued, guardianship is ineffective ins situations where persuasion fails and control is necessary. The alternative view is that greater enforcement powers are unnecessary and undesirable because the vast majority of people

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[65] 1984 Act, s 37(3)(b).
[66] 1984 Act, s 38(3).
[67] *Annual Report 1986*, para 9.5.
[68] Consultative Paper, *Review of the Mental Health (Scotland) Act 1960*, Scottish Home and Health Department 1982.
[69] 1984 Act, s 44.

respect the authority of their guardian and will follow the directions given.[70] Moreover, enforcing compliance by patients living in the community may be impossible; coercive powers are generally only feasible in a contained environment such as a hospital.[71]

2.42 In order to elicit views on the foregoing issues we propose that:

3. If mental health guardianship is to be retained:

(a) the sheriff in approving a guardianship application should have power on application to decline to grant all of the powers specified in section 41(2) of the Mental Health (Scotland) Act 1984, to grant them subject to amendments, or to grant additional powers in the field of personal welfare. Any power granted may be subject to such conditions or restrictions as seem appropriate.

(b) the sheriff should have power to grant the person proposed as guardian in the application such interim powers as seem necessary pending the determination of the application.

(c) the welfare ground for a guardianship application should be changed from guardianship being necessary in the interests of the welfare of the patient to

(i) the patient's welfare being at risk or likely to be at risk if a guardian is not appointed, and

(ii) the risks being sufficiently serious to warrant guardianship as against other course of action, and

(iii) the risks are likely to be alleviated to a substantial extent by guardianship.

(d) the mental health officer should cease to have a veto on a guardianship application. The nearest relative of a mentally disabled person should be entitled to request the local authority to lay an application before a sheriff for approval. The mental health officer should be entitled to present a report, comment on the application and should be given an opportunity to make representations at any hearing.

(e) it should be provided that it is not within the powers of a guardian to require the patient to reside in a hospital in circumstances where detention under the Mental Health (Scotland) Act 1984 would be appropriate.

(f) the sheriff should be empowered on application by a guardian to grant to the guardian such ancillary or supplementary powers as are

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[70] Hoggett, *Mental Health Law*, (2nd edn) p 303.
[71] M Fisher, "Guardianship under the Mental Health Legislation: a Review", Journal of Social Welfare Law, 1988, pp 316-327.

required to enable the guardian to put his or her decisions into effect. These powers should be granted only if the sheriff is satisfied that they are necessary and that all other reasonable courses of action have proved ineffective.

(g) a mental health guardian should be a specified individual likely to have close personal contact with the mentally disabled person. It should cease to be competent to appoint the local authority, or one of its departments or directors as guardian.

SECOND OPTION – ABOLITION OF TUTORS-DATIVE AND RETENTION WITH AMENDMENTS OF MENTAL HEALTH GUARDIANS

2.43 This option involves retaining mental health guardians with the amendments proposed in the previous section and abolishing tutors-dative. The main argument for abolishing tutors-dative is that the procedure is very seldom used (only a few cases since 1986). Tutors-dative have been appointed recently for several purposes. First, the parents of a handicapped adult may wish to be appointed tutor-dative to their adult child in order to have their position recognised by third parties, to ensure that their views are taken into account and to strengthen their position vis-à-vis those professionally involved with their child. Secondly, a tutor-dative has been appointed to authorise major surgery to be carried out on a mentally incapacitated person. Thirdly, the estranged parents of their mentally disabled adult child may use tutory-dative to resolve disputes between themselves about where the child is to live, who is to be allowed to visit him or her or have the child to stay during holidays etc. Tutory-dative is the only procedure available for resolving such disputes as parental rights applications are incompetent in respect of a person aged 18 or over.[72] Finally, tutory-dative has been used to provide for personal guardianship after the death of the parents. One of the parents will be appointed together with a much younger relative.[73]

2.44 Some of the objectives in the first category of cases described in the previous paragraph will be met by the new arrangements for community care under the National health Service and Community Care Act 1990. These are to be fully implemented by April 1993 and will recognise the position of those caring for people affected by ageing or disability. From 1 April 1991 local authorities have been required by directions under section 5B of the Social Work (Scotland) Act 1968 inserted by section 52 of the 1990 Act to have procedures for considering representations about needs and services of such people. Anyone acting on behalf of a disabled person can make representations, including complaints, about needs and services and local authorities are obliged to consider them. When the community care arrangements are fully implemented local authorities will need to take practical steps to ensure that the disabled can participate fully in the processes involving the assessment and provision of services.[74] The Government have decided that the above provisions together with encouragement of voluntary advocacy and similar schemes will give disabled people and those caring for them a greater say in decisions affecting them and have accordingly postponed indefinitely bringing into force sections 1 to

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[72] Law Reform (Parent and Child)(Scotland) Act 1986.
[73] This issue is discussed further at para 2.69.
[74] *Caring for People: Community Care in the Next Decade and Beyond* Cm 849 (1989).

3 of the Disabled Persons (Services, Consultation and Representation) Act 1986 dealing with authorised representatives.[75]

2.45 The existing and proposed arrangements set out above would to some extent do away with the need for tutors-dative. Arguably tutors-dative have too great a range of powers and all that is required is some recognition of the carer's or voluntary advocate's role. Allowing those people to make representations and be involved in decisions about provision of services to mentally disabled people may result in a better balance between the mentally disabled people and their families on the one hand and service providers and professionals on the other. The absence of the legal powers available to tutors-dative might encourage the mutual respect and co-operation which is the ideal to be aimed for. Enhancing the role of carers and voluntary advocates would also be considerably cheaper and simpler than requiring the appointment of tutors-dative. A petition for the appointment of a tutor-dative takes some time and costs about £400-500, although legal aid is available to the petitioner based on the resources of the mentally disabled person rather than those of the petitioner.[76]

2.46 Another recent use of tutors-dative is to consent to a major surgical operation involving irreversible change to a mentally disabled adult's reproductive capacity.[77] Tutors-dative would not be needed for this purpose if alternative methods of giving consent to such operations were devised. We return to this topic later.[78]

2.47 In our view, however, even if better procedures for ensuring that the views of disabled people and those caring for them are introduced and new provisions dealing with consent to medical treatment are enacted, there would still be a role for tutors-dative or similar types of guardian. A tutor-dative has the legal authority to take decisions on behalf of the disabled person in all aspects of personal welfare, whereas carers and members of advocacy schemes are confined to assisting the disabled person and making representations to the local authority in connection with services they provide. For example, a tutor-dative can decide where the disabled person is to live, whom he or she may associate with and what work, training or occupation (if any) he or she may undertake. The tutor may also consent or withhold consent to medical treatment where the risks and benefits are fairly evenly balanced. Furthermore, the tutor may also act on behalf of the disabled person in connection with any third party or organisation where the schemes under the National Health Service and Community Care Act 1990 would be confined to local authority and health authority services. Practice, even if embodied in codes, whereby those dealing with a mentally disabled adult consult those caring for the adult, is no substitute for the positive legal right of a tutor-dative to be consulted. It is unlikely that the families of mentally disabled adults considering the appointment of a tutor-dative would regard informal representatives and codes of practice as adequate alternatives.

2.48 Abolition of tutors-dative would in our view leave a gap in the law. This gap might be filled by a court declaring certain proposed actions to be lawful or by an application to the Court of Session's power to grant a remedy in exceptional cases where no other remedy

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[75] This paragraph is based upon a written answer by Mrs Virginia Bottomley, Minister of State at the Department of Health, on 22 March 1991 (H C Vol 188 Col 254).
[76] Civil Legal Aid (Scotland) Regulations 1987, reg 6A.
[77] *Usher's* CB, *Petr* 1989 (unreported), *McLean, Petr* 1991 (unreported).
[78] Part 3.

exists (the *nobile officium*). The Court of Session is however very reluctant to extend the scope of the latter remedy beyond decided or clearly analogous cases.[79] If cases are going to arise which cannot be dealt with by mental health guardianship, and new statutory personal guardianship is not to be introduced, tutors-dative should perhaps be retained. Accordingly we invite views on the following proposal.

4. It should remain competent to appoint tutors-dative to mentally disabled people, unless new statutory personal guardians are to be introduced.

THIRD OPTION – NEW STATUTORY PERSONAL GUARDIANS REPLACING TUTORS-DATIVE AND MENTAL HEALTH GUARDIANS.

2.49 Another approach would be to replace tutors-dative and mental health guardians by personal guardians whose powers, duties and liabilities would be set out in new legislation. Over the last decade or so many other countries have enacted legislation creating welfare or personal guardians for mentally incapacitated or disabled people.[80] In devising our proposals for personal guardianship in Scotland we have greatly benefited from our study of the laws of these other countries. The details differ from jurisdiction to jurisdiction but all schemes share certain basic features. We discuss in this section the powers and duties that personal guardians might have in Scotland, leaving the questions of whom the appointing authority should be and what procedure should be used in making an appointment until later.[81] However, it may be assumed that there would be an assessment of the person's disability in relation to personal welfare and the need for a guardian, consideration of the proposed guardian's fitness for the task, and procedures giving the allegedly disabled person (or his or her representative) an opportunity to object to the appointment and to make representations to the appointing authority. The current methods of appointing tutors-dative and mental health guardians incorporate all these elements and it would run counter to the European Convention on Human Rights[82] and the United Nations *Declaration on the rights of mentally retarded persons*[83] to dispense with any of them.

2.50 The common features of new style personal guardians are:

(a) restricting guardians' powers in accordance with the principle of minimum necessary intervention;

(b) the guardian being under a statutory duty to encourage the mentally disabled person to do as much as possible himself or herself;

(c) the guardian being under a statutory duty to consult and give effect to the wishes of the disabled person and his or her family so far as possible;

(d) mandatory periodic review of the need for a guardian's appointment to continue.

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[79] *Horne's Trs* 1952 SC 70 at p 72.
[80] For example, Alberta, Dependent Adults Act 1976; Victoria, Guardianship and Administration Board Act 1986; New Zealand, Protection of Personal and Property Rights Act 1988.
[81] See Part 6.
[82] Art 6(1).
[83] 1971 UN General Assembly 26th session, Resolution 2856, quoted in para 1.7.

The objective of personal guardianship is to provide a mentally disabled person with an individual guardian who guides and encourages the mentally disabled person, helps him or her use his or her faculties as far as possible, yet has the legal authority to make decisions on his or her behalf. This type of guardianship involves a long-term commitment and a close personal link between the guardian and the mentally disabled person. The new style guardianship is based on the need to recognise the wide range of abilities of the mentally disabled. The guardian's power should be tailored to meet the circumstances bearing in min the principle of minimum necessary interference, so that a person subject to guardianship is able to continue to make decisions in those areas where it is judged that he or she can competently do so. Personal guardianship should be regarded as necessary where a mentally disabled person is being subjected to extensive, but informal, control in the personal welfare field. Informal control deprives the mentally disabled person of the rights and protections available under the system of personal guardianship.

2.51 The proposed personal guardians would be particularly useful for mentally handicapped young adults. We have received evidence from the Royal College of Psychiatrists in Scotland that it is considered vital to the development of young mentally handicapped adults that they are encouraged to take as many decisions as they can and lead their own lives as far as possible. Because handicapped young adults often continue to improve and increase the range of their abilities, review of guardianship is essential if the functions of the guardian are to continue to match the needs of the handicapped young adult.

2.52 There would be many advantages in replacing mental health guardianship and tutory-dative with a new statutory personal guardianship. First, the law would be simplified. Instead of two types of guardians with different functions there would be a single type appointed by a single process. There would be no need to consider the boundary between the different guardians or to legislate for exclusive or concurrent exercise of functions in the various areas of concern. Secondly, the new personal guardianship could incorporate some of the undoubted good points of mental health guardianship, for example that an application has to be considered from the social welfare aspect as well as the legal and medical aspects and that the disabled person's need for guardianship is assessed. Thirdly, neither tutory-dative nor mental health guardianship is widely used at present. A new statutory personal guardianship might be used more frequently, especially by relatives and carers of disabled people. Relatives, carers and professionals are often conscious of the lack of legal authority to take decisions on behalf of mentally disabled people and a procedure for obtaining a personal guardian would solve some of these problems.

2.53 There may however be disadvantages and dangers in introducing a system of personal guardianship. At present mental health guardians are overwhelmingly regional councils, their social work departments or the directors of social work.[84] Regional councils may come to dominate personal guardianship in the same way. Such guardianship would cease to be personal in the way in which it is considered in this paper. Moreover, the fuller powers of personal guardianship as against mental health guardianship would enable a local authority to take control of the whole personal welfare field without a member of the family being able to apply to be appointed tutor-dative as at present. The experience of other countries that have personal guardians is varied. In Alberta about 20% of all

[84] MWC Guardianship Survey, 73 out of 81 guardians were the regional council or its officials.

guardians are the Public Guardian and the proportion is decreasing.[85] The Public Advocate in Victoria is guardian in 50.9% of cases.[86] Although it would be open to a regional council to apply to have a named social worker appointed personal guardian under our proposals[87], personal guardianship, unlike guardianship under the mental health (Scotland) Act 1984, would not be slanted towards local authority guardianship. Moreover, a local authority personal guardian, like any other personal guardian, would have its powers tailored to the mentally disabled person's disabilities[88] and would be obliged in exercising its powers as guardian to consult with and take account, where reasonably practicable, of the views of the disabled person and his or her family or carers.[89] Secondly, a personal guardian unlike a mental health guardian could have complete control of the mentally disabled person's personal welfare. There is perhaps a fear that this would give too much power to the individual or local authority guardian. This danger exists at present with tutors-dative. The new proposed system of personal guardianship would be better in that it would oblige the court to make the least restrictive order in considering which powers to confer on the guardian.[90] In exercising the powers the guardian would be under a statutory duty, so far as is reasonably practicable, to consult with and take account of the wishes of the disabled person and his or her family.[91] Thirdly, a local authority might be thwarted in its efforts to promote the welfare of a disabled person by a family personal guardian who proved unco-operative. At present a mental health guardian is entitled to exercise his or her powers to the exclusion of any other person including a tutor-dative. In the new system the local authority would no longer be able to apply to the court to be appointed mental health guardian in order to overrule the family personal guardian. On the other hand the local authority would not be without any remedy for it could apply to the court or other appointing body for directions to be given to the personal guardian as to how he or she should carry out the duties[92] or even apply for appointment as personal guardian in place of the existing family guardian.[93]

PROPOSALS FOR A SCOTTISH SCHEME OF PERSONAL GUARDIANSHIP

2.54 The following discussion concentrates on the main features of the proposed new statutory personal guardianship. If personal guardianship were to be introduced many details would have to be decided. At this stage, however, we are concerned to get views on the desirability of introducing personal guardianship and have concentrated on the principal issues.

Grounds for appointment of a personal guardian

2.55 The present grounds for appointing a tutor-dative are not clear. In the past a tutor-dative was appointed following a finding by a jury that the person was fatuous (complete absence of mind) or furious (suffering from insane delusions). Tutors-dative were generally only appointed when the person in question had substantial property which required protection. An appointment could be made if the person was unable to manage his

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[85] Information supplied by the Public Guardian of Alberta.
[86] Guardianship and Administration Board, *Annual Report 1987-88*, p 13.
[87] See para 2.69.
[88] See para 2.80.
[89] See para 2.87.
[90] See para 2.80.
[91] See para 2.87.
[92] See para 2.96.
[93] See para 2.95.

or her affairs due to fatuousness or furiosity. The recent tutor-dative applications have been based on the mentally disabled person's need for a tutor to be responsible for personal welfare decisions.

2.56 Section 36 of the Mental Health (Scotland) Act 1984 provides that a person may be received into guardianship on the grounds that:-

> "(a) he is suffering from mental disorder of a nature or degree which warrants his reception into guardianship; and
>
> (b) it is necessary in the interests of the welfare of the patient that he should be so received."

2.57 We do not favour adopting the present grounds of appointment of tutors-dative or mental health guardians for personal guardians. The grounds for tutors-dative are too unclear while those for mental health guardians have been criticised as being too vague.[94] Too wide or vague grounds can be dangerous for they allow guardians to be appointed to control the lives of too many people. Guardianship has been used in the past in other countries to place drunks, prostitutes, vagrants and social misfits into secure institutions, ostensibly for "their own good" but often for reasons of administrative convenience. It cannot be assumed that applicants will always apply with the best interests of the person in mind. Specific grounds of appointment enable the court or other appointing authority to check inappropriate use of guardianship. It is also important that personal guardianship should not be limited to those who are completely or very substantially mentally incapable. The mentally disabled and the mentally handicapped would otherwise be deprived of the benefits of having a guardian with limited powers appointed.

2.58 The Albertan Dependent Adults Act 1976 originally provided that a guardian could be appointed if the court was satisfied that the person was:

> "(a) an adult,
>
> (b) unable
>
> (i) to care for himself, and
>
> (ii) to make reasonable judgements in respect of all or any of the matters relating to this person
>
> and
>
> (c) in need of a guardian."

The social functioning test in paragraph (b) is not tied to any particular category of person or cause. This may be thought to have the advantage that it avoids stigmatising as mentally disabled all those who are unable to care for themselves simply because the majority will be in that category. On the other hand, by lumping together the other with the mentally disabled it may encourage the belief that all those who are unable to care for themselves are

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[94] See para 2.38.

mentally incompetent and should be treated accordingly. Another criticism is that the word "reasonable" introduces a subjective element which could lead to eccentrics being institutionalised. Should guardianship be imposed on people who reject the views of the majority, or those who strongly wish to live an independent life even at some risk to their personal wellbeing? Paragraph (c) confines guardianship to those in need of it. This is obviously necessary because many people who satisfy the tests in paragraph (b) will be adequately cared for in a home or institution without a guardian.

2.59 A large number of guardians have been appointed in Alberta under the 1976 Act. For example, in the 12 months from April 1981 to March 1982 1,111 guardians were appointed out of a total population of some 2,000,000, less than half that of Scotland.[95] The 1976 Act was amended in 1985. The test is now that the person must be "repeatedly or continuously" unable to look after himself or herself and that the court must be satisfied that the order appointing a guardian "would result in substantial benefit to the person in respect of whom the application is made". There has been a falling off in applications in recent years, but a very substantial number of appointments are still made. The falling off is not though to be a result of the amendments.[96]

2.60 The Victorian Guardianship and Administration Board Act of 1986 adopts a somewhat different approach. Section 22 provides:-

> "(1) If the Board is satisfied that the person in respect of whom an application for an order appointing a guardian is made –
>
> (a) is a person with a disability; and
>
> (b) is unable by reason of the disability to make reasonable judgements in respect of all or any of the matters relating to her or his person or circumstances; and
>
> (c) is in need of a guardian –
>
> the Board may make an order appointing a plenary guardian or a limited guardian in respect of that person.
>
> (2) In determining whether or not a person is in need of a guardian, the Board must consider whether the needs of the person in respect of whom the application is made could be met by other means less restrictive of the person's freedom of decision and action.
>
> (3) The Board cannot make an order under sub-section (1) unless it is satisfied that the order would be in the best interests of the person in respect of whom the application is made."

Disability is defined as meaning "intellectual impairment, mental illness, brain damage, physical disability or senility".[97] It has been held in connection with the disposition of funds

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[95] J Christie, "Guardianship: The Albertan Experience: A Model for Change", Health Law in Canada, (1982), Vol 3, p 58.
[96] Information supplied by the Public Guardian of Alberta.
[97] 1986 Act, s 3(1).

paid into court under the 1986 Act that "disability" includes incapacity to manage one's affairs due to mental infirmity.[98] Restricting the categories of people to whom guardians may be appointed goes some way towards meeting the criticisms of the Albertan Legislation. Subsection (2) is also a brake on indiscriminate use of guardianship and has been used to refuse the appointment of a guardian when the person was being looked after by his or her grown up children.[99]

2.61 New Zealand adopts yet another approach. Instead of looking at the social functioning of the individual in question it focuses on his or her capacity in relation to decision-making. A court has jurisdiction to make various orders relating to personal welfare if the person in question:

> "(a) lacks, wholly or partly, the capacity to understand the nature, and to foresee the consequences, of decision in respect of matters relating to his or her personal care and welfare; or
>
> (b) has the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare, but wholly lacks the capacity to communicate decisions in respect of such matters."[100]

As with the Albertan legislation the cause of incapacity is not mentioned and may arise from a variety of factors. However, because paragraph (a) is tied to aspects of capacity rather than the ability to make reasonable decisions it is unlikely to be applied to persons other than the mentally disabled. Paragraph (b) deals with the less usual situation of the person who is so physically disabled as to be unable to communicate decisions, but who is judged by some other criteria capable of understanding the nature of decisions and foreseeing their consequences. The fear that guardians may be imposed on eccentrics and misfits is dealt with by a provision to the effect that a decision which "a person exercising ordinary prudence would not have made or would not make given the same circumstances" does not, in itself, entitle the court to exercise its powers.[101] There is no explicit reference to the court being satisfied as to the need for guardianship, but the court is directed to make the least intervention possible when deciding what order to make.[102]

2.62 We tend to prefer the New Zealand approach as it focuses on understanding the nature and effects of decisions rather than ability to make a reasonable decision. Many mentally disabled people are able to make a "decision" in the sense that they utter the necessary words or sign the appropriate form and the decision might in fact be a reasonable one, but there is an absence of mind behind the decision. Furthermore, the New Zealand Act has an explicit reference to partial capacity, which we think is useful in the context of partial or limited guardianship. Another useful feature is that the making of decisions which most people world regard as imprudent should not by itself be a ground for guardianship. Some people, even highly intelligent individuals, can make decisions which seem wholly unreasonable. Provided they appreciate the implications they should retain the freedom to make such decisions. The New Zealand approach, however, does not cater for those confused or dementing people who can make a decision when particular questions are

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[98] *Smith v Reynolds and Others* (1989) VR 309.
[99] *M and R v The Guardianship and Administration Board* (1988) 2 VAR 213.
[100] Protection of Personal and Property Rights Act 1988, s 6(1).
[101] 1988 Act, s 6(3).
[102] 1988 Act, s 8.

put to them but cannot remember what they have decided or translate it into effective action. Our proposed formula in Proposal 5 below would enable guardians to be appointed in these circumstances. On the other hand we feel that it would be a good idea explicitly to restrict personal guardianship to cases where it would confer a substantial benefit on the mentally disabled person. Many such people are cared for in their own homes or in nursing homes or other institutions perfectly well. Guardianship will be needed only if legal authority is required for a particular course of action, or those exercising *de facto* control are doing so in an unacceptable manner or so extensively as to deprive the mentally disabled person of the rights and protection he or she would have under personal guardianship. We invite views on the following proposal.

5. (1) If personal guardianship is to be introduced the court or other appointing body should have power to appoint a personal guardian or make some other order relating to personal welfare only if it is satisfied that:-

(a) the person in question lacks wholly or partly the capacity to understand the nature of and to foresee the possible implications of personal welfare decisions or has such capacity butis unable to communicate or act consistently in accordance with such decisions, and

(b) the appointment of a personal guardian or the making of some other order would result in a substantial benefit to, or necessary protection of, the person.

(2) The fact that the person has acted or intends to act in a way an ordinary prudent person would not act should not by itself be evidence of lack of capacity.

Who can be appointed a personal guardian?

2.63 A tutor-dative must be an adult, suitable and have no conflict of interest. An individual or two or more individuals may be appointed, but it is thought a partnership or a company may not be appointed.[103]

2.64 The Albertan legislation contains similar requirements, except that it requires the court to be satisfied that the proposed guardian meets them. The New Zealand 1988 Act is also similar but adds that the court must take account of the relationship between the person and the proposed guardian and is directed to take account of the mentally disabled person's wishes in determining whom to appoint.[104] This seems sensible given that a guardian is expected to have a close personal relationship with the disabled person. Moreover, compatibility makes it more likely that the person will accept the guidance and directions of the guardian, so that enforcement measures will require to be taken only in the last resort.

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[103] This is certainly the position with a curator: *Brogan, Petr* 1986 SLT 420.
[104] S 12(5).

2.65 The Albertan legislation allows for the appointment of the Public Guardian as a guardian of last resort.[105] The Victoria legislation as a similar role for the Public Advocate.[106] There is no such provision in the New Zealand Act. We would not be in favour of setting up a new organisation to act as guardian of last resort. The Mental Welfare Commission for Scotland is a possible guardian of last resort. However, the Commission's current remit is to exercise protective functions over mentally disabled persons. As part of those functions it supervises and visits persons subject to mental health guardianship and we propose elsewhere in this Part that it should supervise persons subject to a tutor-dative[107] or a personal guardian.[108] It would lead to a confusion of roles and a conflict of interest if the Commission were to take on an executive role as Public Guardian. A better solution would be to allow an application by a named official in the regional (or islands) council's social work department or a named member of staff in the home the mentally disabled person lives in. Social workers or other members of staff would normally be in contact with those for whom person guardianship is proposed. A local service would also avoid the feeling of remoteness that might occur if the Public Guardian had a single office serving the whole of Scotland. However, there might be a conflict of interest between the social worker's position as guardian and his or her position as employee of the council providing services to the mentally disabled person.

2.66 Should named council officials be guardians of last resort or should they be capable of being appointed even if relatives were willing to act? Arguments based on conflict of interest and the possibly lesser degree of personal involvement with the disabled person suggest that a council official should be a guardian of last resort. Personal guardians are intended to be advisers, counsellors and decision makers. But, personal guardianship also has protective and interventionist elements and may (like mental health guardianship at present[109]) have to be used to prevent neglect, exploitation or abuse of mentally disabled people by their families or those looking after them. In such situations the regional (or islands) council should be able to be appointed personal guardian and take the appropriate action even though one of the family was willing to act. We do not favour appointing a family guardian but making the appointment conditional upon frequent supervision by council officials. This would require co-operation from the family guardian which might not be forthcoming.

2.67 Should the personal guardian be a single individual or should two or more people be capable of being appointed? Joint tutors-dative have been appointed.[110] The Albertan Act does not seem to allow for joint appointments. The New Zealand legislation permits more than one guardian to be appointed only in exceptional circumstances and where it would be in the disabled person's interests.[111] The Victorian Act allows for joint guardians and

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[105] 1976 Act, ss 13 and 14. Approximately 20% of all personal guardians are the Public Guardian, but over the last year or two only 5% of new applications relate to the Public Guardian. Information supplied by the Public Guardian of Alberta.
[106] 1986 Act, s 23(4). In just over half (50.9%) the cases the personal guardian is the Public Advocate; Guardianship and Administration Board, *Annual Report 1987-88,* p 13.
[107] Proposal 2 at para 2.32.
[108] Proposal 10 at para 2.82.
[109] See *Annual Report of the Mental Welfare Commission for Scotland 1989*, Part 12. The MWC Guardianship Survey found that 47% of those subject to guardianship had conflicts with their families or were considered to be "at risk" in relation to their families.
[110] Fraser, *Parent and Child,* p 669 and recently the *Morris, Henderson and Buchanan petitions*.
[111] 1988 Act, s 12(6).

alternate guardians.[112] An alternate guardian is appointed at the same time as the guardian and takes over on the death, absence or incapacity of the guardian. The requirement that personal guardians should have a close personal relationship and responsibility for the disabled person might suggest that only one individual at a time should be entitled to act as guardian. However, there would be considerable merit in allowing joint applications at least by relatives such as the parents or a parent and a brother and sister. We think the advantages of allowing joint guardians outweigh the disadvantages of complicating the law with provisions for resolving disputes between joint guardians. Parents of children born within marriage have been their joint tutors and curators for nearly 20 years[113] and as far as we are aware this has not given rise to much in the way of litigation. It would seem rather silly for the law to take the view that parents can be trusted to co-operate in looking after children up to the age of 18 but thereafter only one of them could be a personal guardian.

2.68 If joint personal guardianship is to be competent, the relationships of the joint guardians among themselves and with third parties have to be considered. Should each guardian be entitled to act independently or should they be required to act collectively? Is a doctor or a local authority official, for example, entitled to proceed on obtaining approval from one of the joint guardians or should the approval of all be sought? The position in Scotland with tutors-dative and Victoria with joint guardians is not clear. There are arguments and analogies for the independent and collective approaches. Where there are two trustees or executors in Scotland both must join in any transaction.[114] Parents, on the other hand, who are the joint tutors of their pupil children may act independently.[115] The advantages of independent action are that it speeds up matters. A third party need seek approval from only one guardian and one guardian can be left by the others to take all but the most important decisions. Independent action also enables emergencies, where there is no time to contact all the joint guardians, to be dealt with. Requiring collective decision-making by all joint guardians ensures that matters are properly discussed, but it may lead to deadlock and litigation. Given that the courts would try to appoint joint guardians who can work together and trust each other we tend to prefer allowing each guardian to act independently. Joint guardians should, however, be under a duty of consulting each other before one of them transacts with a third party. Emergencies would have to form an exception to the duty to consult. Supplementary provisions would be needed to empower the court or other body to rule on disputes between joint guardians and challenges to a guardian's authority by a third party.

2.69 The problem of who is going to look after the child after the surviving parent's death is of vital interest to parents of vital interest to parents of handicapped adult children. Joint tutors-dative have been appointed for this very purpose in Scotland. In a recent case a much younger close family friend was appointed along with the elderly mother.[116] Joint tutory is, however, not always an entirely satisfactory solution. The close family friend would be entitled to act while the elderly mother was alive. We are attracted to the idea of alternate guardianship – a guardian who takes over on the death or inability to act of the primary guardian. Alternate guardianship provides a direct solution to the question of succession and should not require much in the way of extra statutory provisions. We propose that:

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[112] 1986 Act, ss 23(5) and 34.
[113] Guardianship Act 1973, s 10 now replaced by s 2 of the Law Reform (Parent and Child)(Scotland) Act 1986.
[114] Trusts (Scotland) Act 1921, s 3. A majority may act if there are three or more trustees.
[115] 1986 Act, s 2(4).
[116] *Buchanan, Petr* 1989 (unreported). This has been followed in subsequent applications.

6. If personal guardianship is to be introduced:

(a) The court or other appointing body should be satisfied that the proposed guardian is suitable. The wishes of the disabled person should be taken into account insofar as is reasonable and practicable to do so.

(b) The personal guardian should be a single individual or two or more individuals, but it should not be competent to appoint a partnership, company, incorporation or local authority. Where joint guardians are appointed they should be required to consult among themselves except in an emergency. Any third party should be entitled to rely on a consent, approval or decision by any one joint guardian.

(c) It should be competent to appoint an individual to act as an alternate personal guardian. On the death, incapacity, removal or resignation of the guardian the alternate should become personal guardian without further procedure.

(d) It should be competent to appoint a named social worker from the regional (or islands) council's social work department as personal guardian. The named guardian would be required to exercise his or her functions personally.

Who can apply for a personal guardian to be appointed?

2.70 It is though that anyone with an interest may apply to have a tutor-dative appointed to a mentally disabled person.[117] An application for a mental health guardian can be initiated by the patient's nearest relative or a mental health officer.[118] However, the mental health officer, by refusing to sign one of the required recommendations that must accompany the application,[119] can prevent a nearest relative's application proceeding. Mental health officers are regional (or islands) council social workers with special training and skills in mental health.

2.71 In our view anyone with an interest should be entitled to apply for a personal guardian to be appointed to a mentally disabled person. This is the position in Alberta,[120] New Zealand[121] and Victoria.[122] What interest is sufficient should be left to be developed by the courts, but clearly it should not be confined to a pecuniary interest. Should some public body like a regional (or islands) council or the Mental Welfare Commission for Scotland be under a duty to apply if a personal guardian seems to be needed and no-one else is applying? Where a mentally disabled person's financial affairs are concerned the council has a duty to apply for a curator to be appointed where this seems necessary and no-one else is applying, while the Commission have a power to apply but are not under any duty to do

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[117] This was the position with tutors-at-law; Fraser, *Parent and Child*, p 654.
[118] Mental Health (Scotland) Act 1984, s 38(1).
[119] 1984 Act, s 37(3).
[120] 1976 Act, ss 1 and 2.
[121] 1988 Act, s 7.
[122] 1986 Act, s 19(1).

so.[123] A mental health office of the regional (or islands) council is under a duty to apply for guardianship if satisfied that such an application ought to be made. In Alberta the Public Guardian has a duty to apply,[124] in Victoria the Public Advocate may apply. New Zealand does not have a public authority as guardian of last resort. We proposed earlier[125] that it should be possible for a named official of the regional (or islands) council to be the guardian. Intervention by way of guardianship may be necessary to prevent exploitation or abuse and the council may be the only person willing or suitable to act. In these circumstances the council ought to be under a duty to apply for the appointment of a nominated official of the social work department or any other suitable person (a member of a voluntary organisation for example) as guardian. The Mental Welfare commission should have a power to apply in similar circumstances. The Commission might wish to intervene in a case where the council is unwilling to get involved.

7. If personal guardianship is to be introduced any person with an interest (including the regional (or islands) council and the Mental Welfare Commission for Scotland) should be entitled to apply to the court or other appointing body for a personal guardian to be appointed to a mentally disabled person. The council should be under a duty to apply where a personal guardian is needed and no other suitable person is applying.

Powers of personal guardians

2.72 A tutor-dative has all the powers a parent has over his or her pupil child[126] unless these powers are restricted by the court in making the appointment. In some of the four recent appointments the powers have been restricted by request of the petitioners to those available to partial or limited guardians under recent Commonwealth legislation. The limitation of powers to those necessary in any particular case is central to the new style of personal guardianship, based on minimum intervention and encouragement of maximum self-determination. However, in cases of complete or near-complete incapacity the guardian would have to have the full range of powers. It is a question of legislative technique how full and limited powers are best expressed.

2.73 The Albertan Dependent Adults Act 1976, as amended in 1985, provides that in appointing a guardian the court shall grant only such of the powers set out in the Act as are necessary.[127] The matters in respect of which the guardian can be given power and authority are:-

> "(a) to decide where the dependent adult is to live, whether permanently or temporarily;
>
> (b) to decide with whom the dependent adult is to live and with whom the dependent adult is to consort;
>
> (c) to decide whether the dependent adult should engage in social activities and, if so, the nature and extent thereof and matters related thereto;

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[123] Mental Health (Scotland) Act 1984, ss 92 and 93.
[124] 1976 Act, s 13.
[125] Proposal 6, para 2.69.
[126] Fraser, *Parent and Child*, pp 671-2.
[127] S 10.

(d) to decide whether the dependent adult should work and, if so, the nature or type of work, for whom he is to work and matters related thereto;

(e) to decide whether the dependent adult should participate in any educational, vocational or other training and, if so, the nature and extent thereof and matters related thereto;

(f) to decide whether the dependent adult should apply for any licence, permit approval or other consent or authorisation required by law;

(g) to commence, compromise or settle any legal proceeding that does not relate to the estate of the dependent adult and to compromise or settle any proceeding taken against the dependent adult that does not relate to his estate;

(h) to consent to any health care that is in the best interests of the dependent adult;

(i) to make normal day to day decisions on behalf of the dependent adult including the diet and dress of the dependent adult,

(j) any other matters specified by the court and required by the guardian to protect the best interests of the dependent adult."

The court can restrict, modify or add to any of the powers and grant them subject to conditions.[128] Most guardians are appointed with powers to consent to health care, where to live, and legal decision-making. Many private guardians apply for all the powers.[129]

2.74 The Victorian legislation provides for plenary and limited guardians. The plenary guardian has the same powers a parent has over his or her child,[130] including the power to decide where and with whom the person is to live, what sort of work (if any) the person may do, and the power to consent to health care. The Guardianship Board in making the appointment must choose the least restrictive order to achieve the necessary personal care and must not appoint a plenary guardian if limited guardianship would do.[131] Plenary order are very rare, accounting for less than 1% of order made.[132] The powers of a limited guardian are as specified by the Board in the order.[133] The powers of a plenary guardian or a limited guardian may be subject to specified conditions or restrictions.[134]

2.75 Yet another approach is exemplified by the New Zealand legislation. First, it provides for personal orders, an order in the field of personal welfare to deal with a particular situation. Personal orders are designed to solve a "one-off" problem which once solved should not require further intervention. Examples of personal orders are that the mentally disabled person shall receive specified medical treatment, shall enter, attend or leave an institution (other than a mental hospital), or shall be provided with specified

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[128] S 10(3).
[129] Information supplied by the Public Guardian of Alberta.
[130] 1986 Act, s 24(1).
[131] 1986 Act, s 22(4) and (5).
[132] Guardianship and Administration Board, *Annual Report 1987-88*, p 10.
[133] 1986 Act, s 25(1).
[134] 1986 Act, ss 24(3) and 25(2).

accommodation.[135] These orders could be used to sanction a major operation whose potential risks and benefits were fairly evenly balanced or to get an elderly incapable woman who could no longer manage in her own home into a local authority home or other institutional care. The court in New Zealand may consider appointing a welfare guardian only if it is satisfied that that is the only way of ensuring that the appropriate welfare decisions are made.[136] Where a welfare guardian is appointed he or she is given by statute all the powers normally required to enable him or her to make and implement personal welfare decisions in the areas specified by the court.[137] The court must make the least restrictive intervention possible.[138] Certain powers however cannot be conferred. These include decisions relating to marriage, divorce or adoption, refusal to consent to standard medical treatment, and consenting to medical experiments, brain surgery designed to change behaviour, or electro-convulsive therapy.[139]

2.76 We find the idea of personal orders attractive, in that they provide a solution for situations which may not require continuing personal guardianship. The same result could no doubt be achieved by appointing a personal guardian with only limited powers and then recalling the appointment once they had been exercised, but personal orders seem a neater solution. Moreover, making personal orders the solution to be first considered fits into the concept of minimum intervention better.

2.77 As far as the powers of a limited personal guardian are concerned we favour combining the Albertan and New Zealand approaches. A statutory list (as in Alberta) is useful in that it helps applicants and the courts to draw up the appropriate order. On the other hand courts might be reluctant to grant powers outwith the statutory list on the basis that the list indicated what Parliament had in mind when passing the legislation. Having no list and simply allowing the court to specify in the order appointing the guardian what powers are conferred (as in New Zealand) is legislatively simple. But this approach would give rise to considerable diversity in the wording of powers leaving third parties unsure of what authority a particular guardian had. Our preference would be for the appropriate authorities to draw up a list of powers likely to be frequently requested which would serve as styles. Such a list of styles would we envisage be produced after consultation with the courts, lawyers and those interested in the mentally disabled and would be published as guidance notes or possibly even as subordinate legislation. Adherence to the styles would not be required. Applicants and the courts would remain free to adapt the suggested wordings or use a completely different form. Nevertheless the existence of a list of styles would achieve some measure of uniformity.

2.78 The powers of a full personal guardian could either be enumerated or equated with the power parents have over their pupil children.[140] The latter is an attractive shorthand although referring to parental rights over children may lead some people to think of mentally disabled people as if they were children. Parental powers over pupils are reasonably well defined so that third parties dealing with full personal guardians would know whether or not any action or decision fell within the guardian's authority. The danger

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[135] 1988 Act, s 10(1).
[136] 1988 Act, s 12(2)(b).
[137] 1988 Act, s18(2).
[138] 1988 Act, s 8(a).
[139] 1988 Act, s 18(1).
[140] See our Discussion Paper No 88, *Parental Responsibilities and Rights, Guardianship and the Administration of Children's Property* (Oct 1990), Part II.

of an enumerated list is that some power a full guardian might find necessary would be omitted. It is noticeable that the Victorian Legislation when enumerating the powers of a plenary guardian also contains a catch-all provision in terms of parental rights.[141]

2.79 The New Zealand legislation contains a list of prohibited powers; powers that the court cannot confer upon the guardian. These include powers to take decisions relating to the entering into marriage of the mentally disabled person, dissolution of his or her marriage and the adoption of his or her children. The other prohibited powers relate to medical treatment and research and are considered in Part 3.[142] None of these powers are exercisable by others on behalf of a mentally disabled person at present nor would they be encompassed by reference to parental rights over pupil children. They might be inferred, however, from one or more of the generally stated guardianship powers. For example, in Alberta a guardian's powers may include powers to decide with whom the dependent adult is to live and whether the adult should apply for any license or approval.[143] It is thought that these powers do not give the guardian a veto over the adult's marriage, but the position is not clear.[144] Similarly, a power to commence proceedings on behalf of the mentally disabled person could be construed as conferring power to bring a divorce action. Decisions relating to marriage, divorce and adoption are perhaps so personal that they should be taken only by the individuals concerned. One prohibition ought to be expressly mentioned if the powers of a full guardian are equated with those of the parent of a pupil child. A parent has the right of reasonable chastisement. This would be wholly inappropriate in dealing with mentally disabled adults.[145]

2.80 Summing up the discussion in the preceding paragraphs we put forward the following proposal.

8. If personal guardianship is to be introduced:

(1) the court or other appointing body should, on application, have power:-

(a) to make one or more orders (called personal orders) to deal with a specific issue,

(b) to appoint a personal guardian (called a limited personal guardian) whose powers would be limited to those specified in the order,

(c) to appoint a personal guardian (called a full personal guardian) with the powers a parent has in relation to his or her pupil child.

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[141] 1986 Act, s 24(1).
[142] Paras 3.24 – 3.26.
[143] 1976 Act, s 10(a) and (f) quoted at para 2.73.
[144] Robertson, *Mental Disability and the Law in Canada,* p 144.
[145] Guardians under the Mental Health (Scotland) Act 1960 had the same rights as parents of pupil children, but s 29(6) expressly excluded the power of corporal punishment.

(2) In appointing a full or limited guardian the court should have power to modify the powers that would otherwise be conferred or grant them subject to conditions or restrictions.

(3) A full or limited personal guardian should not have power to make any decision relating to the entry into marriage of the mentally disabled person, the dissolution of his or her marriage or the adoption of his or her children or to inflict corporal punishment upon the mentally disabled person.

(4) The court or other appointing body should under a duty to choose the least restrictive remedy consistent with safeguarding the rights of the mentally disabled person and accordingly should not appoint a guardian unless one or more personal orders were insufficient to meet the needs of the mentally disabled person; and when appointing a guardian should specify the minimum number of powers necessary.

Duty to act and delictual liability of personal guardians

2.81 Should a positive statutory duty to act be imposed on personal guardians and should liability arise for failure to act where necessary? Tutors-dative are liable in damages if the mentally disabled person's estate suffers loss as a result of their acts or omissions. The standard against which tutors-dative are judged is that of an ordinary prudent person in respect of his or her own affairs.[146] Mental health guardians have statutory powers conferred upon them[147] but the legislation is silent as to their liability in exercising or failing to exercise those powers. The existing law of delict imposes liability on guardians in certain circumstances.

2.82 The Albertan legislation provides that:[148]

> "A guardian shall exercise his power and authority
>
> (a) in the best interests of the dependent adult, and
>
> (b) in such a way as to encourage the dependent adult to become capable of caring for himself and of making reasonable judgements in respect of matters relating to his person."

Similarly the Victorian Guardianship and Administration Board Act 1986 provides that[149] A guardian must act in the best interests of the represented person. New Zealand approaches the matter in a different way. Section 20(1) of the 1988 Act provides that:

> "No action shall lie against a welfare guardian in respect of anything done or omitted to be done by the welfare guardian in the exercise of powers conferred by or under

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[146] Fraser, *Paren and Child*, p 392.
[147] Mental Health (Scotland) Act 1984, s 41.
[148] Dependent Adults Act 1976, s 11.
[149] S 28(1).

this Act, unless it is shown that the welfare guardian acted in bad faith or without reasonable care".

The meaning of this provision is not entirely clear. Arguably a guardian incurs no liability for an omission to act even if he or she omits to do so in bad faith or negligently.

2.83 The type of personal guardianship proposed for Scotland should involve a fairly close and personal relationship between the guardian and the mentally disabled person. It might be thought reasonable that a guardian should be placed by statute under a general duty to look after the person's welfare and act where necessary. On the other hand such a duty would be onerous, especially if it were to be interpreted as requiring the guardian to keep the mentally disabled person's welfare under constant review. People might well be deterred from seeking appointment as personal guardians in view of the potential heavy liability for failure to exercise the powers. Suppose, for example, a daughter living near her mildly dementing mother was appointed personal guardian. Should the daughter be liable in damages if the mother falls in her own home and lies there unaided for a few days on the ground that the daughter should have visited her more frequently? We tend to think that a positive statutory duty to act should not be imposed. In our discussion paper on *Parental Responsibilities and Rights, Guardianship and the Administration of Children's Property* we used the concept of parental responsibilities rather than parental rights or parental obligations in order to avoid giving rise to new grounds of action for damages by children and other against parents.[150]

2.84 Legislation in terms of responsibilities rather than duties or obligations would not prevent a personal guardian from being liable for acts or omissions in the exercise of the responsibilities. Like parents in relation to their children or hospitals in relation to their patients, a personal guardian would have to take reasonable care to prevent the mentally disabled person from coming to harm or harming others. The question of liability could be left to the existing law of delict. The relationship of personal guardian and mentally disabled person would be such that a duty of care would be held to exist. On the other hand there is some benefit in putting the matter beyond doubt by means of a statutory provision. The case for a statutory provision becomes stronger if a similar formula is to apply to financial managers and attorneys in relation to personal welfare and financial management functions. We therefore propose that:

9. (1) If personal guardianship is to be introduced it should be provided that a guardian appointed to a mentally disabled person has a responsibility to safeguard and promote the person's welfare within the areas of personal welfare covered by the powers conferred on appointment.

(2) should a personal guardian's liability for exercising or failing to exercise the powers conferred be governed by

(i) the existing law of delict, or

a new statutory provision along the lines that a personal guardian should- be liable for exercising or failing to exercise the powers conferred only if he or she acted

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[150] Discussion Paper No 88, published October 1990, para 2.3.

without reasonable care or failed to act when it would have been reasonable to have acted?

Contractual liability of personal guardians

2.85 In what circumstances (if any) is a personal guardian to be personally liable for obligations he or she enters into on behalf of the mentally disabled person? By analogy with trustees a tutor is personally liable for any obligation undertaken to a third party unless there was a clearly expressed intention to bind the disabled person's estate only.[151] A reference to the obligant's capacity as tutor would generally be insufficient without words of limitation such as "as tutor". These rules seem appropriate to apply to personal guardians.

10. If personal guardianship is to be introduced any obligation to a third party entered into by a personal guardian within the scope of his or her authority should bind the mentally disabled person and not the guardian personally as long as it was made clear that the obligation was entered into in a representative capacity.

Manner of exercise of powers by personal guardians

2.86 The concept of limited guardianship requires that a guardian exercises the powers conferred by the court in the least intrusive way. Whenever possible, a guardian should advise and assist the person to make the decision rather than simply making it himself or herself. Even where the decision is made by the guardian he or she should be under a duty to consult with the person, family and carers and ascertain their wishes before making the decision. Where the mentally disabled person's financial affairs are managed by another person the guardian should also have to consult that person if the welfare decision has any financial implications in New Zealand the welfare guardian and the financial manager are required to keep in touch with each other and consult each other whenever a decision has to be made in one field which has implications for the other.[152] We think this approach should be adopted for Scotland. Neither the personal guardian nor the financial manager should be able to overrule the other. In the event of an irreconcilable dispute the court would have to adjudicate.

2.87 Within these constraints how should a personal guardian exercise the powers? Should it be according to the best interests of the disabled person objectively considered by a reasonable guardian or should the guardian make a decision according to what the disabled person would probably have decided if he or she was able to do so? The former, termed "best interests", is used in Scotland, England and Wales and most Commonwealth countries. The latter, termed "substituted judgement", is used in some states in America and has been recommended by the Law Reform Commission of the Australian Capital Territory.[153] The difference between these standards is shown by the following example. Suppose someone has been adamantly opposed to going into institutional care and constantly expressed the wish to be cared for at home. If he or she becomes incapacitated should the guardian decide on institutional care where that is now in the best interests of the incapacitated person or should the guardian decide that the person should remain at home even though the

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[151] Wilson and Duncan, *Trusts, Trustees and Executors,* pp 395-396.
[152] 19888 Act, ss 18(5) and 43(6).
[153] *Report on Guardianship and management of Property* No 52, (1989), para 2.7 and clause 13(1) of the annexed Bill.

standard of care would not be as good as in an institution? We tend to favour continuation of the "best interests" rule coupled with requiring the guardian to consult with and have regard to the wishes of the mentally disabled person, family and carers. The previously expressed views of the disabled person could and should be taken into account but should not override the judgement of the guardian as to the current best interests of the incapacitated person. We deal later with written instructions as to how personal welfare and medical treatment decisions should be taken after the writer's incapacity.[154]

11. If personal guardianship is to be introduced personal guardians should when exercising their powers do so according to the mentally disabled person's best interests. The personal guardian should be under a duty before exercising a power to consult so far as it is practicable to do so with the disabled person and his or her family or carers and any person appointed to look after his or her financial affairs, and have regard to any wishes expressed by the disabled person while mentally capable.

Supervision of personal guardians

2.88 Tutors-dative appointed by the court are under its general supervision, but the court's function is reactive rather than investigative. It will adjudicate on disputes between the tutor and others which are brought before it and may recall the tutor's appointment, on application by an interested person, if the tutor proves clearly unsuitable. The court does not however monitor the performance of the tutor not does it require a periodic report by the tutor. Tutors-dative are under the supervision of the Accountant of Court if they manage the estate and financial affairs of the incapacitated person.[155] Mental health guardians (but not tutors-dative) on the other hand are monitored by the Mental Welfare Commission for Scotland. Appointments are reported to the Commission which arranges for the person subject to guardianship to be visited by someone from the Commission. The regional (or islands) council also exercises general supervision. It is under a duty to visit people subject to guardianship at least once every three months and may where the guardian is not a council official call for reports and request information from the guardian.[156]

2.89 The first question is whether personal guardians need to be supervised at all. It might be said that the appointing authority assessed the suitability of the guardian before making the appointment so that in the absence of any complaint being made he or she should be left to get on with the job. Where the personal guardian is a parent, a spouse or some close member of the family he or she ought to be relied on to have the disabled person's best interests at heart. Too much supervision and monitoring might make personal guardianship too onerous and hence deter family members from applying. On the other hand the mentally disabled person by reason of his or her disability would be unable to monitor the actings of the personal guardian and would probably not be in a position to bring any complaint before the court. It would be all too easy for a guardian who was the disabled person's parent, husband, wife or other relative to misuse the powers. The very fact that some external body was keeping an eye on the guardian and could visit the

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[154] Paras 5.85 – 5.106.
[155] Judicial Factors Act 1849, s 25.
[156] Mental Health (Scotland) Act 1984, s 43(2) and the Mental Health (Specified Treatments, Guardianship Duties etc) (Scotland) Regulations 1984, SI 1984/1494.

disabled person at any time would act as a brake on guardians who were thinking of abusing their position. Some supervision and monitoring would also allay public anxiety about giving one person too much control over the life of another. An honest and trustworthy guardian should have no fear of being supervised.

2.90 The Mental Welfare Commission for Scotland is perhaps the obvious candidate for a supervisory authority given that it already supervises mental health guardians. The fact that the Commission is centralised with offices in Edinburgh only would not be a serious disadvantage for a supervisory authority. Other possible bodies are the Regional (or Islands) Council Social Work Departments or the Accountant of Court who would supervise any tutors-dative that were appointed with control over the person's finances.[157] The Social Work Department could hardly act as a monitor if an official of the same department had been appointed personal guardian. The Accountant in Court's office would have to change its nature quite considerably if it were to take on a supervisory role in the personal welfare field. We tentatively propose that:

12. If personal guardianship is to be introduced personal guardians should be subject to supervision by the Mental Welfare Commission for Scotland.

Remuneration of personal guardians

2.91 Should personal guardians be permitted to charge fees for acting as guardians? Neither tutors-dative nor mental health guardians are entitled to remuneration. This also seems to be the position in Alberta, Victoria and New Zealand as the relevant legislation makes no reference to fees or remuneration. The Saskatchewan Law Reform Commission, however, recommended that the court should have power to award a fee to a personal guardian.[158] We do not think that a personal guardian should be entitled to remuneration. Where the guardian is a local authority social worker, acting as guardian should simply be regarded as part of his or her official duties. Where the guardian is a relative the duties will normally be undertaken on the basis of affection and concern rather than with though to gain. Moreover, remuneration for personal services and attention would be difficult to quantify as it could hardly be worked out on the basis of value to the mentally disabled person and the services usually so time-consuming that payment based on a reasonable hourly rate would be unduly burdensome on mentally disabled people's estates.

2.92 In New Zealand all outlays reasonably incurred by a guardian in the exercise of his or her functions are payable out of the estate of the mentally disabled person unless the court orders that all or part of them should be borne by central government funds.[159] We are not in favour of a guardian's outlays being made directly chargeable on central government funds. Moreover, we think it is better to have fixed rules about reimbursement rather than leave the matter to the discretion of the court or other appointing body. Personal guardians who are individuals should be automatically entitled to reimbursement of all reasonable outlays. Any other rule would make it very difficult to find people to take on the task. Legal aid is at present available to meet the expenses of a petition for the appointment of a tutor-dative. The eligibility for legal aid is assessed on the resources of the mentally

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[157] Judicial Factors Act 1849, s 25. In current practice tutors-dative have so far been granted powers in the personal welfare field only, but see para 2.7 footnote 2.
[158] *Proposals for a Guardianship Ac, Part 1: Personal Guardianship* (1983).
[159] 1988 Act, s 21.

disabled person not those of the petitioner.[160] The same rule would no doubt be applied to applications for the appointment of a personal guardian.

2.93 A slightly different rule on recovery of outlays may be justified where the personal guardian is a social worker employed by the regional (or islands) council. The administrative expenses of guardianship (travelling, telephone calls and similar items) should be borne by the council as part of the cost of carrying out its social work functions. Money spent on providing items or services for the mentally disabled person should be recoverable from his or her estate if reimbursement would have been sought from a person without a local authority personal guardian. Should the expenses of an application for the appointment of a personal guardian be borne by the mentally disabled person's estate when the application is made by the regional (or islands) council? At present the expenses of a guardianship application under the Mental Health (Scotland) Act 1984 are not charged against the patient's estate. We are inclined to adopt this approach for personal guardianship applications although it could be argued that personal guardianship is for the benefit of the mentally disabled person and hence should be paid for out of his or her estate.

13. (1) If personal guardianship is to be introduced personal guardians should not be permitted to charge fees.

(2) A guardian should be entitled to reimbursement from the estate of the mentally disabled person of any outlays reasonably incurred in the exercise of his or her functions.

Views are sought on whether a regional (or islands) council should be entitled to reimbursement of the expenses of its application for appointment of a personal guardian or its administrative costs of acting as guardian.

Review of personal guardianship orders

2.94 The appointment of a personal guardian should obviously be capable of being altered or recalled if circumstances change later. Apart from this it is for consideration whether there should be any automatic periodic review in order to ensure that the powers and duties of the guardian continue to match the disabilities and needs of the mentally disabled person. A tutor-dative is appointed until further order of the court, although some of the modern petitions have sought appointment for a limited period only.[161] Mental health guardians on the other hand are appointed for 6 months initially. The appointment may be renewed for a further 6 months. After that further renewals are possible for periods of a year at a time.[162] The New Zealand legislation provides that the court must in appointing a welfare guardian specify a date, not more than 3 years after the date of appointment, by which the guardian is to apply for review of the order.[163] An order made after review lasts for a further period of up to 3 years or exceptionally 5 years. Alberta originally required a review every 2 years,[164] but now the period is 6 years.[165]

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[160] Civil Legal Aid (Scotland) Regulation 1987, reg 6A.
[161] *Morris* 1989 (unreported) 5 years, *Henderson* 1989 (unreported) 5 years.
[162] 1984 Act, s 47. Some appointments lapse through inadvertent failure to renew them.
[163] 1988 Act, s 12(8).
[164] 1976 Act s 8.
[165] Dependent Adults Amendment Act 1985.

2.95 A balance has to be struck between the extra work and expense occasioned by a mandatory review and the danger of letting a guardianship order stand even though it is no longer necessary for the protection of the disabled person. We tend to favour giving the court or other appointing body some flexibility in setting a review date, since the prognoses of mentally disabled persons vary so much. A mentally handicapped young adult, for example, may continue to improve so that frequent review would be helpful. On the other hand most severely demented people will never improve and a review would be a pointless formality. Any fixed review date is to some extent arbitrary, but since a fixed review date does not preclude an earlier application for review we tend to favour a fairly lengthy mandatory review date. We propose that:

14. If personal guardianship is to be introduced:

(a) an order appointing a personal guardian should terminate automatically on the date specified by the appointing authority in the order, being a date not later than give years after the date of the order.

(b) The court or other appointing body should have power to renew the guardianship order in its original terms or to vary it, and any renewal or varied order should last for the period specified by the court or other appointing body in the order.

(c) The automatic termination and powers of renewal or variation set out above should be without prejudice to the power of the court or other appointing body to vary or recall an order at any time on application by any person having an interest.

Directions to personal guardians

2.96 In New Zealand a welfare guardian may apply to the court for directions relating to the exercise of his or her functions.[166] A personal guardian may be faced with strong opposition to a proposed course of action and may wish to have the reassurance of an order from the court or other appointing body. It would be useful in these cases for the guardian to be able to apply for directions, although guardians should not be encouraged to apply every time they are faced with a difficult decision. We think title to apply should be extended to any person interested in the mentally disabled person's welfare. This would enable the regional (or islands) council, for example, to prevent what seems an unreasonable proposed course of action on the part of the guardian without having to take the radical step of seeking removal of the guardian. We propose that:

15. The court or other appointing body, on application by any person interested in the welfare of a mentally disabled person should be empowered to give directions to the personal guardian as to the exercise of his or her functions.

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[166] 1988 Act, s 18(6).

Automatic personal guardianship by relatives?

2.97 So far we have been considering personal guardianship in the context of appointment by some authority, such as a court. We turn now to consider whether personal guardianship should be conferred on an individual by virtue of his or her relationship to the mentally disabled person. The desirability of allowing a person to appoint in a document an individual to act in welfare matters in the event of the appointer's subsequent incapacity is discussed in Part 5 under the heading of personal welfare powers of attorney.

2.98 The arguments for guardianship by virtue of relationship are strongest in the case of the parents of a mentally disabled adult or the spouse of a mentally disabled man or woman. It would be possible to provide that a mentally disabled person's parents should automatically become his or her personal guardians with all necessary powers once the person was certified as mentally disabled and incapable of taking reasonable decisions in some or all aspects of personal welfare. This is a superficially attractive solution in that it is simple and costs nothing by way of legal expenses. The parents would simply continue in the same relationship towards their adult child as they did when the child was below 18. Nevertheless we do not think this would be an acceptable system. The European Convention of Human Rights proves that people should not be deprived of their civil liberties except by virtue of a court hearing or other judicial determination at which they have an opportunity to be heard and represented.[167] In the above system there is no independent check on the accuracy or otherwise of the certificates of the person's disability, the allegedly disabled person is given no opportunity of contesting the certificate and no attempt is made to match the powers of the parents as guardians to the needs of their "child". The vast majority of parents would, of course, operate the system properly and act in good faith, but sometimes mentally handicapped young adults need to be protected against their parents because not all act in the best interests of their children. It would be possible to meet some of these objections by providing that parental guardianship would continue only if the child was certified as being incapable after reaching 18 and that there was an independent assessment of the situation by some outside body such as the Mental Welfare Commission for Scotland or the local authority social work department. However, these refinements start to detract from the simplicity of the system yet fail to provide an opportunity for matters to be challenged and debated openly. We think it is essential to have appointments made by an independent decision-making authority with powers to consider all the evidence and hear all interested parties. We reject a husband's automatic guardianship of his wife and the other way round for the same reasons.

16. If personal guardianship is to be introduced an immediate relative (parent, child or spouse) of a mentally disabled person should not be that person's guardian simply by virtue of relationship. The relative should have to be appointed as personal guardian in accordance with the scheme set out in Proposals 5 to 15 above.

Testamentary personal guardians

2.99 A matter of particular concern to parents of mentally handicapped adults is who will look after their children after their death. In Scotland the parent of a pupil who is his or her

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[167] Art 6(1).

tutor can nominate in writing a testamentary tutor to exercise parental powers with respect to the child after the parent's death.[168] The testamentary tutor's powers however terminate when the child attains 18 years of age. Mississippi allows parents to appoint testamentary guardians to their mentally disabled adult children. The guardian must appear before the court and accept the nomination in writing. The guardian cannot act if the other parent is still alive.[169] Testamentary personal guardians would be a cheap and simple method of providing future guardians for mentally disabled sons or daughters. Parents would endeavour to select a suitable and willing person with whom the son or daughter had already established a good relationship. In many cases testamentary guardianship would no doubt work well.

2.100 We are not in favour of this approach. First, it seems wrong in principle for a parent who has not been appointed personal guardian of his or her mentally disabled adult child to confer that status on others. This objection could be met by confining the power to nominate testamentary guardians to those parents who had been appointed guardians. However, this would severely limit the scope and usefulness of testamentary nominations. Secondly, the mentally disabled person would become subject to guardianship without any independent assessment of his or her mental capacity, the need for guardianship, or the suitability of the testamentary nominee to be a personal guardian. Again these objections could be met by requiring an independent body (such as the mental Welfare Commission for Scotland or the local authority social work department) to assess the suitability of the nominated guardian and the mental capacity and needs of the mentally disabled person. These additional requirements make the originally simple proposition much more complicated. Moreover, the mentally disabled person would still have no opportunity of challenging the assessment or putting forward his or her own views. Guardianship seriously affects personal freedom and civil liberties of those subjected to it. We therefore are of the opinion that a guardian should be appointed only after an enquiry by a court or similar authority cognisant of the current mental state of the person in question and at which all interested parties have an opportunity to lead evidence and make representations.

2.101 Parents who wish to ensure that their mentally disabled child has a suitable personal guardian to look after him or her after their death could use joint or alternate personal guardianship described in paragraphs 2.67 and 2.69. Although testamentary nomination of a guardian should not in our view result in the nominee automatically becoming a personal guardian it might still have a useful function. The appointing authority would no doubt give considerable weight to the expressed views of the deceased parent(s). It would be possible to direct the appointing authority to appoint the nominee, in preference to any other applicant, provided he or she was suitable and all the other conditions for guardianship were met. We think it is better however to leave the appointing authority a completely free choice in the matter.

17. If personal guardianship is to be introduced a person nominated by a parent (whether or not the parent had been appointed personal guardian at the time of nomination) to be personal guardian of his or her mentally disabled adult child on the parent's death should not become the personal guardian simply by virtue of the nomination.

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[168] Law Reform (Parent and Child)(Scotland) Act 1986, s 4.
[169] Mississippi Code Annotated, s 93.13.7 and 11.

PROTECTION FROM SEXUAL EXPLOITATION

2.102 Section 106 of the Mental Health (Scotland) Act 1984 seeks to protect mentally disabled females by creating three offences. First, it is an offence for a man to have unlawful sexual intercourse with a "protected" female. Unlawful in this context means outwith marriage.[170] The second offence consists of procuring or encouraging a protected female to have unlawful intercourse. The third offence occurs when an owner, occupier of manager or premises induces a protected female to be on the premises for the purposes of unlawful intercourse. A female is protected[171] if she is:

> "suffering from a state of arrested of incomplete development of mind which includes significant impairment of intelligence and social functioning".

It is a defence to any of the three offences that the person did not know and had no reason to suspect that the female was protected.[172]

2.103 Section 107 makes it an offence for a hospital or nursing home employee or manager to have unlawful intercourse with an in-patient or resident requiring treatment for mental disorder or to have unlawful intercourse with an out-patient on the premises. It is also an offence for a man to have unlawful intercourse with a woman suffering from mental disorder who is subject to his guardianship, under his custody or care, in the care of a local authority under the Social Work (Scotland) Act 1968 or resident in a house provided by the local authority under the 1968 Act. Again it is a defence that the man did not know and had no reason to suspect that the woman was suffering from mental disorder.[173]

2.104 Section 106 stems from the Criminal Law Amendment Act of 1885 via the Mental Deficiency and Lunacy (Scotland) Act 1913 and the Mental Health (Scotland) Act 1960. Over the intervening century there have been considerable changes in the way mentally disabled people and their sexuality are regarded. It is now recognised that most mentally disabled people are as physically mature as other and have the same sexual needs and drive. The present law is open to criticism in that it can have an inhibiting effect in the field of sexual relations on mentally disabled people and those responsible for them. For example, the hospital staff may discover that two of the patients have developed an intimate relationship with each other which may have already resulted in intercourse or is likely to do so. Giving advice about sexual feelings and relationships and how to handle them, or providing contraceptives could lead to a charge of "procuring or encouraging" sexual intercourse with a protected female. Yet supporting a warm and loving relationship may considerably enhance the quality of life of the patients involved. It may be that the courts would take the same view of professional counselling as the House of Lords did in the case of *Gillick v West Norfolk & Wisbech Area Health Authority*[174] where Lord Scarman said in relation to a doctor giving contraceptive advice to a girl under 16:

> "The bona fide exercise by a doctor of his clinical judgement must be a complete negation of the guilty mind which is an essential ingredient of the criminal offence of aiding and abetting the commission of unlawful sexual intercourse."

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[170] *Henry Watson* (1885) 5 Couper 696.
[171] 1984 Act, s 106(6).
[172] 1984 Act, s 106(2).
[173] 1984 Act, s 107(2).
[174] [1986] AC 112, at p 190.

However, the uncertainty in the present law can inhibit the provision of proper advice and help. Another example of a possible contravention of section 106 may occur in the provision of sheltered or hostel accommodation. A mentally handicapped woman living in one of the flats forms a strong attachment to a man. They wish to live together in her flat. Allowing this leaves the owner or manager of the accommodation open to the charge of inducing the woman to be on the premises for the purpose of unlawful sexual intercourse.

2.105 The definition of a "protected" female is also open to criticism. A woman suffering from mental illness which occurred after childhood is arguably not "suffering from a state or arrested or incomplete development of mind". The other part of the definition "significant impairment of intelligence and social functioning" also leads to difficulties. A mentally disabled person may be significantly impaired in some aspects of social functioning but not in sexual matters or the other way round. Claiming exemption from payment of the personal community charge may have unforeseen and drastic consequences on the claimant's sexual life. Exemption is granted if the person suffers from "severe impairment of intelligence and social functioning"[175] so that a female exempt from paying community charge automatically becomes protected under section 106 of the Mental Health (Scotland) Act 1984. Another more technical defect is that section 106 only criminalises sexual intercourse and not other sexual practices.

2.106 Section 106 does not protect mentally disabled men from sexual intercourse or other sexual practices with women. Nor does it protect mentally disabled women from homosexual activities. Men are protected to some extent from homosexual activities under the common law,[176] since such practices are only "decriminalised" if they take place in private between two consenting males over the age of 21[177]. Some mentally disabled men will lack the capacity to consent, but many may have sufficient capacity to consent yet lack full understanding of what is involved.

2.107 Section 107 is also not free from defects. It is arguable that the extra offences of intercourse with mentally disabled patients or persons in care are unnecessary. Such circumstances, amounting to a breach of professional relationship, could be regarded as aggravating circumstances for the basic offences in section 106. Furthermore, criminalising intercourse with a woman mentally disordered to any degree simply because she is in local authority care or resident in a local authority home provided under the provisions of the Social Work (Scotland) Act 1968 seems too sweeping a prohibition.

2.108 Very similar provision to sections 106 and 107 exist in England and Wales in the Sexual Offences Act 1956. These were reviewed by the Criminal Law Revision Committee in a Working Paper published in 1980. The Committee in their Working Paper put forward for comment the suggestion that sexual intercourse with protected females should cease to be a criminal offence and that protection should be provided for women at risk of exploitation by means of civil procedures. A specified man could, on application to the court, be interdicted from having intercourse with the woman in question. The committee's later report[178] rejected this approach as failing to provide sufficient protection in that only intercourse with the specified man or men would be prohibited.

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[175] Abolition of Domestic Rates Etc (Scotland) Act 1987, s 8(9).
[176] Gordon, *Criminal Law*, (2nd edn) paras 36.17 to 36.21.
[177] Criminal Justice (Scotland) Act 1980, s 80.
[178] Fifteenth Report (1984), Cmnd 9213, para 9.3.

2.109 In the Republic of Ireland section 4 of the Criminal Law Amendment Act 1935 makes it an offence for a man to have "unlawful carnal knowledge of any woman or girl who is an idiot or an imbecile or is feeble minded". The Law Reform Commission of Ireland recently published a report[179] on this and allied provisions in view of the criticisms (similar to those of sections 106 and 107 of the Mental Health (Scotland) Act 1984) of these provisions and their outdated and offensive terminology. Among the Commission's main recommendations was that it should be an offence to have unlawful intercourse with a person who was mentally disabled to such an extent that the person is incapable of guarding himself or herself against exploitation.

2.110 Arguably sections 106 and 107 of the Mental Health (Scotland) Act 1984 reflect outdated ideas of sexual matters involving mentally disabled men and women. Clearly sexual intercourse and other sexual practices carried out without the consent of the mentally disabled person, or where the person lacks capacity to consent, must remain offences. The difficult area concerns those people who have some capacity but do not have full understanding. As in so many other areas concerning the mentally disabled, it is a question of balancing protecting them against exploitation and abuse against allowing them to live as normal a life as possible. We tend to think that the mischief to be addressed is not sexual intercourse or other practices in themselves but sexual exploitation and abuse. Mentally disabled people, like young teenagers, often lack the necessary understanding and discretion to protect themselves and should be protected by the criminal law. As at present not only the perpetrators should be punished but also those who encourage them or facilitate the commission of offences. We do not put forward detailed proposals for reform but seek views on the following question.

18. Should sections 106 and 107 of the Mental Health (Scotland) Act 1984 be replaced by provisions which make it an offence for a person to have unlawful sexual intercourse or indulge in sexual activities with a mentally disabled person in circumstances which amount to exploitation or abuse?

LEAVE OF ABSENCE

2.111 Section 27 of the Mental Health (Scotland) Act 1984 permits the responsible medical officer to grant leave of absence from the hospital to any patient liable to be detained. It is established good clinical practice to let detained patients whose conditions have improved as a result of treatment out of hospital for periods. 288 patients were granted leave of absence from Scottish hospitals in 1990.[180] Some hospitals made extensive use of leave of absence, others hardly used it at all. There is no time limit for leave of absence in Scotland.[181] 36% of patients on leave of absence had been away from hospital for more than six months and 8 patients had been on continuous leave of absence for more than two years. Patients can be recalled to hospital by the responsible medical officer if he or she feels that "it is necessary to do so in the interests of the health or safety of the patient or for the protection of other persons ...".

2.112 The recall from leave of absence procedure may be criticised in that recall is a clinical decision of the responsible medical officer and no reasons for recall need be given to the

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[179] *Report on Sexual Offences against the Mentally Handicapped* (LRC 33 – 1990).
[180] The statistical information in this paragraph was supplied by the Mental Welfare Commission for Scotland.
[181] In England and Wales the Mental Health Act 1983, s 17(5) allows leave of absence for up to 6 months.

patient. To a patient, particularly one who has been on leave of absence for an extended period, recall may seem arbitrary. However leave of absence with the possibility of immediate recall may be medically preferable to discharge with the possibility or redetention. A relapse occurring while the patient is out of hospital may lead to irreversible deterioration of the patient's mental condition if not treated promptly. Irreversible deterioration may well occur if one has to wait until detention becomes "urgently necessary" so that the emergency detention procedures in section 24 can be used. A patient who thinks recall is unjustified is not without a remedy. He or she may apply for discharge from hospital under section 33 or 34 or for judicial review of the recall.[182]

2.113 Some patients whose mental disorder has been alleviated by treatment as detained patients in hospital may be released on leave of absence. Provided they continue to take the medication prescribed their condition should not deteriorate and they are unlikely to be recalled. Many mentally disordered patients have no insight into the fact that they are mentally disordered. Once they feel better as a result of treatment they will refuse to take their medication. It may then be necessary to get them back into hospital before irreversible damage is done by a relapse. The provisions for leave of absence with the possibility of being recalled is not without difficulties in view of the wording of section 27(6). This provides that a patient shall not be recalled after he or she "has ceased to be liable to be detained" under Part V of the mental Health (Scotland) Act 1984. In connection with an application for discharge it has been held that a patient is not liable to be detained unless at least some in-patient treatment in hospital is actually required at the date of the hearing.[183] A patient on leave of absence is arguably no longer liable to be detained if he or she continues to take the prescribed medication because in-patient treatment is not actually appropriate but is only potentially appropriate should the medication be discontinued. Giving a personal guardian powers to ensure that the patient continues to take prescribed medication might avoid these problems. The hospital would discharge the patient but apply for a personal guardian to be appointed with appropriate powers. Should the patient stop taking the medication or should his or her mental condition deteriorate for another reason the guardian could use the power to decide the place of residence to return the patient to hospital. We invite views on the following questions.

19. (1) Would giving powers to a personal guardian to ensure that a patient who had been detained but was discharged continued to take medication or other treatment prescribed for his or her mental disorder be a useful alternative to the leave of absence and recall provisions in section 27 of the Mental Health (Scotland) Act?

(2) Should the leave of absence and recall provision be otherwise amended?

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[182] *R v Hallstrom and Another ex parte W, R v Gardner and Another ex parte L* [1986] 2 WLR 883.
[183] *AB and CB v E* 1987 SCLR 419.

Part 3 Medical Treatment and Research

3.1 This Part looks at the problems associated with medical treatment for the research on mentally disabled persons, and organ transplants where they are the donors. Medical treatment is used in a wide sense to include surgery, dental treatment, prescribing and giving drugs, as well as any preliminary examination, and "doctor" means any person giving treatment.

3.2 Treatment of patients detained under the Mental Health (Scotland) Act 1984 is regulated by Part X of the Act. These provisions may be summarised as follows. A patient may be treated for his or her mental disorder without consent (section 103). A patient may also be given urgent treatment for any condition without consent or a second opinion (section 102). Electro-convulsive therapy and medicines for mental disorder given for a period in excess of 3 months require either the patient's consent or a second opinion (section 98). Psychosurgery and implantation of hormones to reduce male sex drive require the patient's consent and a second opinion (section 97). The proposals put forward in this Part do not apply to situations governed by Part X of the 1984 Act.

3.3 The effect of written directions as to the writer's future health care after incapacity is considered along with health care powers of attorney in Part 5.

MEDICAL TREATMENT

The present law

3.4 The starting point is that persons of full capacity are entitled to decide what treatment, if any, they will have. The invasion of a person's bodily integrity by treatment that he or she has not consent to (or that has not otherwise been authorised) amounts to a criminal offence and a civil wrong.[1] As far as the criminal law is concerned any attack upon the person of another is an assault. Gordon states:[2]

> "There need not be substantial violence, and indeed an extremely trivial attack is sufficient. It is an assault to slap someone on the back, even perhaps to tap him on the shoulder, and to spit on someone is an assault in the eyes of the law".

Consent of the patient is generally a defence even where, as in surgery, the injuries will be substantial and may cause death. While there may be treatment that cannot be validly consented to (drugs designed to kill a patient who no longer wishes to live, for example) consent is available as a defence where the treatment is performed by recognised practitioners acting in accordance with accepted professional practice.[3] Assault is also a civil

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[1] *S v S* [1970] 3 All ER 107, Lord Reid at p 111; *W v Official Solicitor* [1972] AC 24, Lord Reid at p 43.
[2] *Criminal Law* (2nd edn), para 29-01.
[3] Gordon, *Criminal Law*, (2nd edn) para 29-40.

wrong and again consent is generally available as a defence. Consent for civil and criminal purposes may be express or implied from the fact that a patient allows himself or herself to be treated.[4]

3.5 The capacity of a patient to give an effective consent depends on his or her ability to comprehend, from information supplied by the doctor or others, the nature of the proposed treatment and its effects and risks, to come to a decision and to communicate that decision to the doctor. The ability of individuals to carry out these steps varies enormously, even among the general adult population. For consent to be effective the patient does not need to have been given an exhaustive evaluation of the treatment. In particular, minimal risks need not be mentioned. What is required is that the patient is informed in broad terms of the nature of the proposed treatment.[5]

3.6 Many mentally disabled patients have capacity (albeit limited) to understand the proposed treatment and hence can give an effective consent to it. There is a presumption in favour of capacity,[6] so that a doctor will be justified in regarding a patient as mentally incapable of giving consent only if an examination or previous medical history shows this to be the situation. A voluntary patient in a mental hospital or even a patient detained there under the Mental Health (Scotland) Act 1984 may be able to consent.[7] A mentally disabled patient should be given a "broad terms" explanation of the proposed treatment and his or her consent to it obtained, if the doctor is of the opinion that the patient is capable of understanding what is proposed. The rest of this Part deals with those mentally disabled patients who are incapable of understanding even a broad terms explanation and so are unable to give an effective consent.

3.7 Treating patients without their consent is justified in certain circumstances. Where a patient is unconscious, drunk or otherwise incapable of giving consent and is not known to have objected to receiving treatment it is widely accepted that doctors may give treatment which it would be unreasonable to postpone until the patient regained capacity to consent to it.[8] Section 102 of the Mental Health (Scotland) Act 1984 allows certain categories of urgent treatment to be given to most detained patients without their consent or a second opinion. Clearly this practice of giving "emergency" or "necessary" treatment should be allowed to continue. However the way in which we have framed our proposals dealing with treatment for the mentally incapable does not depend on distinguishing between treatments which it is unreasonable to postpone and those which it is merely inconvenient to postpone.

3.8 Recently in F (*Mental Health: Sterilisation*),[9] the House of Lords clarified the law relating to treatment of mentally incapacitated patients in England and Wales. F's case concerned the sterilisation of a 35 year old woman resident in a mental hospital who had the mental capacity of a very young child. Sterilisation was regarded as being in her best

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[4] *Thomson v Devon* (1899) 15 Sh Ct Rep 209.
[5] *Chatterton v Gerson* [1981] QB 432. Failure to give an adequate explanation will not invalidate the consent, but may lead to the doctor being liable in damages for negligence, *Bolam v Friern Hospital management Committee* [1957] 2 All ER 118.
[6] *Lindsay v Watson* (1843) 5D 1194.
[7] Ss 97(2) and 98(3). Certain treatments can be given only if the patient consents.
[8] Hoggett, *Mental Health Law*, (2nd edn) p 202; Mason and McCall Smith, *Law and Medical Ethics*, (2nd edn) p 143; Skegg, *Law, Ethics and Medicine*, pp 101-106; Ward, *The Power to Act*, pp 59-60. *Devi v West Midlands Regional health Authority* (1981) Court of Appeal (unreported); see also the Canadian cases *Marshall v Curry* [1933] 3 DLR 260 and *Murray v McMurchy* [1949] 2 DLR 422.
[9] [1990] 2 AC 1. The case is also reported as *F v West Berkshire Health Authority* [1989] 2 All ER 545.

interests because she was having a sexual relationship with a fellow inmate. Pregnancy and birth of a child would, the doctors considered, cause her severe psychological harm. Other contraceptive methods were considered inappropriate. It was held that doctors were entitled under the common law to give treatment to patients who were incapable of consenting. As Lord Brandon[10] said:

> "... a doctor can lawfully operate on, or give other treatment to, adult patients who are incapable, for one reason or another, of consenting to his doing so, provided that the operation or other treatment concerned is in the best interests of such patients. The operation or other treatment will be in their best interests if, but only if, it is carried out in order either to save their lives or to ensure improvement or prevent deterioration in their physical or mental health."

Provided the proposed treatment is accepted as appropriate to the patient's circumstances by a responsible body of medical opinion skilled in the particular field concerned it will be regarded as in the best interests of the patient.[11] English law does not have any person[12] capable of taking medical treatment decisions on behalf of a mentally incapacitated adult so the House of Lords invoked the doctrine of necessity to declare non-consensual treatment in the patient's best interests to be lawful. The decision would probably be followed in Scotland even though the alternative exists of appointing a tutor-dative with power to consent to treatment.[13]

3.9 The British Medical Association has recently issued guidelines[14] on medical treatment for incapable adults pending any reform of the existing law. In all cases any views the patient expresses should be taken into account even though he or she is incapable of consenting to medical treatment. For serious treatments the doctor should:

(a) discuss the proposed treatment with the health care team, relatives or friends of the patient who have an interest in his or her wellbeing and any other professional involved in the patient's care; and

(b) obtain a second opinion from a doctor skilled in the particular treatment proposed.

A second opinion need not be obtained for non-serious treatments. Treatment may be given without recourse to the above procedures in an emergency. Serious treatment is defined as having one or more of the following characteristics:

(a) any treatment that contemplates an irreversible change in the patient;

(b) any treatment that is a serious hazard;

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[10] At p55.
[11] P 68, adopting the test of negligence laid down in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 as applicable to the lawfulness of non-consensual operations.
[12] The courts in England and Wales have no power to consent on behalf of patients following the abolition of the protective "*parens patriae*" jurisdiction in 1960.
[13] In *Usher's* CB, *Petr* 1989 (unreported) a tutor-dative was appointed for the purposes of consenting to a major operation.
[14] *Medical Treatment and Incapable Adults Interim Guidelines for the Medical Profession* by the Medical Ethics Committee and the Mental health Committee of the British Medical Association (October 1990).

(c) any experimental treatment and all types of research;

(d) any intervention which as a consequence may shorten the life of the patient;

(e) any long term regime/intervention designed to effect a change in the mood or behaviour of the patient;

(f) any treatment, notwithstanding that it does not possess one or more of the above characteristics which should be regarded as serious."

Proposals for reform

3.10 As noted above, the position in Scotland is probably that doctors can lawfully treat a mentally disabled adult patient (who is incapable of giving an informed consent and has had not tutor-dative appointed) without obtaining any other consent where the treatment is in the best interests of the patient. We consider first normal or uncontroversial treatment and leave sterilisation and other controversial treatments or treatments carrying severe risks until later.[15] It may well be that no reforms are needed. It can be argued that doctors should be trusted to treat patients in a responsible and humane manner. The medical profession and other allied professions have strict ethical codes and are subject to disciplinary bodies which will react to complaints and take appropriate action. These may be sufficient to check any abuse. Moreover, there is a danger that too much legal intervention in the field of treatment may stifle initiative by doctors and lead to defensive medical practice. It would probably also lead to greater delays in treating patients and place additional burdens on hospital administrators.

3.11 Even if there is to be no change in the substance of the law should the present common law rules and practice be set out in statute? Many people, medical and lay, will be unaware of the recent changes in the law. New legislation with its attendant publicity would alert people to the current position. Statutory provisions are easily accessible and can be readily pointed to as a source of authority by those concerned in treating mentally disabled persons. Moreover, as far as Scotland is concerned, legislation would enable the rules in F (*Mental Patient: Sterilisation*)[16] to be incorporated into Scots law, so removing the slight uncertainty as to whether Scottish courts would follow this English decision. We invite views on the following question.

20. On the basis that the existing law relating to patients mentally incapable of consenting to medical treatment is not to be changed should it be set out in legislation or left to the present common law rules and practice?

3.12 Another view is that decisions as to treatment should not simply be left to doctors. First, doctors are rarely in possession of all the facts about a patient's situation and without full information may find it difficult to decide which of the various courses of action would be in the best interest of the patient. Secondly, it may be felt undesirable that the person proposing to treat a patient also has the power to decide whether or not such treatment should be given. Thirdly, to have decision taken by doctors alone ignores the interests of the patient's family and the valuable contributions they make to the patient's welfare. The

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[15] Para 3.23.
[16] [1990] 2 AC 1.

family may after all have to cope with the patient after he or she is discharged from hospital and may or may not be prepared to take the risk of deterioration in order to gain the benefit of a probable substantial improvement in the patient's condition. Finally, it is perhaps asking too much of doctors to require them to shoulder the burden of making treatment decisions single-handedly. Current practice recognises these points to a certain extent. Doctors often discuss proposed recognises these points to a certain extent. Doctors often discuss proposed treatment with the patient's family and other involved with the patient's welfare and care.[17] As far as surgery is concerned consent is generally sought from a close relative of the patient.

3.13 One possible way forward would be to require some other person to give a legally valid consent on behalf of a patient who is mentally incapable of consenting. We have no hesitation in rejecting the idea that the courts, the Mental Welfare Commission for Scotland or any other organisation should be required to give proxy consent to any proposed medical treatment on behalf of mentally disabled patients before it could be carried out. None of these bodies could cope with the deluge of applications for consent. Necessary treatment would be delayed and made more expensive by any such requirement. Moreover, doctors' professionalism would be downgraded and they might come to be regarded simply as technicians carrying out the orders of the authorising bodies. This is not to say that the courts should have no role in treatment decisions. Where there is disagreement as to whether proposed treatment is in the best interests of a particular patient the courts could be called on to give a decision.[18] Such cases should be uncommon. We reject also the notion that a tutor-dative or personal guardian should have to be appointed in all cases to consent to medical treatment. This would be extremely expensive and time consuming. The role of an existing tutor or guardian is discussed later.[19] In our view if persons other than doctors are to be required to be involved in treatment decisions (and there are strong arguments for leaving treatment decisions to doctors), the only feasible candidates are the patient's near relatives and / or those caring for the patient.

3.14 A patient's near relatives or carers could be involved in treatment decisions by being required to consent to any proposed treatment or by being consulted and their views taken into account. Requiring doctors to obtain the consent of near relatives of a mentally disabled patient before treatment could be lawfully administered arguably protects patients more effectively than a requirement to consult relatives. But mandatory consent has many disadvantages. First, there would have to be exceptions for emergencies and minor or routine health care. Secondly, some relatives do not wish to become involved in treatment decisions, their interests may not coincide with those of the patient or they may have exploited or abused the patient. Thirdly, provisions would have to be made for those cases where there were strong differences of opinion amongst the patient's relatives, either by way of rules of precedence or intervention by a court or other body. Finally, the relatives may unreasonably withhold consent forcing the doctors to abandon the treatment proposed or to go to a court or other body for authority to treat in spite of the relatives' withholding of consent. The alternative approach of requiring the patient's near relatives to be consulted in so far as it is reasonably practicable to do so avoids these problems. It leaves doctors free to use their professional judgement after taking the relative's views into account. Another advantage of this approach is continuity since it generally represents what is good practice

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[17] See the Interim Guidelines discussed in para 3.9.
[18] See para 3.29.
[19] See para 3.15.

at present. Doctors may wish to consult people with an interest in the patient's welfare other than his or her near relatives. There would be no bar to their doing this but they would be only under a duty to consult near relatives.

3.15 Should the position be any different where a tutor-dative or personal guardian has been appointed? The arguments for requiring a consent from such an appointee are stronger than those for requiring consent from a relative. It could be reasonably assumed that the tutor or guardian was interested in the patient's welfare and had not abused the patient. Moreover, the problems associated with differences of opinion amongst relatives would not arise in the case of a single tutor or guardian or even in the case of joint tutors or guardians since we have proposed that a doctor or any other third party would be entitled to rely on a consent given by one of two or more joint guardians.[20] Even with tutors or guardians however we tend to think that a proxy decision maker should have no veto treatment by withholding consent. The analogy with parents and young children is perhaps helpful. Parents have the power to consent to treatment proposed for their young children where such treatment would be in the child's best interests. Where a parent withholds consent the court may overrule a parent if the withholding of consent is unreasonable. Obtaining a court decision may take too long and the current advice issued to doctors by the Scottish Home and Health Department is that doctors may proceed if they get a second opinion that the child's life is in danger if the treatment is not given and the parents acknowledge that the danger has been explained to them and that they still withhold consent.[21] In our view tutors and guardians should like relatives, simply have the right to be consulted by doctors and their views taken into account.

3.16 In order to ensure that the views of near relatives, tutors or guardians were informed the doctor would have to give them sufficient information about the patient's condition, the proposed treatment and its effects. The rules relating to confidentiality of information about patients might have to be amended.

3.17 If doctors providing treatment for mentally disabled patients are to be required to consult near relatives (or contrary to our present thinking required to obtain their consent) then it would in our view be helpful for the legislation to state which relatives should be consulted and in what order. The Mental Health (Scotland) Act 1984 contains detailed provisions about relatives in connection with compulsory admission to hospital or guardianship. Section 53(1) provides that "relative" means:-

(a) Spouse.

(b) Child.

(c) Father or mother.

(d) Brother or sister.

(e) Grandparent.

(f) Grandchild.

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[20] See Proposal 6 at para 2.69.
[21] NHS Circular 1975 (GEN) 81.

(g) Uncle or aunt.

(h) Nephew or niece.

Briefly the nearest relative is the first listed relative who is caring for the patient or was caring for the patient before admission to hospital or guardianship.[22] If no relative is or was caring the first listed relative is the nearest relative (and within the class of children or siblings priority depends on age).[23] Relatives not resident in the UK, spouses living apart and persons under 18 are disregarded.[24] A spouse includes a cohabitant.[25] The sheriff may appoint one of the other relatives or any other person to act as nearest relative on cause shown.[26]

3.18 We tend to think these provisions are unduly complex for the purposes of medical treatment. Our preference is for a simpler scheme if a relative's views are to be sought or consent required. The scheme would operate as follows. The spouse (or cohabitant), an adult child, a parent, or a brother or sister of a mentally disabled patient should be authorised to give views or consent on his or her behalf. The doctor should contact the relatives in the above order. Thus in the case of a married patient the husband or wife would normally be contacted, in the case of an elderly dementing widow(er) one of his or her children, and in the case of a mentally handicapped young adult his mother or father. The nearest relative however may be unavailable or may be unwilling to deal with the request. The doctor should then be entitled to approach the next nearest relative. If there are no relatives within the statutory list, or none of them are reasonably easily contactable, the doctor should be entitled to proceed with the treatment. What would be regarded as reasonable would depend on the urgency of the situation. Treatment might have to be given in an emergency without contacting any relatives.

3.19 The problem of unsuitable nearest relatives is not an easy one to solve. For example, the patient's husband, wife, son or daughter may be estranged from the patient or may have financially exploited or physically abused him or her. There would be no way of preventing such a relative from consenting to, or giving views on, the treatment proposed for the patient. The problem is more acute if consent is to be required. A possible solution would be to empower the court or other body to disqualify an unsuitable relative. If the doctor is merely required to consult and take views into account he or she could discount an inappropriate relative's views, provided he or she was aware of the situation.

3.20 We are not in favour of permitting close friends, persons caring for the patient, or proprietors of institutions in which the patient is normally resident to give consent on his or her behalf because of the difficulty in defining these classes of person and ensuring that they have a sufficient interest in and knowledge of the patient. Their views could in appropriate cases be sought and be taken into account by the doctors concerned but there should be no statutory obligation to do so.

3.21 We invite views on the following proposal and question.

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[22] S 53(3).
[23] S 53(3).
[24] S 53(4).
[25] S 53(5).
[26] S 56.

21. (1) Where a patient is mentally incapable of consenting to treatment doctors should be entitled to give treatment which is appropriate according to their clinical judgement after consulting, so far as is reasonably practicable, the nearest relative of the patient. The doctors may also consult others with an interest in the patient's welfare. The doctors should be required to have regard to the views expressed by those consulted.

(2) A patient's nearest relative should be the first person reasonably available on the following list:

(a) husband, wife or cohabiting partner

(b) a child over 18 years of age

(c) a parent

(d) a brother or sister

(3) should the court or other body be empowered to disqualify a relative if satisfied that he or she is unsuitable to be consulted?

Role of the court

3.22 In the previous section we suggested that the courts should not be routinely involved in approving or refusing to approve medical treatment proposed for patients who lack the mental capacity to consent to it. This is not to say that the court should have no part to play in medical treatment decisions. This section deals with two areas, treatments which are controversial and those where there is serious disagreement between the doctors and others about the treatment, where we think intervention by the courts might be useful. If mental health tribunals or mental health hearings are to be set up to deal with applications relating to the personal welfare and financial affairs of mentally disabled people,[27] these bodies could also deal with applications relating to controversial or disputed medical treatment. The term "court" is to be understood to include a tribunal or hearing.

3.23 **Automatic referral of controversial treatments?** Many jurisdictions have recently introduced new laws or practices to ensure that specified treatments have to be approved by a court before it can be administered. The justification for involving the courts is that the specified treatments are so controversial that the need for such a treatment being given to persons mentally incapable of consenting to it should be examined in a public forum where opposing views can be presented and evidence tested and evaluated. The decision to use such treatment should not simply be left to the doctors and the patient's family; there is a public interest in monitoring their use and protecting those unable to protect themselves.

3.24 In England and Wales in F (*Mental Patient: Sterilisation*)[28] it was strongly suggested that sterilisation and perhaps other controversial operations on mentally incapacitated patients should be referred to the court for approval. Operations where sterilisation is an incidental result but which are performed for a genuine therapeutic reason need not be

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[27] See Part 6.
[28] [1990] 2 AC 1.

referred.[29] Abortions need not be referred.[30] Germany requires consents by the patient's guardian and the Guardianship Court to any treatment carrying a risk of death or severe injury.[31] Where sterilisation is proposed the procedures are even more strict due in part to the forced sterilisation programme carried out during the Nazi period.[32] New Zealand prohibits certain treatments altogether. These are psycho-surgery (brain surgery for the purpose of changing a patient's behaviour) and electro-convulsive therapy.[33] Victoria makes it a statutory requirement that major medical procedures (as specified in regulations) have to be approved by the patient's guardian and the Guardianship Board.[34] The major medical procedures so far specified are sterilisation, abortion and tissue donation.

3.25 In Scotland there is no statutory or common law requirement that certain treatments require consent of the court or a person appointed by the court. However, within the last few years the appointment of a tutor-dative with power to consent to medical treatment and surgery has been sought in at least two cases. One of them concerned the sterilisation of an adult mentally disabled woman. We would favour a system whereby exceptional treatments (as specified by regulations made by the Secretary of State for Scotland) have to be referred to the court for approval. Merely appointing a tutor-dative or personal guardian with power to make the decision seems insufficient to be a safeguard for the patient and to instil public confidence. The advantages of a court are that the decision is seen to be made openly after proceedings in which opposing views can be presented and evaluated. We discuss procedural safeguards and the criteria the court should employ in deciding whether or not to approve treatment later in paragraphs 3.30 to 3.36.

3.26 What treatments should be specified? Specifying all treatments which carry a risk of death or serious injury (as in Germany) would overwhelm the courts. Many operations carry the risk of serious injury, especially where elderly patients of those in poor health are involved. Looking at the legislation in other countries we suggest that sterilisation (other than those carried out for genuine therapeutic reasons) and abortion should be specified. We would also include the implantation of fetal tissue into a mentally disabled person's brain. As mentioned in paragraph 3.24 in New Zealand electro-convulsive therapy and psycho-surgery are prohibited specified treatments. Electro-convulsive therapy is regarded in Scotland as a valuable treatment for some depressive illnesses. It may be given to detained patients under section 98 of the Mental Health (Scotland) Act 1984 provided the patient consents or a second opinion in favour is obtained from a doctor nominated by the Mental Welfare Commission for Scotland. Psycho-surgery is used but not to any great extent. There has been no psycho-surgery carried out on detained patients under section 97 of the 1984 Act, but we understand that it has been used on a small number of non-detained patients. In all cases a consent will have been obtained from the patient. Outright prohibition of psycho-surgery and electro-convulsive therapy seems to go too far. It seems better to add these treatments to the list of those specified so that the court can decide whether or not to approve their use bearing in min the circumstances of the individual patients and the current climate of opinion.

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[29] *In Re E* (*a minor*) Times Law Reports 22 Feb 1991; *F v F* Times Law Reports 29 April 1991.
[30] *In Re E* Times Law Reports 31 January 1991.
[31] BGB s 1904, inserted by Betreuungsgesetz 1990.
[32] BGB s 1905, inserted by Betreuungsgesetz 1990.
[33] 1988 Act, s 18.
[34] 1986 Act, ss 36-42.

3.27 In an emergency it should be lawful to carry out a specified treatment without the approval of the court. Abortion and electro-convulsive therapy are instances where emergency treatment might be needed. Emergencies are where the delay in obtaining approval would be likely to result in the patient's death or severe injury to his or her health. A second opinion that emergency treatment was appropriate could be required as an extra safeguard for patients.

3.28 We propose that:

22. (1) An exceptional treatment (being a treatment specified in regulations made by the Secretary of State) should require the consent of a court (or other body set up to deal with applications relating to the mentally disabled) before it may be carried out on a mentally disabled patient, except where the delay in obtaining consent would be likely to result in the patient's death or serious damage to his or her health. The consent of a tutor-dative, relative or personal guardian should not be sufficient.

(2) Specified treatments should include sterilisation (other than for therapeutic reasons), abortion, electro-convulsive therapy, psycho-surgery and implantation of fetal tissue. Views are invited on whether any other treatments should be specified.

3.29 **Disputes about treatment.** Some mechanism ought to be provided for resolving serious disputes between the doctors and others about treatment proposed for patients. Unless the treatment is urgently necessary – to avoid death or serious ill-health – in which case the doctor has, and should continue to have, power to give treatment notwithstanding any opposition from the relatives, or is standard treatment for a minor matter such as a cut or a throat infection, the court would seem to be the appropriate body for resolving such disputes. The courts in England and Wales have in the past been resorted to in order to overrule a parent's decision in respect of treatment of a child of insufficient age or understanding to consent.[35] We are not aware of any similar cases in Scotland. It may be that in the case of a mentally disabled adult patient the Court of Session would appoint a tutor-dative with express power to take a decision regarding the proposed treatment. Under our proposals for personal guardianship a court or other body would be able to appoint a personal guardian but the doctors would not be bound by the guardian'' views. We suggest that the court should have express statutory power to authorise or prohibit medical treatment. The courts ought to be able to cope with the comparatively small number of cases where there is a strong disagreement about medical treatment for mentally disabled patients. We propose that:

23. The court (or other body set up to deal with applications relating to the mentally disabled) should have power, on application by any person having an interest in the patient's welfare, to make orders relating to the treatment proposed for a patient who is mentally incapable of consenting to it.

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[35] *In Re D (a minor)* [1976] Fam 185 in which the High Court blocked the sterilisation of a young mentally handicapped girl to which her mother had consented; *In Re B (a minor)* [1981] 1 WLR 1421 in which the Court of Appeal overrode the parents' refusal to consent to a life saving operation on their new born mentally handicapped child where the doctors were content to respect the parents' decision. See also *Re C (a minor)* [1989] 3 WLR 240.

3.30 **Criteria for court making orders about treatment.** What principles should a court employ in deciding whether or not to approve treatment proposed for a mentally disabled patient? A simple test would be that the treatment is in the best interests of the patient. This seems too vague. It allows the courts too much discretion and gives insufficient guidance. It might result in treatment being given on the basis of convenience to the patient's family, the hospital or other service providers.

3.31 In *F (Mental Patient: Sterilisation)* it was laid down that treatment which was in mentally disabled patients' best interests could be given without their consent and that the test of whether treatment was in their best interests was whether the proposed treatment was in accordance with a practice accepted as proper by a responsible body of medical opinion skilled in the particular form of treatment in question.[36] This test has been criticised on the basis that it gives undue weight to medical opinions and accepted medical practice.[37] It was originally formulated in the context of whether doctors had been negligent in carrying out treatment. Arguably it is not appropriate for deciding whether or not treatment should be given. The test may also be difficult to apply if there is a clear division of respectable medical opinion about a particular treatment. Finally treatment is sometimes not simply a medical matter; it is but one solution to the problem faced by the patient. Other non-medical methods of dealing with the problem may exist and should be considered. The Scottish medical negligence case *Hunter v Hanley*[38] suggests another formula. Treatment should be approved if it would be adopted by doctors of ordinary skill acting with ordinary care. The objections set out above apply equally to this formula.

3.32 Following *F* the Official Solicitor in England and Wales issued a Practice Note[39] suggesting various criteria that might have to be satisfied before a sterilisation was allowed. These include that:

(1) those proposing sterilisation are doing so in good faith and that their paramount concern is for the patient's best interests rather than their own or the public's convenience,

(2) the patient is incapable of making the decision and is unlikely to become capable in the foreseeable future,

(3) the condition (for example pregnancy) sought to be avoided by sterilisation is in fact likely to occur,

(4) the patient will experience substantial trauma or psychological damage if the condition does occur, and

(5) no less intrusive solution other than immediate sterilisation is practicable.

3.33 The new German legislation also sets out detailed conditions that must be satisfied before a sterilisation can be approved.[40] These are that:

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[36] [1990] 2 AC 1; Lord Brandon of Oakbrook at p 68 adopting the test in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118.
[37] Josephine Shaw, "Sterilisation of Mentally Handicapped Patents: Judges Rule OK?" (1990) 53 MLR 91.
[38] 1955 SC 200.
[39] New Law Journal, 1989, p 1380.

(a) the sterilisation must not be opposed by the patient,

(b) the patient must be permanently incapable of consenting (ie not like to recover capacity),

(c) there must be a definite risk of pregnancy without a sterilisation,

(d) a pregnancy must lead to a serious risk to the patient's physical or mental health which could not be averted in another way, and

(e) a pregnancy must not be reasonably preventable by other means such as contraception or restrictions on sexual activity.

3.34 The criteria in the Official Solicitor's Practice Note and in the German legislation could be adapted to deal with treatment other than sterilisation. They would provide more precise guidance than a simple best interests test and would reassure the public that all important factors had been taken into consideration. Wider issues may also be relevant. The patient's family or carers may have a practical as well as an emotional interest in the treatment decision in that they may have to live with the consequences. For example, in considering sterilisation or abortion the fact that the elderly parents of the mentally disabled woman might have to look after their daughter and her child should be taken into account. Another relevant factor should be the likelihood that any offspring born would suffer from the same genetic defects as the mentally disabled mother. We express no preference but simply ask for views on the following question:

24. Should the court (or other body set up to deal with applications relating to the mentally disabled) dealing with a treatment specified by regulations or a dispute about treatment authorise treatment if it is satisfied that:

(a) the treatment is in the best interests of the patient;

(b) the treatment is one which doctors of ordinary skill would adopt if acting with ordinary care; or

(c) without prejudice to other considerations all the following criteria are met:

(i) the patient has been consulted so far as reasonably practicable and he or she does not oppose the treatment,

(ii) the patient is unlikely to recover capacity or the treatment cannot reasonably be postponed until the patient is likely to recover capacity,

(iii) there is a significant risk to the patient's physical or mental health if the treatment is not given,

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[40] BGB s 1905, inserted by Betreuungsgesetz 1990.

(iv) of the other options (medical and non-medical) that have been considered the treatment proposed is regarded as the best.

3.35 **Procedural matters.** At least one of the Scottish petitions for the appointment of a tutor-dative to consent to the sterilisation of a mentally disabled adult was granted without even a hearing. In England and Wales the Official Solicitor is a respondent or defendant to every application.[41] The new German legislation requires a guardian specially appointed for that purpose and the Guardianship Court to consent to any sterilisation.[42] The patient is ensured independent representation in proceedings in the Guardianship Court.[43]

3.36 Where exceptional treatments are specified by regulations come before the court for approval or there are disputes about treatment which the court has to resolve we think it highly desirable (if not essential) for a special representative to be appointed by the court to the mentally disabled patient. The representative's function would be to consult the patient and obtain his or her views as regards the proposed treatment so far as reasonably practicable, to make sure that the alternatives to sterilisation or other proposed treatment were explored, and generally to look after the interests of the patient. Without the appointment of a representative the danger exists that the court will accept uncritically the medical opinions and the wishes of the patient's family. It has to be recognised, however, that special representation would add to the cost of the proceedings. We propose that:

25. (1) When dealing with applications relating to a treatment specified by regulations or to disputes about treatment for a mentally disabled patient the court (or other body set up to deal with application relating to the mentally disabled) should appoint a special representative.

(2) The representative's functions would include ascertaining the patient's views in so far as that was practicable, ensuring that other options had been considered and generally safeguarding the interests of the patient.

RESEARCH ON MENTALLY DISABLED SUBJECTS

3.37 We now turn to consider whether and under what conditions medical research should be carried out on mentally disabled people. We would distinguish non-therapeutic research from therapeutic research. Non-therapeutic research involves the use of a procedure on a patient for the purposes of furthering medical knowledge rather than forming part of his or her treatment. Therapeutic research is where new or alternative methods of treatment are tried on patients either on an individual basis or in controlled trials for relief of their illnesses. New treatments are tried in the hope that they will prove to be better than existing standard treatments and as such are being used in the best interests of the patients.

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[41] Practice Note, New Law Journal, 1989, p 1380.
[42] BGB s 1905, inserted by Betreuungsgesetz 1990.
[43] Gesetz uber die Angelegenheiten der freiwilligen Gerichtsbarkeit, art 67, inserted by Betreuungsgesetz 1990.

Therapeutic research

3.38 The Declaration of Helsinki, a code of medical ethics drawn up by the World Health Association and adopted by the British Medical Association[44] allows for therapeutic research. Paragraph 6 of Part II provides:

> "The physician can combine medical research with professional care, the objective being the acquisition of new medical knowledge, only to the extent that medical research is justified by its potential diagnostic or therapeutic value for the patient".

Looking at the issue from the point of view of delictual liability it has been held that a doctor using a non-standard therapy will be liable to the patient only if it is established that the therapy adopted was one which no professional person of ordinary skill would have adopted if he or she had been acting with ordinary care.[45] Provided the novel treatment is reasonably intended for the benefit of the patient he position regarding consent and consultation is much the same as for standard treatments. The proposals we put forward in the previous section[46] would therefore apply to therapeutic research as they apply to treatment. The doctors should make it clear when an experimental or novel therapy was being tried and point out that the risks associated with it are to some extent unknown. High risk treatments may be ethically justified on terminally ill patients where other standard treatments have failed.

Non-therapeutic research

3.39 There is virtually no authority in Scotland or England and Wales on the legality of research on mentally incapacitated persons. In *F (Mental Patient: Sterilisation*) Lord Brandon stated that treatment of mentally incapacitated patients without consent was justified on the welfare principle[47]:

> "if, but only if, it is carried out in order either to save their lives or to ensure improvement or prevent deterioration in their physical or mental condition".

Non-therapeutic research procedures, however, fall into none of these categories so that if the same principles apply to research as apply to treatment it would follow that all non-therapeutic research on subjects incapable of consenting to taking part is unlawful. But there are other approaches which tend to suggest that at least some research may be lawful. The first is to take a wider view of the subjects welfare or best interests principle. A mentally disabled research subject is a member of a larger group of similarly afflicted people and his or her participation in research may well lead to improved methods of treatment. These may ultimately benefit the group as a whole and perhaps even the subject in particular. Even if the subject does not directly benefit he or she may benefit from other research carried out on other members of the group. Another justification is based on the public interest. Research adds to medical knowledge and leads to improved treatments or ways of preventing illnesses or disorders. Non-consensual participation may be regarded as justified if the risks are small and the benefits substantial.

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[44] *The Handbook of Medical Ethics* (1986), para 4.3.
[45] *Hunter v Hanley* 1955 SC 200.
[46] Proposals 21-25.
[47] [1990] 2 AC 1 at p 55.

3.40 The Declaration of Helsinki, drawn up by the World Health Association in 1964 and revised in 1975 and 1983, is a code of ethics on experimentation on human subjects. Part I states:

> "(9) In any research on human beings ... the physician should ... obtain the subject's freely-given informed consent, preferably in writing.
>
> (11) In case of legal incompetence, informed consent should be obtained from the legal guardian in accordance with national legislation. Where physical or mental incapacity makes it impossible to obtain informed consent, or when the subject is a minor, permission from the responsible relative replaces that of the subject in accordance with national legislation".

3.41 The British Medical Association in *The Handbook of Medical Ethics* states that in the consideration of any research proposal the subject's interests must come first. It makes the point that public confidence will only be maintained if all proposed research is subjected to rigorous ethical scrutiny and self-discipline.[48] To this end all the Scottish Health Boards have established Ethics Committees to discuss and consider research proposals involving human being. Although an Ethics Committee decision not to approve a research project would not of itself render the research unlawful, unapproved research is very unlikely to obtain grant-aid from usual sources, use of NHS facilities and access to NHS patients would be denied, and many journals would not publish the results.[49]

3.42 The Royal College of Psychiatrists has recently published guidelines for Research Ethics Committees on psychiatric research involving human subjects.[50] It points out that there is no clear legal guidance on participation in research by subjects who are incapable of consenting, and goes on to state:

> "The Ethics Committee should decide in the usual way whether the research is acceptable in terms of the balance of benefits, discomforts and risks. Then it should consider the question of consent. No-one else can consent on behalf of the patient. However, it would be good practice in most cases for the research worker to discuss the research with one or more close relatives and discover their views. If there is no relative, or more close relatives and discover their views. If there is no relative, or the patient expresses the wish that his relatives should not be consulted, it may be appropriate to consult an independent person who knows the patient well and will protect his interests (for example, a nurse). The choice of such a person should be approved by the Ethics of Research Committee. These people should attempt to form a judgement, based on the patient's known previous opinions about research and on his recent behaviour, as to whether the patient would be likely to consent were he able to do so. Any patient who indicates refusal either in words or in actions should be excluded from the research whatever opinion is voiced by the others who have been consulted."

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[48] P 30.
[49] Mason and McCall Smith, *Law and Medical Ethics*, (2nd edn) pp 256-7.
[50] Psychiatric Bulletin, (1990) 14 pp 48-61.

3.43 The Royal College of Physicians of London published a report in January 1990 entitled *Research Involving Patients.* It states:[51]

> "A strong ethical case can be made out for non-therapeutic research (involving only minimal risk) in mentally handicapped patients because only through better understanding of their condition can care for such patients be improved. We think that the best guidance under these circumstances might be that there should be agreement by the close relatives or guardians and that the mentally handicapped individual seems to agree to the procedure. However, the legal status of this type of research following the House of Lords decision, discussed above [*F (Mental Patient: Sterilisation*), [1990] 2 AC 1] remains quite unclear and has not been tested before the courts."

Another report[52] by the Royal College, also published in January 1990, deals with guidance to Ethics Committees. It repeats the substance of the other report quoted above but adds[53], "Where no relative is available or, as sometimes happens, a patient desires privacy and does not wish relatives to be informed, another designated person, approved by the Ethics Committee, should be able to act". Interim guidelines by the British Medical Association[54] allow an Ethics Committee to authorise research on a legally incapacitated person, provided that the research is to the benefit of persons in the same category and that the same scientific results cannot be obtained by research on others.

3.44 There is a great diversity of opinion among various countries as to the acceptability and legality of non-consensual research on mentally incapacitated persons. In 1983 the Council of Europe's Committee of Ministers recommended that such research should be banned.[55] A new recommendation has since been made.[56] The recommendation requires:

> "that medical research should be carried out within the framework of a scientific plan and in accordance with a certain number of principles, notably –
>
> 1. the interests and well-being of the person undergoing a medical research must prevail over the interests of science and society;
>
> 2. the risks for this person must be kept to a minimum;
>
> 3. no medical research may be carried out without the informed and free consent of the person undergoing it;
>
> 4. medical research may not be carried out on legally incapacitated persons (minors, persons suffering from mental disorders etc), except in some very exceptional and strictly defined cases when their participation in medical research is inevitable (eg, children for paediatric drugs); in these exceptional cases special guarantees must be provided;

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[51] Para 7.41.
[52] *Guidelines on the Practice of Ethics Committees in Medical Research involving Human Subjects*.
[53] Para 13.11.
[54] Published October 1990.
[55] Rec No R-83 (1983).
[56] Recommendation of 19 February 1990.

5. under no circumstances should prisoners undergo any medical research other than for their own benefit;

6. potential subjects of medical research should not be offered any inducement and in particular money or any other benefit which compromises free consent;

7. all medical research must be subjected to the approval of an ethical examination by an independent and multidisciplinary ethics committee;

8. any information of a personal nature obtained during medical research should be treated as confidential."

Finally, the recommendation stipulates that if a person who underwent research suffered any injury as a result, the person, or his/her dependents, are to be compensated regardless of the existing law on liability. This compensation may be provided by private or state insurance schemes.

3.45 The European Commission issued in July 1990 extensive guidelines on good clinical practice for trials on medicinal products in the European Community. These guidelines came into force in July 1991. At present the guidelines are merely advisory but the Commission is likely to incorporate them into a directive in the near future, and may well extend them to other aspects of medical research. The guidelines provide[57]:

"1.13 If the subject is incapable of giving personal consent (eg unconsciousness or severe mental illness or disability), the inclusion of such patients may be acceptable if the Ethics Committee is, in principle, in agreement and if the investigator is of the opinion that participation will promote the welfare and interest of the subject. The agreement of a legally valid representative that participation will promote the welfare and interest of the subject should also be recorded by a dated signature. If neither signed informed consent nor witnessed signed verbal consent are possible, this fact must be documented with reasons by the investigator.

1.14 Consent must always be given by the signature of the subject in a non-therapeutic study, ie when there is no direct clinical benefit to the subject."

The effect seems to be that all non-therapeutic trials on subjects incapable of consenting are barred. While this may be an appropriate stance for drug trials it seems too restrictive for non-therapeutic research generally.

3.46 Medical experimentation on mentally disabled people is prohibited in New Zealand. Section 18(1)(f) of the Protection of Personal and Property Rights Act 1988 provides that neither a welfare guardian of a mentally disabled person nor a court has power:

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[57] Extracts from the guidelines appear in the Bulletin of Medical Ethics, Dec 1990, p 18.

> "to consent to that person's taking part in any medical experiment other than one to be conducted for the purpose of saving that person's life or of preventing serious damage to that person's health."

This would appear to allow therapeutic research (adoption and evaluation of new methods of treatment), but to outlaw research which has no therapeutic value to the person concerned.

3.47 France has recently passed legislation allowing biomedical research on human subjects provided certain conditions are fulfilled.[58] Apart from conditions which apply to all biomedical research (such as approval by local ethics committees) non-therapeutic research on mentally disabled adult subjects is permitted only if:

(a) it presents no serious foreseeable risk to the subject's health, and

(b) it will be of use to people of similar illness or handicap, and

(c) the expected benefits cannot be achieved in any other way.[59]

Consent has to be given by the tutor authorised by the family council or judge in tutory. Where the subject has some capacity his or her consent must be sought and it is not possible to overrule a refusal to participate.[60]

3.48 The Law Reform Commission of Canada has recently published a Working Paper in this area. It noted that the existing law in Canada offers no clear guidance as to the legality of research on mentally disabled subjects. The Commission proposed that such research should be allowed subject to strict safeguards. These include consents by the subject's representative and an independent third party.[61]

3.49 **Proposals for reform.** The basic issue is whether non-therapeutic research should be carried out at all on subjects who are incapable of consenting. It is a question of balancing the public interest in the acquisition of new medical knowledge, which will in turn lead to new or improved methods of treatment, against the rights of individuals not to be subjected to unnecessary procedures. A complete ban on on-therapeutic research on mentally incapable subjects cannot, in our view, be justified. Improvements in ways of curing or alleviating mental disorders will occur only if such research can be carried out on sufferers. However, the vulnerability of the mentally disabled requires that any research should be rigorously controlled and subject to very strict conditions.

3.50 First, any non-therapeutic research should be in connection with the subject's condition or mental disorder only. We think general medical research on mentally disabled subjects cannot be justified in the public interest since other subjects capable of consenting will be available.

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[58] Loi No 88-1138 of 20 December 1988 relative à la protection des personnes qui se prêtent à des recherches biomédicales, as amended by Loi No 90-86 of 23 January 1990.
[59] Art L209-6.
[60] Art L209-10.
[61] *Biomedical Experimentation Involving Human Subjects.* Working Paper 61 (December 1989), Recommendation 5.

3.51 Secondly, it should be unlawful to carry out non-therapeutic research in Scotland that has not been approved by the appropriate ethics committee. At present research in breach of professional ethics will not in itself constitute a criminal offence, give rise to civil liability or necessarily result in disciplinary proceedings for professional misconduct. Furthermore, it is not mandatory for such projects to be submitted to ethics committees for approval. The main sanctions against unapproved research are the severely restricted ability to attract funding or to get the results published. We do not regard these sanctions as sufficient, especially as it is possible to get funding from foreign institutions for research that might not obtain ethics committee approval in Scotland and to publish the results in foreign journals.

3.52 Thirdly, consent on behalf of individual subjects should also be required. We would not be in favour of a scheme which permitted an ethics committee to consent on behalf of all mentally disabled participants to research that that committee had approved. In most cases the disabled person's family have a clear interest in his or her welfare. Ignoring the family would be wrong and contrary to current practice. Moreover, there would be a clear conflict of interest between the committee acting as an approving body and acting as a body giving consent. The present practice is for researchers to seek consent from a member of the mentally disabled subjects family or someone caring for the subject. We suggest that this sensible practice should be placed on a firm footing by being given legal recognition.

3.53 We propose that a subject's husband, wife, adult child, parent or brother or sister should be entitled to consent to research on behalf of the subject and that the consent of the nearest such relative should be required. However, where subjects have a tutor-dative or a personal guardian consent should be sought from them rather than any relative.[62] Entitling the nearest relative to consent presents difficulties where that relative is unsuitable (for example he or she has been financially exploiting or physically abusing the subject) or has no real interest in the subject's welfare. The court (or other body could be empowered to disqualify an unsuitable nearest relative and substitute another, but this involves legal proceedings and is unlikely to be used to any great extent.[63] These factors may not be known to those seeking consent.

3.54 We are not in favour of persons other than close relatives being entitled to consent. Once one gets outwith the category of close relatives it is very difficult to lay down other categories of people who should be authorised to give a legal consent. Moreover, entitling carers to consent could lead to consultants or others consenting to research which they themselves are carrying out on their own patients; a situation where there is an obvious conflict of interest. We understand that restricting participation in research projects to those subjects who relatives consent would not unduly hamper research as there are generally plenty of suitable subjects available.

3.55 A mentally disabled subject who refuses to participate in a research project should be excluded, even though a relative consents on his or her behalf. The public interest in research is not sufficiently great to justify overriding the expressed wishes of the subject however irrational or uninformed they may be. We understand that this is in line with current practice so that the restriction would not further hamper research.

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[62] See para 3.58.
[63] See para 3.19 for a similar problem in obtaining views on treatment.

3.56 Finally, we think that any non-therapeutic research on mentally disabled persons should expose them only to foreseeable risks to their physical or mental health which are minimal or insubstantial. The alternative approach of balancing the risks against the benefits expected to flow from the research could lead to very harmful or painful experiments being carried out where the research was likely to be productive. The concept of foreseeable minimal risk may not be easy to apply in practice because research necessarily involves going beyond the confines of existing knowledge where the risks can only be guessed. The report of the Royal College of Physicians of London *Research Involving Patients* deals with risks. Paragraph 5.11 states:

> "The term 'minimal risk' is used to cover two types of situation. The first is where the level of psychological or physical distress is negligible though there may be a small chance of a reaction which is itself trivial, eg a mild headache or feeling of lethargy. The second is where there is a very remote chance of serious injury or death, comparable to the risk of flying as a passenger on a scheduled aircraft."

3.57 The functions of a tutor-dative include power to consent to medical procedures, but the authority to consent to research on the mentally disabled person is doubtful where the research is of no direct benefit to the subject. In Alberta a guardian may be given power to consent to any health care that is in the best interests of the independent adult[64] and is bound to exercise his or her authority in the best interests of the dependent adult.[65] The prevailing view is that this precludes a guardian from consenting to the adult's participation in research.[66] The Victorian legislation also provides that a guardian must act in the mentally disabled person's best interests.[67]

3.58 Where the mentally disabled person has a tutor-dative that representative ought to have the power to consent to medical research to the exclusion of any relative. The powers of the personal guardian with less than full powers depend on the terms of his or her appointment. Where the power to consent to medical procedures is conferred (or included in a grant of full powers) it should be exercisable to the exclusion of any relative.

3.59 Summing up our tentative views we put forward for criticism and comment the following proposals.

26. It should not be lawful to carry out non-therapeutic research or experiments on a subject who is unable by reason of mental disability to give informed consent unless all of the following conditions are satisfied:

(a) the research is into mental disability of the kind suffered by the subject

(b) the research entails only an insubstantial foreseeable risk to the subject's physical or mental health. Views are invited on what should constitute an insubstantial risk.

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[64] Dependent Adults Act 1976, s 10(2)(h), as amended in 1985.
[65] 1976 Act, s 11(a).
[66] Robertson, *Mental Disability and the Law in Canada*, p 139.
[67] Guardianship and Administration Board Act 1986, s 28(1).

(c) The research has been approved by the appropriate health board ethics committee

(d) Written consent has been given by the subjects nearest relative unless the subject has a tutor-dative or personal guardian. The nearest relative should be the first relative reasonably available out of the following list.

(i) husband, wife or cohabiting partner

(ii) an adult child

(iii) a parent

(iv) a brother or sister

(e) Where the subject has a tutor dative or a personal guardian whose terms of appointment include power to consent to medical research, written consent has been given by the tutor-dative or personal guardian.

(f) Before seeking consent from a relative, tutor-dative or personal guardian the researchers have explained to him or her the purpose of the research, the procedures to be used and the foreseeable risks to participants.

(g) The mentally disabled subject does not object to participating in the research.

TRANSPLANTATION OR ORGAN DONATION

3.60 Transplantation of non-regenerative tissue from a living donor into another (kidney donation for example) confers no direct benefit on the donor. Transplantation of organs between persons not closely genetically related (natural parent-child, siblings of whole or half blood, uncles/aunts-nephews/nieces) is made an offence by section 2 of the Human Organ Transplants Act 1989,[68] unless the approval of the Unrelated Live Transplant Regulatory Authority has been obtained.[69] The legality of transplantation where the donor is unable to give informed consent is not clear. The power of a parent or tutor-dative to consent on behalf of a child or mentally disabled person may well be limited to treatments or procedures that carry only a minimal risk such as skin grafts or blood donations. Kidney transplantation from living children is not uncommon[70], although the risks to the child donor could not be described as minimal. Bone marrow donations seem to fall somewhere in between and are considered ethical, where child donors are involved, by the British Medical Association.[71]

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[68] "Organ" means any part of a human body consisting of a structured arrangement of tissues which, if wholly removed, cannot be replicated by the body, s 7(2).
[69] The Human Organ Transplants (Unrelated Persons) Regulations 1989, SI 1989/2480.
[70] Mason & McCall Smith, *Law and Medical Ethics*, (2nd edn) p 221.
[71] *Guidelines on the Transplant of Tissues and Organs* (August 1990).

3.61 In most Canadian provinces legislation provides that a living donor must be mentally competent to consent to transplantation and be able to make a free and informed decision.[72] A guardian is not entitled to consent on behalf of a mentally incompetent person.[73] In the United States kidney transplants involving mentally incompetent donors have been permitted[74]. France adopts a compromise approach. The transplantation must be authorised by an expert committee, consent must be given by the donor's legal representative and the recipient may only be a brother or sister.[75] The Law Reform Commission of Australia have recommended for the Australian Capital Territory that a tribunal should be able to consent to a transplant provided it is satisfied that the risk to the donor is small, the risk of failure of the transplant is law, the donee's life would be endangered if the transplant is not made and a transplant from another person is highly likely to be unsuccessful.[76]

3.62 It is possible to argue that while transplantation offers no direct benefit to the donor it may confer an indirect benefit. If, as is often the case, the recipient is a close relative such as a brother or sister[77] the donor may be distressed by the critical illness of the recipient. Transplantation can also be justified on the grounds of public interest in alleviating pain and suffering where this can be done without causing substantial harm to others. On the other hand a mentally disabled person's health and wellbeing is no less worthy of consideration than that of any other person. The temptation to regard a person as merely a source of spare parts must be firmly resisted. We would not wish to express any view on this matter until we have had the benefit of the views of those involved in this area. In order to elicit comments we ask:

27. Should transplantation of non-regenerative tissue from a living person who is unable to give an informed consent by reason of mental disability be permitted, and if so under what conditions?

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[72] Human Tissue Gift Acts of British Columbia, Alberta, Saskatchewan, Ontario, Prince Edward Island, Newfoundland and Yukon Territories.
[73] Robertson, *mental Disability and the Law in Canada,* p 140.
[74] *Strunk v Strunk* 445 SW 3d 145 (1969) but not followed in *Laugier v Pescinski* 226 NW 2d 180 (1975).
[75] Law of 22 December 1976.
[76] *Report on guardianship and Management of Property* No 52, (1989) para 4.49 and clause 53(3).
[77] Transplants between close relatives are less likely to be rejected by the recipients.

Part 4 Management of Financial Affairs

4.1 This Part is concerned with the management and supervision of the financial affairs and estates of mentally disabled persons. We start by setting out the existing Scottish procedures in these areas and the criticisms that have been made of them. Then, drawing on the experience of other countries, we put forward a range of proposals for reform.

THE PRESENT LAW IN SCOTLAND AND CRITICISMS OF IT

Curators

4.2 The appointment of a curator bonis ("curator" for short) is the most widely used general legal procedure for managing the affairs of a mentally incapacitated person. A curator is an individual appointed by the court to manage and administer the financial affairs and estate of an incapacitated person. About 400 curators have been appointed each year over the last few years. A curator was originally an interim appointment made in order to preserve an incapacitated person's estate until a tutor-at-law[1] or a tutor-dative[2] took over. However, for the last century or more a curator has ceased to be regarded as an interim expedient and the appointment is now considered to be a permanent one.

4.3 The normal ground for appointment of a curator to a person is that the person is of unsound mind and incapable of managing his or her affairs or giving instructions for their management.[3] Curators have in the past been appointed to physically incapacitated persons. "Giving instructions" includes not only the initial act of appointing someone else, such as an attorney, to manage the affairs but also monitoring the appointee's subsequent actings at least to the extent of being able to recall the appointment if the appointee acts improperly.[4] It is very doubtful whether the court would regard a state of facility as a valid ground for appointment. There are old cases in which appointments were made where the person was of weak mind and very apt to be misled.[5] On the other hand there is later, but by no means recent, authority for the view that facility and undue influence are not in themselves sufficient to justify an appointment.[6] Insane delusions also cause problems. If the delusions do not affect the way in which the person manages his or her affairs, then it has been held that the appointment of a curator is not justified.[7] On the other hand if the delusions do affect the management of affairs with the result that the property is used in a

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[1] See para 2.3.
[2] See para 2.5.
[3] Walker, *Judicial Factors*, P22.
[4] *Fraser v Paterson* 1987 SLT 562.
[5] *Speirs* (1851) 14 D 11; *Dewar v Dewar* (1834) 12 S 315.
[6] *Calderwood v Duncan* (1907) 14 SLT 777; *Dowie v Hagart* (1894) 21 R 1052.
[7] *Henderson* (1851) 14 D 11.

way that the person would not have done had he or she been completely sane, a curator may be appointed.[8]

4.4 The application for appointment of a curator is by way of petitioning to the Court of Session or the sheriff court.[9] In the Court of Session the petition is an Outer House one.[10] The sheriff court has jurisdiction to appoint a curator whatever the value of the estate,[11] and the majority of curators are now appointed as a result of sheriff court petitions. Usually one or more of the incapacitated person's relatives will petition, but anyone with an interest may do so. Interest is not confined to a pecuniary interest. Petitions have, for example, been brought by the person's solicitor,[12] banker,[13] a curator who has retired,[14] or the managers of a hospital or proprietor of a home in which the person is residing. The local authority must, and the Mental Welfare Commission for Scotland may, petition if no-one else is doing so and a curator is necessary.[15] The incapacitated person may petition, although this would be very unusual.[16]

4.5 The petition is supported by two medical certificates. Each of these is to the effect that the doctor has examined the patient and finds him or her to be of unsound mind and incapable of managing his or her affairs or giving instructions for their management, or similar wording sufficient to ground a petition. The examination should be within 30 days of presentation of the petition.[17] A petition will be considered without supporting certificates if incapacity is averred and their lack is explained by the refusal of those looking after the person to allow an examination.[18] A copy of the petition is served on the alleged incapacitated person (unless the court, on the basis of statements in the medical certificates that service would be harmful to the person's wellbeing, dispenses with such service[19]) and his or her nearest relatives. The relatives are entitled to oppose the petition, as is the incapacitated person. In the event of opposition the court orders an examination by one or more practitioners expert in the field of mental disorder.

4.6 On appointment the curator takes over the management and administration of the incapacitated person's affairs completely. The person is not divested of his or her estate, but is superseded in its management by the curator who may make use of the person's title and name in administering the estate.[20] The curator's duty, after investigating and ingathering the estate, is to administer it for the benefit of the incapacitated person in accordance with the requirements of the law and directions from the Accountant of Court. The Accountant of Court is an official of the Court of Session whose functions include the supervision of curators. The curator must make up an initial inventory of the estate and submit it to the

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[8] *CB v AB* (1891) 18 R (HL) 40.
[9] The procedure is described in detail in McBryde and Dowie, *Petition Procedure in the Court of Session*, (2nd edn) chap 9. The sheriff court procedure is very similar (Judicial Factors (Scotland) Act 1880, s 4).
[10] Rules of Court, rule 189(a)(i).
[11] Law Reform (Miscellaneous Provisions)(Scotland) Act 1980, s 14, amending the Judicial Factors (Scotland) Act 1880.
[12] *Mason* (1852) 14 D 761.
[13] *Johnstone v Barbé* 1928 SN 86.
[14] *Halliday's* CB 1912 SC 509.
[15] Mental Health (Scotland) Act 1984, ss 92 and 93.
[16] *AB* (1908) 16 SLT 557.
[17] McBryde and Dowie, *Petition Procedure in the Court of Session*, (2nd edn) p 62.
[18] *Davies, Petr* 1928 SLT 142.
[19] The CRU Curatory Survey found that service was dispensed with in 74% of the cases sampled.
[20] *Yule v Alexander* (1891) 19 R 167.

Accountant. Accounts of the curator's transactions have to be submitted annually thereafter for audit by the Accountant.

4.7 Curatory has come in for much criticism recently. First, curatory is "all or nothing" in that the curator's powers are not tailored to the mental capacity and abilities of the disabled person. The mentally disabled are a diverse group ranging from those with limited disability who are capable of many ordinary transactions to the profoundly disabled who are unable to understand even the simplest matter. To impose a regime designed for the profoundly disabled on those with lesser disability is unfair and unjust and in the case of young mentally handicapped adults may prevent them from improving and gaining the skills and confidence to lead more independent lives. There is also the danger that, because only full curatory is available which may be felt inappropriate for people with limited disability, nothing will be done for them. Secondly, the family of a mentally disabled person often resent the imposition of an impersonal professional curator. The courts and the Accountant of Court strongly prefer the curator to be a solicitor or accountant, for large estates at least, because of the complex nature of the work and accounting procedures.[21] Parents of young handicapped adults who had authority to administer their children's financial affairs while they were under 18, may suddenly find themselves excluded and replaced by an outside professional.

4.8 Thirdly, it is no part of a curator's legal duty to visit the mentally disabled person subject to curatory or the family, or to take their views into account. However, it is fair to say that some curators do not have such a narrow view of their duties, and spend much time on personal and family matters for which they are not remunerated. Some curators regard the mentally disabled person as their client and consider that they owe a duty of confidentiality to him or her. The family and those caring for the mentally disabled person may not be shown the annual accounts prepared by the curator and may be excluded from other aspects of management of the estate. The Accountant of Court does not share this approach and encourages liaison between curators and families and carers.[22]

4.9 Fourthly, curatory is expensive. The appointment of a curator will cost around £400 in legal, medical and court fees. Legal aid may be available depending on the financial eligibility of the mentally disabled person. Where the estate exceeds £6,000 (excluding any dwelling-house, furniture and personal possessions) legal aid is unlikely to be granted. The resources of the mentally disabled person's spouse will be aggregated with those of the person in assessing eligibility for legal aid. The running costs of a curatory are also high. It is not uncommon in the case of modest estates for the annual charges (curator's commission, audit fee, and premium on bond of caution) to amount to approximately one-third of the annual income of the estate.[23] The problem of high costs is particularly acute with small estates.

4.10 Fifthly, there is some uncertainty as to the correct balance between conservation of the estate and use of the estate of the benefit of the mentally disabled person and those he or she is legally liable to support.[24] Some curators take a fairly conservative attitude and their

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[21] In *B's Curator* 1990 SCLR 538 a brother was appointed in preference to an accountant. The estate was only £7,000.
[22] *Information for Families of Persons Subject to Curatory*, (a booklet published by the Accountant of Court in 1989).
[23] CRU Curatory Survey.
[24] See para 4.79 – 4.86.

reluctance to spend money on enhancing the mentally disabled person's quality of life can lead to friction with the family. The Accountant of Court's approval is required for expenditure over and above maintenance.[25] Such requests are considered sympathetically taking account of the money available. Encroachments on capital can also be approved by the Accountant for maintenance but other encroachments require an application to the court for special powers.[26]

4.11 Sixthly, a curator must invest the estate within the bounds of the Trustee Investments Act 1961. This Act restricts investment powers quite considerably and is complex to operate where the curator wishes to invest in wider range securities such as ordinary shares of companies. The curator is prohibited from investing in shares in the family company or shares in any foreign company. The court has power to allow the curator to retain unauthorised investments which were part of the estate at the time of appointment of the curator.[27] The curator has no duty to maximise income or balance income against capital growth. The curator can simply invest the funds in narrow range low yielding investments not require advice. Although the Accountant of Court has a duty to supervise and monitor the investments made by a curator, he or she is unlikely to disturb investments which are not plainly wrong.[28]

4.12 Seventhly, there is no review of a curator's appointment in order to see whether there continues to be a need for such a service. A curatory can be recalled if the mentally disabled person recovers capacity. However, there is no mechanism for limiting or terminating a curatory because the mentally disabled person has become able to manage some financial matters or because the level of support available has increased. For example, some hospital in-patients have had curators appointed because insufficient help was available in hospital to enable them to manage their affairs. On discharge into the community where more financial help and advice may be available the curatory still continues.

4.13 Eighthly, the two medical certificates often merely echo the grounds of appointment of a curator, that the person is incapable of managing his or her own affairs or giving instructions for their management. Sketchy certificates have been criticised in a recent case.[29] More details of the areas of competence and incompetence should be provided, particularly if partial curatory is introduced. Also the appointment procedure should require consideration of the need for a curator in the circumstances and whether the mentally disabled person's finances could be managed in another way.

4.14 Finally, on a more technical level, the legislation governing curators and other judicial factors is well over a hundred years old and requires to be overhauled to bring it into line with modern conditions. Furthermore, the application of the Trusts (Scotland) Acts 1921 and 1961 to curators has been criticised because a curator is not a trustee. Like any other judicial factor he or she is an officer of the court. It would be helpful to have modern

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[25] Extras include such items as a holiday, redecorating or purchasing extra equipment for the mentally disabled person's accommodation or modifying the family home so that the person can live there rather than in an institution.
[26] See para 4.85.
[27] *Fraser v Paterson* (No 2) 1988 SLT 124.
[28] Investment powers are discussed later in para 4.97.
[29] *Fraser v Paterson* 1987 SLT 562.

statutory provisions setting out the functions of the courts, the Accountant of Court, curators and others in connection with mentally disabled persons.

DSS appointees

4.15 A person over 18 may apply to become the appointee of a "person unable for the time being to act" in respect of any benefit (including a pension or allowance) payable by the Department of Social Security.[30] The applicant fills up the relevant form and sends it to the local Social Security office. Medical evidence of incapacity may be asked for. Appointees are generally relatives, home helps, or managers of residential or nursing homes in which the recipient lives. An appointment will not be made if the estate is already being administered by a "tutor". "Tutor" includes a curator, a tutor-at-law or a tutor-dative with powers in the financial field. However, all recent tutors-dative have been appointed with powers in the personal welfare field only,[31] so that the DSS appointee has carried on acting.

4.16 The appointee is entitled to apply for any benefit to which the incapacitated person may be entitled, complete any necessary forms, and receive and deal with the benefit, all on behalf of the incapacitated person. The appointee has to notify the Department of any changes in circumstances affecting entitlement to the benefit.

4.17 An appointment may be terminated by the appointee giving one month's notice to the Department. The Department may also revoke the appointment at any time, for example if it becomes aware of improper actings by the appointee. However, appointees are not subject to any regular or spot checks. An appointment is also brought to an end if a curator, tutor-at-law or tutor-dative is appointed to administer the estate.

4.18 The system of DSS appointees is widely used. Because of the scale of use it is impossible for the Department to check the honesty and capability of applicants or monitor them after appointment. There is always the danger that the appointee will apply the money for his or her own benefit. If a complaint is made the Department will withdraw the appointment. Another concern arises where the manager of the home or other institution is the appointee of many of the residents. The funds received may simply be lumped together in a single account operated by the manager and spent on the residents. Individual residents are thus deprived of being able to handle their own finances and may be unable to buy things they want. Hospital authorities have been criticised in the *Report of the Working Party on Incapax Patients' Funds* ("the Crosby Report") for applying to the Department in their capacity as appointee to have DSS benefits reduced or withdrawn and similar action may well be taken by managers of other homes or institutions.[32]

Hospital authorities

4.19 The managers of a hospital may look after money and valuables belonging to in-patients where the doctor in charge of a patient certifies that he or she is incapable by reason of mental disorder or managing and administering his or her property and affairs.[33]

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[30] Social Security (Claims and Payments) Regulations 1979 (SI 1979/628), reg 28.
[31] A pending petition seeks to empower a tutor-dative to renounce a liferent. A decision has not yet been made.
[32] (Chairman Mr W S Crosby), Scottish Health Service Planning Council, Edinburgh HMSO 1985, pp 14, 18 and 19.
[33] Mental Health (Scotland) Act 1984, s 94(1).

The hospital may spend the money for the patient's benefit.[34] They can also dispose of valuables but must have regard to their sentimental value. This power of administration can be used for a particular patient for an amount not in excess of £3,000.[35] Beyond this sum the hospital managers must obtain the consent of the Mental Welfare Commission for Scotland. Such permission may be given for sums up to £50,000, but for larger amounts the Commission will suggest that the appointment of a curator should be sought.[36] This procedure is not available where the patient already has a curator appointed before admission. If a curator is appointed after admission the curator appointed will take over the management of the patient's affairs from the hospital authorities.[37]

4.20 The administration of mentally disabled patients' money and personal possessions by hospital managers is widely used and is clearly useful. However, only one medical certificate is required to bring a patient's funds under management and there is no opportunity to challenge this or question its appropriateness. The system was investigated and several recommendations made for improvement in the Crosby Report. The hospital managers' statutory duty is to hold and receive the money and personal possessions. They also have a discretionary duty to expend money held for a patient on his or her behalf. This is not always done. Money which could be used to enhance the quality of a patient's life in hospital in many ways may simply be left to accumulate. Because management is done by the hospital central management, it may be regarded as remote and impersonal. There is no individual appointed with specific responsibility for the funds of particular patients as there is with curators. The Crosby Report also made recommendations relating to the setting up of proper accounting procedures and the prohibition on using patients' money to buy goods and services which should be provided free by the National Health Service.[38] The Mental Welfare Commission for Scotland examined this area recently and found only piecemeal implementation of the Crosby Report's recommendations. We return to this topic later at paragraphs 4.154 to 4.172.

Negotiorum gestio

4.21 Negotiorum gestio according to Bell "is the management of the affairs of one who is absent, spontaneously undertaken without his knowledge, and on the presumption that he would, if aware of the circumstances, have given a mandate for such interference."[39] Absence includes not only physical absence but absence of mind due to mental incapacity or non-age.[40] Negotiorum gestio is not limited to urgent or immediately necessary acts of administration. In many of the reported cases the administration by the negotiorum gestor continued for many years.[41] The gestor is superseded by the subsequent appointment of a

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[34] S 94(3). See also the Crosby Report.
[35] S 94(2) and Directive by Secretary of State dated 17 August 1989.
[36] Information supplied by the Secretary of the Mental Welfare Commission.
[37] S 94(6).
[38] Recommendations 40-42 and 6 respectively.
[39] Bell, *Principles*, para 540.
[40] *Fernie v Robertson* (1871) 9 M 437; *Paterson v Greig* (1862) 24 D 1370.
[41] *Maule v Graham* 1757 Mor 3529, friend managing affairs of incapax adult for more than 5 years; *Paterson v Greig* (1862) 24 D 1370, mother managing affairs of pupil son for many years; *Fernie v Robertson* (1871) 9 M 437, daughter managing affairs of senile mother for many years; *Dunbar v Wilson and Dunlop's Tr* (1887) 15 R 210, brother managing affairs of mentally incapacitated adult for 2 years.

curator[42] or tutor, and the incapacitated person takes back the administration of his or her own affairs if he or she regains capacity.

4.22 The estate of a person whose affairs are being managed by the gestor is liable for obligations entered into by the gestor for the benefit of the person, and also for the gestor's reasonable expenses.[43] The gestor is not entitled to charge a fee for acting. The gestor has a duty to use in relation to the incapacitated person's affairs the same degree of care as a prudent person would in relation to his or her own affairs. Provided such care is taken the gestor is not liable for any loss caused by his or her actings.[44] Thus a husband, wife, parent, child or other relative or friend who looks after affairs of a mentally disabled adult without being appointed curator or tutor may lawfully undertake the administration of the adult's affairs as a negotiorum gestor.

4.23 The main disadvantages of negotiorum gestio is that it is not widely known, the gestor has no document evidencing his or her authority to act on act on behalf of the mentally disabled person and the limits of a gestor's authority are not clear. It is often difficult, therefore, for gestors to persuade third parties to enter into transactions with them or accept instructions from them.

Miscellaneous statutory provisions

4.24 There are many statutory provisions dealing with the disbursement of sums due to mentally disabled people by central and local government departments and other bodies. These include:

(a) pay, pensions etc administered by a central government department.[45]

(b) National Savings Bank[46]

(c) payments due as compensation for vaccine damage[47]

(d) Industrial and Provident Societies[48]

Each provision is different in detail but generally the paying body is given a discretion to pay the money to those looking after the mentally disabled recipient or apply it on his or her behalf. These arrangements do not apply if a curator has been appointed and come to an end on the appointment of a curator.

Tutors

4.25 Tutors-at-law and tutors-dative are individuals appointed by the Court of Session to look after and control the whole personal welfare and financial affairs of mentally disabled

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[42] *Dunbar v Wilson and Dunlop's Trs* (1887) 15 R 210.
[43] Bell, *Principles*, para 541.
[44] *Smith's Reps v Earl of Winton* 1714 Nir 9275; *Bannatine's Trs v Cunningham* (1872) 10 M 319; *Kolbin and Sons v The United Shipping Company Ltd* 1931 SC (HL) 128.
[45] Mental Health Act 1983, s 142.
[46] The National Savings Bank Regulations 1972 (SI 1972/764), reg 7(4). Similar regulations exist for National Savings Certificates and stock on the National Savings Register.
[47] Vaccine Damage Payments Act 1979.
[48] Industrial and Provident Societies Act 1965, s 22.

people. In current practice tutors-dative are confined to the personal welfare area.[49] A tutor-at law has not been appointed for over 100 years and was thought to be obsolete. However, a petition for the appointment of a tutor-at-law was presented to the Court of Session in June 1991.

Attorneys

4.26 The management of a mentally disabled person's affairs by an attorney appointed by the person before he or she lost capacity is discussed in Part 5**.**

PROPOSALS FOR REFORM

4.27 In this section we set out our proposals for reform of the existing system. First, we look at tutors-at-law and tutors-dative. We have already proposed in Part 2 that it should no longer be competent to appoint a tutor-at-law.[50] Tutors-at-law are virtually obsolete[51] and suffer from many disadvantages. The rule that a tutor-at-law must be a male and related by male links with the disabled person does not fit in with the modern concept of sexual equality. Because a tutor-at-law supersedes any other appointment there is a danger that the nearest male relative could oust a curator appointed by the court after careful consideration of the case.

4.28 As far as tutors-dative are concerned we think that if they are to be retained their functions should be confined to personal welfare. This is in line with modern practice. It seems that no tutor-dative with financial powers has been appointed so far this century, but a petition seeking personal guardianship powers and power to renounce a liferent is pending. We think there is merit in continuing to have two separate posts, a personal guardian or tutor-dative and a financial manager or curator. It is more flexible than a single post of personal and financial manager, since it allows a mentally disabled person's personal welfare and financial affairs to be dealt with by separate individuals, each with their own expertise and qualifications or to have both aspects dealt with by the same individual who was appointed to both posts. But it would complicate the law to have a tutor-dative with financial powers as well as a specialist (financial manager or curator) whose functions are confined to the property and finances of the mentally disabled person we. Therefore propose that:

28. If tutors-dative are to be retained they should not have any functions in relation to the financial affairs or estates of mentally disabled persons.

MANAGEMENT OF FINANCIAL AFFAIRS –

A NEW STATUTORY SCHEME

4.29 In this section we consider a possible new statutory scheme for the management of the financial affairs of mentally disabled people. We use the term "financial manager" for a person appointed in terms of the new statutory scheme. Financial managers would replace curators and would supersede any persons acting under statutory provisions or common law rules at least where full powers were granted. In our view there is considerable

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[49] See para 2.5.
[50] Proposal 1 at para 2.28.
[51] See para 4.25.

advantage in having comprehensive new legislation rather than amending the basically common law regime of curators. In drawing up our scheme we have been helped considerably by recent legislation in Australia, Canada and New Zealand. Only the basic outlines are presented since we are concerned at this stage to obtain views on the principle of introducing a new statutory system of financial management.

4.30 The underlying philosophy of the new scheme of financial management would be to make the least restrictive order and to allow the mentally disabled person as much freedom to manage his or her financial affairs consistent with the need for protection from exploitation and abuse. The scheme would be flexible in that the court or appointing authority would have a range of orders open to it and any financial manager appointed would have considerable discretion in performing the statutory functions. The manager would be under a duty to consult the mentally disabled person and those interested in his or her welfare when making decisions about the estate and to encourage the mentally disabled person to use and develop his or her existing financial abilities as far as possible.

4.31 Whether the appointment of financial managers should be made by a court, tribunal or other body, and what the procedure in dealing with applications should be, is considered later in Part 6. Whatever the nature of the authority and its procedure it can be assumed that the following minimum safeguards would be incorporated. First, there would be an assessment of the mentally disabled person's ability to manage his or her financial affairs and the need for a manager or other order. Secondly, the mentally disabled person would be given an opportunity to contest the application and make representations to the appointing authority. Thirdly, the proposed manager's fitness for the task in question would be investigated.

Grounds for appointing a financial manager or other intervention

4.32 A curator may be appointed under the present law to a person who is incapable by reason of mental disorder or managing his or her affairs or giving instructions for their management. Where instructions are given to another person (such as an agent or attorney) the granter must retain sufficient capacity to monitor and dismiss if necessary the person instructed. If the granter has insufficient capacity to do this then a curator may be appointed.[52] Insane delusions affecting only certain aspects of the person's finances may afford grounds for intervention.[53]

4.33 In Alberta a trustee may be appointed to a person if the court is satisfied that the person is:-

> "(a) an adult,
>
> (b) unable to make reasonable judgements in respect of matters relating to all or any part of his estate, and
>
> (c) in need of a trustee".[54]

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[52] *Fraser v Paterson* 1987 SLT 562.
[53] See para 4.3.
[54] Dependent Adults Act 1976, s 25(1).

The court must also be satisfied that the making of an order would be in the person's best interests.[55]

4.34 The Victorian legislation is very similar but the Guardianship Board must, before making an administration order, first consider less restrictive alternatives and make the order in the least restrictive terms.[56] In addition the Board's powers only arise in connection with persons with a disability, defined as intellectual impairment, mental illness, brain damage, physical disability or senility[57]. It has been held in connection with the disposition of funds paid into court under the 1986 Act that "disability" includes incapacity to manage one's affairs due to mental infirmity.[58]

4.35 In New Zealand the court has jurisdiction if in its opinion the person lacks, wholly or partly, the competence to manage his or her own affairs in relation to his or her own property. The fact that the person is acting or intends to act in a manner in which "a person of ordinary prudence" would not act is not to be a reason for the court to intervene.[59]

4.36 In England and Wales the Court of Protection may intervene if it is satisfied that the person is "incapable, by reason of mental disorder, of managing and administering his property and affairs".[60]

4.37 We find this a difficult area in that all the formulae set out above have advantages and disadvantages. For example, the inability to form "reasonable judgements" as in the Albertan legislation seems too subjective. It depends on the view of the court or other appointing authority as to what sort of financial conduct is reasonable. It would be all too easy to subject eccentrics or spendthrifts to compulsory financial management. Victoria attempts to avoid this by confining appointment of managers to cases where people are suffering from specified disabilities – ie mental impairment, mental illness, brain damage, physical disability or senility. We doubt the value of this as a protection. An elderly person whose financial affairs were in a muddle could readily be labelled as "senile", and financial eccentricity could be regarded as a symptom of mental illness or impairment. The New Zealand approach seems more direct in providing that deviations from the standard of an ordinary prudent person is not in itself a sufficient ground for the court to intervene.

4.38 We tend to favour a test based on total or partial lack of capacity to make financial decisions – the inability to understand what is involved or to comprehend the likely consequences of a decision one way or the other. An explicit reference to partial capacity is, we think, useful since we propose later[61] that partial or limited financial management should be introduced. We have already proposed a similar test for the appointment of a personal guardian.[62] Focussing on a person's total or partial incapacity to understand the likely financial implications of decisions, rather than inability to manage affairs, may allow intervention where a weak minded person gives away money too freely or is easily imposed upon. These situations are problematic under the present law since it is probably the

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[55] 1976 Act, s 25(2).
[56] Guardianship and Administration Board Act 1986, s 46(2), (4).
[57] 1986 Act ., s 3(1).
[58] *Smith v Reynolds and Others* (1989) VR 309.
[59] Protection of Personal and Property Rights Act 1988, s 25(3).
[60] Mental Health Act 1983, s 94(2).
[61] Proposal 34 at para 4.63.
[62] Proposal 5 at para 2.62.

position that averments to this effect are by themselves insufficient to justify a curator being appointed.[63] Some other evidence of inability to manage affairs must be adduced. It is difficult to lay down objective criteria for unreasonable gifts or disposals. Much depends on their amount and frequency, the wealth of the giver and the worthiness or moral claim of the recipients. Providing for intervention (by way of a financial manager or some other order) if the giver is unable fully to comprehend that the gifts or disposals will leave him or her without sufficient money for living expenses or other claims (whether of a moral or legal nature) seems to us to be a possible solution. We would however welcome other suggestions from those with practical experience of these situations.

4.39 Another requisite for intervention should be that the appointment of a financial manager or some other order is needed and would produce a substantial benefit for the mentally disabled person. Many mentally disabled persons' finances are perfectly adequately managed by their family or the hospital authorities. But there comes a point at which informal control is so extensive that it should be put on a formal footing, otherwise the mentally disabled person will lose the safeguards of the proposed financial management system. The court or other appointing body should have to be satisfied that other methods, such as our proposed new access to bank accounts and similar items[64] would be insufficient.

4.40 We invite views on the following proposal.

29. The court or other appointing body should have power to appoint a financial manager or make some other order relating to property or financial affairs only if it is satisfied that:

(a) the person in question lacks, wholly or partly, the capacity to understand the nature of and to foresee the possible implications of financial decisions or has such capacity but is unable to communicate, or act consistently in accordance with, such decisions, and

(b) the appointment of a financial manager or such other order would result in a substantial benefit to the person.

The fact that the person has acted or intends to act in a way an ordinary prudent person would not act should not by itself be evidence of lack of capacity.

Who may apply for the appointment of a financial manager?

4.41 At present anyone with an interest may apply for the appointment of a curator. Interest is not limited to pecuniary interest.[65] A Regional (or Islands) Council has a duty to apply if a curator is needed for a mentally disabled person in its area and no-one else is applying.[66] The Mental Welfare Commission for Scotland has a power, but not a duty, to apply in similar circumstances.[67] The New Zealand legislation has a long list of those

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[63] See para 4.3.
[64] Proposal 57 at para 4.178.
[65] See para 4.4.
[66] Mental Health (Scotland) Act 1984, s 92.
[67] 1984 Act, s 93.

entitled to apply ending up with any other person with leave of the court.[68] We see little virtue in having such a list. Entitling any person who can show an interest is much simpler. The appointing authority can safely be left with the task of deciding who has sufficient interest. There is clearly a need for some official body to act as an applicant of last resort applying if a financial manager is needed and no-one else is applying. Not all mentally disabled people have relatives who are prepared to apply and anyway some may need financial protection from their relatives. Local authorities are last resort applicants at present – the curator being an official in the finance department. This sensible practice should continue for financial managers. Applications by the Mental Welfare Commission for Scotland are almost unknown since the Commission seeks to persuade others to make an application, but we understand an application is under consideration at present. A member or official of the Commission never seeks appointment as curator. Although one last resort applicant (the local authority) might be thought to be sufficient, the Commission may wish to intervene in circumstances where the local authority declined to act.

30. (1) Any individual or organisation with an interest in a mentally disabled person's estate or welfare should be entitled to apply for the appointment of a financial manager to that person or for some other order to be made in respect of that person's property.

(2) The Regional (or Islands) Council is whose area the mentally disabled person lives should be under a duty to apply for the appointment of a financial manager or some other order if a manager or other order is needed and no other person is applying. The Mental Welfare Commission for Scotland should have a power to apply in similar circumstances but should not be under any duty to apply.

Who may be appointed financial manager?

4.42 In Scotland a curator must be an adult, suitable to carry out the functions and have no conflict of interest with the mentally disabled person.[69] It is an almost invariable rule that the curator must be resident in Scotland; non Scottish curators are required to submit themselves to the jurisdiction of the Scottish courts.[70] The vast majority of curators are solicitors or accountants; lay curators are comparatively rare. In a sample of 150 curatories which commenced in 1989 77% of curators were solicitors or accountants, 16% were relatives, 5% were others such as local government finance officers.[71] Being a curator requires a fair degree of financial ability. Investment decisions have to be made and detailed annual accounts prepared.

4.43 Other jurisdictions have similar requirements, but elaborate on suitability and conflict of interest. In Victoria the Board must be satisfied that the administrator will act in the adult's best interests and that he or she has sufficient expertise to administer the estate.[72] The latter requirement may be waived where there is a special relationship between the proposed administrator and the adult. This enables a near relative or close friend to be

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[68] 1988 Act, s 26.
[69] Walker, *Judicial Factors*, pp 62-65.
[70] Walker, p 63.
[71] CRU Curatory Survey.
[72] 1986 Act, s47(1)(c).

appointed.[73] Other factors which have to be taken into account in assessing suitability are the views of the disabled adult and the compatibility of the administrator with him or her.[74] In New Zealand the court must be satisfied that the proposed manager is capable of carrying out the duties satisfactorily having regard to the needs of the adult and the relationship of the proposed manager to the adult.[75] We tend to favour express provisions along the same lines. Efficient administration of the estate is obviously of prime importance but the standard expected of lay curators should be that of an ordinary prudent person. Later, we propose that the accounting duties could be simplified in appropriate cases.[76] This should assist in the appointment of lay financial managers so reducing the expense of administering small or modest estates. Lay appointments are far more common among attorneys, perhaps due to the absence of accounting and compliance with the Accountant of Court's requirements.[77] The wishes of the mentally disabled adult and his or her compatibility with the proposed financial manager are also important. In the case of partially incapacitated people the financial manager would have to act as adviser and encourage the person to deal with such business as he or she is capable of doing. It is a matter of complaint that under the present system no account is taken of the disabled adult's wishes or compatibility so that the disabled person and his or her family may have to deal with a cold and distant curator.

4.44 As regards conflict of interest the New Zealand legislation provides that the person in charge of an institution or home in which the disabled adult is residing cannot be appointed financial manager.[78] Allowing persons in charge of institutions to become financial manager arguably concentrates too much power into their hands. The institution or home would be providing services or treatment to residents, and taking day to day decisions about their lives as well as controlling their finances. Moreover, however scrupulous and correct the person in charge might be there would always be the suspicion that misappropriation of funds could be taking place. On the other hand under the existing law a hospital authority can administer patients' finances up to about £50,000 with the consent of the Mental Welfare Commission for Scotland.[79] Later in this Part we propose that this power of administration should be extended (but for funds only up to a smaller specified amount) to managers of local authority homes.[80] In Victoria a parent or close relative is not taken to have a conflict of interest simply because of the relationship.[81] We tend to think express provisions along these lines are unnecessary.

4.45 In Scotland the appointment of more than one curator is competent but such appointments are very exceptional.[82] Joint managers are allowed in New Zealand[83], and in England and Wales[84] but not apparently in Victoria or Alberta. Joint financial managers may give rise to slight additional delays in administering the estate and problems of accountability and responsibility of one manager for the actions of another. On the other hand it is difficult to see why the parents of a handicapped young adult or the children of an

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[73] 1986 Act, s 47(1)(c)(iv).
[74] 1986 Act, s 47(2).
[75] 1988 Act, s 31(5)(a).
[76] Para 4.110.
[77] See para 5.29.
[78] 1988 Act, s 31(4).
[79] See para 4.19.
[80] Proposal 56 at para 4.172.
[81] 1986 Act, s 47(3).
[82] *Kirk* (1836) 14 S 814.
[83] 1988 Act, s 31(2).
[84] The Court of Protection Rules 1984 (SI 1984/2035), rule 43.

elderly dementing person should not be joint managers. Married parents have been joint tutors of their pupil children's property since 1973[85] and this does not seem to have given rise to difficulties.

4.46 If, as we suggest, two or more managers may be appointed to a mentally disabled person, should all the managers have to take part in any decision and sign every document or should each manager have power to act independently? There are arguments and analogies for either approach. Where there are two trustees or executors in Scotland both must join in any transaction.[86] In New Zealand if two or more managers are appointed they hold office jointly.[87] The requirement that both managers have to agree ensures that administration issues are properly discussed. It is also some protection against misappropriation. On the other hand parents who are joint tutors of their pupil children may act independently.[88] The main advantages of allowing each manager to act alone are that it speeds up administration and prevents disagreements resulting in deadlock. Independent action also enables emergencies, where there is no time to contact all the joint managers, to be dealt with. The courts would try to appoint managers who could work together and limit each other. Although a third party would be entitled to proceed on the authority of one joint manager, the joint managers should be under a duty (except in emergencies of consulting each other about the transaction in question. Provisionally we tend to favour each financial manager being entitled to act independently in line with our proposal on personal guardians.[89] Supplementary provisions would be needed to empower the court or other body to rule on disputes between joint managers and challenges by a third party to a manager's authority.

4.47 Parents of adult handicapped children are very concerned about who will look after their children when they are no longer around to do this. In part 2 we proposed alternate personal guardianship as one solution to this problem.[90] A younger relative or friend could be appointed as alternate guardian at the same time as one of the parents was appointed guardian. The alternate guardian would be entitled to act on the death of the parent or his or her inability to act for any other reason. The same need arises in the financial management field and we favour a similar solution, that of alternate financial managers.

4.48 In *Brogan, Petr*,[91] it was held incompetent to appoint a corporate body as curator. Alberta[92] and New Zealand[93] allow trust companies to be financial managers but not any other corporation. Victoria permits any "person" to be appointed which would include corporate bodies.[94] One argument against corporations is that a curator is an officer of the court subject to court control. Supervision and control by the court and the Accountant of Court would, so the argument goes, be more difficult in the case of a corporate curator than an individual. It might also cause confusion where the curator has to give advice and take decisions in that the family and others involved might not get hold of the same individual on each occasion. One of the aims of the proposed new system of financial managers is the

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[85] Guardianship Act 1973, s 10, now Law Reform (Parent and Child) (Scotland) Act 1986, s 2.
[86] Trusts (Scotland) Act 1921, s 3, although a majority may act where there are three or more trustees or executors.
[87] 1988 Act, s 31(2).
[88] Law Reform (Parent and Child) (Scotland) Act 1986, s 2(4) unless the court orders otherwise.
[89] Proposal 6(b), para 2.69.
[90] Proposal 6(c) at para 2.69.
[91] 1986 SLT 420.
[92] 1976 Act, s 26(1)(b)
[93] 1988 Act, s 31(3).
[94] 1986 Act, s 47(1)(c).

establishment of close personal links between the manager, the mentally disabled person and those caring for him or her. This would be harder to achieve with a corporation as manager. The advantage of a corporation is that it does not die, become ill or go on holiday so that continuity of administration is assured. A cheap and simple procedure for changing managers would lessen the advantages of a corporate manager.[95] It is competent for a corporation to be confirmed as executor-nominate[96] and indeed banks regularly undertake such business. Corporate executors manage to give advice and make decision in relation to deceased people's estates without much difficulty, and, in the event of improper actings, can readily be called to account by the court. We see no reason to suppose the position would be any different for the management of living people's financial affairs. The Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 allows recognised financial institutions to act as executry practitioners. Section 19 contains a definition of recognised financial institutions – banks, building societies and insurance companies – that could be used in the context of financial managers. Another class of corporation that might be allowed to act as financial manager is a non-profit-making organisation concerned with the mentally disabled. If such organisations were to be acceptable as financial managers they could be approved by the Secretary of State and listed in subordinate legislation in order to avoid the court or other appointing body having to enquire into their suitability.

4.49 We seek views on the following proposals and questions.

31. (1) There should be power to appoint as financial manager to a mentally disabled person any individual who is suitable and whose interests do not conflict to any material extent with those of the adult. It should be competent for the same individual to be appointed financial manager and personal guardian.

(2) In deciding whether an individual is suitable as financial manager, the wishes of the mentally disabled person, the likelihood that the individual will be capable of carrying out the duties satisfactorily bearing in mind the size and complexity of the estate, and the relationship between the person and the individual should be considered. The appointment of lay (ie not solicitors or accountants) financial managers ought to be encouraged especially for modest estates.

(3) It should be competent to appoint two or more individuals as joint financial managers. The joint managers should be required to consult among themselves, except in an emergency. Any third party should be entitled to reply on a consent, approval or decision by any one joint manager.

(4) It should be competent to appoint an individual to act as alternate financial manager. On the death, incapacity, removal or resignation of the financial manager the alternate should become financial manager without further procedure.

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[95] See Proposal 51 at para 4.143.
[96] Currie, *Confirmation of Executors*, (7th edn) pp 84-85.

(5) Should it be competent to appoint as financial manager a bank, building society or insurance company? Views are also sought on whether any other corporate body, firm or unincorporated association should be capable of being appointed financial manager provided that it was otherwise suitable and had no conflicting interest.

Relationship between personal guardians and financial managers

4.50 It is a common criticism that curators and mental health guardians are each responsible for only one area of the mentally disabled person's affairs – finances and personal welfare respectively. Decisions in one area inevitably have repercussions in the other. One solution would be to create an "overall guardian" responsible for all aspect of a mentally disabled person's affairs and welfare and abolish the separate posts of curators and mental health guardian. In our view a better solution is to continue to have two separate posts – a personal guardian and a financial manager. This would be more flexible since it enables either one person to hold both posts, becoming an "overall guardian", or separate people to hold the posts, each contributing their own special expertise. Where separate people are appointed it is vital that they should keep in touch with each other and consult each other about all matters of common interest. We would not be in favour of either the personal guardian or the financial manager having a superior position. In the event of an irreconcilable disagreement the court or other body should have to rule on the matter. We propose that:

32. It should be competent to appoint the personal guardian of a mentally disabled person as his or her financial manager. Where the personal guardian and financial manager are separate persons each should be under a duty to consult the other on all matters affecting the mentally disabled person.

Public management

4.51 Most other jurisdictions have Public Trustees or similar officials to provide public administration for those who wish it and to act when no other suitable person is willing to be appointed. In Alberta the Public Trustee is a trustee of last resort having a duty to apply if no other person makes an application and being appointed in the absence of any other suitable person.[97] In England and Wales the Court of Protection may appoint the Public Trustee as receiver if there is no other suitable person or where there is family friction.[98] The Public Trustee is simply listed among those who may be appointed in the New Zealand[99] and Victorian[100] legislation.

4.52 Is there a need in Scotland for public management of the estate of mentally disabled people? One of the functions of a public trustee is to apply for a manager to be appointed if no-one else is applying and a manager is needed – an applicant of last resort. We have dealt with this in our discussion of persons who should be entitled to apply for the appointment of a financial manager in paragraph 4.41. Another function of a public trustee – provision of

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[97] Dependent Adults Act 1976, ss 33 and 34.
[98] Whitehorn, *Court of Protection Handbook*, (8th edn 1988) p 7.
[99] 1988 Act, ss 31 and 39.
[100] 1986 Act, s 47.

an impartial service for administration of estates – is met in Scotland by the appointment of solicitors or accountants as curators. These professionals can be relied on to provide as independent a service as any state administrator, especially since they act under the general superintendence of the Accountant of Court, a State official. We are not aware that there is any difficulty in finding a solicitor or accountant willing to take on the job of acting as curator, except perhaps for small estates, and we would envisage there being equally little difficulty for the proposed financial managers. Another role for public trustees is to provide cheap or free administration for small estates where the fees for professional management would be too great a burden on the estate. There seems to be some scope in Scotland for introducing public management on this ground.

4.53 The commission allowed on a small curatory is often below the cost to a solicitor or accountant of providing the service. On the other hand if the commission were to be adequate remuneration it would form an unacceptable burden on the estate. Commission and the other expenses of administration (premium for the bond of caution and the Accountant of Court's fee for auditing the annual account) may amount to over one-third of the income of a small to modest estate.[101] There is clearly an unmet need for a cheap and simple method of administering modest estates. One solution is for the mentally disabled person's estate to be administered by a relative, friend, or a representative from an organisation dealing with the mentally disabled who waives the commission to which he or she is entitled. Not every mentally disabled person will be fortunate enough to have someone prepared to act as curator or manager without remuneration. We do not see subsidising professional curators or financial managers as a way of alleviating the burdens on small estates. A scheme that was fair to the managers, the estates and the State would be complex and expensive to administer. Moreover, the fact that full professional charges would be payable (by the estate and the State or the latter alone) might encourage the appointment of professional managers where other and cheaper methods of administration were available. An option which we think is worthy of consideration is public management in which the fees are such that small estates receive very favourable treatment. For example, in England and Wales estates of under £5,000 in value can be administered by a Court of Protection official and no fee other than the commencement fee at the beginning of the administration is charged. Even this commencement fee is waived if the clear annual income of the patient (excluding non-taxable DSS benefits) is less than £1,000.[102] The Public Trustee may be appointed to administer estates where there is no suitable person to act as receiver. No receivership fee is charged in a year in which the clear income of the patient does not exceed £1,000.[103]

4.54 There is no Public Trustee in Scotland and we do not think such an official or any other new organisation should be established simply to manage small estates cheaply. We doubt whether there would be sufficient business to justify public management by a new organisation. The issue therefore becomes what existing bodies could take on the additional role of public manager. The choice seems to lie between regional (or islands) councils, the Accountant of Court or the sheriff courts. The Mental Welfare Commission for Scotland would not be an appropriate body. Its function is generally to protect the interests and

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[101] CRU Curatory Survey.
[102] The Court of Protection Rules 1984 (SI 1984/2035), Rule 78(1).
[103] Court of Protection Rules 1984, rule 82(2).

monitor the circumstances of mentally disabled persons.[104] Such a supervisory body should not in our view be given an executive role.

4.55 The arguments in favour of regional (or islands) councils are that they do occasionally act as curators when no-one else is willing to be appointed, that officials in the finance department would be competent to deal with administration of estates, and that the nominated official or colleagues would be reasonably accessible for consultation by the mentally disabled person's family and others interested in the management of the estate. On the other hand there is a danger of concentrating too many functions in the hands of local councils. For some mentally disabled persons the council would already be the landlord or supplier of accommodation, the provider of social work and other services, and the mental health or personal guardian.

4.56 The Accountant of Court and the staff are familiar with curatories and investment of funds, albeit in a supervisory and auditing capacity, and could readily take on the additional role of public managers of the estates of mentally disabled people. Administration by the Accountant's office would be impartial. The other advantages of using the Accountant's office would be that they would build up expertise in this area through dealing with a number of cases and that there would be one body with an overall view as to how the new system of public management was developing. The main disadvantage is that the Accountant of Court's office is situated in Edinburgh so that it would not be easy for those outwith the central belt of Scotland wishing to discuss matters with the official concerned to do so. There is a danger that management by the Accountant of Court's office might be regarded as management by a remote bureaucracy. However, staff do at present travel to see people in connection with curatories, and would no doubt also do so in their capacity as public managers.

4.57 The final option is for the sheriff clerks to be public managers acting under the direction of sheriffs. They could also offer an impartial service. The spread of sheriff courts throughout Scotland means that the local court would in most cases be readily accessible. Administration of mentally disabled persons' estates would not be a completely new type of function for the sheriff courts. Rule 128 of the Sheriff Court Rules[105] directs that damages for personal injuries, or damages resulting from the death of another person, which are payable to a person under legal disability are to be paid into court unless the court orders otherwise. The funds paid into court are then administered by the sheriff clerk under the direction of the sheriff. At present Rule 128 applies to children under 18 since virtually all adult mentally disabled persons have curators to whom payment is ordered.[106] The system of sheriff court administration appears to work well. In practice the investment of the funds and the questions of disbursements for special purposes are decided by the sheriff after discussion with the child's parents. The child may also be consulted if old enough.[107] On the other hand financial management of mentally disabled people's estates would only be a "fringe activity" for the sheriff courts. It would be difficult for each court to build up expertise in this area or to retain trained staff. Furthermore, there would be no central body with an overall view of the new system of public management. Sheriff clerks could,

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[104] Mental Health (Scotland) Act 1984, s 3.
[105] Sheriff Courts (Scotland) Act 1907, Sch 1.
[106] Macphail, *Sheriff Court Practice*m p 697.
[107] Macphail, p 698.

however, be required to report to, and operate under rules drawn up by, the Accountant of Court.

4.58 So far the discussion has been in terms of public management of small estates. If public management is to be introduced it should not be confined to small estates. It ought to be available for larger estates for those who would prefer a public official rather than a solicitor, accountant or lay person as financial manager. A system of public management which also administered large estates for which full fees were chargeable might not be such a burden on public funds. If larger estates were to be included the various schemes for public management mentioned in paragraphs 4.54 to 4.57 need not be mutually exclusive. For example, simple or modest estates could be handled by the sheriff courts, leaving larger or more complex estates to be administered by the Accountant of Court. The appropriate mode could be selected either by reference to the size of the estate or by the appointing authority in dealing with the application for appointment of a manager.

4.59 To elicit views on public management we propose that:

33. (1) The court or other appointing body should have power to direct that the estate of a mentally disabled person should be placed under public management where the applicant asks for public management or where no other suitable manager is nominated.

(2) Views are invited as to whether public management should be carried out by:-

(a) a regional (or islands) council official,

(b) the sheriff clerk acting under the direction of the sheriff along the lines of the present scheme for administering children's damages,

(c) the Accountant of Court,

(d) either (a), (b) or (c) at the discretion of the appointing authority or depending on the value of the estate, or

(e) any other organisation or official.

(3) The fees charged for public management of large or moderate estates should be the full economic cost of providing the service. Small estates should be charged no fee or only a nominal fee. Views are invited as to what should be regarded as a small estate for this purpose.

Partial management and property orders

4.60 Once criticism of the present curatory system is that there is no possibility of limited intervention. The court has a choice between appointing a curator having full financial powers or taking no action. Furthermore, a curator when appointed manages all the mentally disabled person's property. It does not seem competent to limit the curator's authority to particular items of property of the carrying out of particular transactions or to

provide that curatory should lapse once particularly transactions have been effected.[108] One of the underlying principles of the proposed new statutory scheme of financial managers is that of least intervention and that the mentally disabled adult should be encouraged and assisted to manage his or her own affairs as far as possible. Partial management would be useful where a mentally disabled person's estate include both simple and complex financial matters. A manager could for example be appointed to deal only with the letting of the person's residence or managing his or her investments. There are many situations where a simple limited order might be sufficient to resolve a financial difficulty without having to impose continuing financial management on a mentally disabled person. Examples include negotiating and signing a lease for the adult's accommodation, bringing a damages action in which only a small award is likely to be made, giving a receipt for the proceeds of an insurance policy or a payment from the Criminal Injuries Compensation Board or making arrangements with the mentally disabled person's bank for money to be drawn out to meet his or her living expenses.

4.61 In England and Wales a judge of the Court of Protection may make orders or give directions for the control and management of any property of the patient.[109] Under the "short procedure"[110] if it appears to the court that the appointment of a receiver is unnecessary an order may be made directing a nominated person (including an officer of the court) "to deal with the patient's property, or any part thereof, or with his affairs" as specified in the order. In Alberta[111], Victoria[112] and New Zealand[113] a manager may be appointed in respect of part of the estate only.

4.62 We think a limited financial manager – a manager whose functions are restricted to part of the mentally disabled adult's estate and affairs – would be a useful innovation. Another power that should be available is a property order authorising a nominated person to do a particular act or deal with a particular item of property. This order is designed to deal with a "one-off" situation where once the intervention has been made no further action is required. In addition to the examples quoted in paragraph 4.60 a property order could be used to sell the furniture or other possessions of a mentally disabled person going into hospital as a permanent in-patient, the proceeds being handed over to the hospital managers to administer thereafter on behalf of the patient, or to authorise the manager to claim, or renounce a claim to, legal rights in the estate of a parent of the mentally disabled person.

4.63 Accordingly we propose that:

34. It should be competent for the court or other appointing body:

(a) to make a property order whereby a nominated person is authorised to carry out one or more specified acts or transactions on behalf of the mentally disabled adult,

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[108] Occasionally curators allow the mentally disabled person to handle the income of the estate but retain control of the capital.
[109] Mental Health Act 1983, s 96(1)(a).
[110] The Court of Protection Rules 1984 (SI 1984/2035), rule 7.
[111] 1976 Act, s 28(1).
[112] 1986 Act, s 46(2) and 51(1).
[113] 1988 Act, s 31(1).

(b) to appoint a financial manager to deal with part only of the mentally disabled person's property or financial affairs, or

(c) to appoint a financial manager to deal with the person's entire estate.

The court or appointing body should be required to make the least restrictive order.

Duty to act and delictual liability of financial managers

4.64 Should a positive statutory duty to act be imposed on financial managers and should liability arise for failure to act where necessary? In the days when tutors-dative were appointed with control over the estates of mentally disabled people they were liable in damages if the estate suffered loss as a result of their acts or omissions.[114] The same is true of curators.[115]

4.65 In Alberta section 32(1) of the Dependent Adults Act 1976 provides that:

> "A trustee shall, subject to this Act, exercise his authority for the maintenance, education, benefit and advancement of the dependent adult in respect of whose estate he is trustee".

Similarly, the Victorian Guardianship and Administration Board Act 1986 states that "an administrator must act in the best interest of the represented person".[116] These statutory provisions suggest that a duty is being laid on a trustee or administrator, breach of which will give rise to an action of damages. New Zealand adopts a somewhat different approach based on the liability of the manager. Section 49(1) of the Protection of Personal and Property Rights Act 1988 provides:

> "(1) Subject to subsection (2) of this section [dealing with contractual liability], no action shall lie against a manager in respect of anything done or omitted to be done by the manager in the exercise of the powers conferred by or under this Act, unless it is shown that the manager acted in bad faith or without reasonable care."

The meaning of this provision is not entirely clear. Arguably a financial manager incurs no liability for an omission to act even if he or she omits to do so in bad faith or negligently.

4.66 The system of financial managers proposed in this discussion paper should mean that the manager is more in contact with the mentally disabled person and his or her carers and family than a curator is. It might be though reasonable that a manager should be under a general statutory duty to look after the person's estate and act where necessary. On the other hand, such a duty would be onerous especially if it were to be interpreted as requiring the manager to keep the person's financial affairs under constant review. People, particularly non-professionals, might well be deterred from seeking appointment as managers. For example, would a manager be liable for failure to apply for every state

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[114] Fraser, *Parent and Child*, p 392.
[115] *Semple v Tennent* (1888) 15 R 810, curator bonis to a minor personally liable for unnecessary expenditure on building mansion house; *Crabbe v Whyte* (1891) 18 R 1065, curator bonis liable for loss caused by negligent investment.
[116] S 49(1).

benefit that might be awarded or to monitor the investments every week? We think there are dangers in imposing a positive statutory duty to act unless it were to be qualified by reference to some sort of reasonable standard. In our discussion paper on *Parental Responsibilities and Rights, Guardianship and the Administration of Children's Property* we used the concept of parental responsibility rather than parental rights or obligations in order to avoid giving rise to new grounds of action for damages by children and other against parents.[117]

4.67 Legislation in terms of responsibilities rather than duties or obligations would not prevent a financial manager from being held liable for acts or omissions in the exercise of the responsibilities. Like a curator or a trustee a financial manager would have to take the same degree of care a reasonable person would take in looking after his or her own affairs. The question of liability could be left to the existing law of delict. The relationship of financial manager and mentally disabled person is such that a duty of care would be held to exist. On the other hand there is some benefit in having a new statutory provision so that the legislation is self-contained and the position of the manager is explicit. The case for a statutory provision becomes stronger if a similar formula applies to personal guardians and attorneys (financial and health care). We seek views on the following proposal and question.

35. (1) A financial manager appointed to a mentally disabled person should have a responsibility to manage the person's financial affairs and estate within the scope of the powers conferred on appointment.

(2) Should a financial manager's liability for exercising or failing to exercise the powers conferred be governed by

(i) the existing law of delict, or

(ii) a new statutory provision along the lines that a manager should be liable for exercising or failing to exercise the powers conferred only if he or she acted without reasonable care or failed to act when it would have been reasonable to have acted?

Penalties for failing to discharge duties

4.68 A curator, like other judicial factors, may suffer financial penalties for misconduct or failing to discharge the duties. Section 6 of the Judicial Factors Act 1849 empowers the court to impose:-

> "such fine, and to the forfeiture of the whole of any part of his commission, and to suspension or removal from his office as factor, and to payment of expenses, or to any one or more of such penalties, as the court in its discretion shall decide; ...."

The penalties are declared to be in addition to the curator's liability in delict to the estate. Section 4 of the Act of Sederunt of 1730 provides for a minimum fine of half the commission for every year in which the curator fails to lodge accounts.[118] This provision is not used in

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[117] Para 2.3.
[118] *Lowe* (1872) 11 M 17.

current practice. Finally, section 5 of the 1849 Act renders a curator liable for penal interest (at the rate of 20%) for sums over £500 which remain unbanked or in a non-interest bearing account for more than 10 days. The Accountant of Court has a discretion to remit or modify the penalty.[119]

4.69 The legislation in Victoria imposes criminal penalties for enforcing compliance by administrators with statutory duties.[120] In New Zealand a manager who fails to lodge an initial inventory of the estate or an annual statement of transactions commits an offence and is liable to a fine not exceeding $1,000.[121] Alternatively the court may issue an order directing the manager to lodge an inventory or statement within a specified time and the expenses of these proceedings may be charged to the manager.[122]

4.70 We are not in favour of applying the existing Scottish provisions to financial managers. Fines and other criminal penalties should not be employed as sanctions in civil matters unless necessary. Furthermore, the Act of Sederunt of 1730 is still in existence although its provisions for a minimum fine are not used in modern practice. Serious cases of failure to act or mismanagement should be dealt with by the courts. The ultimate sanction should be dismissal as manager with the manager being made liable for the expenses of the proceedings. The manager would also be liable for any damages suffered by the estate. For less serious failure the court should be able to reduce the manager's remuneration (down to nil in appropriate circumstances) for a period or periods in which the failure occurred. The manager could in addition be made liable for expenses of the proceedings. Involving the courts seems too heavy handed for minor infractions. The court could delegate these to the Accountant of Court by authorising the Accountant to consider the manager's actings when fixing the remuneration. We propose that:

36. (1) Where a financial manager fails to carry out his or her duties properly the court should have power, on application by the Accountant of Court or any person with an interest, to remove the manager and/or to modify (to nil if appropriate) the remuneration to which the manager would otherwise be entitled.

(2) The Accountant of Court should have power within limits specified by rules made by Act of Sederunt to modify a financial manager's remuneration if the manager's performance of his or her duties has fallen below the expected standard.

Contractual liability of financial managers

4.71 In what circumstances (if any) is a financial manager to be personally liable for obligations he or she enters into on behalf of the mentally disabled person? Trustees, tutors-dative and curators are personally liable for any obligations undertaken to a third party unless it is clear that the obligation was undertaken in a respective capacity on behalf of the mentally disabled person. A reference to the curator's position without words of

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[119] Rules of court, rule 200(g).
[120] 1986 Act, s 80.
[121] 1988 Act, s 45(4).
[122] 1988 Act, s 48.

limitation, such as "as a curator", would generally be insufficient. These rules seem appropriate to apply to financial managers. Accordingly we propose that:

37. Any obligation entered into by a financial manager within the scope of his or her authority should bind the mentally disabled person and not the manager personally as long as it was made clear that the obligation was entered into in a representative capacity.

Manner of exercise of powers by financial manager

4.72 One common complaint about the current curatory system is that the curator takes over the management completely and is not under any obligation to take account of the views of, or consult with, the mentally disabled person, the family or carers. Some curators do take a personal interest in those whose estates they are administering and consult widely before reaching any decision. But others take a more conservative view of their work and confine themselves to strictly financial management.

4.73 In Victoria the administrator is enjoined to encourage and assist as far as possible the mentally disabled adult to become capable of administering the estate and is under a duty to take account of the disabled adult's wishes.[123] The New Zealand legislation contains very similar provisions. The manager is also under an express statutory duty to consult, so far as practicable, the mentally disabled adult, other persons interested in his or her welfare (including any personal guardian) and any other non-profit-making organisation providing facilities and services for the mentally disabled. The manager may follow advice given on consultation and is not liable for any loss in so doing unless he or she acts in bad faith or does not take reasonable care. The manager may apply to the court for directions if he feels unable to follow the advice.[124]

4.74 We think financial management would be better attuned to the needs and interests of the mentally disabled if managers were under a duty to consult the mentally disabled person and those interested in their welfare. The duty to consult relatives should be subject to the proviso that they are fairly readily contactable. We imagine that in most cases families would come to some arrangement whereby one of their member would act as a contact for the manager. The manager should also have a discretion whether to consult those who show no interest in the mentally disabled person or who have in the past exploited or abused him or her. We have already proposed that where a personal guardian is appointed he or she should consult with the financial manager about matters of common interest.[125] We doubt the desirability of consulting organisations. Also we are not in favour of detailed provisions regarding the manager's duty in relation to the advice received from those consulted or liability for acting or failing to act on the basis of advice. It should be sufficient to state that the manager should have regard to the views expressed by those consulted.

4.75 Within these constraints how should a financial manager exercise the powers? Should it be according to the best interest of the mentally disabled person objectively considered by a reasonable manager or should the manager make a decision according to what the disabled person would probably have decided if he or she was able to do so? The

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[123] 1986 Act, s 49.
[124] 1988 Act, s 43.
[125] Proposal 11 at para 2.87.

former, termed "best interests", is used in Scotland, England and Wales and most Commonwealth countries. The latter, termed "substituted judgement", is used in some states in America and has been recommended by the Law Reform Commission of the Australian Capital Territory.[126] The difference between these standards is shown by the following example. Suppose a mentally disabled person owns a valuable picture to which he is very attached and constantly expressed the wish that it should never be sold. If he or she becomes incapacitated should the manager decide to sell it where a sale would now be in the best interest of the incapacitated person, or should the manager decide not to sell even though the man would not be able to have as good a standard of living? We tend to favour continuation of the "best interests" rule, coupled with requiring the guardian to consult with and have regard to the wishes of the mentally disabled person, family and carers. The previously expressed views of the disabled person could and should be taken into account but should not override the judgement of the manager as to the current best interests of the incapacitated person. We deal later with written instructions as to how financial decisions should be taken after the writer's incapacity.[127]

4.76 We therefore propose that:

38. A financial manager in managing a mentally disabled person's property and financial affairs should always do so in the best interests of the person. In order to establish what are the best interests the manager should, where appropriate and as far as is reasonably practicable, consult

(a) the mentally disabled person,

(b) members of the person's family and others who are interested in his or her welfare, and

(c) any personal guardian or tutor-dative appointed to the adult.

and in reaching any decision should have regard to the views expressed.

Financial manager allowing mentally disabled person to handle affairs

4.77 At present a curator supersedes the mentally disabled person, DSS appointee and others in the management of the estate. Even if a mentally disabled person is competent to carry out some transactions the curator will take over his or her affairs. Where a mentally disabled person is living at home with relatives the curator may allow the various welfare state benefits and allowances to be paid to the relatives to be used by them in maintaining the person. The New Zealand legislation specifically empowers the financial manager to permit the mentally disabled adult to control, or deal with, part of the estate in order to exercise and develop his or her financial competence.[128] This seems to be particularly useful in the case of young mentally handicapped adults who need to be encouraged to make the best use of their abilities. Where management is delegated in this way the manager would in effect be acting as an adviser and counsellor but able to take over again if the adult proved incapable of handling his or her affairs. We propose that:

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[126] *Report on Guardianship and Management of Property* No 52 (1989), para 2.7 and clause 13(1) of the annexed bill.
[127] Part 5.
[128] 1988 Act, s 36(2).

39. A financial manager should be entitled to allow the mentally disabled person to deal with any part of the property under management. In order to encourage such dealing and protect third parties an allowed dealing should not be challengeable on the ground of the mentally disabled person's lack of capacity.

The financial manager's powers

4.78 We turn to consider what powers a financial manager should have in relation to the mentally disabled person's estate. We look first at general powers and than at investment powers.

4.79 **The present Scottish position for curators**. The interlocutor appointing a curator confers upon him or her "the usual powers". The extent of such powers has to be gathered from Acts of Sederunt made between 1690 and 1730, later legislation and case law. Because curatory was originally conceived as a temporary expedient the usual powers are regarded as those necessary for protecting and conserving the estate. Writing in 1881 Thomas stated that curators are appointed "with the view of doing no acts but those of necessary administration".[129] The usual powers include ingathering and taking possession of the estate, realising it where appropriate or necessary, investing the proceeds and making payments for the support of the mentally disabled person and dependants.

4.80 The Trusts (Scotland) Act 1921 conferred upon curators (among others) the general powers of trustees set out in section 4 of the 1921 Act. A curator may exercise any of the powers provided the act in question is not at variance with the terms and purposes of the appointment of the curator. Among the section 4 powers are powers to sell any part of the estate (heritable or moveable), grant leases, borrow money on the security of the estate, and purchase residential accommodation for the mentally disabled person. The 1921 Act provisions were perhaps intended to widen the management powers of curators. That they have not done so is due to the condition that the act must not be at variance with the terms and purposes of the appointment. The interlocutor gives no clear guidance as to the terms and purposes. In order to consider whether a section 4 power can be exercised the common law scope of the usual powers and the whole circumstances of the appointment have to be considered. The underlying common law emphasis on conservation and preservation of the estate has tended to prevent the extension of powers that may be exercised by a curator without further authority from the court.

4.81 A curator who seeks to do an act which is outwith the usual powers or which falls within the section 4 powers but is arguably at variance with the terms and purposes of the curatory may apply to the Court of Session for special powers under section 7 of the Judicial Factors Act 1849. The application is made by lodging a note requesting special powers together with the Accountant of Court's opinion on the request.

4.82 Another, but much less common, method of obtaining authority to do acts outwith the usual powers is to apply to the Court of Session under section 5 of the Trusts (Scotland) Act 1921. This empowers the court to grant the curator authority to do any act within the scope of the section 4 powers

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[129] *Judicial Factors*, (2nd edn) p 105.

> "notwithstanding that such act is at variance with the terms and purposes of the [curatory appointment], on being satisfied that such act is in all the circumstances expedient for the execution of the [curatory]".

The courts have tended to encourage a cautious approach. Thus in the *Marguess of Lothian's* CB (an application to feu part of a large estate on which feuing had already taken place) the Lord President observed[130] that where there was any doubt about a curator's powers:

> "his only safe course is to apply under section 5, for the title he ultimately gives to the purchaser or feuar will be equally good whether the Court gives him the authority craved or refuses his petition as unnecessary".

4.83 Examples of acts which fall outwith normal factorial management and thus used to require the authority of the court under section 7 of the 1849 Act or section 5 of the 1921 Act are:-

(a) sale of the mentally disabled person's dwelling house,

(b) donations to charities,[131]

(c) maintenance of those whom the mentally disabled person is not legally obliged to support,[132]

(d) rebuilding or substantially adding to the mentally disabled person's dwelling-house,[133]

(e) purchasing an annuity,[134]

(f) electing between legal rights and testamentary provisions,[135]

(g) renouncing a lease[136], although it is accepted current practice that a curator may give up the tenancy of the mentally disabled adult's dwelling-house if the adult is unlikely ever to need it again.

4.84 In order to cut down the number of applications to the Court of Session a new procedure was introduced in 1980.[137] This implemented the recommendation in our *Report on Powers of Judicial Factors*[138] and was introduced as an interim measure until the powers of judicial factors could be examined more fully. A curator (among others) can instead of applying to the court, obtain authority from the Accountant in Court to do an act mentioned in paragraphs (a) and (ee) of section 4 of the 1921 Act provided the act is not expressly prohibited by the terms of the appointment. These acts include selling any part of the estate, granting leases, borrowing money and acquiring a residence for the mentally disabled person. The curator's application has to be intimated to various people, including the

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130 1927 SC 5797 at p 585.
131 *M's* CB (1904) 12 SLT 30.
132 *Hamilton's Tutors* 1924 SC 364.
133 *Semple v Tennent* (1888) 15 R 810.
134 *Paisley, Petr* (1857) 19 D 653.
135 *Allan's Exs v Allan's Trs* 1975 SLT 227.
136 *Warden, Petr* (1829) 7 S 848.
137 Law Reform (Miscellaneous Provisions)(Scotland) Act 1980, s 8.
138 Scot Law Com No 59 (July 1980), Cmnd 7904.

cautioner and those on whom the petition for the curator's appointment was served.[139] If there are no objections the Accountant of Court is empowered to consent if he or she considers that the proposed act is in the best interests of the mentally disabled person or any other individual to whom the person owes a duty of support. The main use of the Accountant of Court's consent procedure has been the sale of the mentally disabled person's residence.[140] Other possible acts include granting leases and borrowing money on the security of the estate for repairs or improvements. The consent procedure is also used in current practice where the curator proposes to take some unusual step within the scope of the usual powers. The procedure protects the curator since it establishes that all those with an interest in the estate were informed of the proposal and did not object and that the Accountant of Court approved of the course of action proposed.

4.85 One area of difficulty, due to the high cost of private health care, has been encroachment on the capital of the estate for the maintenance of the mentally disabled person. Recently it was held in *Broadfoot's* CB[141] that a curator's usual powers do not include encroaching on capital. The Accountant of Court possessed delegated authority under the then existing law to allow encroachment if the estate was small in value or the proposed encroachments were such that the estate was unlikely to be dissipated within the expected lifetime of the mentally disabled person. In all other circumstances an application to the court for authority was required. Following this case a new rule of court was made allowing the Accountant of Court to approve encroachments on capital in the absence of objections from the next-of-kin and others with an interest in the estate.[142] The encroachments must be for the purpose of maintaining the mentally disabled person. Using capital to modify the home or to purchase equipment which would improve the quality of the person's life still requires an application to the court for special powers.

4.86 There are some acts that are outwith the competence of a curator and which the court has no power to authorise. These include making a will or creating a trust on behalf of the mentally disabled person. Whether a curator can be authorised to run the person's business except on a temporary basis until disposal is doubtful. In *Gilray* the Lord President said[143] that court "cannot sanction his carrying on the manufactory with the funds of the estate under his charge" and in *Drew* the court in refusing an application for special powers to run the mentally disabled adult's business doubted whether it was ever competent to grant such powers.[144] On the other hand a public house business has been carried on by the owner's curator[145] and the court seems to have been prepared to authorise trading with a ship.[146]

4.87 **Comparative law**. In Alberta section 28 of the Dependent Adults Act 1976 as amended empowers the trustee appointed by the court to "manage, handle, administer, sell, dispose of or otherwise deal with the estate to the same extent as the dependent adult could have done" if competent. However, the Act goes on to list powers the trustee has without reference to the court (unless the court imposes restrictions or conditions) and further

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[139] Rules of Court, rule 200A.
[140] The sale of heritage held merely as an investment is within the curator's usual powers.
[141] 1989 SLT 566.
[142] Rules of Court, rule 200B.
[143] (1872) 10 M 715 at p 717.
[144] 1938 SLT 435.
[145] *McDougall v Inland Revenue* 1919 SC 86.
[146] *Macleod* (1856) 19 D 133.

powers the trustee can obtain on application to the court.[147] The first list includes investment in authorised securities, granting and accepting leases for up to three years in length, and performing any contract entered into by the dependent adult. In the second list is the power to purchase or sell real property or personal property over a prescribed value, carry on the adult's business, and invest in unauthorised securities. It concludes with a "catch-all" provision whereby the court may approve any other action.

4.88 The administrator in Victoria has such of the powers of the Public Trustee under the Public Trustee Act 1958 as may be specified by the Board in making the appointment. The Board may also attach conditions and restrictions.[148] The administrator is specifically prohibited from making a will for the disabled person.[149]

4.89 In New Zealand the court in appointing a manager decides which of the powers enumerated in Schedule 1 and any other powers should be conferred.[150] Any powers may have conditions or restrictions attached. Schedule 1 comprises 25 paragraphs and contains almost every power a manager is likely to need. Powers to make gifts to charities or relatives, purchase a residence for the mentally disabled person, or selling heritable property are subject to pecuniary limits. The manager may exercise powers in excess of the limits with the consent of the court. The court's consent is also required for granting leases for longer than 10 years or investing in securities outwith the Trustee Act 1956.

4.90 Another approach has been adopted by the Law Reform Commission of Australia in their *Report on Guardianship and Management of Property*[151] containing recommendations for reform of the law in the Australian Capital Territory. The manager is empowered to do anything the mentally disabled person could have done if he or she were competent, except to the extent that the Tribunal limits the powers. The manager has express power to make payments for the benefit of the mentally disabled person and his or her dependants, but is not permitted to invest in non-Trustee Act investments without the permission of the Tribunal.

4.91 **Proposals for managers** We do not think the present Scottish rules relating to powers of curators should be used as a model for financial managers' powers. First, to appoint managers with "the usual powers" would make it uncertain what powers they had. Secondly, extending or defining managers' powers by reference to those of trustees under the Trusts (Scotland) Acts would be unsatisfactory. Trustees and managers serve different purposes and have little in common with each other. Thirdly, managers ought to be given in appropriate circumstances very wide powers which they may exercise either independently or only with the approval of the Accountant of Court. They should not be given mere administrative powers so that they have to return to the court for anything beyond these. The present regime may be sensible for judicial factors other than curators, such as those appointed on partnership estates or the estate of people who cannot be traced. In these situations strictly limited powers and close control by the court can be justified. The powers of curators were formulated in the days when curatory was regarded as an interim measure.

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[147] Ss 29 and 30 respectively.
[148] 1986 Act, s 48(1), (2).
[149] 1986 Act, s 50(2).
[150] 1988 Act, s 29.
[151] Report No 52 (1989).

Nowadays, the vast majority of curators are permanent appointments which terminate on the death of the mentally disabled person subject to curatory.[152]

4.92 We have reservations about allowing the manager to do anything (apart from the statutory exceptions mentioned in paragraph 4.95) that the mentally disabled person could do if he or she had full mental capacity.[153] Even in the case of a totally incapacitated person a grant to the manager of powers in such terms seems too wide. It would be difficult for the court or other body to list all the appropriate restrictions such as not investing in highly speculative investments or managing the estate to benefit the manager.

4.93 We favour empowering the court or other appointing body to grant a financial manager whatever powers seem appropriate in the circumstances. Conditions and restrictions should be capable of being attached to the powers granted. The result would be a flexible scheme of financial management capable of being tailored to the circumstances of the individual mentally disabled person. Thus in the case of a person who is unable to deal with financial affairs to any extent the manager could be given very wide powers. It would be possible in appropriate cases to stipulate that the disposal of certain assets, for example the mentally disabled person's residence and its contents, or shares in a family company, should be subject to the prior approval of the Accountant of Court in much the same way as at present. At the other end of the scale are the mentally handicapped with considerable mental capacity. They would require the services of a financial manager only in connection with major financial transactions which could be specified on appointment.

4.94 The New Zealand legislation contains an extensive list of powers some or all of which the court may grant in appointing a financial manager. A statutory list is useful in that it helps applicants and the courts draw up the appropriate order, avoids diversity in the wording of powers and inadvertent omission of necessary powers. On the other hand courts might be reluctant to grant powers outwith the statutory list on the basis that the list indicated what Parliament had in mind when passing the legislation. We think it would be helpful if the appropriate authorities were to draw up styles of powers likely to be frequently granted. We envisage that the styles would be produced after consultation with the courts, lawyers and those interested in the mentally disabled and could be published as guidance notes or even in subordinate legislation. Adherence to the styles would not be required. Applicants and the courts would remain free to adopt the suggested wording or use completely different forms. Nevertheless, the existence of the styles would achieve some measure of uniformity.

4.95 Should there be any powers which cannot be conferred upon the manager even subject to conditions? We suggest that a financial manager should never be entitled to make a will for the mentally disabled adult. This facility is available in some jurisdictions; England and Wales, and New Zealand for example. Other jurisdictions, such as Victoria, follow Scotland in that neither the curator not the court may make a will on behalf of a mentally incapacitated person. This issue was raised in our exercise on succession. The response on consultation was overwhelmingly against the introduction of a power to make a will for a person lacking testamentary capacity and we recommended against changing the

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[152] CRU Curatory Survey. The average curatory lasted nearly 5 years. 88% terminated due to the death of the mentally disabled person and a further 4% to the estate being exhausted.
[153] The approach recommended for the Australian Capital Territory, see para 4.90.

law in this respect.[154] In view of the overwhelming negative response we do not propose to re-open this matter.[155] We would take the same view on trusts. Neither the court nor the financial manager should have power to create a trust into which all or part of the mentally disabled person's estate would be put. The only exception would be a trust for administration described in more detail later.[156] Another area where we think that financial managers should have no powers concerns the functions of the mentally disabled person as trustee or executor. Financial managers are being introduced for the purpose of managing the affairs of a mentally disabled person, not the affairs of others which had been entrusted to the person on the basis of his or her special qualities. In Part 5 we take the same line in relation to powers of attorney.[157] The court (or other body dealing with applications relating to the mentally disabled) should be empowered when appointing a financial manager or making a property order to remove the mentally disabled person from any position as trustee or executor. This would avoid the need for separate proceedings under section 23 of the Trusts (Scotland) Act 1921.

4.96 In relation to the powers of financial managers we propose that:-

40. (1) The court or other appointing body should, when appointing a financial manager, specify the powers conferred upon the manager in relation to the mentally disabled person's estate, and should be under a duty to specify the minimum appropriate in the circumstances.

(2) The powers should be capable of being conferred subject to any conditions or restrictions that seem appropriate to the other body. Such restrictions could include approval by the Accountant of Court.

(3) Styles of powers should be produced after consultation with interested people and organisations. Use of the styles should not be obligatory.

(4) Neither the court or other body nor the financial manager should have power to:

(a) make or alter a will for a mentally disabled person,

(b) create a trust on behalf of a mentally disabled person (other than an administrative trust as set out in Proposal 52), or

(c) exercise any powers the mentally disabled person possesses as trustee or executor.

Investment powers of financial managers

4.97 We turn now to consider what investment powers financial managers should have. In Scotland at common law the only permissible investments were band deposits, Government stock and heritable securities. Later local authority loans and railway company debentures were also approved. The position is now regulated by the Trustee Investments

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[154] *Report on Succession*, Scot Law Com No 124 (1990), No Change Recommendation 10, paras 4.78 to 4.80.
[155] See para 7.55 for a discussion of testamentary capacity.
[156] Paras 4.144 to 4.153.
[157] Para 5.42.

Act 1961. This Act enables curators to invest in unit trusts and ordinary shares of the United Kingdom companies which have a paid up capital of £1,000,000 or more and have paid a dividend in each of the last five years.[158] These investments are termed wider range investments.

4.98 If a curator wishes to invest in wider-range investments the funds available must be divided into two. One half has to be placed in narrower range investments (bank deposits, Government securities and UK company debenture loans secured on property, building society deposits etc), and the other in wider range investments.[159] Gains and losses on realisation accrue to the range from which the investment came.[160] Surplus revenue has to be equally divided between the ranges,[161] but capital to meet a deficit in income may be taken from either range at the discretion of the curator.[162] Investing in wider range investments is generally considered to be not worthwhile for modest estates (under £20,000) because of the extra administration involved in coping with the Act.

4.99 Curators must also consider whether a particular investment is suitable for the estate and keep in mind the need to diversify so that the whole estate is not invested in one or two particular securities or sectors of the market.[163] A proposed investment must also be prudent. Advice from a stockbroker or other person qualified to give financial advice should be obtained. The Accountant of Court has a duty to consider the investments made and their suitability and may require a curator to sell unsuitable investments.[164]

4.100 The court may grant a curator special power to retain an investment previously held by the mentally disabled person which is not authorised either at common law or under the Trustee Investments Act 1961.[165] The 1961 Act does not prevent the court authorising investment in an otherwise unauthorised investment, but such authority is rarely given.[166]

4.101 The administrator of a mentally disabled person's estate in Victoria has generally the same investment powers as trustees under the Trustee Act 1958. However he or she may retain any of the person's investments[167] and with the consent of the Board may invest in non-trustee securities or land where this would be for the benefit of the person and his or her family or dependants.[168] In Alberta the trustee is empowered to invest in Trustee Act investments.[169] Investment in any other securities or assets is permitted provided the consent of the court is obtained.[170] New Zealand managers have power to invest in Trustee Act investments without obtaining the court's approval. Other investments require the prior approval of the court.[171]

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[158] Funds may be lodged with a building society by a judicial factor without regard to the provisions of the Trustee Investments Act 1961; Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, Sch 8, para 21.
[159] S 2(1).
[160] S 2(3)(a).
[161] S 2(3)(b).
[162] S 2(4).
[163] S 6.
[164] Judicial Factors Act 1849, s 13.
[165] *Fraser v Paterson* (No 2) 1988 SLT 124 (shares in family company).
[166] S 15, see *Henderson, Petr* 1981 SLT (Notes) 40.
[167] 1986 Act, s 51(1)(a).
[168] S 51(2).
[169] 1976 Act, s 29(b).
[170] S 30(i).
[171] 1988 Act, Sch 1, para (c).

4.102 What powers of investment should the proposed Scottish financial managers have? One option would be to permit financial managers to invest in any investment provided it was suitable in the circumstances (including the need to diversify) and was an investment which a normal prudent person would make. It is rare nowadays for a trust deed to limit trustees' investment powers to those permitted under the Trustee Investments Act 1961. The usual approach is to confer upon the trustees the same investment powers as they would have if they were the owners of the funds. If this approach is acceptable for solicitors, accountants and others acting as trustees, it is arguable that the same people acting as financial managers for mentally disabled persons should have similar freedom. The opinion has recently been expressed that the Trustee Investments Act is a barrier to sound investment of a sizeable fund.[172] There may be very good reasons for investing in non-Trustee Act securities. For example, the manager may wish to purchase further shares in the family company in order to prevent loss of family control, buy a piece of land in order to improve an estate or farm, or take advantage of the tax benefits provided by business enterprise schemes, personal equity plans and additional voluntary contributions to pension plans. An application for special powers to retain an existing non-Trustee Act investment results in delay and expense.[173]

4.103 The contrary view is that curators and managers are appointed by the court in order to protect the estates of the mentally disabled. Uncontrolled discretion as to investments is incompatible with judicial protection. Giving managers unfettered investment powers would also make it more difficult for the Accountant of court to check and control unwise investments since the Accountant would have no criteria, other than prudence (about which there is usually room for different views) to judge the suitability of an investment by. The analogy with trustees is not exact in that the truster can be assumed to have nominated persons whose judgement and prudence are to be relied on. A mentally disabled person however normally has no choice in his or her curator or manager. Moreover, stricter standards ought to apply to involuntary management.

4.104 The second option would be to retain the present position. This has the advantage of continuity, but little else to commend it. The Trustee Investments Act is too restrictive and is administratively complex.

4.105 A third option would be limited reform. A financial manager should be entitled to invest in any of the investments authorised by the Trustee Investments Act 1961 without having to divide the estate into narrower and wider ranges if wider range securities were to be invested in. The division presently required gives rise to considerable increased administration costs without really increasing the protection of the estate. Most investment schemes, particularly where income is a priority, tend to include Government securities, high yield deposit accounts and similar narrow range investments. The change in investment practice if the third option was adopted might therefore not be all that large, but the administrative complications would be eliminated. Another innovation that could usefully be introduced concerns the powers of the manager and the court in relation to non-Trustee Act investments. We tend to think that the manager should have express statutory authority to retain such investments made by the mentally disabled person, subject of course to continuing review of their suitability. We would also favour empowering the court on

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[172] *The University Court of the University of Glasgow, Petrs* 1991 SCLR 402.
[173] *Fraser v Paterson* (No2) 1988 SLT 124.

application by the manager to authorise new investment in non-Trustee Act investments. We envisage such powers being granted sparingly but they should be available for unusual cases.

4.106 The manager should still require to obtain written advice about the suitability of permitted investments from a stockbroker or other financial adviser[174] and the Accountant of Court should still have a duty to consider the investments and give directions to the manager.[175]

4.107 Having regard to the foregoing discussion on investment powers of managers we propose that:

41. (1) A financial manager should have statutory authority to invest (either directly or through a Personal Equity Plan or any other similar scheme) in any of the narrower or wider range investments specified in Schedule 1 to the Trustee Investments Act 1961, subject to any restrictions imposed by the authority appointing him or her.

(2) A manager should have statutory authority to retain any non-Trustee Act investments made by the mentally disabled person unless the appointing authority orders otherwise.

(3) A manager should have power to invest funds of the estate in non-Trustee Act investments only if the appointing authority on application grants such power.

(4) The existing law relating to the duty to consider the suitability and diversity of investments, and the need to obtain written advice from qualified persons should be applied to managers. The Accountant should consider the investments of the mentally disabled person (whether or not made by the manager) and give such directions as are necessary to the manager.

Lodging of accounts by financial managers

4.108 Curators in Scotland must submit accounts of their transactions with the estate each year within one month of the due date, although the Accountant of Court may give up to two months extra time.[176] The Accountant audits the account and also fixes the curator's commission.[177] The curator is given an opportunity to object to the audit of the account or the amount of commission allowed. Objections which cannot be resolved are sent by the Accountant to the Court of Session for a decision.[178]

4.109 In Alberta trustees are normally required to lodge accounts every two years. The court may however dispense with accounting for not more than four years from the date of the order. Accounts usually have to be audited by the Clerk of Court, but if the court is

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[174] Trustee Investments Act 1961, s 6.
[175] Judicial Factors Act 1849, s 13.
[176] Judicial factors Act 1849, s 4.
[177] 1849 Act, s 13.
[178] 1849 Act, s 15.

satisfied that it is in the best interest of the estate and the mentally disabled person the accounts can be approved in the form in which they are presented.[179] Administrators in Victoria have to lodge an account manually with the Public Trustee for audit. The public trustee reports on the account to the Board which may order the Administrator to meet any deficiency. This penalty may be waived if the Board is satisfied that the administrator acted in good faith and with reasonable care. The Court of Protection in England and Wales can dispense with accounts in very small estates or other appropriate cases.[180] The court will accept accounts that have been certified by a solicitor or accountant.[181] In this case the court no longer verifies the accounts but may still comment and give directions on general management matters.

4.110 We think that managers should generally be required to submit accounts for auditing by the Accountant of Court. However, the accounting system could be made more flexible in a number of ways. First, as in Alberta and England and Wales, there should be a discretionary power to dispense with the requirement to lodge accounts or to require them only at periods longer than a year. This could be useful in small estates or estates where little change is expected in either capital or income. This power might be suitable for delegation to the Accountant of Court where its exercise was proposed after appointment of the manager in order to avoid the expense of an application to the appointing authority. Secondly, accounts should be capable of being presented in a more modern form that gives a full and correct picture of the management of the estate. At present the account has to be prepared in the form of an account of charge and discharge.[182] Accounts of charge and discharge are hardly used nowadays except in judicial factories. We have reservations about permitting a manager's accounts to be certified by a solicitor or accountant instead of the Accountant of Court. Administration by a state-appointed manager should perhaps be checked by a public official. The Accountant's audit fee is £7 plus 17½% of the commission allowed to the curator. On an average commission of £1,000 the audit fee is £182.[183] Certification by an independent solicitor or accountant is unlikely to cost less than this. Thirdly, the Accountant of Court should have a discretionary power to accept accounts where expenditure up to a prescribed limit was unreceipted. There have been complaints from time to time that expenditure on trivial items such as bus fares and sweets have been disallowed because no receipts were kept. A reasonable limit might be £100 or 5% of the income of the estate whichever was the smaller. If, as we have proposed,[184] the manager is entitled to allow the mentally disabled person to handle part of the estate, the manager's duty to account and produce receipts would have to be modified in relation to any delegated portion. Finally, accounts which contain minor discrepancies should be capable of being approved if the manager acted in good faith and it is in the best interests of the estate not to pursue the matter further. We propose that:

42. (1) The court or other appointing authority (or in circumstances prescribed by rules, the Accountant of Court) should have power to waive the requirement on the financial manager to lodge annual accounts for such periods as seem reasonable.

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[179] 1976 Act, s 31, as amended by 1985 Act.
[180] Whitehorn, *Court of Protection handbook*, (8th edn 1988), p 30.
[181] *Court of Protection Handbook*, p 33.
[182] Judicial Factors Act 1849, s 4. A modern standard form of account would speed up audits by the Accountant.
[183] CRU Curatory Survey.
[184] Proposal 39 at para 4.77.

(2) The account should give a full and true picture of the income and capital of the estate. Should the form of the account be prescribed?

(3) An account which contains minor discrepancies (including the absence of receipts for up to a prescribed sum or prescribed proportion of the income) should be capable of being approved as it stands provided the manager has acted in good faith and approval would be in the best interests of the estate.

(4) Views are invited as to whether a manager's accounts should be capable of being certified by a solicitor or accountant instead of being subjected to audit by the Accountant of Court.

Supervision and monitoring of financial managers

4.111 Should managers be supervised by any person or organisation and if so by whom? At present every curator (or other judicial factor) is under the supervision of the Accountant of Court who generally supervises his or her conduct. The Accountant's functions include:-

(a) receiving and checking the bond of caution,[185]

(b) receiving and checking the inventory of the estate,[186]

(c) auditing annual accounts and fixing commission,[187]

(d) making requisitions or orders on curators and reporting failure to obey to the court,[188]

(e) reporting other failure or misconduct to the court,[189]

(f) reporting malversation or misconduct meriting punishment to the Lord Advocate,[190]

(g) reviewing investments and approving schemes of investment where investment in the wider range is to be undertaken,[191]

(h) considering and reporting to the court applications for special powers and discharge of curators,[192]

(i) giving consent to the sale of a dwelling-house or encroachment on capital,[193]

(j) reporting divergent sheriff court practices to the Court of Session,[194] and

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[185] Rules of Court, rule 200(d), (e).
[186] Judicial Factors Act 1849, ss 3 and 12.
[187] 1849 Act, ss 4 and 13.
[188] 1849 Act, s 19.
[189] 1849 Act, s 20.
[190] 1849 Act, s 21.
[191] 1849 Act, s 13.
[192] 1849 Act, ss 7 and 34.
[193] Trust (Scotland) 1961 Act, s 2; Rules of Court, rules 200A and B.

(k) applying for the appointment of a successor to a deceased factor or one who has ceased to act where no other person applies.[195]

The Accountant's office is also a source of advice and assistance for curators, carers and the families of mentally disabled persons.

4.112 In Alberta and New Zealand initial inventories and accounts are checked and audited by the court and Public Trustee respectively.[196] The courts will vary or recall an appointment or make other orders but only on the application of any interested person. There appears to be no body charged with the general supervision of the management of disabled persons' estates. Victoria in addition to having a Public Trustee to audit accounts also has a Public Advocate whose duties include investigating complaints that disabled people are being exploited or abused and making application to the Board.[197] In England and Wales officials of the Court of Protection have a supervisory role similar to that of the Accountant of Court.[198]

4.113 We doubt whether managers should operate without supervision by some public official or authority. In straightforward estates the supervision would amount to little more than checking the bond of caution and initial inventory and thereafter auditing accounts either annually or at some longer interval. However, in appropriate cases the whole range of supervisory and advisory functions should be available. Supervision is no doubt irksome and increases the cost of administration, but it seems to us to be necessary for maintaining public confidence in a system of involuntary administration of the estates of those who are unable to manage their own affairs. The degree of supervision could vary with the size of the estate. For modest estates annual accounts could be replaced by a spot-check system, for example.

4.114 It would be possible to parcel out the Accountant's present supervisory functions amongst various existing bodies. For example, the court or other body that appointed managers could check the bonds of caution, accountants in private practice could audit the inventories and accounts, and the court or appointing body could deal directly with applications for the sale of dwelling-houses, encroachments on capital and other matters. This fragmentation would burden the court or appointing body with additional applications, increase the expenses of administration and lead to loss of overall control. The office of the Accountant of Court was created in 1849 to remedy the confusion caused by the fragmentation of functions and the lack of systematic control under the previous system. We think that there should be one official or organisation charged with the function of supervising managers.

4.115 We turn now to consider the appropriate supervising body. The choice seems to lie between the Accountant of Court, local authorities, the sheriff courts or the Mental Welfare Commission for Scotland. Voluntary organisations, like the Scottish Society for the Mentally Handicapped or Alzheimers Scotland, do not have the resources or expertise to act as supervisors although they can play a valuable role in bringing complaints to the attention of the authorities.

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[194] Judicial Factors (Scotland) Act 1880, s 4(7).
[195] Judicial Factors (Scotland) Act 1889, s 10.
[196] 1976 Act, s 31; 1988 Act, s 46.
[197] 1986 Act, s 15.
[198] Mental Health Act 1983, s 93(2).

4.116 The main argument in favour of the Accountant of Court is continuity. The Accountant and his staff have over the years acquired considerable expertise in the supervision of curators and other judicial factors and their administration of estates. Creating a separate organisation performing the same functions in relation to managers would not take advantage of this expertise. Moreover, it would be costly to set up a new organisation to supervise managers leaving the Accountant of Court to supervise other judicial factors. To some extent the cost would be offset by reduction in the number of staff needed in the Accountant's office but economies of scale would be lost. Training staff and retaining trained staff is easier in a larger office than in two or more smaller offices.

4.117 One disadvantage of the Accountant of Court is that the office is situated in Edinburgh so that it is not easy for those in other areas of Scotland to visit it. This is perhaps not such a problem for a supervising authority where much of the work is done by correspondence. The Accountant of Court and the staff do on occasion travel to see people in connection with curatories and would no doubt also do so if they were to supervise managers. Another disadvantage is that many mentally disabled persons may well have a personal guardian and a manager appointed. We propose elsewhere in this paper that personal guardians should be supervised by the Mental Welfare Commission for Scotland[199] and that the personal guardian and the manager should liaise with each other about matters of common concern.[200] There could be merit in having the same supervising authority for personal guardians and managers. On the other hand separate supervision can arise at present where a person has a mental health guardian (supervised by the local authority and the Mental Welfare Commission) and a curator (supervised by the Accountant of Court). Separate supervision does not seem to give rise to problems.

4.118 Regional or district councils would have the benefit of having offices located throughout Scotland. On the other hand they have little experience of supervising administration of estates and would require to recruit and train suitable staff. Sheriff courts also have offices situated throughout Scotland and the staff there have some experience of administering the estates of minors or pupils awarded damages and auditing judicial accounts. Most curators are now appointed by the sheriff courts rather than the Court of Session and we would imagine the same patters would apply to managers. There is some merit in having local control of locally appointed people. On the other hand extra staff would be necessary and perhaps also additional accommodation. Having supervisors dispersed in the sheriff courts throughout Scotland would mean there was no person with insight as to how the system of managers was developing and there would be no central control. Because the supervising department in each sheriff court would be small promotion prospects would be poor and it might be difficult to retain trained senior staff.

4.119 We tend to favour using the existing supervisory system (with such modifications as seem appropriate) and accordingly propose that:

43. Financial managers should be subject to the supervision of the Accountant of Court. Views are invited on ways in which supervision could be more flexible or less burdensome, especially in relation to small and modest estates.

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[199] Proposal 12 at para 2.88.
[200] Proposals 11 and 32 at paras 2.87 and 4.50.

Remuneration of financial managers

4.120 Curators are remunerated by way of commission fixed by the Accountant of Court. The commission awarded is what is far bearing in mind the size and nature of the income and capital transactions over the accounting period. The commission covers all normal administration. Fees and accounts payable by the curator to others for business or professional services are outlays chargeable directly against the estate. If the curator is a partner in a firm of solicitors the firm cannot charge the curator a fee for legal work done.[201] Instead the commission is increased to take account of it.

4.121 In Victoria an administrator (other than the Public Trustee) is not entitled to any fee unless the Board permits fees to be charged.[202] New Zealand allows a manager to charge outlays against the estate but no remuneration is payable unless the court directs otherwise.[203] The Albertan legislation contains no provision for remuneration of trustees. In England and Wales professional receivers (ie solicitors or accounts) will be allowed reasonable remuneration, but lay receivers are remunerated only in exceptional circumstances and even then only a nominal sum is allowed.[204]

4.122 Solicitors and accountants will clearly decline to act as managers unless they are paid reasonable remuneration for their services. Lay managers, particularly close relatives, should not expect to be paid. Many lay curators at present waive the commission to which they are entitled. All managers should be entitled to reimbursement of outlays they have incurred in connection with the administration of the estate. But fees paid to others for performing work within a lay manager's sphere of competence should not be allowed as outlays.

4.123 We put forward for consideration the proposal that:

44. (1) Financial managers who act as such as part of their professional business should be entitled to reasonable remuneration as fixed by the Accountant of Court.

(2) Other financial managers should not be entitled to remuneration unless the court or other appointing body directs otherwise. Their outlays in connection with the administration of the estate should however be met out of the estate.

Interim remuneration of financial managers

4.124 Commission is fixed when auditing a first or annual account. This can cause problems for professional curators who may have to wait for 15 months (or longer if the audit takes some time to complete) for commission to cover work done immediately after appointment. A common situation which gives rise to complaint relates to the sale of the mentally disabled person's residence. This is often done soon after appointment, yet the

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[201] *Mitchell v Burness* (1878) 5 R 1124, but legal fees for work done up to the appointment is a proper charge. *Watt v Watt and Others* 1909 1 SLT 103.
[202] 1986 Act, s 47(5).
[203] 1988 Act, s 50.
[204] Whitehorn, *Court of Protection Handbook*, (8th edn 1988) p 7.

solicitor curator and his or her firm may have to wait for a considerable period in order to receive remuneration for this work. Allowing a manager a payment to account of the remuneration would go some way towards preventing this hardship arising. Furthermore, if as we propose earlier,[205] accounts could be required every say two or three years it seems unreasonable for the manager to have to wait that long for the remuneration to be fixed. On the other hand too many claims for payments to account would slow down the work of the Accountant of Court's office and if the Accountant charged a fee for considering an application for payment to account this would increase the financial burden on estates. Giving the Accountant of Court a discretion to make payments to account would be a way of achieving a balance between these conflicting interests. Accordingly we propose that:

45. The Accountant of Court should be authorised to allow a professional financial manager a payment to account of remuneration if satisfied that a considerable amount of work had been done by the manager (or the manager's firm) and that it would be reasonable to make a payment to account.

Caution by financial managers

4.125 A bond of caution is a guarantee by a third party (in modern practice invariably an insurance company from a list of companies approved by the Lord President[206]) to indemnify the mentally disabled person or any creditor against loss caused by maladministration or fraud on the part of the curator. Bonds of caution provide protection in those cases where suing the curator would not be worthwhile. Each curator at present has to find caution before the interlocutor (court order) of appointment is issued. Caution must be found within one month of appointment (or an application for extension of time made to the court within that period) otherwise the appointment lapses.[207]

4.126 In New Zealand the court may, if it thinks fit, require a manager to find security for the proper performance of his or her duties either on appointment or at any time afterwards.[208] The Victorian and Albertan legislation contain no provisions about security. A receiver in England and Wales is generally required to find security.[209]

4.127 We tend to favour all managers being required to obtain caution. It would be difficult for the appointing authority to decide whether or not to order caution as it would have no knowledge of the manager's competence. One possible exception would be corporate managers such as an established bank or insurance company. The disadvantage of caution is its expense. The annual premium is around £1 per £1,000 of estate (subject to a minimum premium of £20) and caution is normally fixed at three quarters of the easily realisable estate. Claims under bonds of caution are rare so that all estates are put to expense in order to protect a small number of people. However, without caution some mentally disabled people whose managers acted negligently or fraudulently would be left without any effective remedy. Moreover, even where a claim could be made against the manager it would be simpler and cheaper to claim under the bond of caution.

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[205] Proposal 42 at para 4.110.
[206] Rules of Court, rule 200(e)(iv).
[207] 1849 Act, s 2; Rules of Court, rule 200(c).
[208] 1988 Act, s 37.
[209] Whitehorn, *Court of Protection Handbook*, (8th edn 1988) p 20.

4.128 An alternative to individual bonds of caution by each manager would be for the Accountant to take out a master indemnity policy covering all estates under management.[210] The premium would be allocated and charged against the individual estates by the Accountant according to capital value or some other measure. The advantages are that all estates would be automatically protected without the need to check bonds or consider the amount of cover needed, appointments would never lapse due to managers overlooking the requirement to find caution within a month, and a lower rate than that currently charged could probably be negotiated with an insurance company or consortium of companies. A single master policy should also give rise to considerably less administration and correspondence for the Accountant of Court, managers and insurance companies that the present system of some 2,000 individual policies.

4.129 We propose that:

46. Financial managers of estates of mentally disabled persons should always be required to find caution. Views are sought on the desirability of the master policy scheme outlined above.

Review of financial manager's appointment

4.130 The appointment of a manager and the scope of his or her functions should obviously be capable of being recalled or altered on application by any interested person if circumstances change later. Apart from this should there be any periodic review in order to ensure that the powers and duties of the manager continue to match the disabilities and needs of the mentally disabled person? Scottish curators are appointed until further order of the court and there is no periodic review. The position is the same for receivers in England and Wales, but the Court of Protection can intervene if the mentally disabled person's interests are not being served by the existing receiver.[211] Alberta requires the court in making or reviewing the appointment to specify a review date not more than 6 years later.[212] In New Zealand the specified date is to be within 3 years.[213] In Victoria the Board must review the administration order every 3 years.[214]

4.131 A balance has to be struck between the extra work and expense of mandatory reviews and having managers continuing when they are not needed. We tend to favour flexibility in setting the review date since the prognoses of mentally disabled people vary so much. We also tend to favour a fairly lengthy period before mandatory review since an application for review can always be made earlier if necessary. In Part 2 in dealing with personal guardianship we proposed an initial five-year review period[215] and see no reason to adopt a different period for financial managers. Accordingly we propose that:

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[210] Managers of large estates (say over £100,000) could be required to take out individual "top up" cover.
[211] Whitehorn, *Court of Protection Handbook*, (8th edn 1988), p 23.
[212] 1976 Act, s 27(2)(a) as amended in 1985.
[213] 1988 Act, s 31(8).
[214] 1986Act, s 61.
[215] Proposal 14 at para 2.95.

47. An order appointing or varying the appointment of a financial manager should require to be reviewed not later than the date specified in the order. The date should not be not more than five years after the date of the order. This mandatory review should not prevent the appointing authority reviewing or recalling an order earlier in appropriate circumstances on application by any interested person.

Termination of financial management

4.132 Most curatories come to an end because of the death of the mentally disabled person whose estate is under curatory.[216] A few terminate because there is no longer any estate left to manage – the estate is said to be exhausted. In order to avoid the expense of a formal petition for discharge the Accountant of Court can informally "write off" the curatory. A report detailing the exhaustion of the estate is then added to the other court documents relating to that curatory. Section 67 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 empowers the Court of Session to pass Acts of Sederunt dealing with the discharge of a curator otherwise than by way of petition when the curatory estate is exhausted. No Act of Sederunt has been made as yet although we understand the matter is under consideration. This sensible "write off" practice should be adopted for financial managers and should we think be extended.

4.133 There are many situations where a financial manager could be dispensed with even though there is still estate to manage and the mentally disabled person is still incapable of managing it. One common example is a person going into hospital as a permanent in-patient. The manager could be dispensed with if the estate could be handed over to the hospital authorities for them to manage. We propose later that the local authority should have a similar power of management in relation to residents in local authority homes provided under Part IV of the Social Work (Scotland) Act 1968.[217] This would increase the number of estates where financial management could be dispensed with. Another class of cases likely to become common relates to people in private nursing or residential homes. Now that a simplified procedure has been introduced to approve capital being used to pay the fees[218] many estates will be rapidly reduced to the point at which the Department of Social Security will generally meet the fees in full. Financial management will not often be of benefit for such small estates and the money could simply be placed in a bank account for the benefit of the mentally disabled person. A member of the family or other carer could be given access to the account in order to spend money for the benefit of the mentally disabled person under our new proposals.[219] Before "writing-off" the estate and so terminating the financial management the Accountant of Court would have to be satisfied that the remaining funds would be properly administered by some other person or organisation. Any person dissatisfied with the Accountant's decision to terminate the manager's appointment should be entitled to apply to the court or other body set up to deal with financial managers. We therefore propose that:

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[216] CRU Curatory Survey.
[217] Proposal 56 at para 4.172.
[218] Rules of Court, rule 200B.
[219] Proposal 57 at para 4.178.

48. (1) The Accountant of Court should be empowered to terminate the appointment of a financial manager where the mentally disabled person's estate is of such a size that it can be administered by hospital authorities or the managers of residential accommodation provided by a local authority, or where the estate is below a sum specified by regulations (say £5,000) and other satisfactory methods of management can be found.

(2) On terminating a financial manager's appointment the Accountant should have power to direct the manager to hand over the estate to another person or body.

(3) Any person dissatisfied with the Accountant's decision to terminate the manager's appointment should be entitled to apply to the court or other body set up to deal with financial managers.

Termination of financial management if capacity recovered

4.134 Occasionally a curatory terminates because the mentally disabled person recovers, or is found on a later examination to have, sufficient capacity to take over the management of his or her financial affairs.[220] At present a petition has to be presented to the court for recall of the curator's appointment and evidence of recovery produced. Section 67 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 empowers the Court of Session to make an act of sederunt providing for the discharge of a curator otherwise than by presentation of a petition. No such act of sederunt has been made as yet. There are several problems in this area under the current law which the proposed new system of financial managers should avoid.

4.135 First, the onus is on the mentally disabled person to establish that capacity has been recovered: the presumption of incapacity arising from the appointment of a curator has to be rebutted.[221] This contrasts with the presumption of capacity in dealing with the question of appointment of a curator so that the onus is on those who wish a curator to be appointed to establish incapacity. These differing standards can lead to an existing curatory being continued when in the same circumstances a curator would not be appointed. We think it would be unrealistic to have a presumption of capacity in proceedings for termination of financial management on the basis of recovery. Such presumption would meant that an application simply had to be made and it would be up to those opposing termination of management to provide evidence to rebut the presumption. A middle course, which we find attractive, would be to have no presumption either way.

4.136 Secondly, whether capacity has been regained and the curatory should terminate is regarded as primarily a medical issue. We think the focus should be whether, in view of the mentally disabled person's current capacity, financial management will continue to confer a substantial benefit on the person. These are the criteria we proposed earlier for the appointment of a financial manager.[222] The personal circumstances of the mentally disabled person may have changed so that he or she becomes able to handle the estate, even though there has been no great improvement in mental capacity.

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[220] CRU Curatory Survey.
[221] *Forsyth* (1862) 24 D 1435, Lord Deas at p 1440.
[222] Proposal 29 at para 4.40.

4.137 Thirdly, the entitlement of person other than the mentally disabled person to seek recall of a curatory on the ground of recovery of capacity is not clear. The title to seek recall of a financial manager's appointment should, we think, be fairly widely stated. Confining the right to the mentally disabled person could lead to financial management continuing unnecessarily in many cases. A mentally disabled person may regain sufficient capacity but remain unaware of the right to apply for recall or lack the determination to bring or instruct proceedings. In considering the question of title to apply for the appointment of the financial manager we proposed[223] that any person with an interest in the mentally disabled person's estate or welfare should be able to apply. This approach is also proposed for the removal of a manager on grounds of incompatibility.[224] We would adopt the same test for recall. We propose that:

49. (1) An application may be made for recall of the financial manager's appointment on the ground that the criteria set out in Proposal 29 for the appointment of a financial manager (lack of capacity to understand implications of financial decisions or to act consistently with decisions and management would produce substantial benefits are no longer fulfilled.

(2) In dealing with an application for recall on the grounds of recovery there should be no presumption that the mentally disabled person either has capacity or lacks capacity.

(3) An application under paragraph (1) above may be made by any individual or organisation interested in the mentally disabled person's estate or welfare.

Removal of financial managers

4.138 A curator may be removed from office by the court on application by an interested party for various reasons. These include:

(a) the curator failing to discharge the duties or otherwise misconducting himself or herself.[225]

(b) the curator becoming bankrupt.[226]

(c) the curator acquiring an interest adverse to the mentally disabled person.

(d) the curator becoming mentally incapacitated.

4.139 Occasionally the curator appointed and the mentally disabled person's family and carers fund that they cannot get on with each other. However, unless the curator fails to discharge the duties satisfactorily there are no grounds for apply for the curator's removal and the appointment of a new and more compatible curator. This can give rise to considerable distress and ill-feeling if the curator refuses to resign. The scheme we are proposing would entail more liaison between the manager, the mentally disabled person

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[223] Proposal 30 at para 4.41.
[224] Proposal 50 at para 4.139.
[225] Judicial Factors Act 1849, s 6. See para 4.68.
[226] *Miller* (1849) 12 D 911.

and his or her family and carers. For example, we have proposed[227] that the manager should encourage the mentally disabled person to develop and exercise such financial skills as he or she has, and should be under a duty to consult the mentally disabled person, and those interested in the person's welfare. We accordingly propose that:

50. On application by any interested party the court or other appointing body should be empowered to remove a financial manager whose relationship with the mentally disabled person or the person's family and carers is such that it would be in the best interests of the person that the manager ceased to act as manager. This ground would be in addition to any of the other presently recognised grounds for removal of curators.

Resignation or retiral of financial managers

4.140 A solicitor or accountant appointed as curator to a mentally disabled person's estate may wish to resign (on retiral from business perhaps).[228] A petition for recall of the retiring curator's appointment and discharge combined with an application for appointment of a new curator (often a younger partner in the same firm) has to be presented. This gives rise to a great deal of expense, especially if the retiring person is a curator to several estates.

4.141 A judicial factor may be appointed by the Court of Session to administer damages awarded there to a minor or pupil.[229] Where a factor resigns any interested person or the Accountant of Court may apply for a new appointment simply by writing to the Deputy Principal Clerk of Session. The letter is placed before a Lord Ordinary in chambers who decides whether or not to appoint the proposed new factor.[230] The resigning factor is discharged by a similar procedure, the concurrence of the Accountant of Court being required in order to ensure that the factor's accounts to date are correct.[231] There would be considerable advantage if a simple method along these lines were to be adopted for a change of manager due to resignation or death of the existing manager.

4.142 When dealing with who should be capable of being appointed manager we proposed[232] that:

(a) the proposed manager should be capable of performing the duties satisfactorily,

(b) the views of the mentally disabled person should if possible be sought, and

(c) the proposed manager should have no substantial interest adverse to that of the mentally disabled person.

It would be anomalous for these not to be taken into account on a change of manager. But to require a hearing to consider these matters would defeat the simplicity of the suggested scheme. One possible solution would be to have an affidavit from the proposed new

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[227] Proposal 38 at para 4.76.
[228] The CRU Curatory Survey found that 7% of curatories which came to an end in 1989 did so because of a change of curator.
[229] Rules of Court, rules 131-134.
[230] Rules of Court, rule 134(b).
[231] Rules of Court, rule 134(a).
[232] Proposal 31 at para 4.49.

manager that he or she had no adverse interest and that the mentally disabled person either consented to the change of manager or was incapable of giving consent. It could be assumed that another solicitor or accountant would be as capable of performing the duties as satisfactorily as the retiring manager. This might not be true of lay managers and furthermore the mentally disabled person's family might not be happy about the substitution of one relative for another. The simple procedure should perhaps be confined to changes of professional managers.

4.143 We propose that:

51. On resignation of a financial manager a successor should be capable of being appointed by a simple procedure along the following lines.

(a) The proposed new manager should apply in writing to the appointing authority enclosing an affidavit that he or she had no substantial interest adverse to that of the mentally disabled person, and that the mentally disabled person does not oppose the change of manager.

(b) The Accountant of Court should submit a statement that the retiring manager's administration of the estate had so far been complete and correct.

(c) On receipt of these documents the appointing authority should intimate the proposed change of manager to the mentally disabled person's family, cautioners, and others the authority may direct intimation to be made to, giving them a period within which to object. In the absence of any objections the application should be granted without a hearing.

Views are invited as to whether the procedure should be restricted to cases where the proposed new financial manager is a solicitor or accountant.

ADMINISTRATIVE TRUSTS

4.144 In this section we examine the option of administering the estate of a mentally disabled person as a trust. The basic idea is that the court would appoint two trustees, of which one would normally be a solicitor and the other a member of the mentally disabled person's family if possible. The court or other appointing body should be given some flexibility. The "professional" trustee could be a trustee service such as that recently established by the Scottish Society for the Mentally Handicapped. The SSMH Trustee Service Limited is a company limited by guarantee which acts as a trustee for individual trusts created for the benefit of one or more mentally handicapped people. There might be more than two trustees appointed, or only one if a relative was a solicitor or accountant. These trustees would administer the estate for the benefit of the mentally disabled person and would have the same powers and duties as normal trustees unless the legislation provided otherwise. The trust would have no testamentary provisions. On the mentally

disabled person's death the trustees would make over the funds to his or her executors for distribution according to the mentally disabled person's will or the rules of intestacy. The trustees would not be under the supervision of the court of the Accountant of Court although the court could, if aware of any complaint or misgivings, intervene or ask the Accountant to investigate and report. The trust funds would, in appropriate cases, be all the property of the mentally disabled person at the date of setting up of the trust together with money and property to which he or she became entitled thereafter. The ideals of minimum interference and encouraging the mentally disabled person to exercise and develop his or her abilities could be accommodated within the trust framework by the court restricting the trust to certain assets (such as the house and investments), or the trustees allowing the mentally disabled person to handle some of the trust funds under their general supervision.

4.145 The purposes of the proposed statutory trust would have to be set out in the legislation as there would be no trust deed or common law rules that applied.[233] The basic purpose would be to use the income and where necessary the capital of the trust for the maintenance and benefit of the mentally disabled person and his or her dependants. Benefit should be given a wide meaning and should include buying items for the use of the mentally disabled person (even if others share in their use), paying for domestic assistance or a holiday for the person or respite care for those looking after him or her. The powers should be capable of being modified or added to by the court or other appointing body within the limits set out in the legislation. The trustees would also be obliged to pay out of the trust funds the expenses of administration and the mentally disabled person's debts. The trustees would have the powers conferred by section 4 of the Trust (Scotland) Act 1921 to do acts which were not at variance with the purposes of the trust and could apply to the court under section 5 for authority to do acts which were at variance but which were nevertheless expedient. It might be helpful to make it clear that the trustees had power, without application to the court, to sell the mentally disabled person's residence and household contents where they considered that a sale was justified in the circumstances. The absence of such a power would lead to a large number of applications to the court. The procedure of authorising the Accountant of Court to consent to certain transactions, including sale of residential accommodation, was introduced to avoid the cost of court applications.[234] Since the trustees would not be subject to the supervision of the Accountant of Court the consent procedure would not be appropriate.

4.146 An alternative approach would be for a financial and care plan to be submitted to the court for approval by the trustees along with the application for setting up the trust. The plan would have to be in conformity with the legislative purposes but could be in greater detail and would be regarded as setting out the purposes of the trust. The plan would be capable of subsequent variation by application to the court.

4.147 An administrative trust would have many advantages. Firstly, the mentally disabled person's estate could be looked after by a member of the family and the family solicitor. The member of the family would bring to the trust a close personal knowledge of the mentally disabled person and the solicitor would contribute professional expertise in the management of financial affairs. It would give a recognised role to the member of the family and should enable the trustees to use the estate in the most appropriate way to benefit the mentally

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[233] Judicial factors are appointed with "the usual powers" which are fixed by common law.
[234] S 2(3)-(6) of the Trusts (Scotland) Act 1961 added by the Law Reform (Miscellaneous Provisions)(Scotland) Act 1980, s 8. See para 4.84.

disabled person. Many people setting up trusts for disabled relatives make a similar choice of trustees for the same reasons. Secondly, the estate would not be subject to the supervision of the Accountant of Court. Many families of mentally disabled people resent the intrusion of public officials into what they see as private matters. The resentment is to some extent exacerbated by the Accountant of Court's office being situated in Edinburgh and having no local offices. We wish to stress that we are in no way criticising the Accountant of Court or his staff in the performance of their functions. Some of the frustration felt by the families of mentally disabled people arises because of the rigidity of the present law. Thirdly, the estate would not have to pay for supervision by the Accountant of Court. For an average curatory estate (£60,000 capital and £4,000 annual income)[235] the fees are in the region of £300 for the first year and £150 thereafter. These fees are over and above the professional trustee's fee which is likely to be much the same as a curator's commission. Fees are also charged by the Accountant for applications for special powers or the Accountant's consent to certain transactions. Further, if caution was not required the annual premium (about £40 for an average estate) would also be saved.

4.148 But the proposed administrative trusts would have disadvantages. First, an administrative trust would deprive the mentally disabled person of his or her property since it would be transferred to the trustees. This is a greater intrusion than the appointment of a financial manager, especially one with restricted powers or powers over only part of the estate. Secondly, disputes might well arise between the family and professional trustees about the way in which the trust should be run or the money used. These disputes could be acrimonious and difficult to resolve without legal proceedings. Thirdly, there is no external supervision and control by the Accountant of Court. There is a risk that, by negligence or deliberate misappropriation on the part of the trustees, loss would be caused to mentally disabled people's estates. This risk could be reduced if the trustees were required to find caution, although the premium would add to the annual cost of administration. We tend to think that the main protection would be the appointment of a solicitor or other professional as one of the trustees whose approval would be required for every transaction and whose signature would be required on every document. Furthermore, having two trustees is an additional protection since both would have to be involved in any fraudulent scheme.

4.149 An administrative trust would be unlikely to be cheaper than financial management. The solicitor trustee would require to be paid normal professional fees which would be much the same as if the solicitor were acting as manager, or acting as agent for a lay manager. An administrative trust would certainly be more expensive than financial management where a lay manager carried out all the functions without professional assistance and waived commission. Expense could be saved by appointing one of a number of voluntary non-profit making organisations involved with the mentally disabled and approved by the Secretary of State as the "professional" trustee instead of a solicitor.

4.150 An administrative trust would also mean that the trustee had to incur expense in transferring the mentally disabled person's assets to themselves as trustees. It is an essential element of a trust that the funds are held by the trustees. A curator, on the other hand, manages the estate which usually remains vested in the mentally disabled person. Statutory vesting of the estate in the trustees by virtue of the court order creating the trust, along the

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[235] CRU Curatory survey.

lines of the provisions in section 31 of the Bankruptcy (Scotland) Act 1985, would avoid this expense.

4.151 In England and Wales trusts for sums awarded in the High Court for children may be set up by the court. These trusts have been available for a long time but are not much used because:

(1) they are more expensive than administration by the High Court which is free,

(2) it is difficult to find trustees who are both competent and impartial,

(3) it is difficult to draft the trust deed so as to reconcile flexibility with prudence and security.[236]

The Court of Protection has a similar power to make settlements of the property of a mentally disabled person.[237] The first perceived disadvantage does not apply to Scotland since there is no free court administration for mentally disabled people's property.[238] There is some force in the second objection since acting as a trustee is an onerous duty. However, there should be little difficulty in finding suitable solicitors to act as one of the trustees on a paid basis[239] since they readily make themselves available for curatories. As the solicitor would shoulder a large part of the administrative work it should not be too difficult to find a member of the mentally disabled person's family to act as the other trustee. The third objection would not apply to the proposed scheme for administrative trusts since there would be no trust deed to draft. The purpose of the statutory trust and powers of the trustees would be set out in the relevant statute or subordinate legislation although the court or other appointing body would have power to modify or add to the purposes and powers within limits specified by the legislation.

4.152 As far as possible the trustees of the proposed administrative trust should have the same functions as trustees under normal private trusts. Many major differences between administrative trusts and normal trusts would lose the advantage of using familiar legal concepts and machinery. Nevertheless, we have identified certain aspects where it would be highly desirable, if not necessary, to amend normal trust rules. These are listed below:

(a) Trustees have power to resign and to assume new trustees.[240] Curators however are prohibited from resigning without judicial authority and are not entitled to assume new curators.[241] We think the proposed administrative trustees should be in the same position as curators. The court should be involved in selecting trustees where a trust is imposed on mentally disabled people by law. A simple administrative procedure could be used to change the professional trustee where he or she wished to resign.[242]

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[236] Supreme Court Practice 1985, Jacob (ed), vol 1, pp 1159-1160.
[237] Mental Health Act 1983, s 96(1)(d).
[238] Public management is considered in paras 4.51 to 4.59 but would not necessarily be free.
[239] The solicitor would be statutorily entitled to appropriate remuneration for acting as trustee. The lay trustee would be entitled to reimbursement of outlays only.
[240] Trusts (Scotland) Act 1921, s 3(a), (b).
[241] Trusts (Scotland) Act 1921, s 33.
[242] See para 4.143 where a similar procedure was proposed for changing a financial manager.

(b) Trustees do not have to find caution (a guarantee, usually by an insurance company, that the duties will be performed properly) before entering into their duties, but curators do.[243]

(c) There are significant differences between curatories and trusts in the field of taxation and means-tested benefits. In order to avoid tax and benefit considerations discouraging the setting up of administrative trusts, the rules for such trusts should be as close as possible to those applicable to curatories.

(d) Trustees, even when acting in a professional capacity, are not entitled to remuneration for acting as trustees unless the trust deed so provides.[244] They can claim reimbursement for all expenses of administration properly incurred.[245] Solicitors acting as administrative trustees would have to be allowed to charge normal professional fees, as otherwise it would be virtually impossible to find solicitors willing to act.

(e) The purposes of a trust may be varied by the Court of Session on application under section 1 of the Trusts (Scotland) Act 1961. Variation would be incompatible with the fixed statutory purposes to use the funds for the benefit of the mentally disabled person. Trustees should however be entitled to apply to the court for power to do an act which was at variance with the statutory purposes but which was nevertheless expedient.[246] Changes in the way of carrying out the statutory purposes could where necessary be achieved by this method without fundamental revision of the purposes which variation would allow.

(f) Income in a trust may be accumulated only for certain permitted periods which are set out in section 5 of the Trusts (Scotland) Act 1961 and section 6 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966. The only one that would be applicable to administrative trusts is 21 years from the date of setting up the trust. Power to accumulate is implied if trustees are given a discretion as to the amount of income they spend on the maintenance of beneficiaries or other trust purposes since the excess has to be invested.[247] The trustees of an administrative trust would be unable to save excess income after 21 years. It may be that the anti-accumulation provision would not apply to a statutory administrative trust since they strike at wills, settlements or other dispositions made by "persons". A statutory administrative trust would be made by the court. 21 years would not be a sufficient period in the case of a young mentally handicapped or brain-damaged adult. These doubts should be settled by an express provision permitting accumulation for the lifetime of the mentally disabled person or the duration of the trust, whichever is the shorter.[248]

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[243] Judicial Factors Act 1849, s 2.
[244] Wilson and Duncan, *Trusts, Trustees and Executors*, pp 367-8.
[245] Wilson and Duncan, p 400.
[246] Trusts (Scotland) Act 1921, s 5.
[247] *Watson's Trs v Brown* 1923 SC 228.
[248] If life-time accumulation were to be permitted for administrative trusts it should also be allowed for all other trusts benefiting the mentally disabled.

(g) Trustees' and curators' powers of investment are limited by the Trustee Investments Act 1961. We have already proposed that these powers should be widened for financial managers.[249] It would be desirable if administrative trustees also had these wider powers.

4.153 Our tentative and provisional view is that the flexible scheme of financial management proposed earlier in this Part could be tailored to achieve most, if not all, of the benefits for administrative trusts without attracting their disadvantages. However, we would welcome comments on the desirability in principle of introducing a statutory trust as one method of administering the estates of mentally disabled people unable to manage their affairs and on the detailed provisions to achieve this set out below.

52. (1) The court or other body may, on application, if it is satisfied that a person is wholly or partially incapable of dealing with his or her property and financial affairs by reason of mental disorder appoint a trustee or trustees to administer that person's estate.

(2) The purposes of the trust should be to apply the income and, if necessary, the capital of the estate for:-

(a) the expenses of the trust and the mentally disabled person's debts.

(b) the maintenance and benefit of the mentally disabled person.

(c) the maintenance of the mentally disabled person's dependants.

It should not be competent to apply to the court under section 1 of the Trusts (Scotland) Act 1961 for variation of these purposes. Views are sought on whether it would be useful for the trustees to be required to submit a financial management plan prepared in conformity with the statutory purposes to the court for approval.

(3) One of the two trustees should normally be a solicitor, the other if possible should be a member of the mentally disabled person's family closely associated with him or her. The court of other body should have power to make other appointments in appropriate circumstances. No trustee should be entitled to resign without leave of the court or assume new trustees. Both trustees should be entitled to reimbursement from the estate of outlays properly incurred by them, but only the solicitor trustee should be entitled to remuneration. Should the claim for remuneration be taxed by a court auditor?

(4) The estate of a mentally disabled person administered by the proposed statutory trust should be treated in the same way as one subject to curatory for tax and benefit purposes.

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[249] See para 4.107.

(5) The investment powers of the trustees should be limited by the provisions of the Trustee Investments Act 1961, as amended along the lines proposed in Proposal 41 above.

(6) It should be permissible for the trustees to accumulate income in excess of that required for the trust purposes during the whole of the mentally disabled person's lifetime or the duration of the trust whichever period is the shorter.

(7) Should the trustees be required to find caution for the proper performance of their duties?

MANAGEMENT OF PATIENTS' FUNDS BY HOSPITALS

The present position and criticisms of it

4.154 The managers of a hospital may receive and hold money and valuables belonging to an in-patient on his or her behalf if the doctor in charge of the patient certifies that the patient is incapable by reason of mental disorder of managing and administering his or her financial affairs.[250] The hospital may spend the money for the patient's benefit and dispose of the valuables but must have regard to their sentimental value.[251] The various social security benefits and therapeutic earnings are the major source of income for most patients. Once the funds of a particular patient exceed £3,000 the hospital requires the consent of the Mental Welfare Commission for Scotland in order to continue to manage them.[252] Consent is usually given for sums up to £50,000[253], beyond that the Commission will suggest that a curator should be appointed. The hospital cannot manage the funds of a patient who has a curator and their management ceases as soon as a curator is appointed.[254] Some patients have their social security benefits collected and administered by a relative acting as appointee. This arrangement is usually left to stand on admission to hospital, although the hospital may keep an eye on the support provided by the relative out of the DSS benefits.[255]

4.155 The management of patients' funds was investigated by a Working Party (Chairman Mr W S Crosby) set up by the Scottish Health Service Planning Council. Its report, the *Report of the Working Party on Incapax Patients' Funds* ("the Crosby Report"), was published in 1985. The Working Party found that in 1984 most of the funds held on behalf of in-patients were fairly small. One quarter of the balances were less than £50 and three quarters were less than £500.[256] 4% of in-patients had curators appointed.[257]

4.156 The management by hospitals of in-patients' money and personal possessions and the way in which the scheme is currently operated are open to many criticisms. First, a hospital can take over the management of a patient's funds if the medical officer in charge of the treatment certifies that the patient is incapable, by reason of mental disorder, of

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[250] Mental Health (Scotland) Act 1984, s 94(1).
[251] S 94(3).
[252] S 94(2) and Directive by Secretary of State dated 17 August 1989.
[253] Information supplied by Mental Welfare Commission for Scotland.
[254] S 94(6).
[255] Mental Welfare Commission for Scotland, *Annual Report 1988*, pp 10 and 11.
[256] Crosby Report, Appendix II, Table 4.
[257] Crosby Report, Appendix II, Table 2. The Mental Welfare Commission found a similar proportion in 1988, *Annual Report 1988*, p 11.

managing and administering his property and affairs.[258] This administrative procedure compares unfavourably with that for appointing a curator where two medical certificates are required, the "mentally disabled" person is given an opportunity to challenge averments of incapacity and the appointment is made by a court after consideration of the evidence. Many in-patients could manage their affairs if more help and advice was available to the, yet the current procedure pays no attention to this possibility. Moreover, the present procedure is possibly in breach of the European Convention of Human Rights. Article 6(1) stipulates that determinations of civil rights (which include the right to manage one's own property and financial affairs) should be determined by an independent and impartial tribunal established by law after a fair and public hearing.

4.157 Secondly, the hospital managers' statutory duty is to hold and receive the money and personal possessions. They have a discretion to spend money held for a patient on his or her behalf. The Crosby Report noted and deprecated the negative attitude that mentally disabled patients have no need for money because they cannot appreciate the benefits.[259] This may lead to hospitals seeking termination of state benefits or not claiming them on behalf of patients, allowing money to accumulate, or spending only small amounts on items such as sweets or cigarettes. The Crosby Report recommended that all income should be claimed and a more active policy should be adopted towards spending it to enhance the quality of life of in-patients.[260]

4.158 Thirdly, it is not clear whether the hospital managers' duty to receive money extends to withdrawing money from a patient's bank or building society account in order to spend it on the patient's welfare. Practice varies but all too often small balances have to lie untouched since it is not worth having a curator appointed.

4.159 Fourthly, there is a danger that patients' funds are used to buy items that the National Health Service should provide free of charge. The Crosby Report[261], the Mental Welfare commission for Scotland[262] and a recent Channel 4 television programme "The Incapax Scandal"[263] have all drawn attention to misuses of patients' funds in this way. The Crosby Report recommended that proper accounting procedures should be set up.[264]

4.160 Fifthly, management of patients' funds by hospital central management may lead to a remote and impersonal service. Unlike curatory there is no single individual responsible for the funds of particular patients. The family of an in-patient who helped him or her to manage money before admission to hospital are superseded by the hospital administration and may feel excluded.

4.161 Finally, the current limit of £50,000 seems excessive. Mentally disabled people with estates approaching this size living outside hospitals would almost certainly have curators appointed. The statutory limits set by the Secretary of State for Scotland is currently £3,000 but as already noted the Mental Welfare Commission for Scotland may authorise funds to be held up to £50,000 for a particular patient. In the absence of special circumstances approval

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[258] Mental Health (Scotland) Act 1984, s 94(1).
[259] Page 14.
[260] Recommendation 2.
[261] Recommendation 6.
[262] *Annual Report 1988*, pp 11 to 13.
[263] Sunday 10 March 1991.
[264] Recommendations 40-43.

should perhaps not be given by the Mental Welfare Commission for Scotland for sums substantially in excess of £3,000. Parliament in enacting section 94 of the Mental Health (Scotland) Act 1984 was unlikely to have considered empowering the Commission to extend the powers of hospitals to such an extent.

Proposals for reform

4.162 The basic question is whether management of patients' funds by hospitals should be retained at all. The present system is widely used and has many advantages. It offers a cheap and simple way of administration. The majority of patients have modest amounts of money which would be expensive to administer by way of private financial managers or the Public Manager. We think hospital managers should continue to be entitled to administer modest amounts of money and possessions belonging to mentally disabled patients. In paragraph 4.158 above we noted the difficulty hospital managers face in being unable to withdraw money from a patient's bank or building society account to spend for his or her benefit. We put forward proposals later[265] enabling a member of a mentally disabled person's family or other individual caring for him or her to withdraw money from the person's bank or building society account for his or her maintenance. It would be possible to extend this scheme to hospital managers, subject perhaps to restrictions on the amounts that could be withdrawn.

4.163 The many criticisms of the existing system become increasingly important as the amount of money involved increases. It is difficult to justify on grounds of expediency an administrative procedure (relying on a single certificate and without any opportunity of challenge or judicial control) where anything beyond modest sums of money are involved. Where substantial sums of money are involved it seems better to have some other form of management. We understand that small curatories involving hospital in-patients are viable because the patients' affairs are relatively uncomplicated. Alternatively, funds over a specified limit could be administered by the Public Manager which we suggested introducing earlier.[266]

4.164 One possible scheme would involve the hospital notifying the Public Manager as soon as the funds of an individual patient exceeded the prescribed limit. The Public Manager would then take over and invest the funds using the income and if necessary the capital for the patient's benefit.[267] The hospital could be given a small amount of cash to spend on regular requirements and comforts with additional sums being made available to meet other needs. Alternatively the Public Manager could supervise the continued administration of the patients' funds by the hospital. Whichever system was adopted it would be part of the Public Manager's functions to ensure that an appropriate amount of money was spent for the benefit of the patient, unless there were good reasons to accumulate capital.[268] This might require consultation with the patient, the ward staff at the hospital and the patient's family. The patient's family may prefer to have a private financial manager (curator) appointed rather than the funds come under public management. To enable this option to be considered the hospital should inform the patient's nearest relative

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[265] Proposal 57 at para 4.178.
[266] Proposal 33 at para 4.59.
[267] Exceptionally the Public Manager could leave the funds with the hospital managers, for example if the patient was to be discharged in the near future.
[268] For example if the patient was expected to be discharged in the near future.

of the fact that the funds exceed the prescribed limit. The Public Manager would take over until a financial manager was appointed.

4.165 The involvement of the Public manager would reduce the role of the Mental Welfare Commission for Scotland in relation to in-patients' funds. The latter would no longer be required to consent to continued hospital management when the funds exceeded the specified limit. Nevertheless, the Mental Welfare Commission should continue to have a general supervisory function and should be under a duty to pass on any concerns they may have to the Public manager.

4.166 Administration by the Public Manager should not impose too great a burden on that service because only a small proportion of mentally disabled patients have funds exceeding £3,000 in value. Any increase in the figure to say £5,000 would reduce the burden much further.

4.167 In order to elicit views on hospital management of mentally disabled patients' funds we propose that:

53. (1) Hospital managers should continue to be entitled to administer money and personal possession of mentally incapable in-patients but only up to a prescribed amount in relation to each individual patient. Views are invited as to what the prescribed limit should be.

(2) Should hospital managers be entitled to withdraw money from a mentally incapable in-patient's bank or building society account in order to spend it for that patient's benefit, and if so should there be any restricts on the amounts that could be withdrawn?

(3) Funds in excess of the prescribed limit should be managed by the Public Manager or a financial manager.

(4) In deciding whether or not to certify that a patient is incapable of managing his or her affairs the doctor should consider the help that could reasonably be made available to the patient by the hospital, relatives, members of a voluntary organisation or otherwise.

Review on transfer to Public Manager

4.168 Where funds are handed over by the hospital to the Public Manager because they exceed the specified limit, we think there should be a review of the patient's capacity and circumstances. If this safeguard was not adopted, the patient who had built up substantial funds would be subject to public management without any of the detailed procedural safeguards that would normally apply to the appointment of the Public Manager. We propose that:

54. The Public Manager to whom an in-patient's funds were handed when they exceeded the prescribed amount should be required to apply within three months to the court or other appointing body for a review of the patient's capacity and circumstances.

External audit of hospital management

4.169 The Crosby Report recommended that proper accounting procedures should be set up and complied with for management of patients' funds.[269] It is for consideration whether there should be in addition some sort of external check on the way mentally disabled patients' money is spent by hospital authorities. The Public Manager could, for example, be entitled to call on a hospital to produce accounts of transactions with funds of specified patients. "Spot checks" would be a less expensive way of providing external control than requiring accounts for all patients to be produced to and audited by the Public Manager. We therefore propose that:

55. The Public Manager should be entitled to require the hospital to produce for auditing an account of their transactions with the money and personal possessions held by them on behalf of specified individual mentally disabled patients.

Extension to local authority and other homes?

4.170 At present only the funds of in-patients in National Health Service hospitals can be administered by the managers. The managers of local authority homes are often appointees for their residents' social security benefits and collect and bank them on their behalf. But local authorities have no statutory powers to hold and manage other funds on behalf of mentally disabled residents. This can cause problems where patients have no relatives and it is not worth having a curator appointed.

4.171 We think that a scheme similar to that proposed above for hospital management should be extended to residents of homes run by the local authority under the Social Work (Scotland) Act 1968. If local authorities are to be entitled to manage funds of residents in their homes the management should be entrusted to officials in the finance department or others who are not concerned with the day to day running of the home. The managers and the staff of the home should clearly have a role in deciding how the patients' funds would best be used for his or her advantage.

4.172 We seek views on whether the proprietors of private hospitals, nursing or registered homes should be entitled to manage the funds of their patients and residents under a similar scheme. They may lack adequate accounting procedures and are not publicly accountable in the same way as health boards and local authorities are. On the other hand they perform much the same functions as hospitals and local authority homes and have to be registered with the local authority either under the Nursing Homes Registration (Scotland) Act 1938 or the Social Work (Scotland) Act 1968. Serious financial irregularities could result in registration being cancelled. Furthermore, our proposed spot checks by the Public Manager would provide a further external check on misuse of funds. We propose that:

56. (1) The scheme of management by hospital authorities of their patients' money and personal possessions with the amendments proposed in Proposals 53 to 55 above should be extended to local authorities running residential homes in relation to their residents.

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[269] Recommendations 40-43.

(2) Views are invited as to whether the scheme should be extended to residents or patients in private hospitals and registered nursing or residential homes.

ACCESS TO BANK ACCOUNTS AND SIMILAR ITEMS

4.173 Some of the financial problems of the mentally disabled, especially the dementing elderly, could be solved if access could be gained to their bank or building society accounts. Income such as pensions, dividends and social security payments payable to the mentally disabled person can be paid into a bank account without any intervention by the mentally disabled person. However, there is often difficulty in obtaining money from the account to pay bills such as the running costs of the home, food and clothing on behalf of the mentally disabled person. Informal arrangements can sometimes be made with the bank manager whereby a relative is permitted to withdraw money, but often a curator has to be appointed to gain access to the account. Some building societies have a formal procedure for authorising access by a carer to a mentally disabled person's account.[270] A curator takes over the entire estate which may be unnecessary or undesirable when all that is required is access to the bank account.

4.174 In our proposed new scheme of financial managers we suggested that one of the orders the court would make would be a property order.[271] A property order would deal with a single item of property or a situation where continuing management of the whole or a substantial part of the estate was unnecessary. Property orders would certainly solve the problem of access to mentally disabled people's bank accounts, but they still require legal proceedings with their attendant expense and delay. We think there is scope for a less formal procedure that does not involve applications to a court. A possible scheme is outlined below.

4.175 When a mentally disabled person is incapable of signing cheques or withdrawing money from a deposit account certificates could be obtained from the person's general practitioner and solicitor or social worker. The medical certificate would state that the person was suffering from a mental disability to a substantial degree and the certificate from the solicitor or social worker would confirm that a relative or other individual (named in the certificate) was looking after the mentally disabled person. The named individual would then take the certificate to the branch of the bank where the mentally disabled person's account was kept. The manager would then be entitled, but not bound, to permit the named individual to withdraw money from the bank account for the benefit of the mentally disabled person. The bank would not be liable for misappropriation of money withdrawn by named individuals within the terms of the scheme. Abuse of the scheme could be limited by placing a monetary ceiling on amounts that could be withdrawn each week or month. The difficulty is that mentally disabled people's circumstances vary too much for a financial limit to be of use. Withdrawals of £100 per month out of the bank account of poor pensioners might soon leave them penniless while similar withdrawals would be insufficient for those living in large houses and receiving private nursing care. Another option is that money could only be withdrawn against receipted bills for goods and services supplied for the benefit of the mentally disabled person. the bank manager would have a discretion where the bills were not clearly for the mentally disabled person's household and other expenses and might need to make further enquiries. The named individual however

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[270] For example, Halifax Building Society, rule 11.
[271] Proposal 34 at para 4.63.

would run the risk of having to pay the bills out of his or her own pocket and hope to be reimbursed by the bank manager later. Furthermore, the bank manager may not be aware of the customer's circumstances and would not welcome being given the task of deciding whether or not a particular bill fell within the scope of the scheme.

4.176 The scheme could be suspended or terminated by the bank manager at any time on receipt of information suggesting abuse or mis-application of money or disputes within the family as to how the mentally disabled person should be cared for. Similar action is often taken with joint accounts held by married couples and others who are in disagreement. On the request of any account holder instead of any one of them. The court or other body should also be empowered to terminate or suspend the arrangement on application by any person having an interest. Another useful check might be to require the arrangements to be reviewed every year or so.

4.177 The arrangements described above could be extended to other items such as building society accounts, payment of insurance claims or compensation or refunds of income tax.[272] It is worth noting that somewhat similar statutory arrangements already exist in relation to National Savings assets and sums with industrial and provident societies.[273] Further provisions would be needed to deal with the granting of receipts. Payments into a building society account of cheques payable to the mentally disabled person would also have to be authorised without endorsement of the cheques by the mentally disabled person. In the case of lump sum payments a monetary limit might be a useful safeguard against serious abuse.

4.178 We put forward the following scheme for comment.

57. (1) The manager of the bank at which the mentally disabled person has an account should be entitled, but not bound, to permit a named individual to withdraw money from that account.

(2) The bank should incur no liability for money withdrawn provided there had been presented

(a) a certificate by the mentally disabled person's general practitioner stating that the patient suffers from mental disorder to a substantial degree,

(b) a certificate by a solicitor or social worker who knows the mentally disabled person and his or her circumstances stating that he or she was being looked after by a relative or other individual (named in the certificate), and

(c) an undertaking by the named individual to use the money for the living expenses of the mentally disabled person or otherwise for his or her benefit.

(3) The bank manager should suspend or terminate withdrawals on becoming aware that the mentally disabled person was opposed to the withdrawals or

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[272] A case which was brought to our attention involved applying for building society interest to be paid without deduction of tax.
[273] See para 4.24.

the named individual might be abusing his or her position. The court or other body should have power, on application by any interested person, to suspend or terminate the scheme.

(4) Views are sought on whether the scheme should be extended to other items and if so which other items might be appropriate, and whether the arrangements relating to an individual mentally disabled person should be reviewed periodically (say every two years).

Part 5 Continuing powers of attorney for financial affairs and personal welfare

5.1 In this Part we look at way in which an individual, anticipating his or her future mental incapacity, may empower another to manage his or her affairs and take personal welfare decisions when incapacity arises. These appointments are alternatives to the system of personal guardians and financial managers appointed by the courts or other authorities discussed in Parts 2 and 4. Powers of attorney have the advantages of being relatively cheap and flexible in that the attorney's powers can be tailored to fit the individual circumstances and desires of the granted. Furthermore, the granting of a power of attorney does not require the acknowledgement by the granter or his or her family of mental incapacity or its certification by medical practitioners. The facility of appointing others to manage one's financial affairs has been available in Scots law for many centuries. Those appointed were known as factors, or factors and commissioner's, and the document of appointment was called a factory, or a factory and commission. Nowadays, those appointed are termed attorneys and the document a power of attorney. The modern term is used for the remainder of this Part. Appointments in the field of personal welfare do not feature in current Scottish practice, although many other jurisdictions, especially the United States of America, have introduced them in the last 20 or so years.

5.2 Powers of attorney for financial affairs are considered separately from powers of attorney relating to personal welfare. While it is accepted that individuals may delegate management of their financial affairs, it is perhaps questionable whether delegation of personal welfare matters should be permitted. Moreover, delegation of personal welfare matters, such as consent or refusal of consent to medical treatment, raises ethical issues which are different from those in the financial management field.

5.3 In current usage a power of attorney is a legal document whereby one person (the granter) empowers another (the attorney) to manage all or part of the granter's financial affairs. Apart from various commercial uses powers of attorney are used by two main classes of persons; those who are going abroad and wish someone to look after their affairs in Scotland during their absence, and those with declining physical and mental faculties who wish someone to look after their affairs.[1] One of the key features of a power of attorney is that the attorney is empowered to sign documents on behalf of the granter. Powers of attorney are a type of agency agreement and care will have to be taken that out proposals do not affect commercial agency agreements.

5.4 Other jurisdictions have continued to use the term power of attorney and enduring or durable powers of attorney for those which do not lapse on the granter's subsequent incapacity. We doubt whether either of these terms has much meaning for non-lawyers. A more self-explanatory term would be a continuing power of financial management. We

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[1] A survey of 100 powers of attorney registered in 1977 in the Books of Council and Session showed 31 were granted because of the granter's absence and at least 41 because of his or her infirmity. A similar pattern was observed in powers registered in 1987.

return to the topic of nomenclature in Part 8 where we consider what form legislation might take if our proposals were to be implemented. Meanwhile there are advantages in adhering to existing usage. In the rest of this Part we use the term continuing power of attorney to refer to the proposed new power of attorney which does not lapse on the subsequent mental incapacity of the granter.

CONTINUING POWERS OF ATTORNEY FOR FINANCIAL MATTERS

5.5 It has long been a matter of doubt whether or not a power of attorney granted while the granter was mentally capable lapsed on his or her later incapacity.[2] A curator[3] or tutor-dative[4] appointed by the court supersedes the attorney appointed by the granter, but in the absence of any such appointment the continued authority of the attorney is uncertain. Legislation has been passed recently clarifying the situation for future powers of attorney. Section 71(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 provides that:

> "Any rule of law by which a factory and commission or power of attorney ceases to have effect in the event of the mental incapacity of the granter shall not apply to a factory and commission or power of attorney granted on or after the date on which this section comes into force."

Section 71 came into force on 1 January 1991.[5] It was intended as an interim measure pending our consideration of the issues.[6] As already mentioned many other jurisdictions have legislated in this field recently. Their schemes for powers that do not lapse on the granter's incapacity, generally called enduring or durable powers of attorney, differ quite considerably in detail. We have studied most of them and have derived considerable benefit from the comparative material. In the rest of this section we put forward proposals for a system of continuing financial powers of attorney (abbreviated to CPA) in Scotland, illustrating the range of possible options by reference to schemes in other jurisdictions.

5.6 It seems helpful to set out the main arguments for and against a CPA that have been advanced in other countries. The main argument for a CPA is that it seems hardly sensible for the attorney's authority to be terminated irrespective of the granter's wishes at the very time when the attorney is most needed to manage the granter's affairs. If a person wishes to make provision for the administration of his or her estate in the event of later mental incapacity by appointing a trusted person as attorney then the law should allow this. Another argument is that in the absence of a CPA the affairs of incapable granters would have to be administered by court appointed officials. State administration is inherently more expensive and cumbersome, and also involves an "official" recognition of mental incapacity which may be disturbing to mentally incapacitated people and their families. The third argument put forward in other jurisdictions relates to the need to protect attorneys acting under ordinary powers of attorney. It is very hard to determine the precise point at which mental incapacity occurs. Attorneys who continue to act after the granter becomes incapable are at risk of being personally liable. This last argument is of less force in Scotland for several reasons. There is no definite rule of law here that a power of attorney lapses on

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[2] Bell, *Commentaries*, I 525; *Pollok v Paterson* Dec 10 1811 FC; *Wink v Mortimer* (1849) 11 D 995.
[3] *Fraser v Paterson* 1987 SLT 562.
[4] If appointed with financial powers.
[5] 1990 Act, s 75(3); Royal Assent on 1 November 1990.
[6] HL Debs, Vol 522, Col 1649 (25 October 1990).

incapacity. Even if an attorney's authority does terminate on incapacity, the attorney is not personally liable unless he or she is aware of the termination.[7] Furthermore, the principle of *negotorum gestio* authorises an act carried out on behalf of an incapable person provided the act was intended to be beneficial and it was reasonable to suppose that consent would have been given if the incapable person had been capable of giving it. If the attorney's authority under the power of attorney lapses he or she may carry on the administration of the granter's financial affairs to a certain extent as a *negotiorum gestor*.

5.7 While it is clear that some cheap and simple method should be devised of managing the affairs of people who become mentally incapacitated it is not obvious that a CPA is the best method. The first objection to a CPA is that people who are incapable of looking after their own financial affairs should have them managed by court-appointed officials whose actings are subject to strict supervision and control. Only in this way can a property degree of protection against fraud or mismanagement be provided. Frail elderly people may come under pressure, however well-meaning, by their families to grant a CPA. Secondly, the granter of a CPA can after incapacity no longer monitor the attorney or alter the instructions or terminate the appointment should something emerge which makes such action appropriate.

5.8 In putting forward detailed proposals for a CPA we have attempted to balance the conflicting requirements of simplicity and protection. A scheme which attempted to protect the granter completely against loss would be so complex that it would probably not be used. Instead people would either have financial managers (as proposed in Part 4) appointed or carry on using ordinary powers of attorney, *negotiorum gestio* or informal methods of administration notwithstanding their disadvantages and the uncertainty of their legal effectiveness. On the other hand, lack of protection exposes granters, especially those without close relatives who can keep an eye on things, to losses by attorneys who abuse the trust placed in them by the granters. In considering the amount of protection appropriate to CPAs it should be borne in mind that the present system of powers of attorney has virtually no protective elements. The granter relies to a very large extent for his or her protection on the honesty and integrity of the attorney appointed. About 2,600 powers of attorney are estimated to have been granted in 1987 by frail elderly people.[8] This number is likely to have increased since then.[9] Although we are aware of some mismanagement and abuse by attorneys it is difficult to quantify the overall extent in the absence of statistics. We would, however, welcome views from those with practical experience in this area. Our present inclination is to favour a fairly straightforward scheme.

Form and execution of CPA

5.9 The present statutory position is that a power of attorney granted after section 71 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 came into force continues to have effect notwithstanding the granter's subsequent incapacity. Granters who do not wish their powers of attorney to continue now have to insert an express "opting-out" clause. We

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[7] See para 5.88.

[8] In 1987 a sample of 500 documents registered in the Books of Council and Session (a national register of deeds kept at Edinburgh) revealed that 13.2% were powers of attorney, of which half were definitely or very probably granted because of the grantor's infirmity. If the sample was representative of the 39,877 documents registered for the whole of that year the number of "infirm" powers of attorney amounts to just over 2,600.

[9] The annual number of powers of attorney registered is estimated to have doubled from 1977 to 1987. This is based on samples taken in the two years.

do not favour the interim provisions in the 1990 Act as the basis for a permanent scheme. Granters who wish their attorneys to continue to have authority after incapacity should in our opinion be required to "opt-in" by including express provisions to that effect in the document. An opting-in system enables appropriate safeguards to be incorporated for those powers of attorney that are expressed to be continuing. It also ensures that people have to consider carefully the desirability of granting a continuing power and do not do so through inadvertently omitting opting out provisions. About one-third of all powers of attorney are granted in order to appoint someone to manage the granter's financial affairs during his or her absence abroad or for some other commercial reason.[10] In these cases we doubt whether the same arrangements would be made if the granter intended to make provision for his or her subsequent incapacity. Another danger of the present provision lies in the fact that powers of attorney are often granted for limited purposes or for a limited period although this may not appear on the face of the document. It is not usual practice to prepare and register formal recalls. "Stale" powers of attorney could therefore be operated after incapacity. Moreover, the attorney chosen to act many years previously may be unsuitable to take over the whole financial affairs of the by now incapacitated granter.

5.10 An "opting-in" system would require to be backed up by a statutory provision to the effect that a power of attorney that did not expressly provide for the attorney's authority to continue should lapse on the granter's subsequent incapacity. Otherwise there would be a danger that the safeguards thought appropriate for CPAs might be circumvented by the use of ordinary powers of attorney, since there is no clear rule of law in Scotland that the latter cease to have effect on incapacity.

5.11 Should the clause which has the effect of imparting a continuing effect to a power of attorney be prescribed? In England and Wales and New Zealand prescribed styles are provided.[11] In the latter jurisdiction immaterial differences are ignored.[12] Most other jurisdictions do not prescribe a style. The advantages of a prescribed form of words are that third parties can readily see whether or not the power of attorney is a continuing one and that granters and their advisers are more likely to use CPAs if there is a form of words available whose effect is certain. The disadvantage is that any deviation from the prescribed style will deny effect to the granter's intention. One could get the best of both worlds by providing a style but further providing that a clause to the same effect as, or along similar lines to, the style should also be effective. In other words the prescribed style would be a facility, which people could use, but which would not be mandatory. South Australia confers continuing effect on a power of attorney if the document refers to the enabling legislation.[13] We are not in favour of this approach. First, the continuing nature of the power of attorney would not be obvious to third parties unfamiliar with the Act in question. Secondly, the legislation would in its terms be restricted to Scotland and that would give rise to a doubt whether the continuing powers were intended to be exercised outside Scotland.[14]

5.12 Summing up we propose that:

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[10] Estimates based on samples of powers registered in the Books of Council and Session in 1977 and 1987.
[11] Enduring Powers of Attorney Act 1985, s 2(1)(a); 1988 Act, s 95(1).
[12] 1988 Act, s 95(2).
[13] Powers of Attorney and Agency Act 1984, s 6.
[14] See paras 5.91-5.93.

58. (1) Section 71 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 should be repealed with respect to powers of attorney granted after the commencement date of legislation implementing our recommendations.

(2) A post-commencement power should continue to have effect notwithstanding the granter's subsequent incapacity only if the document contains an express provision to this effect. A style should be prescribed for the express provision but it should not be mandatory to use the prescribed style.

5.13 A CPA should clearly be required to be in writing which is at least signed at the end by the granter. In practice it would almost invariably be attested by witnesses, and would then be probative or "self-proving" in that it would be presumed to be authentic and formally valid until the contrary was established in court proceedings.[15] The strong presumption of authenticity conferred by attestation would be very useful in a document such as a CPA which the attorney and third parties are going to reply on for an indefinite future period, and which might well be challenged. Furthermore, if the challenge was made after the granter became incapable his or her evidence would no longer be available. A further practical advantage of probativity is that the CPA becomes registerable in the Books of Council and Session (a national public register of documents situated in Edinburgh) for preservation.[16] Registration avoids the risk of losing the document. Although CPAs would, in practice, almost invariably be attested for evidential and registration purposes we are against making attestation a requirement of formal validity. First, a genuine document may fail to take effect because of some defect in the attestation which is discovered too late for it to be corrected. Secondly, we do not see any reason why CPAs should be treated differently from other important legal documents. The general rule recommended in our *Report on Requirements of Writing*[17] - signature at the end by the granter for formal validity, attestation by a single witness for probativity – should therefore apply to CPAs.

5.14 Some other jurisdictions impose additional requirements in order to ensure that granters understand what they are going in granting a CPA. For example, in England and Wales the prescribed form includes explanatory notes which the granter certifies that he or she has read[18] and in New South Wales a prescribed person (solicitor, barrister or clerk of court) has to certify that he or she has explained the effect of the document to the granter before it was signed.[19] Many granters will be elderly people whose mental powers have started to decline and who are dependent to a large extent on those looking after them. These people are susceptible than normal adults to suggestions that a CPA should be granted. They may not appreciate the consequences of appointing an attorney with continuing effect, in particular that there may be no-one to monitor or challenge the actings of the attorney after incapacity.

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[15] In our *Report on Requirements of Writing*, Scot Law Com No 112 (1988) we made recommendations on the formal validity and probativity of various types of legal documents. The general rule would be that signature at the end by the granter would be necessary and sufficient for formal validity where a formally valid document was required by law; attestation by a single witness would make the document probative or "self-proving".

[16] Improbative documents (with the exception of holograph wills) are not registrable in the Books of Council and Session.

[17] Scot Law Com No 112 (1988).

[18] Enduring Powers of Attorney (Prescribed Forms) Regulations 1987 (SI 1987/1612).

[19] Conveyancing Act 1919, s 163F added by Conveyancing (Powers of Attorney) Amendment Act 1983; Conveyancing Regulations 1984.

5.15 It is vitally important that granters of CPAs do fully understand what they are doing. However, we doubt whether incorporating explanatory notes in a prescribed form would ensure that more granters understood the effects of a CPA. The minority of people who are content to sign documents without fully understanding their effect will in all likelihood not take the trouble to read any explanatory notes either. They will simply sign the CPA and any statement that they have read and understood the explanatory notes.

5.16 We tend to favour the granter being given an explanation by a solicitor if such protective provisions are felt to be necessary. Powers of attorney are at present almost invariably prepared by solicitors and this pattern could be expected to continue for CPAs.[20] It would add little or nothing to the expense of preparing a CPA for the solicitor to add a docquet certifying that he or she had explained the nature and effect of the CPA to the granter before signature.

5.17 A similar requirement occurs in the Matrimonial Homes (Family Protection) (Scotland) Act 1981. The Act confers occupancy rights in the matrimonial home on a non-entitled spouse and permits these rights to be renounced. Because of the possibility of improper pressure being brought to bear on spouses to renounce, section 1(6) provides that the renouncing spouse must swear before a notary public that the renunciation is made freely and without coercion of any kind. A notary will make sure that a spouse who proposes to renounce knows the consequences of his or her action.

5.18 On the other hand solicitors as part of their professional duties towards their clients ensure that clients understand the nature and effect of any legal document they are asked to sign. Wills, contracts, and other complex documents of great importance to clients are routinely signed without any certificate of explanation having to be attached.

5.19 Another approach would be to require a CPA to have a medical certificate appended to it. A doctor would examine the granter and certify that he or she had sufficient capacity to understand the effects of the proposed CPA. It has been held in England and Wales that the test of capacity is whether the granter understands the nature and affect of the enduring power of attorney and not whether the granter is capable of understanding all the various transactions which the document authorises the attorney to undertake on the granter's behalf.[21] Medical certification of capacity was recommended by the Manitoba Law Reform Commission but not implemented in the legislation. We are not in favour of a certificate of capacity on several grounds. First, it would not prevent later challenge unless it was made conclusive, which seems too extreme. Secondly, whether a person understands the legal effects of a document such as a CPA is perhaps not primarily a medical issue. If such a judgement has to be made it is best made by a lawyer. Finally, a medical examination and certificate for similar purposes currently costs about £50 and would add considerably to the expense of a CPA.

5.20 Where the attorney is a solicitor he or she should not be permitted to certify that the granter had had the effects of the CPA explained. Similarly a medical attorney should be prohibited from certifying the granter's capacity if that is to be a requirement.

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[20] The survey of 100 "infirm" powers of attorney in 1977 showed that all the documents had been presented for registration (and were almost certainly prepared) by solicitors.
[21] *Re K* [1988] 2 WLR 781.

5.21 Views are invited on the following proposal and question.

59. (1) A CPA should be required to be in writing and signed at the end by the granter in order to be formally valid.

(2) Should any of the following additional requirements:

(a) a certificate by the granter that he or she has read the prescribed explanatory notes,

(b) a certificate by a solicitor (other than the attorney) that the granter has had the effect of the CPA explained and appears to understand it, or

(c) a certificate by a medical or other appropriate practitioner (other than the attorney) that the granter had at the time of signing sufficient capacity to understand the consequences of signing the CPA;

be necessary for a CPA to be valid?

Restrictions on witnesses to CPA

5.22 Where a CPA is to be attested we suggest that the normal rules of attestation should apply with one modification. The normal rules at present are that a witness to the signature of the granter of a document must be mentally capable, and aged 14 years or more.[22] One of several granters cannot act as a witness for any of the others. There are no special requirements for powers of attorney. Most jurisdictions prohibit the attorney from acting as a witness to the granter's signature, some also prohibit the attorney's spouse from acting[23] and others disqualify a wide range of the attorney's relations as well.[24] Although an attorney is not strictly speaking a party to the CPA, in our view he or she is too closely connected to the document to act as a witness. A wider prohibition seems unjustified. Current practice in relation to similar socuments isto obtain completely independent witnesses (such as neighbours or employees of the client's bank or solicitor) if possible. We propose that:

60. An attorney to be appointed by a CPA should not be qualified to act as a witness to the granter's signature of it.

Signature of CPA by attorney?

5.23 In England and Wales the attorney is required to sign the prescribed form of enduring power.[25] The prescribed form contains explanatory notes as to the effect of the power, and the attorney by signing it declares that he or she is not under 18, understands the limited power to use the granter's property to benefit others, and is aware of the duty to

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[22] We recommend several reforms in our *Report on Requirements of Writing*, Scot Law Com No 112 (1988).
[23] Manitoba, Powers of Attorney Act 1987, s 3(1)(b); Ontario, Powers of Attorney Act (RSO 1980 c 386) as amended in 1986.
[24] Tasmania, Powers of Attorney Act 1934, s 11A(2), inserted by Powers of Attorney Amendment Act 1987, s 7.
[25] Enduring Powers of Attorney Act 1985, s 2(1)(b).

apply for registration of the power with the Court of Protection as soon as the granter is becoming incapable. New Zealand simply requires the attorney to sign as evidence of acceptance of the position.[26] Most of the other jurisdictions do not require the attorney's signature for the CPA to be valid.

5.24 While we have some sympathy with the underlying objectives we have reservations about making it a condition of validity of a CPA that the attorney signs the document. Equally onerous duties are imposed on executors, trustees and attorneys acting under ordinary powers of attorney yet there is no demand as far as we are aware for any of these appointees to sign the document appointing them. Granters will as a matter of course ask the proposed appointees whether or not they are willing to act and the proposed appointees would consider carefully their future duties before accepting. Even if duties are to be imposed on CPA attorneys we think these duties should arise from acceptance of the post rather than signature of the CPA. For example, a person may agree to be appointed CPA attorney but may not wish to act when the granter becomes incapable many years later. Moreover, requiring the attorney's signature would lead to some additional complexity in the law. Would the attorney have to sign at the same time as the granter? What period of time would have to elapse before an attorney could no longer sign? Where more than one attorney was appointed each would no doubt be required to sign, but what would be the position where one omitted to sign? Would the CPA be completely invalid or is the non-signing attorney prohibited from acting? Such questions and others would have to be answered and made the subject of express rules. We propose that:

61. It should not be a requirement of validity that a CPA be signed by the attorney(s) appointed.

CPAs for small estates only?

5.25 Should enduring powers of attorney be limited to estates below a certain value of those containing only certain types of assets? The USA Model "Special Power of Attorney for Small Property Interests Act" in 1964 included a financial limit on estates that could be managed by means of a durable power of attorney. This limitation was based on the belief that enduring powers should not be made for large or complex estates where there should be more extensive safeguards and more complex procedures.

5.26 We are not in favour of restricting CPAs by reference to any financial limit or type of asset. First, there could well be less risks with large and complex estates since professional advisers would probably have been involved by the granter in managing them and this experience would continue to be available to the attorney. Secondly, any financial limit would be arbitrary and would need to be frequently reviewed. Thirdly, there would be a problem if the estate substantially exceeded the limiting value after the granting of the CPA. Either the power would have to lapse thus frustrating the granter's intentions or the attorney would after all be administering a large estate. We accordingly propose that:

62. There should be no limit on the value of an estate for which a CPA may be granted.

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[26] 1988 Act, s 95(1)(c).

Restrictions on who may be appointed a CPA attorney

5.27 Should the granter be free to appoint any person to act as attorney under a CPA or should there be some restrictions? Legislation in some other jurisdictions excludes certain persons from being appointed. These fall into two main categories – those with a likely conflict of interest and those whose personal attributes render them unsuitable.

5.28 In British Columbia an employee of a community care facility cannot act as an attorney for a resident and any such enduring power of attorney is void.[27] Exceptions are made where the employee is a close relative of the granter or the Public Trustee consents. We doubt whether such restrictions are necessary. An in-patient or resident with a modest estate and no close family might well feel that the manager of the hospital or local authority home was best suited to look after his or her affairs. We have already suggested that the managers of local authority residential homes should be able to administer the affairs of mentally disabled residents in the same way as hospital managers can.[28] Our suggestion was based on its usefulness and the monitoring and accounting procedures that would be available to ensure that the administration was carried out in a proper and responsible way. These would also be available if the manager was an attorney appointed under a CPA.

5.29 It could be argued that close relatives of the granter should not be capable of being appointed as attorneys under a CPA since they might have influence over the granter and have potentially adverse interests. Only professional attorneys (solicitors, accountants, bank managers and the like) should be appointed, so the argument goes, in order to ensure a proper standard of management with recourse to professional indemnity insurance if lapses occur. We reject this approach. It would involve excluding the very people who are most likely to be trusted by the granter and who are most likely to act in the granter's best interests. The survey of powers of attorney granted by infirm people indicated that most people appoint either close relatives or professional people in roughly equal proportions.[29] It is likely that the same pattern would apply to CPAs if granters were to be given an unrestricted choice.

5.30 In England and Wales a power of attorney which appoints a person who is under 18 years of age or bankrupt at the time of the attorney signing the power cannot be an enduring power of attorney.[30] New Zealand similarly prevents attorneys who are under 20 years of age or bankrupt being appointed and also disqualifies those who are mentally incapable of acting.[31] We agree with the disqualification of the mentally incapable and bankrupts. Those whom the law treats as unable to administer their own affairs should not be capable of being appointed to look after the affairs of others. If the Age of Legal Capacity (Scotland) Bill, currently before Parliament, is enacted in its present form a person will attain full legal capacity on his or her sixteenth birthday and then be able to act as a CPA attorney.

5.31 Should it be competent to appoint a corporate body as an attorney under a CPA? It might be argued that the appointment of an attorney is based so much on the personal attributes of the attorney (honesty, integrity, experience of managing financial affairs) that

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[27] Community Care Facility Act 1978.
[28] Proposal 56 at para 4.172.
[29] 32% appointed a son or daughter, 13% another relative, 43% a solicitor, 1% a bank manager and 11% some other individual.
[30] 1985 Act, s 2(7).
[31] 1988 Act, s 95(3)(a).

no corporation should be capable of being appointed. On the other hand the same qualities are also desirable in executors-nominate or trustees where it is commonplace for banks and similar organisations to be appointed. Any corporation can be appointed executor-nominate and confirmed as such.[32] England and Wales[33] and New Zealand[34] permit trust or trustee corporations to be appointed as attorneys under enduring powers of attorney but not any other corporate bodies. A trust corporation is defined in England and Wales[35] as:

> "the Public Trustee or a corporation either appointed by the High Court or a county court (according to their respective jurisdictions) in any particular case to be a trustee or entitled by rules under section 4(3) of the Public Trustee Act 1906 to act as custodian trustee".

The New Zealand definition is in similar terms. Most trust corporations acting under enduring powers of attorney are banks or insurance companies. The concept of a trust corporation does not exist in Scotland. However, the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 allows recognised financial institutions to act as executry practitioners. Section 19 contains a definition of recognised financial institutions – banks, building societies or insurance companies – that could be used in the context of a CPA. We doubt whether there would be much demand for corporate attorneys to be appointed under CPAs. In England and Wales the appointment of trust corporations is rare. Our survey of ordinary powers of attorney revealed no cases of corporate appointees.

5.32 Many powers of attorney appoint two or more people (usually two) to act as joint attorneys or alternate attorneys in order to ensure that the power of attorney will not lapse on the death or incapacity of a sole appointee. An alternate appointment allows the second attorney to act only when the first attorney dies or becomes incapable of acting or is removed. Unlike executors-nominate and trustees, attorneys have no power to assume new colleagues. We think it would be sensible to permit joint and alternate appointments in CPAs. Where two or more attorneys are appointed it should be left to the granter to decide whether they act jointly (ie all have to enter into any particular transaction) or jointly and severally (ie any one attorney can enter into a transaction alone). We deal later with the court's powers when it decides to terminate the authority of an attorney, or one of several attorneys acting under a CPA.

5.33 We ask for views on the following proposals and question.

63. (1) It should be competent to appoint one or more persons to act as attorney under a CPA. An attorney must at the date of granting of the CPA not be bankrupt, under age or mentally incapable of acting as attorney. Two or more attorneys may be appointed jointly or jointly and severally. Alternate attorneys., who would act in the event of the first-named attorney dying or becoming incapable of acting, should also be permitted.

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[32] Currie, *Confirmation of Executors*, pp 84-85.
[33] 1985 Act, s 2(7)(b).
[34] 1988 Act, s 95(3)(b).
[35] 1985 Act, s 13(1).

(2) Should it be competent to appoint a corporation as an attorney and if so should there be any restrictions as to the kind of corporation that could be appointed?

Limitation on powers that may be conferred by a CPA

5.34 In Scotland the powers conferred by a simple power of attorney are limited to ordinary management powers. Powers in excess of these (such as the power to sell substantial assets, borrow money or litigate) have to be expressly conferred.[36] In practice most powers of attorney, especially those granted by elderly or frail granters, confer a very wide range or powers. The law however imposes some limitations. First, some powers such as making a will or exercising the discretionary functions of a trustee cannot be conferred.[37] Secondly, the attorney is in a fiduciary relationship with the granter.[38] The attorney must not permit his or her personal interests to conflict with those of the granter. The attorney should not buy property from the granter or sell his or her own property to the granter however fair or reasonable the transaction is. The attorney must not use the granter's estate for his or her own benefit. Any transaction in breach of fiduciary duty can be set aside unless the granter ratifies it. Ratification would not be possible in a CPA where the granter has lost capacity. The attorney may not use information obtained by virtue of his or her position to personal advantage. The attorney must account for any secret profits such as commission or discounts obtained from those with whom he or she deals. Thirdly, the attorney is entitled to remuneration only if the power of attorney permits this.[39] Where professional attorneys (solicitors or accountants for example) are appointed the power of attorney generally authorises the charging of the normal professional fees. Secret profits however such as commissions or discounts obtained from those with whom the attorney deals must be accounted for. Finally, making gifts out of the granter's estate is prohibited unless specifically authorised by the power of attorney.

5.35 We are not in favour of a statutory list of powers that could be conferred by a CPA. The main advantage of a CPA is its flexibility, the powers being tailored to meet the wishes of the granter and his or her circumstances. The question of remuneration of the attorney should be left to be decided by the granter and the attorney. We do not suggest altering the common law position whereby remuneration is not claimable unless the power of attorney authorises it. The other two matters, prohibition of transactions in breach of fiduciary duty and inability to make gifts, can give rise to difficulties especially where the attorney is a close relative of the granter. In England and Wales an attorney, acting under an enduring power of attorney, may make reasonable Christmas, birthday or wedding gifts to people (including the attorney) related to or connected with the granter. Charitable gifts are permitted where the granter had previously made such gifts or might be expected to do so.[40] Also an attorney may act in relation to himself or herself or any other person if the granter might have been expected to provide for their needs.[41] New Zealand has almost identificial provisions.[42]

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[36] Halliday, *Conveyancing Law and Practice*, Vol 1 para 13.03.
[37] *Freen v Beveridge* (1832) 10 S 727.
[38] Walker, *Principles of Scottish Private Law*, Vol II (4th edn) pp 233-235.
[39] Halliday, para 13-09.
[40] 1985 Act, s 3(5).
[41] 1985 Act, s 3(4).
[42] 1988 Act, s 107.

5.36 The argument for relaxing the present prohibition on family and charitable gifts is that the rules may frustrate the likely wishes of the granter. The attorney of an elderly woman who always gave Christmas and birthday presents to her children and grandchildren and made annual donations to selected charities and her local church should arguably be permitted to carry on this tradition. If she had not lost capacity she would undoubtedly have continued with her benevolence. Although a curator's usual powers do not extend to making gifts the court may grant special powers[43] and we have proposed that a financial manager should be capable of being granted similar powers.[44] While we see considerable force in this argument we doubt whether any change should be made by legislation. Granters ought to have to consider whether or not they wish to authorise their attorneys to make family and charitable gifts, and should be required to confer this power expressly in the CPA rather than having to exclude legislative provisions if they do not want gifts to be made. In short, granters should be required to "opt-in" rather than "opt-out" of donations. If the power to make gifts is omitted from a CPA it would be open to disappointed relatives to have a financial manager appointed with such power, but the expense and inconvenience of legal proceedings would hardly ever make this course of action worthwhile.

5.37 Where the attorney is a close relative of the granter, breaches of fiduciary duty will be almost impossible to avoid. For example, a man may appoint his wife to be his attorney under a CPA. It would be almost impossible for her to manage his affairs in such a way that she derived no personal advantage from her actings or no conflict of interest arose. An attorney is entitled to use the granter's estate to meet the granter's legal obligations which include the maintenance of a husband, wife and children up to age 18 or 25 in certain circumstances.[45] These obligations should be recognised in the legislation relating to CPAs. However, we have reservations about extending to persons other than legal dependants the attorney's power to use the granter's estate for their benefit. Examples can be envisaged where there would be little doubt that the granter would have wished to benefit someone else. For example, if the granter's grown-up daughter fell on hard times the granter would if mentally capable almost certainly have helped her financially. But it is very difficult to draw a legislative line anywhere other than at those whom the granter has a legal obligation to maintain. The provision in England and Wales based on what the granter might have been expected to so seems dangerously wide and could be abused by attorneys who were not over-conscientious. In taking this line we are not denying granters who wish their estates to be used for the benefit of others the power to provide in this way. It would remain open to them to make express provisions in the CPA authorising their attorneys to use the estate for the benefit of non-dependants. But we think granters should have to "opt-in" rather than "opt-out". Even if the granter failed to make suitable provision for non-dependants it would be possible to use the estate for their benefit by applying for the appointment of a financial manager with appropriate powers.

5.38 Should the attorney have the right to see the granter's will? It would held the attorney exercise his or her powers in a way which would avoid difficulties on the granter's death.[46] But unless this right came into effect only on the granter's incapacity, the attorney would be entitled to see the will as soon as the CPA was signed. We tend to think this

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[43] *M's* CB (1904) 12 SLT 30 (charitable donations).
[44] Paras 4.78 to 4.96.
[45] Family Law (Scotland) Act 1985, s 1.
[46] See para 5.67.

should be a right which the granter could expressly confer, but which should not be a normal consequence of appointing a CPA attorney.

5.39 We propose that:

64. (1) An attorney acting under a CPA should not be permitted:-

(a) to charge any fees for acting as attorney,

(b) to make gifts out of the estate, or

(c) to see the granter's will,

unless the granter in the CPA authorises it.

(2) An attorney acting under a CPA should be permitted to use the estate for the benefit of those (including the attorney) whom the granter is obliged to aliment, but in the absence of any power to do so in the CPA, should not use the estate to benefit other people.

Delegation of trustee functions by CPA?

5.40 Trustees are not permitted to delegate their discretionary functions to others by way of a power of attorney or mandate.[47] Administrative functions, like voting at a company meeting and perhaps also signing documents, can be delegated.[48] In addition, people such as solicitors, stockbrokers or estate agents can be employed in a professional capacity to carry out tasks on behalf of the trustees.[49] To what extent, if any, should a person be able to confer, by way of a CPA, power of attorney to exercise the granter's functions as a trustee? Trustee is used in a wide sense and includes executor, tutor, curator or guardian.

5.41 In England and Wales section 3(3) of the Enduring Powers of Attorney Act 1985 allows an attorney to "execute or exercise all or any of the trusts, powers or discretions vested in the donor as trustee", subject to any restrictions in the enduring power of attorney. This provision was inserted at a very late stage of the Parliamentary proceedings. It has given rise to confusion as it is inconsistent with the general restrictive approach adopted by the law to the delegation of trustees' functions.[50] The Law Commission of England and Wales have recently issued a consultation paper *The Law of Trusts: Delegation by Individual Trustees*[51] dealing with this and similar issues. They have provisionally concluded that trustees should not be permitted to delegate their powers after incapacity to attorneys.[52]

5.42 It may be that the extent to which delegation of functions by trustees is permitted generally should be examined, but we do not propose to do so in this discussion paper. As far as CPAs are concerned we think an attorney should not be entitled to exercise any of the granter's functions as trustee once the granter loses capacity. Any CPA which purported to empower the attorney to act in this way should be to that extent ineffective. Trustees would

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[47] *Freen v Beveridge* (1832) 10 S 727.
[48] *Wolfe v Richardson* 1927 SLT 490.
[49] Trusts (Scotland) Act 1921, s 4(1)(f).
[50] Law of Property Act 1925, s 25, amended by Powers of Attorney Act 1971, s 9.
[51] No 118 (1991).
[52] Para 4.50.

of course continue to be able to delegate their functions to the limited extent currently permitted, but the delegation would be effective only while they retained capacity. The purpose of a CPA is to allow the attorney to manage the affairs of the granter after the granter's incapacity. It would be extending this purpose unduly to allow attorneys to manage the affairs of others which had been entrusted to the granter on the basis of his or her personal qualities. We do not think prohibiting delegation to a CPA attorney would cause much difficulty in practice. A trustee whose mental faculties are declining should resign and another trustee should be appointed. If the trustee becomes incapable without having resigned beforehand he or she can be removed by the court[53] or, if there are three or more trustees in all, the remaining trustees can act without reference to the incapable trustee.[54] In order to avoid an application to the court it might be useful for a CPA to be able to empower the attorney to resign the granter's position as trustee, provided the granter was not sole trustee.[55] We therefore propose that:

65. An attorney acting under a CPA should not be entitled to exercise any of the functions of the granter as trustee, executor, tutor or curator once the granter becomes mentally incapable except that the power to resign (unless the granter is sole trustee) could be conferred.

Supervision and control of CPA attorneys

5.43 One of the most important issues in CPAs is to what extent attorneys should be supervised and controlled. As long as the granter retains capacity he or she can monitor the actings of the attorney under a power of attorney and revoke the attorney's appointment if dissatisfied with the way in which the duties have been carried out. After the granter becomes mentally incapable of carrying out these functions there may be no-one to monitor the attorney's performance. This lack of monitoring may lead to abuse and mismanagement remaining undetected. Furthermore, the knowledge that they are not being monitored may lead some attorneys into temptation. But many elderly or infirm granters of powers of attorney do not exercise any effective control over their attorneys. Having chosen an attorney they rely on his or her honesty and integrity. Anecdotal evidence and the result of our survey suggest that many pre-1990 Act powers of attorney granted by elderly people whose mental faculties are declining continue to be used notwithstanding any subsequent loss of capacity.[56] Such powers of attorney strongly resemble CPAs in this respect. The Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 makes no provision for monitoring the operation of powers of attorney after the onset of incapacity. Although we are aware of some abuse by attorneys it is difficult to quantify the overall extent in the absence of statistics.

5.44 One option would be to set up a public register of CPAs with the registration authority having monitoring and supervisory functions. A CPA would be required to be registered either within a prescribed number of days of being granted or on the granter's incapacity. The registration authority would require an inventory of the granter's estate to be lodged and account of the attorney's transactions to be produced annually for audit. Any

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[53] Trusts (Scotland) Act 1921, s 23.
[54] 1921 Act, s 3.
[55] The 1921 Act, s 3(1) prohibits a sole trustee from resigning without appointing new trustees or obtaining leave from the court.
[56] Of the 94 granters in the sample who had died during the survey period (1977-1987) 24 were dementing and 9 probably dementing at death. None of them had had a curator appointed.

deficiencies or mismanagement would be reported to the appropriate authorities for action to be taken against the attorney. Revocation of a CPA by the granter or the court or any other court orders affecting the CPA would also be registered. This scheme has undoubted advantages. It provides substantial protection for granters. They can grant a CPA in the confidence that their attorneys will be thoroughly supervised by competent impartial public officials. It also protects the interest of third parties dealing with the attorney. By inspecting the register they can readily find out whether the attorney has the authority to carry out the proposed transaction. Nevertheless, we have little hesitation in rejecting this option. It seems pointless to create a system of CPAs which virtually duplicates the present system of curators or the proposed system of financial managers.

The purpose of CPAs is to provide a simpler and less formal method of administering the estates of those who become mentally incapable. Setting up a new public register would also be extremely expensive in staff and accommodation costs. This expense would have to be recouped by way of fees out of the granter's estates. The increased protection for third parties would be illusory. At present third parties who deal with an attorney appearing to have authority are protected so long as they act in good faith and are unaware of the termination of the attorney's authority.[57] The existence of a public register would impel third parties to inspect it otherwise they could not be said to have acted in good faith. This would simply increase the cost of transactions involving an attorney without any real gain in protection.

5.45 Another less elaborate option would omit the continuing monitoring functions of the registration authority. The register would not be open to public inspection. England and Wales has such a scheme.[58] When the attorney thinks that the granter is or is becoming mentally incapable he or she has to apply to the Court of Protection for the enduring power of attorney to be registered. Before applying the attorney has to give notice of the intended application to the granter and the granter's nearest relatives. Those notified and any other person having an interest may lodged objections to the application for registration. The grounds of objection include that the document is not valid, that the granter is not yet becoming mentally incapable, that fraud or undue pressure was used to induce the granter to grant the enduring power and that the attorney is unsuitable. If objections are lodged the court will investigate and only register the power if satisfied that the objection are unfounded. If there are no objections the court registers the power unless it is obviously defective or there are suspicious circumstances which require investigation. Once the granter is becoming incapable the attorney's powers are very limited until the power is registered. The attorney's full authority is restored once the power has been registered. The court's powers after registration are described later.[59]

5.46 The registration scheme outlined above was put forward by the Law Commission of England and Wales in order to back up the duty of notification of the granter's relatives. Notification was seen as a positive safeguard for the granter as distinct from the negative passive protection afforded by intervention of the courts on application by interested parties. They pointed out that the granter might have made a mistake in the choice of attorney or conferred too wide powers. The granter's relatives would usually know him or her best and would be in a position to vet the appointment made by the granter. They

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[57] See para 5.88.
[58] Enduring Powers of Attorney Act 1985, ss 4 to 7.
[59] Paras 5.51 to 5.68.

would also be able to challenge the validity of a power granted while the granter was incapable or suggestible without waiting for the attorney to start exercising authority. The absence of objections after an opportunity to make them would indicate the family's satisfaction with the granter's arrangements. No other jurisdiction has a similar registration scheme. Powers of attorney have to be registered in court registers in Tasmania and New South Wales, but only if the power of attorney is being used in connection with transactions involving land. Registration in these countries seems to be an administrative procedure akin to registration in the Books of Council and Session in Scotland.

5.47 We are not attracted by the registration provisions in England and Wales, principally because we are not convinced that it is necessary for the protection of the granter of a CPA for the document to be notified to the granter's nearest relatives. Most relatives will probably already be aware of the CPA and the identity of the attorney. Granters would normally discuss their future arrangements for the management of their financial affairs with their immediate family. Even if the relatives were not aware of the existence of the CPA before the granter becomes incapable, they would become so once the attorney started to exercise the powers. At that stage an appropriate application could be made to the court for removal or supersession of an unsatisfactory attorney. Furthermore, granters are entitled to some privacy in their financial affairs. It is by no means obvious that nearest relatives should be entitled to vet a granter's arrangements. If a married woman appointed one of her children, her separated husband and all the other children would be entitled to object under the scheme in England and Wales. Notification may simply provide disgruntled or estranged relatives with an opportunity to open up family disputes in other areas or make a nuisance of themselves.

5.48 Another difficulty with the registration provisions in England and Wales is that the duty to apply for registration arises when the attorney has reason to believe that the granter is or is becoming mentally incapable. The onset of mental incapacity is often an imprecise event so that attorneys may be in some difficulty in deciding when to apply for registration. The notification and registration provisions also involves a public acknowledgement of mental incapacity which may be distressing to the granter and his or her family. Finally, CPAs would be greatly complicated by notification and registration requirements. It is understood that the majority of applications for registration in England and Wales are made by solicitors on behalf of the attorneys, so that the cost of legal assistance has to be added to the registration fee. If registration were to be made a requirement in Scotland some registration authority would have to be found. Although the Court of Session or the sheriff court could be given this function, registration is primarily an administrative task. The obvious candidate would by the Accountant of Court's office since the Accountant and his staff already have considerable expertise in dealing with curators appointed to mentally incapable people.

5.49 A very simple registration scheme would merely require a CPA to be registered in the Books of Council and Session (a national public register of documents situated in Edinburgh) within say 15 days of its being granted. Failure to register would invalidate the power unless the court, on application, allowed late registration where there was some good reason for failure to register timeously. The advantage of this system is that it brings the CPA into the open and the terms of the CPA can be inspected by the granter's family and other interested people. We doubt whether it is necessary to legislate for this as a matter of prudent professional practice, in order to guard against loss of the document, solicitors

invariably register powers of attorney in the Books of Council and Session or similar registers kept at local sheriff courts soon after the document has been completed.

5.50 Our provisional view is that the granters of CPAs would be adequately protected by ensuring that they knew what they were doing when granting a CPA and by increasing the powers of the court to intervene when the attorneyship is proving unsatisfactory. The former has been discussed in paragraphs 5.19 to 5.21 and we examine the latter in the next section. Accordingly we propose that:

66. Provisions should not be introduced requiring:

(a) the setting up of a new public register of CPAs with the registration authority being empowered to monitor and control the exercise of the attorney's functions,

(b) the registration of a CPA with an appropriate authority when the granter is or is becoming mentally incapable, or

(c) registration of a CPA in the Books of Council and Session within a specified number of days from the date of its execution.

Control of CPA attorneys by the courts

5.51 We have previously rejected imposing requirements to register CPAs with a public authority or to notify the granter's family of the application for registration, on the grounds that improvements in the powers of the courts to control attorneys would adequately protect granters. This section considers what additional powers are needed.

5.52 **Reduction (annulment) of CPA**. A power of attorney may be reduced (annulled) by the court on various grounds. These include forgery, error by the granter, force and fear and facility and circumvention.[60] The pursuer in an action of reduction must have both title and interest to sue. A person has title if he or she has a claim against the attorney or granter, and has an interest if he or she will be prejudiced (financially, in status or otherwise) by the document sought to be reduced continuing in operation.[61] We propose that:

67. The present rules relating to title and interest to bring an action of reduction of documents should apply to an action of reduction of a CPA.

5.53 **Production of accounts by CPA attorney**. An attorney acting under an ordinary power of attorney has a duty to keep accurate accounts of transactions under the power and to produce these on request to the granter or the granter's executors. If accounts are not produced an action of count, reckoning and payment can be brought in either the Court of Session or the sheriff court. The difficulty with transactions under a CPA is that once the granter loses capacity he or she is unable to ask for accounts to be produced or to check that any accounts produced are in order.

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[60] Facility and circumvention occurs where the granter is of weak mind (facile) and deceit or dishonest means have been used (circumvention) to induce him or her to grant the document in question.
[61] Walker, *Civil Remedies*, p 142.

5.54 One solution would be to require an attorney acting under a CPA to lodge accounts annually with the court or the Accountant of Court's office for audit. Mandatory accounting would be unduly burdensome for non-professional attorneys and the audit fees would have to be paid out of the granter's estates. Mandatory accounting has been rejected in all other jurisdictions and we do not propose it for Scotland. A better solution, adopted in many jurisdictions[62] would be to empower the court, on application, to order an attorney to produce accounts. Accounting would then be confined to those cases where there was evidence or suspicion of mismanagement. It might be argued that this is insufficient to prevent abuse since it requires a person with sufficient interest and knowledge to bring legal proceedings. On the other hand, the possibility of having to produce accounts will in itself act as a deterrent.

5.55 Title and interest to apply for an order requiring production of accounts should be fairly generously drawn. The legislation in England and Wales and New Zealand does not specify who may apply; it simply empowers the court to grant various orders. Tasmania and South Australia and South Australia entitle those who in the opinion of the court have a proper interest in the matter, while Ontario allows applications by those with an interest in the granter's estate and any other person permitted by the court.[63] We tend to prefer "proper interest" but it should be made clear that interest is not confined to financial interest.

5.56 Should it be competent to apply for production of accounts while the granter of the CPA remains mentally capable? Allowing others to apply while the granter remains capable seems an unwarranted intrusion into the granter's affairs. The granter and the attorney may have agreed to dispense with accounts, because of their relationship (husband and wife for example). On the other hand confining it to the period of incapacity gives the court dealing with an application the problem of first deciding whether or not the granter is capable. Nevertheless, we tend to favour restricting applications to the period after incapacity. However, the accounts required to be produced should, if necessary, be for the whole period of appointment. In Ontario the court may only order accounts covering the period after incapacity.[64] Because of the difficulty in deciding the precise point at which the granter lost capacity, this power is ineffective and rarely used.[65]

5.57 We propose that:

68. (1) A person with an interest in the estate or welfare of the granter of a CPA should be entitled to apply to the court for an order requiring the attorney to produce accounts and receipts for his or her transactions. An application should not be competent as long as the granter remains mentally capable.

(2) the court should have power to order accounts and receipts to be produced for all or any part of the period from the date of execution of the CPA to the date of the application.

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[62] England and Wales, Enduring Powers of Attorney Act 1985, s 7(2); New Zealand, 1988 Act, s 102 (2); Tasmania, Powers of Attorney Act 1934, s 11E(1) inserted by Powers of Attorney Amendment Act 1987; South Australia, Powers of Attorney and Agency Act 1984, s 11(1); Ontario, Powers of Attorney Act (RSO 1980 c 386), s 9.
[63] See previous footnote.
[64] Powers of Attorney Act (RSO 1980 c 386), s 9.
[65] See Alberta Law Reform Institute, *Enduring Powers of Attorney, Report for Discussion No 7*, February 1990 pp 72 and 73.

(3) Accounts produced should, if so ordered by the court, be audited by the Accountant of Court and the accounts (together with any audit report) should be available for inspection by the applicant and any other person having an interest.

5.58 **Revocation of attorneyship**. As long as the granter retains capacity he or she is able to revoke the appointment. Once the granter becomes incapacitated revocation by the granter is no longer possible and the court has no express powers to remove an attorney. However, the court may appoint a curator and the curator takes over the management of the granter's affairs from the attorney.[66]

5.59 Several jurisdictions empower the court to remove an attorney in addition to providing for the appointment of a financial manager or trustee who supersedes the attorney. We think an express power of removal would be useful. For example, where the granter was a hospital in-patient, the attorney may require to be removed but it might not be necessary to appoint a financial manager. In New Zealand the court may revoke the attorney's appointment if satisfied that he or she is not acting, has not acted, or proposes not to act in the best interests of the granter.[67] "Best Interests" is not further defined except that where the court determines that the power was granted as a result of undue influence or fraud or that the attorney is not suitable to be the granter's attorney it is directed to revoke the appointment.[68] The Enduring Powers of Attorney Act 1985 of England and Wales empowers the court to cancel the registration of an enduring power of attorney (so terminating the authority of the attorney) on various grounds. These include the two just mentioned together with the termination of the power by reason of the occurrence of an event such as bankruptcy of the granter or the invalidity of the power.[69] South Australia simply provides that the court may, on application, revoke the power.[70]

5.60 We do not think it desirable to spell out in detail all the circumstances in which the court might revoke a CPA. On the other hand, some guidance ought to be given to the courts by legislation. We tend to favour the test that the attorney is not acting in the best interests of the granter. The attorney's unsuitability to be attorney is not in our view an appropriate formula. Unsuitability is too subjective; it takes into account the personal characteristics of the attorney and this could give rise to bitter and protracted litigation. It is better to concentrate on the effects of the attorney's actings rather than his or her character. For reasons given in paragraphs 5.55 and 5.56 above we think that any interested person should be entitled to apply for removal of an attorney and that the application should only be competent once the granter of the CPA has lost capacity.

5.61 Ontario[71] has no direct power of removal of an attorney, but the court there has power to substitute another person as attorney to act under the power of attorney. The legislation in Nova Scotia is similar.[72] We do not favour this scheme. The essence of a CPA and the justification for not applying to attorneys all the various protections that apply to financial managers, is that the granter has appointed a person in whom he or she has

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[66] *Fraser v Paterson* 1987 SLT 562.
[67] 1988 Act, s 105(1).
[68] 1988 Act, s 105(2).
[69] S 8(4).
[70] Powers of Attorney and Agency Act 1984, s 11.
[71] Powers of Attorney Act (RSO 1980 c 386), s 10.
[72] Powers of Attorney Act 1988, s 5(1)(c).

confidence. Moreover, the granter has appointed an attorney in order to avoid selection by the court. Some powers of attorney at present expressly provide for a substitute attorney to act if the first-named attorney becomes incapable or unable to act. The effect of a court order removing the first-named attorney under a CPA should be to allow any substitute to take over as attorney. Where no substitute was nominated removal of the attorney under a CPA would leave the granter's estate without anybody to administer it. A hiatus in administration is undesirable. Where the applicant for removal of an attorney does not also apply for the appointment of a financial manager the court should be able to order intimation of the application to be made to the granter, his or her nearest relatives, and the local authority and perhaps also the Mental Welfare Commission for Scotland. Intimation should not be mandatory as there may be circumstances where a financial manager would be unnecessary. For example, if the granter was a hospital in-patient his or her financial affairs could be administered by the hospital authorities.

5.62 As already mentioned, another way of terminating an attorney's authority is to apply to the court for appointment of a curator or other financial manager.[73] The curator or financial manager supersedes the attorney. Should this rule be extended to CPAs? The American Uniform Durable Power of Attorney Act provides[74] that the attorney becomes accountable to the court appointed official who is given the same powers as the granter to revoke or amend the durable power of attorney. South Australia has similar provisions.[75] We think that the existing Scottish solution should be adopted as it is simpler to vest the management of the estate in the court appointee and remove the attorney completely. It makes for confusion to have two people administering the estate, one subject to the authority of another. If an application were to be made for the appointment of a financial manager while an attorney was acting under a CPA, the court would be faced with a difficult decision. Should it appoint a financial manager if the grounds for appointment were established or should it refuse as long as the attorney was acting in the best interests of the granter? We favour the latter formula because it gives effect to the granter's wishes expressed in the CPA for having his or her affairs administered by the attorney. It is also consistent with the ground for removing an attorney proposed in paragraph 5.60.

5.63 We propose that:

69. (1) A person with an interest in the estate or welfare of the granter of a CPA should be entitled to apply to the court for removal of the attorney. An application should not be competent so long as the granter is mentally capable.

(2) Where the applicant is not also applying for appointment of a financial manager to the granter the court should have power to order the application to be intimated to the granter, his or her nearest relatives and the local authority.

(3) The court should order removal of the attorney if satisfied that removal would be in the best interests of the granter. The effect of removal of the

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[73] *Fraser v Paterson* 1987 SLT 562.
[74] S 3.
[75] Powers of Attorney and Agency Act 1984, s 10.

attorney should be that any substitute attorney named in the CPA acquires authority to act.

(4) Where an application for the appointment of a financial manager is made while an attorney is acting under a CPA the court should appoint a financial manager only if satisfied that removal of the attorney would be in the best interests of the granter.

5.64 **Other powers of the courts in relation to CPAs**. Various other powers are conferred on the courts in other jurisdictions. A common power is the power to vary the terms of the power of attorney, or the functions of the attorney or the rights and duties as between granter and attorney.[76] We are not in favour of judicial variation of a CPA. It involves interfering with the expressed wishes of the granter. The court in re-writing the CPA could only guess at what the granter might have done in the changed circumstances. Several jurisdictions confer a power on the court to give directions to the attorney as to the exercise of his or her functions.[77] This would be useful in enabling the attorney to obtain a ruling when faced with a difficult decision. Others interested in the granter's affairs could also apply to the court to give the attorney positive orders as to how he or she should exercise authority.

5.65 Proposals have already been made concerning the remuneration of attorneys and their authority to use the granter's estate to benefit people other than the granter.[78] The position would be governed by the terms of the CPA and the proposed legislation. We do not think the court should have any power to confer authority outwith the terms of the CPA or the proposed legislation.

5.66 England and Wales[79] and New Zealand[80] empower the court to give any consent or authorisation to act which the attorney would have had to obtain from a mentally capable granter. The Law Commission for England and Wales stated in their *Report on The Incapacitated Principal*[81] that this power could be used to resolve conflicts of interest such as the attorney proposing to buy the granter's property at full value for himself or herself or for a member of his or her family. This seems a good idea. Conflicts of interest are almost impossible to avoid if the attorney is a close relative of the granter. Provided the attorney pays a full price (set perhaps by an independent valuator) the granter's estate will not suffer from the conflict of interest.

5.67 South Australia recently amended its legislation to deal with ademption of legacies. A legacy adeems or suffers ademption if the item bequeathed is not part of the deceased's estate at his or her death due to having been disposed of earlier. The beneficiary of an adeemed legacy receives nothing in lieu. The following example illustrates the problem. The granter of a CPA makes a will leaving his shares in British Gas to his son and his shares in British Telecom to his daughter. The attorney in ignorance of the will sells the British Gas shares to raise case or invest elsewhere. On the granter's death the son cannot receive the

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[76] New Zealand, 1988 Act, s 102(1)(d); South Australia, Powers of Attorney and Agency Act 1984, s 11(1)(c).
[77] England and Wales, Enduring Powers of Attorney Act 1985, s 8(2)(b); Tasmania, Powers of Attorney Act 1934, s 11E(2)(b) added by Powers of Attorney Amendment Act 1987.
[78] Proposal 64 at para 5.39.
[79] 1985 Act, s 8(2)(d).
[80] 1988 Act, s 102(1)(f).
[81] Law Com No 122 (1983), para 4.83.

British Gas shares since they are adeemed – no longer part of the granter's estate, and will not receive their value in lieu. Section 11a of the south Australian Powers of Attorney and Agency Act 1984[82] empowers the court after the granter's death to make such orders as to ensure that no beneficiary under the granter's will suffers a disproportionate disadvantage from any exercise of power by the attorney. In the example above the court could order that the son should be paid the cash value of the British Gas shares sold or receive the shares purchased with the proceeds. A similar problem occurs at present in Scotland when the curator sells property belonging to an incapable person. A sale does not result in ademption of any specific legacy of the property unless the sale was necessary.[83] We tend to think that this is a simpler solution which avoids the need for litigation. We discussed earlier whether an attorney should be entitled to see the granter's will.[84]

5.68 We propose that:

70. (1) The court should not have power to vary the terms of a CPA, or to allow the attorney to use the granter's estate in a way not authorised by the CPA or legislation.

(2) The court should have power, on application by the attorney or any person having an interest in the granter's estate or welfare, to:

(a) give directions to the attorney as to the exercise of his or her authority, or

(b) give any consent or authorisation which the attorney would have had to obtain from the granter if mentally capable.

(3) A special legacy should be adeemed where the property is disposed of by an attorney acting under a CPA only if the disposal was a necessary act.

Complaints agency for CPAs

5.69 We have considered and tentatively rejected the idea that attorneys acting under CPAs should be subject to monitoring and control by the Accountant of Court or some other public agency.[85] This is not to say that public agencies should have no part to play in CPAs. The Mental Welfare Commission for Scotland has general protective functions in respect of mentally disordered people.[86] In particular it may investigate any case where the property of a mentally disordered person is exposed to loss or damage. The commission already receives complaints from members of the public about the actings of attorneys under ordinary powers of attorney and looks into them. Many complaints arise from misunderstandings or lack of information and the Commission can resolve these informally so avoiding legal proceedings. In view of the role already being played by the Commission we do not think it necessary to nominate any other public body as a body to which complaints can be made and where they can be investigated. We return to the commision's role in Part 6.

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[82] Inserted by the Powers of Attorney and Agency Amendment Act 1988.
[83] *McFarlane's Trs v McFarlane* 1910 SC 325.
[84] Para 5.38.
[85] Proposal 66 at para 5.50.
[86] Mental Health (Scotland) Act 1984, s 3.

Duty of CPA attorney to act?

5.70 Should a CPA attorney be under a statutory duty to use the powers conferred by the power of attorney and be liable for loss caused to the granter's estate for failure to use them? The position under normal powers of attorney depends on the terms of the document. The usual styles merely empower the attorney to do various acts without imposing any obligation to do so.[87] It would be difficult to imply an obligation that the attorney should act simply from the narrative that the granter wished someone to look after his or her affairs, especially where the document gives the attorney a complete discretion whether or not to act.[88] The existence of a delictual remedy is also doubtful since conferring powers does not necessary give rise to liability for failure to use the powers.[89] However, powers of attorney granted to enable the attorney to carry out specific functions, for example, to carry through the sale of property while the granter was abroad, may well contain an express or implied duty to act.

5.71 Many of the jurisdictions in which enduring powers of attorney have been introduced have considered the question of imposing a statutory duty to act.[90] But as far as we are aware only two jurisdictions impose a duty. Tasmania deems an attorney under an enduring power of attorney to be a trustee.[91] South Australia imposes a duty to exercise the powers with reasonable diligence to protect the interests of the granter.[92] In both countries failure to act when necessary gives rise to personal liability for any resulting loss to the granter's estate.

5.72 The main argument in favour of imposing a duty to act is that it would be in line with the granter's expectations. CPAs are designed to enable granters to appoint someone to manage their affairs once they have become incapable of managing their affairs themselves. The purpose of the CPA would be frustrated if the attorney simply sat back and failed to take any action. Secondly, imposing a statutory duty would by and large not represent much of a change from current practice. Solicitors or accountant attorneys appointed on a remunerated basis are under a professional duty to act while relatives and friends feel morally obliged to act.

5.73 However there are drawbacks in imposing a duty. First, the duties may turn out to be onerous and time-consuming. This is of little consequence if a professional person has been appointed on a remunerated basis, but may be a heavy burden for a relative. Secondly, legislation creating a duty to act and imposing personal liability for losses for failure to act may well deter relatives and friends from agreeing to be appointed. Thirdly, the scope of the duty would require to be clearly laid down; "using reasonable diligence to protect the interests of the granter" seems too vague. Deeming attorneys to be trustees is not an approach that we find attractive. Many rules and statutory provisions applying to trustees (such as powers of investment or assumption of new trustees) would have to be amended or disapplied in relation to attorneys. A duty to act could only arise during the period when the granter lacks capacity. Otherwise an attorney would be obliged to monitor the actings of

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[87] Halliday, *Conveyancing Law and Practice*, Vol 1 para 13.12; Journal of the Law Society of Scotland 1981, p W209.
[88] As in the style of Halliday.
[89] *Murphy v Brentwood District Council* [1990] 3 WLR 414.
[90] See for example Law Commission for England and Wales, *The Incapacitated Principle*, Law Com No 122, (1983) paras 2.13-2.16, 4.66-4.69.
[91] Powers of Attorney Act 1934, s 11C, added by Powers of Attorney Amendment Act 1987.
[92] Powers of Attorney and Agency Act 1985, s 7.

a capable granter. This restriction in turn gives rise to practical difficulties because deciding when a person ceased to have capacity is problematic and capacity may be lost for different tasks at different times.

5.74 Our provisional view is that the arguments in favour of imposing a statutory duty to act are stronger than those against. The duty should be to carry out the functions set out in the power of attorney. The duty would be confined to attorneys appointed by documents executed after the coming into force of the relevant legislation. It would be up to the granters and their advisers to draft documents which made it clear what the attorney was expected to do. As mentioned many current powers of attorney are not clear in this respect. Postponing the imposition of the duty until the attorney expressly or impliedly accepts the position avoids the problems mentioned in the previous paragraph of deciding when the granter loses capacity. A CPA attorney should not be obliged to accept the position because his or her circumstances and the financial affairs of the granter may have changed considerably since the power of attorney was signed. The standard of care in discharging the duty should be that which a reasonably prudent person would adopt in relation to his or her own affairs. This is the standard applicable to trustees or curators.[93] We therefore propose that:

71. (1) An attorney appointed by a CPA executed after the coming into force of the relevant legislation should be under a statutory duty to carry out the functions specified in the CPA.

(2) The standard of care the CPA attorney should adopt in carrying out the functions should be that adopted by a reasonably prudent person in managing his or her own affairs.

Power of a CPA attorney to resign

5.75 An attorney under an ordinary power of attorney may resign at any time. Should an attorney appointed under a CPA be entitled to resign? Resignation after the granter has lost capacity would leave the granter's estate "in limbo" until the court appointed a financial manager or other arrangements are made. A similar situation occurs with the resignation of sole trustees. A sole trustee in Scotland is not permitted to resign without assuming new trustees or the court appointing new trustees.[94] This approach would not be appropriate for attorneys since in our view neither an attorney nor the court should have power to appoint a new attorney.

5.76 Several jurisdictions restrict an attorney's entitlement to resign. South Australia requires an attorney to obtain leave of the court once the granter has lost capacity.[95] The court would then take appropriate steps to safeguard the granter's estate. In England and Wales[96] and New Zealand[97] an attorney disclaiming an enduring power of attorney had to give notice of the disclaimer to the granter or, if the granter is or is becoming incapable, to the court. Failure to notify invalidates the disclaimer. The New Zealand court in turn notifies those entitled to apply for the appointment of a welfare guardian or a financial

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[93] See para 4.64.
[94] Trusts (Scotland) Act 1921, s 3.
[95] Powers of Attorney and Agency Act 1984, s 9.
[96] 1985 Act, ss 2(12), 4(6) and 7(1)(b).
[97] 1988 Act, s 104.

manager in order to alert them to the fact that the attorney is no longer looking after the granter's affairs.

5.77 We have some doubts about the need to regulate the resignation of attorneys. A professional attorney (a solicitor or accountant for example) would never resign without taking steps to ensure that the granter's estate would be properly managed in future and we imagine that most relatives would act in a similar fashion. Imposing by legislation a requirement of notification makes CPAs more complex and hence possibly less attractive. On the other hand formalisation of current practice ought not to deter people from taking on the job of a CPA attorney. If it is though desirable for the attorney to have to notify his or her intention to resign before doing so, those notified should be the granter's nearest relative and not the court. Courts in Scotland have no power to appoint curators or financial managers at their own instance. Notification could also be made to the local authority sot that if the nearest relative declines to apply for appointment a financial manager the local authority would come under a statutory duty to apply.[98]

5.78 If there are to be restrictions on resignation they should only apply to a sole or remaining attorney. Where the CPA nominates an alternate to act on the failure of the first-named attorney the alternate would become attorney on resignation of the first attorney.

5.79 We invite views on the following question.

72. Should a sole or remaining attorney acting under a CPA be required to notify his or her intention to resign to:

(a) the granter, if capable, or

(b) if the granter is incapable, to the granter's nearest relative and the local authority in whose area the granter resides?

Commencement of a CPA attorney's authority – springing CPAs

5.80 One disadvantage of normal styles of powers of attorney is that they confer immediate authority on the attorney. The attorney may take over the administration of the granter's affairs forthwith. Many granters of CPAs do not wish this to happen. At the date of signing the power they are perfectly capable of managing their own affairs although perhaps failing in their powers of memory and concentration. These granters are merely making prudent provision for the future in which the same way as people make wills and appoint executors to administer their estates after their death. The immediate effect of a power of attorney may deter many from signing a CPA until it is too late.

5.81 Some other jurisdictions have introduced or are considering introducing legislation enabling powers of attorney to be granted with delayed effect. Among these is New York which has coned the apt term "springing power of attorney" for a power of attorney which becomes effective or springs into effect at a later date than the date of its creation. Should legislation dealing with springing powers be introduced and if so what form it should take?

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[98] Proposal 30 at para 4.41.

5.82 It is perfectly possible under the existing law for the granter of a power of attorney to include in the document a clause delaying its commencement until the granter becomes mentally incapacitated. As far as we are aware, however, this is not a feature of current practice. Not including a clause postponing commencement has practical advantages. First, it makes the appointment flexible. The attorney can take over control of the granter's affairs gradually in line with the granter's increasing infirmity and wishes. Attorneys will consult with their granters and their families before starting to act or taking over new areas of the granter's financial affairs. Few, if any, attorneys would act in the situation where the granter was perfectly competent to look after his or her own affairs and wished to do so. Secondly, it copes well with the gradual deterioration in mental capacity often encountered in infirm elderly people. This is because the power of attorney is not tied to incapacity. It is notoriously difficult to determine when a person whose mental faculties are slowly declining becomes incapable. Moreover, a person may be capable of some financial transactions but not others. We think that there is considerable force in these arguments, and that the hesitation felt by many in granting powers of attorney with theoretically immediate effect is to a large extent unwarranted. A granter who has sufficient trust in a person to appoint him or her attorney under a CPA ought to have the confidence in the attorney's judgement as to when and to what extent the powers should be exercised.

5.83 On the other hand, the concern and hesitation felt by many in granting a power of attorney with immediate effect is real. If it can be assuaged by a simple statutory provision then this would be a helpful innovation. While it is true that a springing power could be created without express legislation, granters, attorneys and third parties dealing with them may feel uneasy about clauses whose precise legal effect was uncertain. Legislation would promote certainty and also alert the legal profession and the general public to the possibility of using springing powers of attorney. Granters would not be bound to use a springing power of attorney. Those who wished to retain the flexibility of an ordinary CPA would be free to do so.

5.84 **Ways of achieving springing CPA**. One way of preventing an attorney exercising powers is to hand over the document to a third party with instructions to release it to the attorney only at the appropriate time. Although the power has in theory immediate effect, in practice an attorney will find it almost impossible to exercise his or her authority without showing the power of attorney to third parties. We no not think that this would be a satisfactory solution. It requires the custodian to judge when the granter's mental faculties have deteriorated to such an extent that the attorney should act. It involves having another person besides the attorney in whose judgement the granter has to have confidence. It would also expose the granter to the risk that the document may get mislaid or lost. The custodian could not register the document in the Books of Council and Session (as is normally done for powers of attorney immediately after their execution) because the attorney could then obtain an extract (officially authenticated copy) without the knowledge of the custodian.

5.85 The second approach is for the CPA to state when it is to come into effect. For example, the granter may specify that the power should commence in six months time, or when the granter is admitted to hospital as a permanent patient, or when he or she had become mentally incapable. South Australia, to take one of many similar jurisdictions, provides that "an enduring power may be created ... containing words indicating an

intention that the authority conferred is to be exercisable ... in the event of the granter's subsequent incapacity."[99] The difficulty with this approach is that unless the third party dealing with the attorney knows or can easily verify that the springing condition is satisfied he or she may refuse to recognise the attorney's authority. As has already been pointed out the granter's loss of capacity is not something that would be easy to demonstrate to a third party. The solution proposed by the New York Law Reform Commission and enacted in that state is that the springing power should nominate one or more individuals to certify that the springing condition was satisfied he or she may refuse to recognise the attorney's authority. As has already been pointed out the granter's loss of capacity is not something that would be easy to demonstrate a third party. The solution proposed by the New York Law Reform Commission and enacted in that state is that the springing power should nominate one or more individuals to certify that the springing condition was satisfied and that it should be provided that certification was conclusive evidence of satisfaction of the condition.[100] The Albertan Law Reform Institute have recommended a refinement of the solution. In their view the New York approach is too rigid in requiring certification by a nominated individual or individuals. The CPA would lapse if the nominated individual were to die or become unavailable before the springing event. They proposed a legislative "fall back" position so that if certification by the nominee were not possible, certificates by two medical practitioners could be obtained instead.[101] This seems sensible but we would allow certification by an appropriately qualified person other than a doctor (such as a clinical psychologist).

5.86 In order to elicit views on the need for legislation on springing powers of attorney we ask the following questions.

73. (1) Should new statutory provisions be enacted expressly enabling a CPA to come into effect after execution of the document on the occurrence of an event specified in the document?

(2) Where the document specifies how the occurrence of the springing event is to be ascertained should this be deemed to be conclusive as far as the attorney's authority is concerned?

(3) Where the event is the granter's becoming mentally incapacitated should legislation provide that if the method of certification specified in the CPA is unable to be used or no method is specified, then certificates by two doctors or other appropriate professionals should be conclusive evidence of incapacity as far as the attorney's authority is concerned?

Termination of CPAs and third party rights

5.87 A power of attorney may cease to have effect in many circumstances. These include:[102]

(a) express revocation by the granter,

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[99] Powers of Attorney and Agency Act 1984, s 6(1).
[100] Laws of New York, 1988 Regular Session, chap 210, para 1.
[101] *Enduring Powers of Attorney, Report No 59* (1990), recommendation 25.
[102] Halliday, *Conveyancing Law and Practice*, Vol I, para 13.11.

(b) death of the granter,

(c) exhaustion of the power – the purposes for which the power was granted having been fulfilled,

(d) the occurrence of events which are expressed to be terminating events in the power,

(e) death, incapacity or resignation of the attorney, and

(f) removal of the attorney by the court or the appointment of a person who supersedes the attorney in the management of the granter's affairs.

Some of these have been the subject of earlier proposals. We are concerned here with two interrelated questions. To what extent (if any) can the attorney continue to exercise his authority under a CPA after its termination, and to what extent (if any) do third parties have a claim against the granter in respect of obligations entered into by the attorney after the power of attorney has terminated?

5.88 In relation to ordinary powers of attorney Scots law deals with both questions by reference to good faith and lack of knowledge of termination. A transaction entered into by an attorney on behalf of the granter is valid provided the attorney acted in good faith and without knowledge of the termination of the power of attorney. In *Campbell v Anderson*[103] the granter died abroad and it was held that the factor was entitled to continue to act until he received reliable information of the death. *Pollock v Patterson*[104] concerned the validity of debts against the granter's estate arising out of transactions by the attorney after the granter had become insane. The question of whether the power of attorney fell on incapacity was left undecided because it was held that the granter was still liable to third parties who were unaware of the insanity even if this did have the effect of terminating the attorney's authority. Third parties who are aware however of the termination of the attorney's authority cannot hold the granter liable.[105]

5.89 Most other jurisdictions have similar rules or have recently enacted similar rules in relation to powers of attorney.[106]

5.90 The existing Scottish Law on the effects of termination of powers of attorney seems sensible and should be adopted for CPAs. Third parties transacting with an attorney should not be expected to make independent enquiries as to whether the attorney's authority has been terminated by some event. Similarly attorneys should not have to run the risk of personal liability by continuing to act when their authority has been terminated by some event unknown to them. Our provisional view is that no reform is necessary but we welcome views.

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[103] (1829) 3 W & S 384.
[104] Dec 10 1811 FC.
[105] *North of Scotland Banking Company v Behn, Moller and Co* (1881) 8 R 423.
[106] New South Wales, Conveyancing Act 1919, ss 161 and 162, introduced by Conveyancing (Powers of Attorney) Amendment Act 1983; England and Wales, Powers of Attorney Act 1971, s 5 and Enduring Powers of Attorney Act 1985, Sch 2.

International private law aspects

5.91 So far we have confined discussion to the question of CPAs in Scotland. But, as has already been mentioned, other jurisdictions have had durable or enduring powers of attorney for many years. What is the effect in Scotland of such a power of attorney granted in say South Australia by a person resident there in connection with transactions in Scotland? What is the position if a man signs an enduring power of attorney in England appointing his daughter as attorney and they both move to Scotland after the document has been registered according to the provisions of the enduring Powers of Attorney Act 1985 in England and Wales? Is the document valid and effective in Scotland or not? With the increasing mobility of people and ownership of foreign assets such problems are likely to become of greater importance.

5.92 A person in Scotland proposing to transact with an attorney of a foreign granter needs to be sure that the power of attorney is formally valid and that the attorney has the necessary authority to carry out the transaction in Scotland. As far as formal validity of foreign documents is concerned it is a general rule of private international law that this is governed by the law of the place of execution.[107] Provided the power of attorney is executed in accordance with the law of the country in which it was executed, the document will be accepted as being formally valid in other jurisdictions. A non-Scottish power of attorney may need to be accompanied by a certificate of validity from a person familiar with the law of the place of execution and if it is in a foreign language by a certified translation. A possible exception may arise in relation to documents relating to Scottish heritage signed by an attorney. The purchaser or other third party is entitled to a marketable title in which every writ or link in title during the prescriptive period is valid and probative – presumed to be valid because of the way in which the document was executed.[108] A foreign power of attorney may not be probative if it had not been executed in Scottish form. The prevailing view is that it is sufficient that a foreign power of attorney is formally valid according to the law of the country of execution, and we understand that the Keeper of the Registers of Scotland proceeds on this view when registering a title in the Land Register. We would welcome views from conveyancing practitioners as to whether non-probative foreign powers of attorney cause problems. Any problems would be lessened if our *Report on the Requirements of Writing* were to be implemented since non-probative documents could be given probative status by means of a simple court procedure.[109]

5.93 Given that a foreign power of attorney is formally valid the next question is whether it authorises the attorney to carry out the proposed transaction in Scotland on behalf of the granter. This question is decided by reference to Scots law (unless the granter specifies otherwise) if Scotland is the place where the transaction is to be carried out.[110] This gives rise to a practical difficulty in relation to non-Scottish enduring powers of attorney. On the view that in Scots law an attorney's authority ceases on the incapacity of the granter, a foreign enduring power of attorney may not receive effect in Scotland, at least once the granter has lost capacity. We are informed that the Keeper of the Registers of Scotland used to exclude indemnity for loss arising out of the invalidity of the power of attorney where a non-Scottish enduring power was a link in a title presented for registration in the Land

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[107] Anton, *Private International Law*, (2nd edn) p 305.
[108] Walker and Walker, *The Law of Evidence in Scotland*, p 155.
[109] Scot Law Com No 112 (1988), rec 26(a) at para 5.30.
[110] Anton. *Private International Law*, (2nd edn) pp 304-307.

Register for Scotland. It is not clear what effect the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 has. Section 71 merely disapplies in relation to powers of attorney executed after commencement any rule of Scots law that a power of attorney ceases to have effect on the granter's subsequent incapacity. Pre-commencement Scottish powers of attorney are unaffected and so arguably are foreign enduring powers executed before commencement. Legislation implementing our proposed new continuing powers of attorney would likewise not be retrospective. Non-Scottish powers executed before 1 January 1991[111] are likely to be sufficiently common for many years to come to warrant action. We tend to think that the question of durability or endurance of an attorney's powers should be referred to the proper law of the power of attorney. Thus a South Australian, Manitoban or English enduring power of attorney signed in 1989 should be regarded as conferring authority on the attorney to carry out transactions in Scotland. We propose that:

74. Any question as to the power of an attorney to act after the granter has lost capacity should be governed by the proper law of the power of attorney.

Transitional provisions

5.94 Powers of attorney have been granted before section 71 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 came into force. Arguably such powers do not lapse on the supervening incapacity of the granter, and the 1990 Act does not apply to them. The previous law (whatever it was) continues to apply. Powers of attorney which do not lapse on incapacity have also been granted under the 1990 Act. If new provisions are to be enacted as a result of future recommendations should they apply to existing powers of attorney or only to powers of attorney granted after the provisions come into force? The answer in our view depends on the type of provision in question.

5.95 If, contrary to our provisional proposal,[112] registration of a CPA was required we do not think it would be appropriate to require registration of powers of attorney that had been created prior to the introduction of any statutory requirement to register. The purpose of registration is to alert the granter's relatives to the fact that the granter is becoming incapable and the attorney is about to act under a CPA. These purposes would not be served in the case of an existing power where the granter was already incapable and where the attorney had been acting under it for some time. It would be possible to draw a distinction between existing powers where the granter had become incapable at the date of the new legislation and those where the granter still retained capacity, but this would be a difficult distinction to draw in practice.

5.96 Any of the special execution provisions suggested earlier could clearly not be made retrospective since the practical effect would be to invalidate all existing powers of attorney on the coming into force of the new legislation. Nor would it be right to impose on all attorneys a duty to act if such a duty were to be imposed on attorneys acting under post-commencement CPAs.

5.97 On the other hand there is no reason why the proposed new powers of the courts to call for accounts from the attorney, to give him or her directions, or to remove an attorney,

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[111] The commencement date for s 71.
[112] Proposal 66 at para 5.50.

should not apply to attorneys acting under existing powers of attorney. There is however a practical difficulty in distinguishing the powers of attorney that were intended to provide for the administration of the granter's affairs after incapacity and those which were granted for other reasons (going abroad, commercial transactions etc). Many powers of attorney do not reveal the reasons for which they were granted. But as these new powers of the courts would arise only in the event of the granter becoming incapable we see no reason why they should not apply to powers of attorney of every kind. Their purpose is to protect granters who cannot protect themselves after incapacity, elderly people just as much as young business people.

5.98 We propose that:

75. The following proposals should apply to powers of attorney executed before the date of commencement of any legislation implementing our proposals:

(a) Proposal 68 (power of court to require attorney to produce accounts)

(b) Proposals 69 and 70(2) (power of court to give directions to or remove attorney)

(c) Proposal 72 (duty of attorney to notify resignation).

but none of our other proposals in this section should apply.

CONTINUING POWERS OF ATTORNEY FOR PERSONAL WELFARE

5.99 In this section powers of attorney in respect of personal welfare matters such as medical treatment, residence, social activities, employment and training are examined. As far as we are aware powers of attorney are confined in current Scottish practice to administration of estate and managing financial affairs, although there seems to be no rule of law prohibiting attorney in the personal welfare area. Many other jurisdictions have introduced enduring health care powers of attorney[113] or are considering their introduction.

5.100 The first question is whether people should be permitted to delegate decisions about their personal welfare when they are no longer competent to make such decisions themselves. It could be argued that medical treatment and similar welfare matters are so personal that the authority of an attorney to make decisions in these areas should not be recognised. The absence of attorneys does not meant that mentally incapable patients will not receive treatment simply because there is no-one competent to consent to it. Doctors probably have authority to treat patients who lack the capacity to consent to the proposed treatment provided the treatment is in the patient's best interests.[114] On the other hand the law already allows proxy consent in the area of personal welfare decisions. For example, a parent may make such decisions on behalf of his or her pupil child and a tutor-dative[115] may do likewise on behalf of a mentally incapacitated person. it may be argued that a tutor-dative is appointed by the court after his or her suitability and the need for the

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[113] California, Durable Power of Attorney Health Care Act 1983; New Zealand, Protection of Personal and Property Rights Act 1988.
[114] See para 3.8.
[115] See para 2.5.

appointment has been considered by an independent body. These elements would not be present in a private appointment by the granter. But the granter is perhaps as good a judge as a court in deciding who should exercise authority on his or her behalf after incapacity.

5.101 We tend to think that the appointment of personal welfare attorneys could serve a useful purpose in that they would enable people to appoint trusted relatives or friends to make decisions on their behalf in the event of their future incapacity without the expense of legal proceedings for the appointment of tutors-dative or personal guardians. It may be that such appointments are competent already. Statutory provisions expressly permitting them would put the matter beyond doubt and serve to encourage their use. The attorney would be entitled to exercise authority only while the granter was incapable of making decisions.[116] The authority would terminate on the appointment of a tutor-dative or personal guardian. It would be helpful if new names could be found. We doubt whether the terms personal welfare attorneys and continuing personal welfare powers of attorney would be well understood by non-lawyers. We return to the question of nomenclature later in Part 8. Meanwhile we continue to use terminology based on attorneys. We propose that:

76. Legislation should be introduced providing for the appointment of an attorney with authority to make decisions on behalf of the granter in the field of personal welfare after the granter's incapacity by means of a document called a welfare continuing power of attorney ("welfare CPA").

Form and execution of welfare CPA

5.102 In our proposals for continuing powers of attorney in the field of financial affairs we proposed that in order for a power of attorney to continue to have effect after the granter's loss of capacity the document should be required to contain an express clause to this effect.[117] We also made proposals or asked for views on various requirements for signing and witnessing the power of attorney.[118] Whatever is decided to be appropriate for a financial power of attorney should be equally appropriate for a document dealing with personal welfare. There seems no good reason to have different levels of protection for the granters and other involved.

5.103 We also proposed that any individual who was not mentally incapable, under age or bankrupt should be capable of being appointed a financial attorney. The appointment of a bank or insurance company was considered and we asked for views on whether they should be capable of being appointed attorney under a continuing financial power of attorney.[119] In the field of personal welfare decisions we are firmly of the view that banks and insurance companies are not suitable candidates for appointment. Joint attorneys and alternate attorneys should be permitted if permitted in the financial field[120] since it is difficult to justify a different solution for the personal welfare field. Allowing joint and alternate personal welfare attorneys would also be in line with out proposal to empower the court (or other appointing body) to appoint joint and alternate personal guardians.[121] It would be for

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[116] See para 5.123.
[117] Proposal 58 at para 5.12.
[118] Proposals 59 and 60 at paras 5.21 and 5.22.
[119] Proposal 63 at para 5.33.
[120] Proposal 63.
[121] Proposal 6 at para 2.69.

the granter to decide whether joint attorneys could act independently or whether all the attorneys had to join in any act or transaction. We propose that:

77. (1) A welfare CPA should continue to have effect on the supervening mental incapacity of the granter only if the document contains an express provision to this effect.

(2) The statutory requirements for valid execution of a welfare CPA should be the same as those for a financial CPA.

(3) It should be competent to appoint as personal welfare attorneys only one or more individuals who at the time of appointment were not under age, bankrupt or mentally incapable of acting.

(4) Joint, joint and several, and alternate appointments should be competent.

Powers of welfare attorneys

5.104 What restrictions, if any, should be placed on the powers that the granter of a welfare CPA can competently confer upon his or her attorney or which the attorney can validly exercise? Possible restrictions in the field of personal status, medical treatment and experiments and residence in mental hospitals are considered.

5.105 In Scotland the intended spouses must be present at the marriage ceremony and declare that they accept the other as husband or wife.[122] Proxy marriages and proxy consents are therefore not permitted. Divorce proceedings cannot be brought on behalf of a mentally incapable individual.[123] A curator may defend an action of divorce because of the financial consequences of a decree[124], but any consent to the granting of a divorce based on two years non-cohabitation must be that of the defender personally. Consent of parents or guardians in relation to adoption of a child must also be given personally. The court dealing with an adoption petition may dispense with the consent of a parent or guardian who is incapable of giving it.[125] The New Zealand legislation prohibits a personal welfare attorney from making decisions in relation to the granter's marriage or its dissolution or the adoption of the granter's children.[126]

5.106 The present position seems satisfactory. Marriage, divorce and adoption are too personal for decisions in these fields to be taken by an attorney. The only question is whether or not the present restriction should appear in the new legislation. There are arguments both ways. Express exclusion puts the matter beyond doubt and also ensures that the statutory and common law rules are not overlooked by those who are unaware of their existence. But express exclusions are unnecessary. As a matter of statutory interpretation common law rules do not cease to have effect unless the statute expressly provides. Our tentative preference is to leave the existing common law rules and statutory provisions in place, but we invite views.

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[122] Marriage (Scotland) Act 1977, ss 9(3), 13 and 19.
[123] Clive, *Husband and Wife*, (2nd edn), p 606.
[124] Rules of Court, rule 167(1).
[125] Adoption (Scotland) Act 1978, s 16(12)(a).
[126] 1988 Act, s 18(1) as applied by s 98(4).

5.107 **Medical treatment**. By medical treatment we mean all forms of treatment carried out by doctors, dentists and other care providers in the field of health except for controversial operations. Controversial operations such as sterilisations, abortions and psycho-surgery are discussed later.[127] Non-therapeutic medical research also raises different issues from medical treatment and is also dealt with later.[128] In the field of medical treatment should the attorney have power to consent, or more importantly, power to withhold consent? Power to consent is less important since doctors will generally not propose treatment that is not in the patient's best interests. Moreover, an attorney cannot, by consenting to treatment, demand that a specific treatment be carried out or force doctors to provide treatment that they are unwilling to provide. The problem area is withholding consent.

5.108 The appointment of attorneys to withhold consent to treatment or to require treatment to be discontinued on behalf of patients or the use by patients themselves of written directives to their doctors (calling "living wills") has become common in the United States of America over the last 30 or so years. These appointments or directives are a response to unnecessary treatment being given to terminally ill patients, defensive medicine where all possible steps are taken in order to avoid being sued, and expensive private health care which can impoverish patients and deprive their families of their anticipated succession rights. These difficulties do not arise to the same extent in Scotland.

5.109 Personal welfare attorneys ought to have power (if conferred by the granter) to consent and withhold consent to medical treatment and to require treatment to be discontinued. The present law does not regard medical treatment decisions as so personal that only the patient can consent or withhold consent. For example, parents can make such decisions on behalf of their pupil children and tutors-dative likewise on behalf of mentally disabled persons. Moreover, it would be scarcely worthwhile introducing personal welfare attorneys if medical treatment, as defined in the wide sense above, were to be excluded from the scope of their authority. Given that an attorney should be entitled to withhold consent to medical treatment proposed for the granter or request discontinuance of treatment, what should the effect of a withholding or request be?

5.110 An informed withholding of consent by a patient having full capacity will be binding on doctors in the sense that they will not proceed with the proposed treatment, however much this endangers the patient's health. The position is the same if a competent patient requests that treatment be discontinued. We do not think a similar approach could be adopted for an attorney's powers in relation to treatment of the mentally incapable granter. The American Uniform Rights of the Terminally Ill Act and the Californian Durable Power of Attorney Health Care Act 1983 make the patient's directive or the attorney's decision binding. The detailed provisions in these pieces of legislation show the difficulties of this approach.

5.111 First, feeding, nursing and other palliative treatments would have to be excluded. It would be asking the impossible to require doctors and other health care professionals to neglect patients and let them starve to death in pain. Pregnant women would also have to be excluded. A terminally ill pregnant woman ought to be kept alive for longer than strictly necessary where there is a reasonable chance of saving her unborn child.

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[127] See para 5.117.
[128] See para 5.118.

5.112 Secondly, "conscience clauses" would have to be included. Those who are not willing to abide by the attorney's decision should not be forced to withhold or stop treatment. Their duty is to find another doctor who is prepared to act in accordance with the attorney's decision.

5.113 Thirdly, death or serious injury caused by withholding treatment has to be declared not to give rise to any civil or criminal liability on the part of the doctors or other health care professionals. Neither are they to be subject to any professional disciplinary charges provided they acted in accordance with recognised medical standards. Where the withholding of treatment stems from instructions by the patient either to the attorney or directly to the doctors any resulting death has to be deemed not to be suicide and any life insurance policy is not to be invalidated on this ground.

5.114 Finally, binding directions by the patient or his or her attorney downgrades the status of doctors and other health care providers. Their professional judgements and contributions are ignored and they become mere technicians carrying out the directions of attorneys.

5.115 The New Zealand legislation adopts another approach. Section 18(1)(c) of the 1988 Act, as applied to personal welfare attorneys by section 98(4), provides that an attorney shall not have power to refuse consent to the administration of any standard medical treatment or procedure designed to save the granter's life or to prevent serious damage to his or her health. This seems to go too far the other way. In the case of dying patients it seems perfectly reasonable for consent to be withheld to elaborate or distressing treatment that simply postpones the moment of death. If a patient is incapable of withholding consent to such treatment his or her attorney should be able to do so. Moreover, we do not think it right to shut out attorneys from all decisions relating to standard medical treatment.

5.116 We tend to think a better approach is that doctors should be obliged to discuss proposed treatment with the patient's attorney. While they should give due weight to the views expressed they should not be bound by them. The overall interests of patients would be better served by a flexible system in which the professional judgement of doctors continues to have a major role.

5.117 Sterilisations, abortions and similar controversial operations should be referred to the court for a decision, whatever the views of the doctors and the attorney. We took a similar view in considering whether a personal guardian should have power to consent to such treatments.[129] Resolution by the court seems even more desirable where the proxy decision-maker (the attorney) has not been appointed by the courts.

5.118 In Part 3 we proposed that non-therapeutic medical research should not be carried out on a mentally disabled subject unless the nearest relative agreed. Where the subject had a personal guardian that guardian's agreement would be required instead.[130] We think it should be competent to appoint a personal welfare attorney with power to agree to the granter's participation in non-therapeutic research. The power however should be required to be explicit. The attorney's agreement or the withholding of agreement should prevail over any decision of the nearest relative.

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[129] Proposal 22 at para 3.28.
[130] Proposal 26 at para 3.59.

5.119 Summing up we propose that:

78. (1) It should be competent to empower a personal welfare attorney

(a) to consent or to withhold consent on behalf of the mentally incapable granter to medical treatment (except sterilisation, abortion and other forms of treatment prescribed by the Secretary of State for Scotland) and to request that treatment being given should be discontinued, and

(b) to consent to the granter's participation in non-therapeutic medical research.

(2) Doctors and others involved with the patient's health care should be obliged to seek the attorney's views in circumstances where they would seek the views of a mentally capable patient. The attorney's views should be taken into account by the doctors and others concerned but should not be binding on them.

5.120 **Placement in mental hospital or other facility**. In California a health care attorney may not consent to placement of the granter in a mental health treatment facility.[131] Should a Scottish personal welfare attorney be empowered to consent to the granter's admission to hospital for treatment as a voluntary patient? Voluntary admission whereby a patient consents to being admitted to hospital for treatment is widely used as an alternative to the compulsory detention procedures under the Mental Health (Scotland) Act 1984. There is a danger, however, that consent by the attorney would be used to circumvent the 1984 Act procedures that are designed to safeguard mentally disordered people requiring treatment. Views are invited on the following questions.

79. Should a personal welfare attorney have power to the granter's admission to a hospital or other institution for treatment for a mental disorder? If so, should such power require to be expressly granted in the welfare CPA or should it be implied from a general power to take personal welfare and treatment decisions.

Effect of granter's directions to welfare attorney

5.121 Should a welfare attorney be bound by any directions given by the granter in the welfare CPA or in another written or oral communication? The difficulty with binding directions is that they are inevitably given some time, some considerable time perhaps, before the relevant event occurs and the attorney has to take the appropriate decision. In view of the time lapse the attorney cannot be sure that the granter if capable would have made the same decision as contained in the directions. The American Uniform Rights of the Terminally Ill Act attempts to avoid this problem by providing that a directive is valid only if granted by a terminally ill patient and comes into force only when the patient is judged incapable of making decisions. However, this severely limits its usefulness because most terminally ill patients do not survive long after becoming incapable. It is also difficult to be sure that the granter's directions were informed directions, given after discussion of the

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[131] Durable Powers of Attorney Health Care Act 1983.

options with doctors and relatives, and were not the result of family or other pressures. There is also the problem of interpretation; is the situation that has occurred covered by the granter's directions? Even the best drafting cannot foresee every eventuality and the more complex the directions become the more scope for argument as to their precise meaning. In Part 2 we rejected the idea that personal guardians should decide personal welfare issues by reference to what the mentally disabled person would have decided if he or she were capable. We preferred a modified best interests test in which the expressed wishes of the mentally disabled person should be carefully considered by the personal guardian but should not be binding on him or her.[132] We would adopt the same approach here. We propose that:

80. A personal welfare attorney should decide any matter within the scope of the powers conferred by the welfare CPA in accordance with the best interests of the granter after consideration of the granter's wishes or directions in the power of attorney or otherwise and all the other circumstances of the case.

Duty of welfare attorney to act?

5.122 In discussing CPAs for financial affairs we proposed that an attorney should be under a statutory duty to carry out the functions set out in the document.[133] Failure to act which gave rise to loss to the granter's estate should result in liability for damages. Should a similar approach be taken for welfare CPAs? It might be difficult to set out the functions of a personal welfare attorney except in general terms which could imply wide-ranging and onerous duties, so deterring people from agreeing to act as personal welfare attorneys. We seek views on the following questions.

81. (1) Should a welfare attorney appointed under a welfare CPA executed after the coming into force of the relevant legislation be under a duty to carry out the functions set out in the CPA?

(2) If a duty is to be imposed on a welfare attorney should the standard of care be that adopted by a reasonably prudent person in making decisions about his or her own personal welfare?

When should powers be exerciseable?

5.123 A personal welfare attorney, like any other attorney, would normally be entitled to exercise his or her powers as soon as the power of attorney was signed unless another time is specified. Immediate authority does not seem sensible in the personal welfare field. If the granter is capable of consenting to treatment or making some other personal welfare decision then the doctors and third parties would naturally seek consent from the granter rather than from the attorney. Even if the attorney did seek to exercise authority the granter's decision would have to prevail over that of the attorney. The New Zealand 1988 Act provides that an attorney shall not act unless the granter is incapable.[134] The Californian Durable Powers of Attorney Health Care Act 1983[135] adopts a slightly different approach.

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[132] Para 2.87.
[133] Proposal 71 at para 5.74.
[134] S 98(3).
[135] S 2434(a).

An attorney has no power to act in relation to a particular matter if the granter is capable of making an informed decision in respect of that matter. The Californian approach seems preferable since it focuses on incapacity in a particular matter, which is easier to determine than incapacity in general.

5.124 In the section on financial attorneys we asked for views on whether new statutory provisions should be enacted dealing with "springing" powers of attorney – powers that spring into effect on the happening of a specified event, such as the granter's incapacity.[136] We do not think springing powers should be introduced into the personal welfare field. Granters should not be divested of their power until they are incapable of making informed decisions. We propose that:

82. A personal welfare attorney should not have authority to make a decision in respect of a personal welfare matter while the granter is capable of making an informed decision in that matter.

Supervision and control of welfare attorney

5.125 In connection with financial powers of attorney we tentatively rejected registration of powers of attorney and the monitoring of attorneys by the registration authority.[137] Instead we proposed that the court should have increased powers to act when applications were made in respect of attorneys suspected of not carrying out their duties properly.[138] Should the same approach be taken for personal welfare attorneys?

5.126 The appointment by the court of a guardian under the Mental Health (Scotland) Act 1984 has to be intimated to the Mental Welfare Commission for Scotland. The Commission as well as exercising general protective functions over people who may be suffering from mental disorder has specific functions in respect of patients subject to guardianship. For example, it has a duty to visit them regularly and to bring to the attention of the hospital or local authority concerned any matters harming the patient's interests. If it considers that guardianship is no longer warranted by the patient's condition and circumstances it may make an order for discharge of the guardianship.[139] We have proposed a somewhat similar role for the Commission in respect of tutors-dative and personal guardians.[140] Should all appointments of personal welfare attorneys be intimated to the Commission at least when the attorney starts to exercise the powers? On intimation the Commission could visit the granters and ensure that the attorneys understood the effects of the power of attorney. They could also check on the suitability of the attorney and thereafter arrange for periodical visits to the granter. Whether this is practicable depends to a large extent on how many personal welfare attorneys are likely to be appointed. At present 40 equivalent service for say 500 personal welfare attorneys and their granters would substantially increase the work load of the Commission. Differences in supervision between guardians and personal welfare attorneys can be justified. Guardians are appointed by the court after considering recommendations submitted by a mental health officer and are normally local government officials. Personal welfare attorneys, however, will be appointed by the granters on the basis

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[136] Proposal 73 at para 5.86.
[137] Proposal 66 at para 5.50.
[138] Proposals 67 to 70.
[139] Mental Health (Scotland) Act 1984, s 3.
[140] Proposals 2 and 12 at paras 2.33 and 2.90.

of their reliability, honesty and understanding of the views of the granter. We seek views on the following questions.

83. Should personal welfare attorneys be subject to supervision and control by the Mental Welfare Commission of Scotland or any other body? What other powers and duties should the supervising body have in relation to them?

Part 6 Procedural Matters

6.1 This Part is concerned with what body is to make decisions in the field of mental disability, what procedure should be used and to what extent the initial decisions should be challengeable by way of appeal.

What decision making authority?

6.2 In Scotland the vast majority of orders affecting the personal welfare or financial affairs of mentally disabled people are made by the courts. Guardianship applications are decided in the sheriff court,[1] tutors-dative are appointed by the Court of Session,[2] while either court may appoint curators.[3] Some decisions, however, can be made administratively. For example, hospital managers may administer the funds of an in-patient who has been certified by the medical officer in charge of treatment as incapable of managing his or her own property and affairs.[4] Many other jurisdictions, such as Alberta and New Zealand, give an equally prominent role to the courts. Others have set up special tribunals to deal with the issues arising out of mental disability. Victoria, for example, has a Guardianship and Administration Board with a legally qualified president.[5]

6.3 The European Convention on Human Rights, which has been ratified by the United Kingdom, emphasises the need for a proper adjudication where decisions affect a person's civil rights. Article 6(1) of the Convention provides that questions of civil rights should be determined by an independent impartial tribunal established by law within a reasonable time and after a fair public hearing. Legislation in breach of these standards would lay the United Kingdom open to proceedings before the European Court of Human Rights.[6] Decisions such as the appointment of a personal guardian or financial manager certainly affect a mentally disabled person's civil rights, but in terms of the Convention they could be made either by a court or a tribunal established by statute.

6.4 The main argument in favour of the courts is that they have established detailed procedures designed to ensure that before a decision is made all relevant matters are considered and all those interested have been given an opportunity to make representations. Another argument is based on continuity. Guardians, tutors-dative and curators are all appointed by the courts at the present. In the absence of a clear demand for change the courts should perhaps continue to exercise these powers.

6.5 Tribunals, compared with the courts, are relatively informal, less adversarial, and can have members with special expertise. Informality in conducting proceedings and in the

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[1] Mental Health (Scotland) Act 1984, s 40.
[2] *Dick v Douglas* 1924 SC 787.
[3] See para 4.4.
[4] Mental Health (Scotland) Act 1984, s 94.
[5] Guardianship and Administration Board Act 1986.
[6] See *Winterwerp v Netherlands*, judgement dated 24 October 1979.

atmosphere and layout of the places where hearings take place is very important if people other than lawyers are to participate in the proceedings. Party litigants feel more at ease with tribunals and hearings than with courts. The surroundings and procedures ought not to be unwelcoming and unintelligible. The experience so far with small claim proceedings in the sheriff courts indicates that it is not easy for courts to adjust to an informal, more inquisitorial system and that the use of normal courts makes informality difficult to achieve. Courts are essentially adversarial. Their function is to find out the truth about disputed facts by hearing both sides and their witnesses and then applying the law to them. Most guardianship, tutor-dative, and curatory applications at present are undefended, and we envisage that this non-adversarial character of proceedings will continue under our proposed reforms. Many of the hearings might take the form of a discussion as to what order or orders out of the available range would be best for the mentally disabled person. Tribunals would arguably be better at holding such non-adversarial proceedings than the courts. The Victorian Guardianship and Administration Board is widely regarded within Australia as a system which works well. The third advantage of tribunals is that the tribunal members' expertise can be tailored to the cases under consideration. Mental disability applications may well involve medical and social work issues as well as legal ones. The tribunal could, for example, consist of a legally qualified chairman or chairwoman together with a psychiatrist and a social worker. Courts have only legally trained judges, although expertise in other areas may be brought in by way of reports or expert testimony.

6.6 Tribunals, however, have disadvantages. Using professionals as tribunal members could blur the distinction between professional assessments or opinions and judicial or quasi-judicial decision making. Moreover, members of one profession may dominate the others who lack the expertise to question their opinions or assessments. The volume of mental disability cases would make the job a part-time one. It may prove difficult to get and train suitable members. Accommodation for the hearings and the tribunal staff would also be a problem. The cost of having separate premises would seem unjustifiable so that the tribunal would have to share with another appropriate organisation. It is also questionable whether a tribunal should have power to make orders in the financial field where substantial assets are involved. A broader objection is that proliferation of specialist tribunals leads to fragmentation of the system of justice.

6.7 Scottish Action on Dementia, a voluntary organisation set up to promote the interests of dementia sufferers and their carers, has proposed a system of Mental Health Hearings along the lines of Children's Hearings to make decisions on behalf of sufferers.[7] Although their particular concern is with elderly people with dementia, the proposed hearing system was regarded as suitable for all mentally disabled people. In outline the proposals were as follows:-

(a) A Mental Health Hearing would consist of three people chosen from a list of trained panel members. The members would not necessarily have any legal, medical or social work qualifications. They would be unpaid but would receive allowances for expenses. Panels would be appointed for each regional or islands council area.

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[7] *Dementia and the Law: The Challenge Ahead* (1988).

(b) Each regional or islands council would appoint an official called a mental health reporter, together with appropriate staff.

(c) Hospital staff, social workers, relatives, neighbours and others would be able to contact the reporter if they were concerned about the personal welfare or financial affairs of a mentally disabled person. the reporter would then come under a duty to investigate and to obtain any necessary reports and assessments.

(d) The reporter could then decide that no action was necessary, dispose of the case informally or refer it to a Mental Health Hearing. He or she would also have power to make interim orders where immediate action was necessary.

(e) A Mental Health Hearing would consist of three members sitting in private together with the reporter, the mentally disabled person and his or her representative and relatives. The hearing would have power to appoint an individual to safeguard the interests of an unrepresented mentally disabled person. Any assessments and reports obtained by the reporter would be available to the hearing. The proceedings would be conducted informally but the hearing could call for witnesses to attend and for documents to be produced.

(f) The hearing would have power to make a wide variety of orders in the personal welfare and financial fields, guided by the principle of minimum intervention. For example, a hearing could order supervision by a social worker, require the mentally disabled person to reside in a particular home or hospital, attend a day centre, consent to treatment on behalf of the mentally disabled person, make orders relating to the person's home, finances and other assets, or appoint a personal guardian or financial manager. The hearing's decision would be notified to the Mental Welfare Commission for Scotland. All orders would be reviewed periodically, or at other times on application by the reporter or the mentally disabled person.

(g) The reporter or the mentally disabled person would have a right of appeal to the sheriff in respect of any decision of the hearing.

6.8 The main difference between tribunals and the hearing system proposed by Scottish Action on Dementia is the reporter in the latter system. This official would be a person to whom cases could be referred where intervention might be required, would act as a filter by disposing of cases without reference to a hearing, and would be empowered to investigate and obtain information, reports and assessments. Against these advantages must be set the cost of reporters and their staff both in pay and accommodation. The likely scale of use of hearings suggests that reporters and their staff would be part-time, combining their duties with other functions. We do not think Reporters to Children's Hearings should take on mental disability functions. First, it would give credence to the view that mentally disabled adults are much the same as children and should be treated the same way. Secondly, reporters have no expertise in the area of mental disability.

6.9 Each system – courts, tribunals and mental health hearings has its advantages and disadvantages. Whatever system is adopted, we think there would be considerable merit in

giving it exclusive jurisdiction over the entire range of applications outlined in this Discussion Paper and also applications for detention under the provisions of the Mental Health (Scotland) Act 1984 and compulsory removal from home under section 47 of the National Assistance Act 1948. A "one door" approach makes it easier for people to know where to go and avoids duplication or gaps in jurisdiction. It also enables the court or other body to deal with all aspects of the problem in one application. We express no preference and simply ask for views on the following question.

84. Should all applications relating to the personal welfare and financial affairs of mentally disabled people outlined in Parts 2 to 5 of the Discussion Paper and in other legislation be heard by the courts, new Mental Health Tribunals or new Mental Health Hearings?

6.10 If it were decided that the courts were the appropriate decision making body, we suggest that all applications should be dealt with by the sheriff courts, the Court of Session having only an appellate role. The majority of applications for appointment of curators are now heard in the sheriff courts, and there is little difference in the size of estates between the cases heard in the Court of Session and the sheriff courts. Over half of the Court of Session cases relate to people resident in Lothian and Borders for whom the Court of Session is a "local court".[8] All applications under the Mental Health (Scotland) Act 1984 for the appointment of a guardian or detention in hospital are heard by the sheriff. Tutors-dative are appointed by the Court of Session but this is for historical reasons[9] and there seems no good reason why appointments should not now be made by the sheriff courts. Sheriff courts have the advantage of accessibility as they are spread throughout Scotland. We have already stressed the need for an atmosphere of informality in hearings. It would be more difficult for the Court of Session, because of its layout and traditions, to provide such an environment.

6.11 If tribunals or hearings were to be the decision making bodies, considerations of accessibility suggest they should be spread throughout Scotland. They could be allocated either on a regional or islands council basis, a health board basis or by sheriffdoms. Social work is organised on a council basis, medical treatment on a health board basis. Rooms for hearing cases could be made available as and when required in council or health board premises. Organisation by sheriff court districts would also ensure availability throughout Scotland. It would also avoid the danger that the tribunals or hearings are regarded simply as committees of the local council or health board and would emphasise their judicial role and independence.

6.12 We propose that:

85. (1) If courts are to be the decision making bodies for applications in respect of mental disability, the courts initially concerned should be the sheriff courts.

(2) If tribunals or hearings are to be the decision making body for such applications, there should be at least one in each regional (or islands) council area, health board area, or sheriff court district.

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[8] CRU Curatory Survey.
[9] See para 2.5.

Jurisdiction

6.13 In this section we deal with jurisdiction, ie in what circumstances Scottish Courts, tribunals or hearings should be empowered to make orders relating to a mentally disabled person. At present a curator may normally be appointed by a Scottish Court if the mentally disabled person is domiciled in Scotland or owns heritable property situated in Scotland.[10] An appointment may be made in other cases where it is necessary. As Professor Anton puts it:

> "The dominant theme is the protection of the *incapax* and the court will always make an appointment which is required either by the urgency of the situation or by the special facts of the case."[11]

In the case of an application to the sheriff court for appointment of a curator the appropriate court is the court of the sheriffdom in which the mentally disabled person is resident.[12] The basis of jurisdiction for appointing a mental health guardian is residence. The application is made to the local authority in whose area the patient is resident and is approved by the sheriff in whose sheriffdom the patient is resident.[13] Jurisdiction in relation to the appointment of tutors-dative is unclear.

6.14 In New Zealand the court may appoint a personal guardian if the mentally disabled person is ordinarily resident in New Zealand.[14] Jurisdiction in relation to the appointment of a financial manager depends on either domicile or ordinary residence in New Zealand or ownership of property situated in New Zealand[15]. The Guardianship and Administration Board in Victoria may appoint an administrator to a disabled person who resides in or possesses estate in Victoria.[16]

6.15 If the proposed new schemes of personal guardianship and financial management are introduced jurisdictional rules will be needed. The Civil Jurisdiction and Judgements Act 1982 does not apply to such matters.[17] The basis of jurisdiction should depend on the type of application being made to the court, tribunal or hearing. It seems inappropriate, for example, to appoint a personal guardian to a foreigner simply because he or she owns a holiday cottage in Scotland. This may, however, be a good ground for appointing a financial manager at least in respect of the property in Scotland. We suggest that as far as appointment of a financial manager or making various property orders are concerned one ground of jurisdiction should be the ownership of property situated in Scotland. Property should not be confined to heritable property such as land, houses or other premises. The Scottish courts will generally recognise the authority of a foreign guardian to moveable property in Scotland but not in relation to heritable property.[18] Recognition of a guardian's powers in relation to moveable property within the various law districts of the United

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[10] Thoms, *Judicial Factors*, (2nd edn) p 286.
[11] *Private International Law*, (2nd edn) p 568. See also the cases cited there.
[12] Judicial Factors (Scotland) Act 1880, s 4(1A) as amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, s 14.
[13] Mental Health (Scotland) Act 1984, ss 38 and 40.
[14] 1988 Act, s 6.
[15] 1988 Act, s 25.
[16] 1986 Act, s 43.
[17] Sch 9, paras 1 and 3.
[18] Anton, *Private International Law*, (2nd edn) p 569.

Kingdom is statutory.[19] But there may be a need to make orders (particularly interim or emergency orders) in relation to moveable property in Scotland where the mentally disabled foreign owner has no guardian or similar person. There ought to be additional grounds for jurisdiction in relation to financial managers and property orders. It should, for example, be possible to appoint a financial manager to a mentally disabled man who had lived in Scotland all his life even though he owns only shares in non-Scottish companies. Traditionally the additional ground of jurisdiction has been domicile. In our *Report on Private International Law: The Law of Domicile*[20] we recommended changes in the law of domicile relating to the mentally incapacitated. Domicile would be determined by reference to the test of closest connection.[21] Although residence would be a strong feature we suggested that it should not be conclusive as to closest connection.[22] We think that if domicile is changed in this way there is perhaps no need to have residence (either simple, ordinary or habitual) as yet another ground of jurisdiction.

6.16 Where personal guardianship and other orders affecting personal welfare are concerned ownership of property should be irrelevant in determining jurisdiction. Should domicile in its reformed sense or residence be sufficient of is there a case for conferring jurisdiction on either basis? We tend to prefer the latter option, that either should be applicable. A foreign visitor to Scotland may become brain damaged in an accident or suddenly become mentally ill. In these circumstances it should be open to a Scottish court to appoint a personal guardian. An example where domicile might be useful would involve a woman born in Scotland, who had lived with her parents in Scotland nearly all her life but was currently living (except for holidays) in a community for the mentally disabled in England. Residence and domicile should also be used to allocate jurisdiction to a particular sheriff court.

6.17 We propose that:

86. (1) The Scottish courts should have jurisdiction to appoint a personal guardian or make other orders relating to personal welfare in relation to a mentally disabled person who is either resident in Scotland or domiciled in Scotland.

(2) The Scottish courts should have jurisdiction to appoint a financial manager to, or make other orders relating to property owned by, a mentally disabled person if that person:

(a) is domiciled in Scotland, or

(b) owns property situated in Scotland.

(3) The above criteria should also be used to select an appropriate sheriff court.

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[19] Mental Health (Scotland) Act 1984, s 95(2) and Mental Health Act 1983, s 110(1).
[20] Joint Report with Law Commission for England and Wales (Law Com No 168, Scot Law Com No 107), 1987, Cm200.
[21] Para 6.6.
[22] Para 6.12.

(4) A mentally disabled person should be regarded as domiciled in Scotland if Scotland is the country with which he or she has the closest connection.

Procedure

6.18 Whatever body is chosen as the decision making authority, we think it is important that its procedure should be simple, cheap and flexible. The proposed reforms will not be effective if the procedure is such as to deter applicants. We do not wish to make detailed proposals about procedure but would mention certain aspects. It should be possible to combine in one application craves in the personal welfare and financial fields. Thus, for example, one single application for the appointment of a personal guardian and a financial manager should be competent, whether or not the same person is appointed to both positions. There should also be a power to conjoin two or more applications by different applicants in respect of the same mentally disabled person. Another useful power would be to make orders other than those applied for where to do so is in the best interests of the mentally disabled person. For example, in hearing an application for the appointment of a personal guardian or detention under the Mental Health (Scotland) Act 1984 it may become apparent that some order is needed to deal with financial affairs. Notice should, however, be given of the intention to use this power and the parties given an opportunity to make representations.

6.19 Emergency, interim and temporary orders would also be required since a decision might have to be made in a matter of hours rather than days.

6.20 A court or tribunal is to a very large extent dependent on the applicant for information about the mentally disabled person. The proposed Mental Health Hearings would be different in that they would be supplied by the reporter with information, assessments and reports that had been ordered prior to the hearing. The following discussion is therefore confined to courts and tribunals. The amount of information provided at present for curatory applications leaves a lot to be desired. The two medical certificates, for which there is no form prescribed, merely state, echoing the criteria for appointment, that the person is unable to manage his or her affairs or give instructions for their management.[23] A system based on the principles of minimum intervention and encouraging the mentally disabled person to use his or her capacity to the full requires more information to be provided. The court or tribunal should be empowered to obtain information and reports if it is not satisfied with what has been provided and to have regard to any assessments for other purposes that have already been carried out (a Future Needs Assessment under the Education (Scotland) Acts or a Community Care Assessment for example). The court or tribunal should also be able to order a Community Care Assessment for the mentally disabled person and check that he or she is receiving all the welfare benefits entitlements. Extra services or finances may solve the problem without the need for any formal order. In Victoria the board hearing a case may appoint a person with appropriate expertise to assist it and may request a report from various official bodies including the Public Advocate.[24]

6.21 The present procedure for the appointment of a mental health guardian incorporates a recommendation on the need for a guardian by a mental health officer of the local

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[23] Brief certificates were criticised recently in *Fraser v Paterson* 1987 SLT 562.
[24] Guardianship and Administration Board Act 1986, s 11.

council.[25] This social work input could usefully form a feature of applications for appointment of personal guardians and even financial managers. The application should be intimated to the local authority social work department and the Mental Welfare Commission for Scotland. Either body should be able to make representations to or put information before the court or other body. Notice of the appointment should be sent to these bodies and in the case of a financial manager also to the Accountant of Court.

6.22 Mere provision of information may not go far enough. The mentally disabled person will usually lack the capacity to take an active part in the proceedings, yet it is important that his or her interests are properly considered. In New Zealand the court hearing an application under the Protection of Personal and Property Rights 1988 Act must appoint a legal representative to the mentally disabled person unless he or she is already represented.[26] The job of the legal representative is to interview the mentally disabled person, ascertain his or her views as far as possible, and to support orders which are the least restrictive and allow the mentally disabled person to use his or her capacity to the utmost.[27] The fees of a legal representative appointed by the court are paid by the State, but the court may order a proportion to be paid by the mentally disabled person or the applicant.[28] Scottish adoption procedure has somewhat similar provisions that could form a useful model for mental disability applications. Where a petition for adoption of a child is heard, the sheriff must appoint a reporting officer to investigate certain matters and a curator *ad litem* to safeguard the interests of the child.[29] The reporting officer and the curator *ad litem* are usually the same person.[30] The court also has before it a report by the local authority or the adoption agency. We propose that:

87. (1) A court or tribunal hearing an application in relation to a mentally disabled person should have power to request a report or information relating to the mentally disabled person's welfare or affairs from any appropriate person or organisation.

(2) The court or tribunal should be required to appoint an appropriately qualified individual to safeguard the interests of the mentally disabled person unless it is satisfied that his or her interests are already adequately safeguarded.

Appeals

6.23 To what extent should an appeal be allowed from the decision of the court, tribunal or hearing dealing with a mental disability application? At present a final judgement of the sheriff may be appealed to the sheriff principal and thence to the Court of Session or directly to the Court of Session.[31] From the Court of Session a further appeal on a point of law only lies to the House of Lords unless excluded by statute.[32] If the decision-making body is to be the sheriff court, we see no reason to depart from the existing appeal system set out above.

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[25] Mental Health (Scotland) Act 1984, s 37.
[26] S 65(1).
[27] S 65(2).
[28] S 65(5) and (8).
[29] Adoption (Scotland) Act 1978, s 58 and Act of Sederunt (Adoption of Children) 1984, paras 20 and 21.
[30] McNeill, *Adoption of children in Scotland*, para 8.03.
[31] Sheriff Courts (Scotland) Act 1907, ss 27 and 28.
[32] Court of Session Act 1988, ss 40 and 32(5).

6.24 There is a bewildering variety of systems of appeal from tribunals to the courts. One common one is to allow an appeal to the Court of Session on points of law only.[33] However, because the Court of Session has an inherent supervisory jurisdiction over all inferior courts and tribunals, a decision of a tribunal may be challenged in the Court of Session by means of judicial review. The grounds for judicial review are wider than points of law. The decision of a children's hearing is appealable by the child or his or her parents to the sheriff.[34] A further appeal may be taken by the child or parents or the reporter to the Court of Session on a point of law or in respect of any irregularity in the conduct of the case.[35] It is provided that no other or further appeal is competent, but it is doubtful whether this excludes judicial review.

6.25 In selecting a system of appeal we have borne in mind three objectives. First, the reason for having a tribunal or hearing as the decision-making body is that the decision can be made by, or with the help of, persons and expertise in the various aspects of mental disability in a non adversarial and informal way. This advantage would be list if a court could on appeal overrule the tribunal or hearing because it would have come to a different decision. Secondly, appeals ought to be allowed on grounds of error of law, procedural irregularities and wholly unreasonable decisions. To deny appeals in these circumstances would severely dent public confidence in the new tribunals or hearings. Where points of law are concerned, it is important that it should be possible to obtain a ruling from the Court of Session since the ruling would apply throughout Scotland. Finally, an appeal from a local tribunal or hearing should be in the first instance to a local court on grounds of cheapness, ease of access and speed. It is difficult or impossible to exclude by way of legislation the remedy of judicial review by the Court of Session. However, the grounds of appeal to a local court could be framed so as to include all the grounds of judicial review and so make the latter unattractive to appellants.

6.26 An appeal scheme which by and large meets our objectives is contained in the Civic Government (Scotland) Act 1982. Paragraph 24 of Schedule 2 to the 1982 Act deals with appeals from the local licensing authorities which licence various activities or businesses. An appeal is by way of summary application to the sheriff. The sheriff may hear evidence. He or she may uphold an appeal only if satisfied that the licensing authority in arriving at their decision:-

> "(a) erred in law;
>
> (b) based their decision on any incorrect material fact;
>
> (c) acted contrary to natural justice; or
>
> (d) exercised their discretion in an unreasonable manner.".

The sheriff may remit the matter back to the authority or reverse or modify the authority's decision. A further appeal to the Court of Session is available on a point of law only. We accordingly propose that:

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[33] Tribunals and Inquiries Act 1971, s 13.
[34] Social Work (Scotland) Act 1968, s 49.
[35] 1968 Act, s 50.

88. (1) If the decision-making body is to be the sheriff court, the normal rules for appeal to the sheriff principal, the Court of Session and the House of Lords should apply.

(2) If the decision-making body is to be a tribunal or hearing, appeals, should be allowed to the sheriff along the lines of the provisions in paragraph 24(7) of Schedule 2 to the Civic Government (Scotland) Act 1982 with a further appeal to the Court of Session on a point of law only.

Promoting the reforms

6.27 Part of the undoubted success of the Victorian Guardianship and Administration Board is due to the creation of the post of Public Advocate. The Public Advocate's functions include promoting and encouraging the provision, co-ordination and development of services for the mentally disabled, supporting citizens' advocacy programmes and guardianship, and informing and educating the public and organisations about legislation affecting the mentally disabled, in particular the Guardianship and Administration Board Act. Many of these functions are within the remit of the Mental Welfare Commission for Scotland. We note the recent series of explanatory pamphlets on guardianship and other topics issued by the Commission. In view of this we do not consider that there is a need for a separate body similar to the Public Advocate. Nevertheless, we think it is vital that any new legislation or procedures relating to the mentally disabled should be publicised and promoted as much as possible. If it would be of assistance to the Mental Welfare commission to have this expressly added to their statutory functions then we think this should be done.

89. Views are sought on whether the Mental Welfare Commission for Scotland should be under an express statutory duty of publicising and promoting any new legislation or procedures relating to the mentally disabled.

Part 7 Capacity and Competence in Private Law

7.1 In this Part we look at the legal capacity or competence of mentally disabled people to make decisions and enter into transactions involving their personal or financial welfare. For example, can a mentally disabled person buy a bicycle, sign a lease, borrow money, make a will, marry or consent to an operation in a legally effective way? Should the position be different if a personal guardian, curator or financial manager has been appointed? We consider these issues only in the private law field. We are not concerned with public law matters such as the ability to vote or serve on a jury, nor with the capacity of the, mentally disabled in the field of delict or crime.

7.2 The first section of this Part deals with the question of competence or capacity where no personal guardian, curator, tutor-dative or any other similar person has been appointed. The next section examines the position where one or more such people have been appointed. The final section concerns the capacity to marry or make a will. These are dealt with separately as they pose rather different issues from other "transactions".

NO MANAGER OR GUARDIAN APPOINTED

7.3 This section looks at the position where no tutor-dative, mental health guardian, curator, personal guardian or financial manager has been appointed to an individual.

The present law

7.4 There is a presumption that a person of full age is capable of entering into every kind of legal transaction. He or she is presumed competent until the contrary is demonstrated.[1] The onus is therefore on those averring incapacity to establish that the mentally disabled person did not understand the nature of the transaction or did not appreciate its effects. The level of capacity required depends on the nature and complexity of the transaction in question. For example, not much in the way of mental capacity is required in order to buy a newspaper, but considerable understanding is needed to buy a time-share holiday home. Capacity or lack of capacity is established by consideration of medical evidence and what was said and done at the time of the transaction.[2] In order to invalidate a particular transaction the incapacity must affect that particular transaction. Delusions which are confined to one area of decision-making will not affect capacity in other areas. For example, an unfounded delusion that valuable jewellery was fake could invalidate a sale of the jewellery for a few pounds but would not invalidate the sale of other property or taking out a life policy. If incapacity is established the transaction in question is void, whether or not

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[1] *Lindsay v Watson* (1843) 5 D 1194.
[2] McBryde, *Contract,* p 144.

the incapacity was apparent to the other person or persons in the transaction.[3] Two statutory exceptions relating to land and necessary goods are dealt with later.[4]

7.5 In England and Wales a mentally disabled person is capable of entering into a valid contract if at the time he or she understands the nature of the contract.[5] A generally incapable person may have contracted in a lucid interval, or the particular transaction may be one that he or she is capable of understanding, or the delusions are unconnected with the subject matter of the transaction.[6] Where contractual capacity is lacking the contract is voidable at the option of the mentally disabled person. But the mentally disabled person has to establish that the other person knew or ought to have known of his or her incapacity.[7] There is authority for the view that, even if the incapacity was not known to the other person, the mentally disabled person may be able to set aside an unconscionable contract.[8]

7.6 In Canada a contract is voidable if one party is mentally incapable of understanding its nature and effect, and either the incapacity is known to the other party or the contract is unfair.[9]

Discussion and proposals for reform

7.7 As we have seen there is a presumption of competence, but for any particular transaction this may be rebutted by proof of lack of understanding of the nature and effects of the transaction. This seems unexceptionable. Clearly there must be a presumption of competence and because the degree of understanding required varies enormously according to the type of legal transaction involved it is only sensible to consider capacity in relation to each particular transaction.

7.8 As has already been stated[10], in Scotland a transaction by a mentally disabled person who lacks capacity to undertake it is void. A void transaction is null right from the start. Reduction or setting it aside by application to the court is strictly unnecessary. No title to the property comprised in the transaction passes to either party to the transaction so that neither can pass on title to third parties. The transaction may be reduced even though unscrambling to put the parties back into their original position is impossible. The transaction may be repudiated without liability for damages by either party, but there may be claims based on restitution or recompense. In some other jurisdictions a transaction by a person without capacity is voidable. Voidable transactions are valid until reduced or set aside. During the period of their validity title to the property concerned may be validly passed to third parties. Reduction may not be allowed because of personal bar or inability to unscramble the transaction.

7.9 It seems to us to be more principled for a transaction involving a person lacking capacity to be void rather than voidable. There is a complete absence of understanding or

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[3] *Gall v Bird* (1855) 17 D 1027; *John Loudon & Co v Elder's* CB 1923 SLT 226.
[4] Para 7.14.
[5] *Broughton v Knight* 1873 LR 3P & D 64.
[6] Hoggett, *Mental Health Law*, (2nd edn) p 324.
[7] *The Imperial Loan Co Ltd v Stone* [1892] 1 QB 599.
[8] *Molton v Camroux* (1848) 2 Exch 487 at p 503.
[9] Robertson, *Mental Disability and the Law in Canada*, p 162.
[10] Para 7.4.

consent in the same way as a transaction by a pupil which is also void.[11] Moreover, making the transaction void protects mentally disabled people from exploitation due to their lack of capacity to a greater extent than if the transaction were merely voidable. On the other hand this protection may be at the expense of the other party to the transaction and innocent third parties. The following examples illustrate these points.

Example 1

> A person with no understanding of what is involved buys a new car for his own use. The sale is void and under the general law of restitution and recompense the supplier can recover the car and will in turn be bound to pay back the price received. The supplier will however be prejudiced since the car will have depreciated in value yet the supplier will have to pay back the full purchase price.

Example 2

> An incapable person sells a valuable picture to a dealer at a fraction of its true value. The dealer then re-sells it at a large profit to a purchaser. The sale to the dealer is void so that the purchaser fails to acquire a valid title. The purchaser is bound to return the picture to the owner and can recover the price from the dealer. The dealer in turn can recover the price paid to the incapable owner from him or her.

7.10 The innocent purchaser in *Example 2* may lose out if he or she is unable to recover the price from the dealer. Protection for the incapable person has been at the cost of hardship to an innocent third party purchaser in good faith.

7.11 By contrast if a transaction involving an incapacitated person is voidable title can pass until the transaction was avoided. Thus third parties, such as the purchaser of the picture in *Example 2*, would be protected if they acquired in good faith before avoidance.[12] Since restitution has become impossible the bargain between the incapable person and the other party to the transaction cannot be undone and the loss would fall on the incapable person.

7.12 There is in our view a strong case for a more flexible approach – empowering the court to make such orders as seem just and reasonable in the circumstances. Victoria and New Zealand adopt this course.[13] Account should perhaps be taken of the fairness of the transaction involving the incapable person. Fair bargains might perhaps be left to stand. Sometimes it would be to the advantage of the mentally disabled person that the transaction should not be avoided, a secure tenancy for example. The court should also be able to weigh up the conduct of the parties and the opportunity (if any) the other had in assessing incapacity. Nowadays, many commercial transactions are done without any fact-to-face contact; by letter, telephone, fax or linked computers, for example. It may not be obvious from the signature on a standard form contract that the person signing it was mentally incapable of the transaction involved.

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[11] Bell, *Principles*, s 2067. It may be that a pupil is entitled to enforce a contract beneficial to him or her, McBryde, *Contract*, p 133.
[12] Sale of Goods Act 1979, s 21.
[13] See paras 7.25-7.26.

7.13 We do not put forward proposals for such a flexible approach, because we think it is part of a more general problem. Protection of good faith third parties, and restitution or recompense in void and voidable transactions occur in many other areas of the law. In our view it would be better to examine these problems generally rather than attempt a piecemeal approach which would lead to special treatment for one particular class of people – the mentally disabled. Minors and pupils are also legally incapable of certain transactions. In a previous discussion paper we asked for views on whether special protection should be provided for third parties who deal with them in good faith.[14] The clear response on consultation was there was no good reason why transactions void or voidable on the ground of non-age should be treated differently from those in any other area of the law.[15] We are currently reviewing restitution and recompense and would hope to put forward proposals that would remove some of the injustices that may arise in transactions which are void through incapacity of the participants or any other cause. Our provisional view is that:

90. Pending a review of restitution and recompense and the protection of third parties acting in good faith in void or voidable transactions, the existing law on transactions involving persons incapable by reason of mental disability of understanding their nature and effect should not be changed.

Land and necessary goods

7.14 There are statutory exceptions to the general rule described above. Where land is concerned the title of a purchaser who buys in good faith from an incapacitated person is protected once the transfer is registered in the Land Register in Scotland. The register cannot be rectified by reinstating the name of the incapacitated seller unless the purchaser acted fraudulently or carelessly.[16] The former owner will in general be entitled to compensation payable by the Keeper of the Land Register for not being able to recover his or her land. Compensation is not payable if the loss was caused by the former owner's fraudulent or careless behaviour.[17] The need for certainty in transactions involving interests in land in our view outweighs any injustice suffered by incapacitated owners in receiving compensation instead of a return of their property.

7.15 No such protection exists for purchasers from incapacitated owners where the title is registered in the Register of Sasines. Even after the purchaser has recorded his or her title the incapacitated owner may recover the property since the purchaser's title is null. Third parties deriving title from a purchaser are protected to a very minor extent. Section 46 of the Conveyancing (Scotland) Act 1924 provides that as long as a third party registers his or her title before the decree of reduction of the original transaction is recorded in the Register of Sasines the title is unchallengeable. There is Outer House authority however that this provision protects only persons acquiring rights between the granting of the decree of reduction and its recording.[18] The Sasine Register is to be replaced by the Land Register over a period of years. We do not think it necessary or desirable to propose reforms affecting only the Sasine Register which would probably prove quite complex yet have a limited life. Moreover, we doubt whether many heritable transactions are entered into by

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[14] Discussion Paper No 65, *Legal Capacity and Responsibility of Minors and Pupils*, (1985), para 5.93.
[15] *Report on the Legal Capacity and Responsibility of Minors and Pupils*, Scot Law Com No 110 (1987), para 3.33.
[16] Land Registration (Scotland) Act 1979, s 9(3).
[17] S 12(3)(n).
[18] *Mulhearn v Dunlop* 1929 SLT 59.

mentally incapacitated persons. Conveyancing remains almost exclusively the preserve of solicitors who take care to ensure that their clients understand the nature of any proposed transaction and assure themselves that their clients have capacity before proceeding.

7.16 Another statutory exception is the supply of goods that are reasonably necessary for ordinary living (termed "necessaries"). Section 3(2) of the Sale of Goods Act 1979 provides that:

> "Where necessaries are sold and delivered to a ... person who by reason of mental incapacity ... is incompetent to contract, he must pay a reasonable price for them".

Necessaries are defined as goods suitable to the condition in life of the person concerned and "to his actual requirements at the time of the sale and delivery".[19] The 1979 Act applies to England and Wales too and there are very similar provisions in Canada.[20] This provision is useful in that it enables mentally disabled people to acquire the basic necessities of life. Traders can supply these items with confidence since they are entitled to a reasonable price. In most cases of food, furnishings, fuel and clothes a reasonable price will be the market or contract price. But mentally disabled people are protected against exploitation since if they agreed to pay an unreasonable price their liability is restricted to a reasonable one.

7.17 One minor criticism of the existing law is that necessaries are defined by reference to the recipient's actual needs at the time of sale and delivery. The trader in order to take advantage of the statutory protection should enquire whether the recipient already has similar goods. For example, in case of a bed the trader ought to find out whether the mentally disabled person already has a suitable bed. This strikes us as quite unrealistic; enquiries would take much time and be seen as an impertinence to hose who wish to acquire goods. However, a trader who knows that the mentally disabled person does not need the goods in question should not be able to take advantage of him or her. The counter-argument in favour of the existing law is that a mentally disabled person who is a compulsive shopper, in the habit of ordering a bed every week, ought to be protected against his or her own folly. We propose that:

> **91. Suppliers of goods should be entitled to receive a reasonable price for necessaries sold and delivered to a mentally incapable person whether or not they are actually required by him or her at the time of sale and delivery unless the supplier knew that they were not required, and section 3(3) of the Sale of Goods Act 1979 should be amended accordingly.**

MANAGER OR GUARDIAN APPOINTED

7.18 We now turn to consider the position where a manager or guardian has been appointed to a mentally disabled person and the effects of such appointment on the person's existing transactions and capacity to transact in future. We look first at financial and property transactions which fall within the scope of the manager's powers and then at those outwith the manager's powers. Since mental health guardians and the proposed personal guardians have no functions in the financial area the effect of such appointments on capacity in relation to financial transactions is not discussed in this section. The effect of the

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[19] S 3(3).
[20] Robertson, *Mental Disability and the Law in Canada*, p 165.

appointment of a curator is discussed in the context of transitional problems at paragraphs 7.43 to 7.45. Finally we consider the effect of the appointment of a personal guardian on the mentally disabled person's capacity to make decisions in the personal welfare field.

Financial transactions within the scope of manager's powers

7.19 **The present law**. Transactions which were completed before appointment of the manager are dealt with as in the previous section. The transaction would be presumed to be valid. However, the manager appointed would be entitled to have the transaction reduced (ie annulled or set aside) on the grounds that the mentally disabled person lacked capacity at the time when he or she entered into it. There is some doubt as to the position of contracts which were entered into while capacity exists and which remain to be completed after incapacity has arisen. Where such a transaction involves performance by the mentally disabled person after he or she loses capacity it may be terminated. But the position is not so clear where no performance is required by the mentally disabled person after incapacity arises.[21]

7.20 The appointment of a tutor-dative to a person following cognition as insane was said in the nineteenth century to reduce his or her status to that of a pupil child. The person therefore ceased to have any legal standing or capacity and so could not validly enter into any future transaction.[22] This statement may not be correct or represent the present law. First, it is doubtful whether an interlocutor by a court appointing a tutor-dative after consideration of medical and other evidence has the same effect as cognition as insane by a jury. Cognition has been obsolete for many years, having been replaced by consideration of medical certificate of incapacity by a court, but when these two processes co-existed Fraser was of the opinion that they had different effects on status.[23] Secondly, Bell did not consider that even cognition had a completely incapacitating effect. His view was that the verdict raised a rebuttable presumption of insanity, but it was open to lead evidence to show that a subsequent transaction was done during a lucid interval.[24] Finally, tutors-dative in modern practice have been appointed solely in the personal welfare field and even these may have limited powers. It is not at all clear what effect such a limited appointment has on the capacity of a mentally disabled person in areas not covered by the powers conferred or in the separate field of financial affairs.

7.21 As far as the appointment of a curator is concerned Walker states[25] "the interlocutor appointing a *curator bonis* has the same effect as a 'proven' verdict of a jury in a cognition and is conclusive as to incapacity". McBryde doubts this and is of the view that the appointment may merely alter the normal presumption of sanity to a presumption of insanity. Evidence of capacity could still be led in relation to a particular transaction.[26] A curator has no power over the personal affairs of a mentally disabled person. According to Fraser an individual under curatory retains his status.[27] This may mean that he or she retains competence to make personal welfare and other non-financial decisions.

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[21] McBryde, *Contract*, pp 144-5.
[22] Fraser, *Parent and Child*, p 684-5.
[23] Fraser, *Parent and Child*, p 684.
[24] *Commentaries*, I 132.
[25] *Judicial Factors*, p 26.
[26] *Contract*, p 143.
[27] *Parent and Child*, p 682.

7.22 In England and Wales once a mentally disabled person's affairs have been taken over by the Court of Protection he or she is thought to be unable to enter into a valid contract, even if capacity in fact exists in relation to that particular transaction. The position is however not beyond doubt.[28]

7.23 In Canada if a mentally disabled person has been judicially declared incompetent to manage his or her affairs and has a committee of the estate appointed any contract the person makes thereafter is normally void. This is so whatever the actual capacity of the person or the other party's state of knowledge.[29] It has been suggested that his common law rule is limited to contract affecting property or imposing a positive obligation. Recent legislation may have altered the position. Any disposal of property by a person under committeeship is deemed to be void as against the committee if it was not made for full and valuable consideration, or the other party to the transaction had notice of the person's mental condition.[30] These provisions imply that certain contracts by a person under committeeship are valid.

7.24 The position under the Albertan Dependent Adults Act 1976 is not clear. The Act provides that a trustee may contract and deal with the part of the dependent adult's estate under his or her control[31] and that any contract by a personal guardian, or a trustee binds the adult and the estate.[32] Apart from the power to make a will notwithstanding the appointment of a trustee or personal guardian[33], there are no provisions setting out what (if any) capacity an adult retains following the appointment of a trustee.

7.25 In Victoria when a mentally disabled person has a financial manager appointed any subsequent transaction is void whatever the circumstances, unless legislation provides otherwise.[34] The Guardianship and Administration Board Act 1986 provides that a mentally disabled person to whom an administrator has been appointed is deemed incapable of entering into any contract or dealing with his or her property so far as under administration without the consent of the Board or the administrator.[35] Every dealing of the mentally disabled person affecting any part of the estate under administration is void and the money or property may be recovered by the administrator.[36] However, transactions for adequate value and in favour of persons who act in good faith and without knowledge of the appointment of the administrator are not affected.[37]

7.26 In New Zealand a mentally disabled person is incapable of entering into any contract or disposition in respect of property under court-appointed financial management. Any such transaction or disposition is avoidable by the person or manager.[38] There are four main exceptions. First, the court may grant leave to the disabled person to enter into a transaction if satisfied that it is for the person's benefit and he or she has an adequate understanding of

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[28] Anson, *Law of Contract*, (26th edn), p 207.
[29] Robertson, *Mental Disability and the Law in Canada*, pp 163-5.
[30] Robertson, pp 164-5.
[31] S 28.
[32] S 44.
[33] S 46.
[34] *Re Barnes* [1983] 1VR 605.
[35] S 52.
[36] 1986 Act, s 52(2).
[37] 1986 Act, s 52(3).
[38] Protection of Personal and Property Rights Act 1988, s 53(1),(2).

its nature.[39] Secondly, the manager may delegate part of the management of the property to the mentally disabled person in order to encourage financial self-reliance.[40] The person may transact with the delegated property although proof of his or her actual incapacity in relation to a transaction would avoid it. Thirdly, contracts by the mentally disabled person for necessaries are not avoidable.[41] Finally, the other party to a voidable transaction may by notice give the manager 28 days in which to decide whether or not to avoid it. If the manager does not avoid it within 28 days he or she is deemed to have adopted it.[42] Where a transaction is avoided the court may, on application by any party to the transaction or the manager, adjust the rights of the parties. The court may refuse to grant relief or grant partial relief only against someone who has received money or property in good faith and who has altered his or her position in reliance on the receipt.[43]

7.27 **Discussion and proposals for reform**. If a manager is appointed with powers over all or part of a mentally disabled person's property or an order is made directing that a particular transaction be carried out, what capacity should the mentally disabled person have in relation to property falling under the manager's powers or that transaction? The options are that the person should be deemed to have no capacity or that there should be a presumption of incapacity. The arguments in favour of the former seem stronger. First, the position of the manager would be undermined if the mentally disabled person could enter into transactions which might be upheld. Declaring the person to be incapable is a simple certain rule so that the manager, the disabled person and those transacting with the person in the knowledge that a manager had been appointed are more likely to be aware of the legal position. In order to reduce a transaction the manager would simply have to show that he or she had been appointed. The deemed incapacity could not be challenged by evidence suggesting that the person in fact had capacity. Secondly, under our proposals in Part 4 a manager would not be appointed where an order less restrictive of the mentally disabled person's capacity would suffice and if a manager is appointed he or she is given the minimum powers that the circumstances of the case require. These proposals reduce the likelihood that a mentally disabled person will in fact be perfectly capable of a transaction which falls within the manager's powers. Thirdly, the scope of the manager's powers can be altered by review of the order and the proposed scheme calls for periodic review. These provisions go some way towards countering the objection that the mentally disabled person might have recovered capacity while under management.

7.28 The main argument in favour of a presumption of incapacity is that it can be rebutted by evidence of capacity and it caters for lucid intervals. If the interval looks as if it is going to be of short duration it might not be thought worthwhile applying to the court for review of the manager's appointment or his or her powers.

7.29 A related issue is whether the court or other appointing body or the manager should be empowered to authorise the mentally disabled person to enter into a particular transaction. We see no reason why the court or appointing body should not have this power. It would simply be another, and in some cases a neater, way of modifying the scope of the manager's authority. Authorisation of a particular transaction by the manager also fits

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[39] S 53(3).
[40] S 36(2).
[41] S 53(2).
[42] S 53(4), (5).
[43] S 53(6)-(8).

well in the philosophy of the scheme. The manager has under our proposals a duty to encourage the mentally disabled person to exercise and develop his or her capacity and allow him or her to manage part of the estate. Allowing a handicapped young adult to enter into a lease for residential accommodation with the manager in the background to provide support would be useful. People who had been used to handling their own finances before a manager was appointed would feel less helpless if they could have some financial responsibility. Even severely disabled people could be permitted a small allowance to buy themselves extra comforts. Where a transaction or act has been permitted by the manager or the court (or other appointing body), the act or transaction should not be challengeable on grounds of the mentally disabled person's incapacity. This would protect third parties and encourage them to deal with the mentally incapable person.

7.30 We provisionally propose that:

92. If a manager has been appointed to manage all or part of the estate or affairs of a mentally disabled person the mentally disabled person should be deemed to be lacking any capacity to transact in relation to any estate or matters within the authority of the manager. But where the transaction is carried out by the mentally disabled person with permission of the manager or the court or other body it should not be challengeable on the ground of incapacity of the mentally disabled person.

7.31 It is clearly impossible to prevent mentally disabled people from carrying out transactions. What then should be the position if a transaction is effected? The obvious, and in our view the best, solution is that the same rules should apply as apply to an incapacitated person to whom no manager has been appointed. In other words deemed incapacity should have the same effect as actual incapacity. Thus a transaction should be void and the rights of the parties to the transaction and others with derivative rights should be adjusted according to the existing law.[44] We therefore propose that:

93. Where a mentally disabled person is deemed to be lacking capacity to deal with property or enter into a particular transaction the position of the parties to the transaction and those deriving rights from them should be the same as if the mentally disabled person was in fact incapable of entering into that transaction.

7.32 It would be possible to prevent a mentally disabled person from entering into transactions involving land by registering in the Register of Inhibitions and Adjudications (the personal register) notice of the appointment of a manager. This notice would in effect warn potential purchasers, creditors and other that the mentally disabled person was deemed to have no capacity to transact in relation to his or her heritable estate and that any transaction by the mentally disabled person would be void. Registration in the personal register would be a facility rather than a mandatory requirement. Where the mentally disabled person's estate did not include any heritable property there would be no need to register a notice. This notice would protect innocent parties from the worry and expense of having the transaction reduced and possibly being unable to recover the money. On the other hand no notice of a curator's appointment is registered. The curator simply takes over

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[44] See paras 7.8 to 7.17.

the management and control of the heritable and other estate of the mentally disabled person. This seems not to have given rise to problems arising from unauthorised transactions by the mentally disabled person. Introducing a new form of notice may simply complicate the law in order to remedy a non-existent problem. We seek views on the following question from those with practical experience in this area.

94. Should a notice appointing a manager to a mentally disabled person be registrable in the Register of Inhibitions and Adjudications?

7.33 It would be possible to extend the effect of a notice to moveable property. But we are definitely not in favour of this. We do not think it would be practicable or desirable to require persons dealing with the mentally disabled to search the Register of Inhibitions and Adjudications, or a new register set up for this purpose. Heritable transactions are different since the personal register is searched as a matter of course to see whether notices of other kinds have been registered.

Personal welfare decisions within scope of guardian's powers

7.34 So far we have considered the question of capacity in relation to property and financial affairs. We turn now to look at capacity in the personal welfare field.

7.35 The effect of an appointment of a tutor-dative to a mentally disabled person may be that the person ceases to have capacity to make legally valid decisions, but the position is not free from doubt.[45] The grounds for appointment of a mental health guardian are that the patient is suffering from mental disorder of a nature or degree which merits his or her reception into guardianship and that it is necessary in the interests of the welfare of the patient that he or she should be under guardianship.[46] The guardian's powers are restricted to specifying where the patient is to live, requiring the patient to attend for treatment, education, etc, and requiring access by doctors, social workers and others to be given to the patient.[47] The guardian is entitled to exercise these powers to the exclusion of any other person.[48]

7.36 The Albertan and Victorian legislation is silent as to the effect of the appointment of a personal guardian on the capacity of a mentally disabled person in matters lying within the scope of the guardian's powers. In New Zealand the position seems to be that the mentally disabled person has no such capacity. Although there are no explicit provisions, section 4 of the Protection of Personal and Property Rights Act 1988 provides that except as provided by or under the Act or any other enactment the capacity of any person subject to an order under the Act shall be the same as any other person. However, the main ground for appointment of a personal guardian is that the person "lacks, wholly or partly, the capacity to understand the nature, and to foresee the consequences, of [personal welfare] decisions".[49]

7.37 What should be the effect of an appointment of a personal guardian on the mentally disabled person's capacity within the areas covered by the guardian's powers? One option is

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[45] See para 7.20.
[46] Mental Health (Scotland) Act 1984, s 36.
[47] 1984 Act, s 41.
[48] 1984 Act, s 41(2).
[49] 1988 Act, s 6(1)(a). A personal guardian may also be appointed if the mentally disabled person has capacity to make a decision but is wholly unable to communicate that decision.

to adopt the same approach as proposed for the appointment of a financial manager in the field of financial affairs – that the person should be deemed to have no capacity.[50] The arguments advanced there – not undermining the authority of the manager, simplicity and certainty, the likelihood that the powers conferred will match the person's lack of decision making – apply with equal force in the personal welfare field. Another option is to sidestep the issue of capacity by providing that any decision of the personal guardian in respect of matters within his or her authority should prevail over that of the mentally disabled person. There are several advantages in the second option. The personal guardian is free to leave some decisions to the mentally disabled person or those treating or providing services to that person. But the validity of these decisions would however be challengeable unless there were express statutory provisions validating them.[51] With the exception of medical treatment most personal welfare decisions are not irrevocable. The personal guardian can therefore override the mentally disabled person's decision at a later date without too much harm being done in the meantime. Furthermore, in financial transactions the rights of third parties deriving title from the original parties to the transaction have to be considered thus bringing in the issue of capacity. These considerations are generally absent in the area of personal welfare.

7.38 In order to elicit views we ask the following questions.

95. Where a personal guardian has been appointed to a mentally disabled person should it be provided that in relation to matters within the scope of the guardian's authority

(a) the mentally disabled person should be deemed to have no capacity to make decisions, or

(b) any decisions of the personal guardian should prevail over the decision of the mentally disabled person?

Transactions outwith scope of manager's or guardian's powers

7.39 Here we look at the situation where the transaction lies outwith the scope of the manager's or personal guardian's powers. This may arise because a transaction involves the mentally disabled person's personal welfare but only a financial manager has been appointed or the other way round. The appointment of managers and guardians with limited powers could also give rise to the mentally disabled engaging in transactions outwith the scope of the appointee's authority. We consider first the issues in the area of financial transactions.

7.40 If a manager was appointed with powers over part only of the estate or certain transactions were not included within the scope of the manager's authority, what should the mentally disabled persons capacity be taken to be in relation to other transactions or transactions involving the other part of his or her estate? For convenience we refer to both of these as "excluded transactions". The options are:

(a) A presumption of incapacity.

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[50] Proposal 92 at para 7.30.
[51] See para 7.29 for validating delegated financial matters.

(b) A presumption of capacity.

(c) No presumption of incapacity.

We are not in favour of the first option – a presumption of incapacity even though this could be rebutted by evidence of understanding of the nature and effects of the excluded transaction in question. The court has considered the extent of the mentally disabled person's mental disability and has come to the conclusion that this warrants only partial management or that a manager is not needed in respect of certain transactions. It would defeat the idea of partial management and run counter to the whole philosophy of the scheme were the mentally disabled person to be presumed by law to have no capacity in excluded transactions. On the other hand the second option, a presumption of capacity, probably goes too far the other way although it is perhaps the most logical. We are attracted by the third option, an express provision that there would be no deemed or presumed incapacity in relation to excluded transactions. Capacity would therefore be a question of fact to be established by evidence in the same way as if no manager had been appointed. Accordingly we propose that:

96. It should be provided that a mentally disabled person should not be presumed to be incapable of entering into a transaction in areas not falling within the scope of the manager's appointment.

7.41 It follows from the above proposal that where only a personal guardian had been appointed then the mentally disabled person would not be presumed to be incapable of any transaction involving his or her property or financial affairs. If this was not desired a manager would have to be appointed in addition to the personal guardian. We understand that a large number of joint appointments are made in Alberta and Victoria.

7.42 Turning to the personal welfare field what should be the effect of the appointment of a personal guardian with limited powers on the mentally disabled person's capacity to make decisions in areas outwith the guardian's authority? The answer depends on the approach adopted for areas within the personal guardian's authority.[52] If the approach is to be deemed incapacity (as proposed for financial managers) then we would suggest the same answer as for areas outwith the authority of the financial manager – no deemed or presumed incapacity. On the other hand, if the answer is that the guardian's decision merely overrules any decision by the mentally disabled person, then nothing needs to be done in relation to matters outwith the guardian's authority since he or she is not entitled to make a decision in those areas.

Transitional provisions

7.43 Even if our proposed schemes for personal guardians and financial managers are implemented many mentally disabled people will have had curators, tutors-dative or mental health guardians appointed before the commencement of the legislation. What is to be the effect of such appointments on the mentally disabled person's capacity after commencement in the personal welfare and financial fields?[53]

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[52] See paras 7.34 to 7.38.

[53] On the assumption that the appointment continues. Other options are discussed in Part 8.

7.44 In the case of a curator one option is that the mentally disabled person should be deemed to have no capacity in relation to financial transactions. A person subject to curatory would therefore be in the same position as one subject to a financial manager with full powers. The law would after commencement be the same for both. Another option is that the mentally disabled person subject to curatory should be presumed to have no capacity in relation to financial transactions. This is the position under the present law. We tend to prefer it because the court in appointing a curator could not have made an appointment with restricted powers. Deeming people to have no capacity in the whole financial field is justifiable only where the court has actually considered the matter and come to the conclusion that full powers were necessary. The disadvantage of our preferred view is that the law would not be the same for curators and managers. However, this would be a transitional problem because curatories existing at the date of commencement of the new regime will eventually come to an end.[54] We propose that:

97. Where a curator bonis has been appointed to a mentally disabled person that person should be presumed to be incapable of any transaction involving the estate and affairs under the curator's management.

7.45 The effect (if any) of an appointment of a mental health guardian on the patient's capacity in the personal welfare field should we think be left to the existing law. The guardian would continue to be entitled to exercise the statutory powers notwithstanding any contrary decision by the patient. Tutors-dative have in recent practice been confined to the personal welfare field and have only been appointed with limited powers. Whatever solution is adopted for partial personal guardians[55] should also be adopted for tutors-dative.

MARRIAGE AND WILLS

7.46 The final section of this Part deals with the capacity of mentally disabled people to get married and make a will. These "transactions" have traditionally been regarded as somewhat different from other contracts and transactions.

Marriage

7.47 **Capacity to marry**. In Scotland a marriage is valid provided each person involved was at the time of celebration mentally capable of understanding the nature of marriage and of consenting to it. Marriage is a fairly simple concept whose broad effects are widely known. Participants therefore require only limited mental capacity in order to be able to enter into a valid marriage.[56] The appointment of a curator or mental health guardian to a mentally disabled person does not necessarily mean that the person is incapable of entering into a valid marriage. The appointment of a tutor-dative to a mentally disabled person has been stated to reduce his or her status to that of a pupil.[57] If this is correct (and it has been doubted)[58] then a person to whom a tutor-dative has been appointed will be incapable of entering into a valid marriage. A marriage where one or both of the couple was mentally

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[54] It might be provided that all curators should be converted automatically into financial managers on commencement or that they would have to apply for appointment as financial managers within a specified period otherwise their appointment as curators would lapse. See Part 8.
[55] See Proposal 95 at para 7.38.
[56] *Long v Long* 1950 SLT (Notes) 32.
[57] See para 7.20.
[58] See para 7.20.

incapable of entering into it is void.[59] In other jurisdictions the level of capacity required for entering into a valid marriage is much the same as in Scotland.

7.48 In a previous discussion paper *Family Law: Pre-consolidation Reforms*[60] we considered nullity of marriages on the ground of defective capacity or consent. We proposed[61] that:

> "A marriage should be void on the ground of a party's mental incapacity, whether temporary or permanent, only if the party is at the time of the marriage ceremony incapable of understanding the nature of marriage or of giving consent to marriage.
>
> A person should be conclusively presumed not to have been under a temporary mental incapacity at the time of the marriage ceremony if he or she does not bring an action for declarator of nullity of marriage as soon as is reasonably practicable after regaining capacity."

These proposals were generally accepted on consultation and accordingly we do not make any further proposal here. However, we think the effect of the appointment of a personal or financial "guardian" on capacity to marry should be clarified. We are not in favour of a mentally disabled person being automatically prohibited from marriage simply because of the appointment of a curator, financial manager, personal guardian, mental health guardian or tutor-dative or even there being a presumption of incapacity arising from any such appointment. The degree of mental capacity required for marriage is very different from that required for managing financial affairs or other personal welfare decisions such as where to live or whether to have a particular medical treatment. Accordingly we propose that:

> **98. A person should neither be deemed nor presumed to be incapable of entering into a valid marriage solely on the ground that a curator, financial manager, personal guardian, tutor-dative, or mental health guardian has been appointed to him or her.**

7.49 **Role of personal guardian or financial manager**. Should a curator or other "guardian" appointed to a mentally disabled person have a role in relation to the mentally disabled person's marriage or intended marriage? Section 5 of the Marriage (Scotland) Act 1977 deals with objections that can be made to a proposed marriage. The objection has to be submitted to the district registrar to whom notice of intention to marry has been given. Where the objection is on the ground that "one or both of the parties is or are incapable of understanding the nature of a marriage ceremony or of consenting to marriage" a medical certificate has to accompany the objection. The registrar notifies the Registrar General and awaits a decision on whether the marriage may proceed. Those dissatisfied with the Registrar General's decision that a legal impediment exists or does not exist may apply to the court for a decision.[62] Where a marriage has taken place a curator or financial manager might be regarded as having an interest to bring an action for declarator of nullity on the basis that the estate has become liable to aliment the spouse.[63]

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[59] *Park v Park* 1914 1 SLT 88.
[60] No 85 (1990).
[61] Proposal 7(b) at para 3.19.
[62] Clive, *Husband and Wife*, (2nd edn) pp 39-40.
[63] Clive, *Husband and Wife*, (2nd edn) p 97.

7.50 In England and Wales marriage invalidates a will made before marriage unless the will provides otherwise in relation to a particular marriage.[64] For this and other reasons the Court of Protection takes a keen interest in the matrimonial intentions of patients. The receiver is under a duty to report any intended marriage to the court and give his or her views as to the desirability or otherwise of the marriage.[65] The court may authorise the receiver to take steps to prevent marriage by entering a caveat with the appropriate superintendent registrar.[66] The Court of Protection may order a new will to be drawn up and executed on behalf of the patient if a marriage takes place.[67]

7.51 In Alberta a welfare guardian has no power to consent to marriage on behalf of a mentally disabled person, nor is the guardian's consent necessary to the marriage taking place.[68] A guardian may be granted authority "to decide whether the dependent adult should apply for any licence"[69] but it is thought unlikely that this includes a licence to marry.[70] No person may issue a marriage licence or solemnise the marriage if the existence of a committee of the estate, trustee, guardian or certificate of incapacity is known or suspected. However, if a physician certifies that the mentally disabled person has sufficient capacity to understand the nature and effects of marriage, then the procedural prohibition no longer applies.

7.52 In New Zealand the Protection of Personal and Property Rights Act 1988 expressly provides that neither the court nor a welfare guardian or financial manager has powers in relation to marriages of mentally disabled persons.[71]

7.53 We are not in favour of encouraging interference in matters so personal as marriage and would prefer to leave the law as it is. The court should, as at present, decide whether a curator or other appointee had sufficient interest to sue in a nullity action, but there would be no specific duty to take action. Similarly any person, including a curator or other personal or financial guardian, should be entitled to lodge an objection to an intended marriage under the Marriage (Scotland) Act 1977 on the ground that one of the couple is incapable of understanding the nature of, or consenting to, marriage. However, there should be no specific duty to object or consider objecting. The position is different in those jurisdictions (such as England and Wales) where marriage revokes a will. In such jurisdictions a positive duty to prevent a marriage can be justified on the basis that if nothing is done the mentally disabled person's relatives and beneficiaries (who have no title to se for annulment of the marriage) will lose any benefit under the will.

7.54 We propose that:

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[64] Wills Act 1837, s 18.
[65] Gostin, *The Court of Protection*, p 42.
[66] Marriage Act 1949, s 29.
[67] Mental Health Act 1983, s 96(1)(e).
[68] Robertson, *Mental Disability and the Law in Canada*, p 144.
[69] Dependent Adults Act 1976, s 11(1) as amended in 1985.
[70] Robertson, p 144.
[71] S 18.

99. (1) There should be no change in the existing law whereby a curator, mental health guardian or tutor-dative appointed to a mentally disabled person may object to his or her intended marriage under section 5(4)(d) of the Marriage (Scotland) Act 1977 and may be regarded as having sufficient interest to bring an action for declarator of nullity of the marriage, but is under no duty to take either step.

(2) If personal guardians and financial managers are to be introduced they should be in the same position as curators in relation to matters in paragraph (1) above.

Making a will

7.55 In Scotland a will made by an insane person is invalid. In order to make a valid will a mentally disabled person should be capable of understanding the nature and effect of the document. As Lord Haldane said in *Sievewright's Trs v Sievewright*[72]:

> "The question whether there is such undoundness of mind as renders it impossible in law to make a testamentary disposition is one of degree. A testator must be able to exercise a rational appreciation of what he is doing. He must understand the nature of his act.... The question is simply whether he understands what he is about".

The testator may suffer from delusions, but as long as they do not appear to have influenced the terms of the will the will is valid. A mentally disabled person under curatory may have sufficient capacity to make a will. The appointment of a curator at best gives rise to a presumption of incapacity which those seeking to uphold the will may rebut by evidence of the testator's mental state and understanding when making the will. We understand that it is common practice for a mentally disabled person under curatory who wishes to make a will to be examined by a medical practitioner or psychiatrist in order to find out whether sufficient testamentary capacity exists.

7.56 In Alberta the test for testamentary capacity is much the same as in Scotland. Section 46 of the Dependent Adults Act 1976 provides that a guardianship or trusteeship order is not of itself sufficient to establish lack of testamentary capacity. In these circumstances, however, the onus on those seeking to uphold the will to prove testamentary capacity is much heavier.[73] Neither the courts nor a trustee or committee of the estate may make or revoke a will on behalf of a mentally disabled person.[74]

7.57 In Victoria the Guardianship and Administration Board Act 1986 contains various provisions about wills. The Board may examine the will of any mentally disabled person to whom a guardian or administrator has been appointed.[75] The Board is not empowered to make a will for a mentally disabled person, nor has the administrator the authority to do so.[76] Making a will is not something a mentally disabled person is deemed incapable of

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[72] 1920 SC (HL) 63 at p 64.
[73] Rpbertson, *Mental Disability and the Law in Canada*, p 177.
[74] Robertson, pp 84-85.
[75] S 54.
[76] S 50(2).

because of the appointment of a guardian or administrator.[77] Testamentary capacity would seem to be a question of fact in each case.

7.58 In New Zealand a mentally disabled person is not incapable of making a will simply because a manager has been appointed[78], but the court may order that a mentally disabled person shall make a will only with leave of the court and in this case a will without leave is automatically invalid.[79] An existing will may be examined by the court and if it appears that the will was not made when the mentally disabled person had testamentary capacity and does not express the present wishes of the mentally disabled person the court can authorise the manager to make a new will.[80]

7.59 We do not consider here whether the court, a curator or financial manager should have power to make or revoke a will on behalf of a mentally disabled person. The reason is that we have already consulted on this in our examination of the law of succession. Although a few of those consulted were in favour of introducing such powers, most were firmly against. In our *Report on Succession* we recommended against introducing such powers.[81]

7.60 We think that where a mentally disabled person is not subject to guardianship or financial management orders the existing law is satisfactory. Capacity to make a will should be a question of fact in each case. The main issue therefore is whether the appointment of a personal guardian, financial manager or similar appointee should give rise to deemed incapacity to make a will, presumed incapacity to make a will or have no effect one way or the other.

7.61 We are not in favour of deeming a mentally disabled person to have no testamentary capacity simply because a curator or financial manager has been appointed. First, inability to manage one's affairs is different from inability to give directions as to how one's estate is to be divided on death. In practice many valid wills are made by those subject to curatory. Secondly, the testator's mental state may have improved since a curator or manager was appointed, yet unless the appointment was recalled or reviewed any will would be invalid. This would impose considerable delay and expense on the estates of those mentally disabled people wishing to make wills. Thirdly, the philosophy of the proposed financial management scheme is that the least restrictive order should be made and that managers should only be appointed in areas where management is necessary. It is difficult to square these concepts, particularly that of partial management, with complete negation of testamentary capacity. Finally, neither Victoria, Alberta nor New Zealand adopt this approach. Indeed their legislation expressly provides that testamentary incapacity does not arise simply by virtue of the appointment of a guardian, trustee, administrator, manager or whatever.

7.62 The arguments against deeming a mentally disabled person to have no testamentary capacity where a personal guardian or mental health guardian has been appointed are even stronger. These persons are appointed purely for personal welfare purposes and have no functions in the area of financial affairs and property.

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[77] S 52(1).
[78] Protection of Personal and Property Rights Act 1988, s 54(1).
[79] S 54(2).
[80] S 54(5), (6).
[81] Scot Law Com No 124 (1990), para 4.80.

7.63 The choice lies in our view between the appointment of a curator or financial manager giving rise to a rebuttable presumption of lack of testamentary capacity or it giving rise to no presumption at all. The former represents the existing law and seems more sensible than the latter. A presumption is useful if it is likely to be true in the majority of cases. We think that people who are unable to manage their financial affairs and property are more likely than not to be incapable of making a valid will. The presumption should be less or non-existent where a manager was appointed to part of the mentally disabled person's estate only, since there has been a judicial determination that the person had capacity to manage at least part of his or her affairs. Where a personal guardian, tutor dative or mental health guardian has been appointed we think there should be no presumption at all since the court in making such an appointment has not considered the mentally disabled person's capacity in the field of financial or property matters. We propose that:

100. (1) The appointment of a financial manager with limited powers, personal guardian, tutor-dative, or mental health guardian to a mentally disabled person should not give rise to any presumption of lack of testamentary capacity.

(2) It should be provided that the appointment of a curator or financial manager with full powers to a mentally disabled person should give rise to a rebuttable presumption that the person lacks testamentary capacity.

Part 8 General Effect of Proposals

8.1 This Part looks at the general effect of our proposals and the way in which they might be implemented by legislation. We also consider what should happen to persons appointed as curators, tutors-dative and mental health guardians once any legislation introducing personal guardians and financial managers comes into force.

8.2 On many of the issues contained in this discussion paper we have formed no provisional view and merely invited comments. It is therefore not possible to say what the general effects of our proposals might be. One possible outcome would be replacing the present system by a comprehensive new system of personal guardians and financial managers whose powers, duties and responsibilities would be set out in legislation. The legislation required might be much simpler than the number of proposals and questions (100 in all) might suggest. Many provisions could apply to personal guardians and financial managers. These would deal with matters such as procedure for appointment, the principle of minimum intervention, and the powers of the court (or other appointing body) to intervene or remove the manager or guardian.

8.3 The legislation might be further simplified by adopting a new approach to powers of attorney granted to enable a person to look after the granter's financial affairs and health care in the event of his or her later incapacity. The approach adopted in the discussion paper is the traditional one of regarding them as powers of attorney with the added statutory effect of continuing after the granter's incapacity. As a consequence of this continuing effect several differences from ordinary powers of attorney are proposed in order to provide better protection for granters. An alternative approach which would intergrate financial and health care attorneyship with personal guardianship and financial management would be to regard the former as privately appointed versions of the latter. A crude analogy would be to executors-nominate and executors-dative. The analogy is crude since granters would have much greater freedom to vary the powers and duties of financial or health care appointees in the document of appointment than they have in relation to executors. If this alternative approach were adopted it would be sensible to replace the term "attorneys" with some other term which emphasises their relationship with financial managers and personal guardians. Possible replacements for "attorney" in the financial field would be "financial appointee" or "financial representative", and in the health care and personal welfare field "personal welfare appointee" or "personal welfare representative". These terms would be restricted to those people whose appointments did not lapse as a result of the later incapacity of the granter.

8.4 Another general concern is that of transitional provisions. If personal guardians and financial managers are introduced what should happen to the many curators, mental health guardians, tutors-dative appointed before the relevant legislation comes into force? One option would be that all previous appointments should lapse on commencement. This would cause considerable disruption to arrangements made for the benefit of the mentally disabled people involved and expense to their estates in having new personal guardians and

financial managers appointed. Its only advantage would be to make a clean break with the past. We do not favour it. Another simple approach would be to allow curators, tutors-dative and mental health guardians to continue as under the existing law. They would simply continue to exercise their existing functions until their appointments terminated on the death of the mentally disabled persons or otherwise. There would be no abrupt break with the past. But for many years there would be two systems, the old and the new, operating side by side. This may result in confusion for those having to deal with the mentally disabled. The way forward we prefer is that on the commencement date of the legislation those appointed under the previous law would be automatically transformed into the new type of appointees. Thus a mental health guardian would become a personal guardian with powers limited to those set out in the Mental Health (Scotland) Act 1984, a tutor-dative would become a personal guardian with the powers conferred on him or her by the original order of appointment and a curator would become a financial manager with full powers. Although there would be no change in the new appointee's powers the new provisions relating to the manner in which the powers were exercised would apply. Thus a curator who became a financial manager would be obliged to consult before exercising the powers and to encourage and assist the mentally disabled person to make the full use of his or her capacity. Further transitional provisions will obviously be required but it is difficult to see what will be needed until the shape of the legislative changes becomes clearer.

LIST OF PROPOSALS AND QUESTIONS

Part 2 Personal Guardianship

1. It should cease to be competent to appoint a tutor-at-law to a mentally disabled person and accordingly the Curators Act 1585 should be repealed.

(Paragraph 2.28)

First option – retention with amendment of

Tutors-dative and mental health guardians

2. If tutors-dative are to be retained:

   (a) the application for appointment of a tutor-dative to a mentally disabled person should be intimated to the regional (or islands) council in whose area the person resides.

   (b) their functions should be confined to the field of personal welfare,

   (c) either the Court of Session or the sheriff courts should have power to appoint tutor-dative, and

   (d) all appointments of tutors-dative should be notified to the Mental Welfare Commission for Scotland by the clerk of the court making the appointment. The Commission should have the same functions in respect of tutors-dative as they have in respect of guardians appointed under the Mental Health (Scotland) Act 1984. The appointment should also be intimated to the regional (or islands) council.

(Paragraph 2.33)

3. If mental health guardianship is to be retained:

   (a) the sheriff in approving a guardianship application should have power on application to decline to grant all of the powers specified in section 41(2) of the Mental Health (Scotland) Act 1984, to grant them subject to amendments, or to grant additional powers in the field of personal welfare. Any power granted may be subject to such conditions or restrictions as seem appropriate.

   (b) the sheriff should have power to grant the person proposed as guardian in the application such interim powers as seem necessary pending the determination of the application.

   (c) the welfare ground for a guardianship application should be changed from guardianship being necessary in the interests of the welfare of the patient to

      (i) the patient's welfare being at risk or likely to be at risk if a guardian is not appointed, and

(ii) the risks being sufficiently serious to warrant guardianship as against other course of action, and

(iii) the risks are likely to be alleviated to a substantial extent by guardianship.

(d) the mental health officer should cease to have a veto on a guardianship application. The nearest relative of a mentally disabled person should be entitled to request the local authority to lay an application before a sheriff for approval. The mental health officer should be entitled to present a report, comment on the application and should be given an opportunity to make representations at any hearing.

(e) it should be provided that it is not within the powers of a guardian to require the patient to reside in a hospital in circumstances where detention under the Mental Health (Scotland) Act 1984 would be appropriate.

(f) the sheriff should be empowered on application by a guardian to grant to the guardian such ancillary or supplementary powers as are required to enable the guardian to put his or her decisions into effect. These powers should be granted only if the sheriff is satisfied that they are necessary and that all other reasonable courses of action have proved ineffective.

(g) a mental health guardian should be a specified individual likely to have close personal contact with the mentally disabled person. It should cease to be competent to appoint the local authority, or one of its departments or directors as guardian.

(Paragraph 2.42)

Second option – abolition of tutors-dative and

Retention with amendments of mental health guardians

4. It should remain competent to appoint tutors-dative to mentally disabled people, unless new statutory personal guardians are to be introduced.

(Paragraph 2.48)

Third option – new statutory personal guardians replacing

Tutors-dative

and mental health guardians

5. (1) If personal guardianship is to be introduced the court or other appointing body should have power to appoint a personal guardian or make some other order relating to personal welfare only if it is satisfied that:-

(a) the person in question lacks wholly or partly the capacity to understand the nature of and to foresee the possible implications of personal welfare decisions or has such capacity but is unable to communicate or act consistently in accordance with such decisions, and

(b) the appointment of a personal guardian or the making of some other order would result in a substantial benefit to, or necessary protection of, the person.

(2) The fact that the person has acted or intends to act in a way an ordinary prudent person would not act should not by itself be evidence of lack of capacity.

(Paragraph 2.62)

6. If personal guardianship is to be introduced:

(a) The court or other appointing body should be satisfied that the proposed guardian is suitable. The wishes of the disabled person should be taken into account insofar as is reasonable and practicable to do so.

(b) The personal guardian should be a single individual or two or more individuals, but it should not be competent to appoint a partnership, company, incorporation or local authority. Where joint guardians are appointed they should be required to consult among themselves except in an emergency. Any third party should be entitled to rely on a consent, approval or decision by any one joint guardian.

(c) It should be competent to appoint an individual to act as an alternate personal guardian. On the death, incapacity, removal or resignation of the guardian the alternate should become personal guardian without further procedure.

(d) It should be competent to appoint a named social worker from the regional (or islands) council's social work department as personal guardian. The named guardian would be required to exercise his or her functions personally.

(Paragraph 2.69)

7. If personal guardianship is to be introduced any person with an interest (including the regional (or islands) council and the Mental Welfare Commission for Scotland) should be entitled to apply to the court or other appointing body for a personal guardian to be appointed to a mentally disabled person. The council should be under a duty to apply where a personal guardian is needed and no other suitable person is applying.

(Paragraph 2.71)

8. If personal guardianship is to be introduced:

(1) the court or other appointing body should, on application, have power:-

(a) to make one or more orders (called personal orders) to deal with a specific issue,

(b) to appoint a personal guardian (called a limited personal guardian) whose powers would be limited to those specified in the order,

(c) to appoint a personal guardian (called a full personal guardian) with the powers a parent has in relation to his or her pupil child.

(2) In appointing a full or limited guardian the court should have power to modify the powers that would otherwise be conferred or grant them subject to conditions or restrictions.

(3) A full or limited personal guardian should not have power to make any decision relating to the entry into marriage of the mentally disabled person, the dissolution of his or her marriage or the adoption of his or her children or to inflict corporal punishment upon the mentally disabled person.

(4) The court or other appointing body should be under a duty to choose the least restrictive remedy consistent with safeguarding the rights of the mentally disabled person and accordingly should not appoint a guardian unless one or more personal orders were insufficient to meet the needs of the mentally disabled person; and when appointing a guardian should specify the minimum number of powers necessary.

(Paragraph 2.80)

9. (1) If personal guardianship is to be introduced it should be provided that a guardian appointed to a mentally disabled person has a responsibility to safeguard and promote the person's welfare within the areas of personal welfare covered by the powers conferred on appointment.

(2) Should a personal guardian's liability for exercising or failing to exercise the powers conferred be governed by

(i) the existing law of delict, or

(ii) a new statutory provision along the lines that a personal guardian should be liable for exercising or failing to exercise the powers conferred only if he or she acted without reasonable care or failed to act when it would have been reasonable to have acted?

(Paragraph 2.84)

10. If personal guardianship is to be introduced any obligation to a third party entered into by a personal guardian within the scope of his or her authority should bind the mentally disabled person and not the guardian personally as long as it was made clear that the obligation was entered into in a representative capacity.

(Paragraph 2.85)

11. If personal guardianship is to be introduced personal guardians should when exercising their powers do so according to the mentally disabled person's best interests. The personal guardian should be under a duty before exercising a power to consult so far as it is practicable to do so with the disabled person and his or her family or carers and any person appointed to look after his or her financial affairs, and have regard toany wishes expressed by the disabled person while mentally capable.

(Paragraph 2.87)

12. If personal guardianship is to be introduced personal guardians should be subject to supervision by the Mental Welfare Commission for Scotland.

(Paragraph 2.90)

13. (1) If personal guardianship is to be introduced personal guardians should not be permitted to charge fees.

(2) A guardian should be entitled to reimbursement from the estate of the mentally disabled person of any outlays reasonably incurred in the exercise of his or her functions.

Views are sought on whether a regional (or islands) council should be entitled to reimbursement of the expenses of its application for appointment of a personal guardian or its administrative costs of acting as guardian.

(Paragraph 2.93)

14. If personal guardianship is to be introduced:

(a) an order appointing a personal guardian should terminate automatically on the date specified by the appointing authority in the order, being a date not later than five years after the date of the order.

(b) The court or other appointing body should have power to renew the guardianship order in its original terms or to vary it, and any renewal or varied order should last for the period specified by the court or other appointing body in the order.

(c) The automatic termination and powers of renewal or variation set out above should be without prejudice to the power of the court or other appointing body to vary or recall an order at any time on application by any person having an interest.

(Paragraph 2.95)

15. The court or other appointing body, on application by any person interested in the welfare of a mentally disabled person should be empowered to give directions to the personal guardian as to the exercise of his or her functions.

(Paragraph 2.96)

16. If personal guardianship is to be introduced an immediate relative (parent, child or spouse) of a mentally disabled person should not be that person's guardian simply by virtue of relationship. The relative should have to be appointed as personal guardian in accordance with the scheme set out in Proposals 5 to 15 above.

(Paragraph 2.98)

17. If personal guardianship is to be introduced a person nominated by a parent (whether or not the parent had been appointed personal guardian at the time of nomination) to be personal guardian of his or her mentally disabled adult child on the parent's death should not become the personal guardian simply by virtue of the nomination.

(Paragraph 2.101)

18. Should sections 106 and 107 of the Mental Health (Scotland) Act 1984 be replaced by provisions which make it an offence for a person to have unlawful sexual intercourse or indulge in sexual activities with a mentally disabled person in circumstances which amount to exploitation or abuse?

(Paragraph 2.110)

19. (1) Would giving powers to a personal guardian to ensure that a patient who had been detained but was discharged continued to take medication or other treatment prescribed for his or her mental disorder be a useful alternative to the leave of absence and recall provisions in section 27 of the Mental Health (Scotland) Act?

(2) Should the leave of absence and recall provisions be otherwise amended?

(Paragraph 2.113)

Part 3 Medical Treatment and Research

20. On the basis that the existing law relating to patients mentally incapable of consenting to medical treatment is not to be changed should it be set out in legislation or left to the present common law rules and practice?

(Paragraph 3.11)

21. (1) Where a patient is mentally incapable of consenting to treatment doctors should be entitled to give treatment which is appropriate according to their clinical judgement after consulting, so far as is reasonably practicable, the nearest relative of the patient. The doctors may also consult others with an interest in the patient's welfare. The doctors should be required to have regard to the views expressed by those consulted.

(2) A patient's nearest relative should be the first person reasonably available on the following list:

(a) husband, wife or cohabiting partner

(b) a child over 18 years of age

(c) a parent

(d) a brother or sister

(3) Should the court or other body be empowered to disqualify a relative if satisfied that he or she is unsuitable to be consulted?

(Paragraph 3.21)

22. (1) An exceptional treatment (being a treatment specified in regulations made by the Secretary of State) should require the consent of a court (or other body set up to deal with applications relating to the mentally disabled) before it may be carried out on a mentally disabled patient, except where the delay in obtaining consent would be likely to result in the patient's death or serious damage to his or her health. The consent of a tutor-dative, relative or personal guardian should not be sufficient.

(2) Specified treatments should include sterilisation (other than for therapeutic reasons), abortion, electro-convulsive therapy, psycho-surgery and implantation of fetal tissue. Views are invited on whether any other treatments should be specified.

(Paragraph 3.28)

23. The court (or other body set up to deal with applications relating to the mentally disabled) should have power, on application by any person having an interest in the patient's welfare, to make orders relating to the treatment proposed for a patient who is mentally incapable of consenting to it.

(Paragraph 3.29)

24. Should the court (or other body set up to deal with applications relating to the mentally disabled) dealing with a treatment specified by regulations or a dispute about treatment authorise treatment if it is satisfied that:

(a) the treatment is in the best interests of the patient;

(b) the treatment is one which doctors of ordinary skill would adopt if acting with ordinary care; or

(c) without prejudice to other considerations all the following criteria are met:

(i) the patient has been consulted so far as reasonably practicable and he or she does not oppose the treatment,

(ii) the patient is unlikely to recover capacity or the treatment cannot reasonably be postponed until the patient is likely to recover capacity,

(iii) there is a significant risk to the patient's physical or mental health if the treatment is not given,

(iv) of the other options (medical and non-medical) that have been considered the treatment proposed is regarded as the best.

(Paragraph 3.34)

25. (1) When dealing with applications relating to a treatment specified by regulations or to disputes about treatment for a mentally disabled patient the court (or other body set up to deal with application relating to the mentally disabled) should appoint a special representative.

(2) The representative's functions would include ascertaining the patient's views in so far as that was practicable, ensuring that other options had been considered and generally safeguarding the interests of the patient.

(Paragraph 3.36)

26. It should not be lawful to carry out non-therapeutic research or experiments on a subject who is unable by reason of mental disability to give informed consent unless all of the following conditions are satisfied:

(a) the research is into mental disability of the kind suffered by the subject

(b) the research entails only an insubstantial foreseeable risk to the subject's physical or mental health. Views are invited on what should constitute an insubstantial risk.

(c) The research has been approved by the appropriate health board ethics committee

(d) Written consent has been given by the subjects nearest relative unless the subject has a tutor-dative or personal guardian. The nearest relative should be the first relative reasonably available out of the following list.

(i) husband, wife or cohabiting partner

(ii) an adult child

(iii) a parent

(iv) a brother or sister

(e) Where the subject has a tutor-dative or a personal guardian whose terms of appointment include power to consent to medical research, written consent has been given by the tutor-dative or personal guardian.

(f) Before seeking consent from a relative, tutor-dative or personal guardian the researchers have explained to him or her the purpose of the research, the procedures to be used and the foreseeable risks to participants.

(g) The mentally disabled subject does not object to participating in the research.

(Paragraph 3.59)

27. Should transplantation of non-regenerative tissue from a living person who is unable to give an informed consent by reason of mental disability be permitted, and if so under what conditions?

(Paragraph 3.62)

Part 4 Management of Financial Affairs

28. If tutors-dative are to be retained they should not have any functions in relation to the financial affairs or estates of mentally disabled persons.

(Paragraph 4.28)

29. The court or other appointing body should have power to appoint a financial manager or make some other order relating to property or financial affairs only if it is satisfied that:

(a) the person in question lacks, wholly or partly, the capacity to understand the nature of and to foresee the possible implications of financial decisions or has such capacity but is unable to communicate, or act consistently in accordance with, such decisions, and

(b) the appointment of a financial manager or such other order would result in a substantial benefit to the person.

The fact that the person has acted or intends to act in a way an ordinary prudent person would not act should not by itself be evidence of lack of capacity.

(Paragraph 4.40)

30. (1) Any individual or organisation with an interest in a mentally disabled person's estate or welfare should be entitled to apply for the appointment of a financial manager to that person or for some other order to be made in respect of that person's property.

(2) The Regional (or Islands) Council in whose area the mentally disabled person lives should be under a duty to apply for the appointment of a financial manager or some other order if a manager or other order is needed and no other person is applying. The Mental Welfare Commission for Scotland should have a power to apply in similar circumstances but should not be under any duty to apply.

(Paragraph 4.41)

31. (1) There should be power to appoint as financial manager to a mentally disabled person any individual who is suitable and whose interests do not conflict to any material extent with those of the adult. It should be competent for the same individual to be appointed financial manager and personal guardian.

(2) In deciding whether an individual is suitable as financial manager, the wishes of the mentally disabled person, the likelihood that the individual will be capable of carrying out the duties satisfactorily bearing in mind the size and complexity of the estate, and the relationship between the person and the individual should be

considered. The appointment of lay (ie not solicitors or accountants) financial managers ought to be encouraged especially for modest estates.

(3) It should be competent to appoint two or more individuals as joint financial managers. The joint managers should be required to consult among themselves, except in an emergency. Any third party should be entitled to rely on a consent, approval or decision by any one joint manager.

(4) It should be competent to appoint an individual to act as alternate financial manager. On the death, incapacity, removal or resignation of the financial manager the alternate should become financial manager without further procedure.

(5) Should it be competent to appoint as financial manager a bank, building society or insurance company? Views are also sought on whether any other corporate body, firm or unincorporated association should be capable of being appointed financial manager provided that it was otherwise suitable and had no conflicting interest.

(Paragraph 4.49)

32. It should be competent to appoint the personal guardian of a mentally disabled person as his or her financial manager. Where the personal guardian and financial manager are separate persons each should be under a duty to consult the other on all matters affecting the mentally disabled person.

(Paragraph 4.50)

33. (1) The court or other appointing body should have power to direct that the estate of a mentally disabled person should be placed under public management where the applicant asks for public management or where no other suitable manager is nominated.

(2) Views are invited as to whether public management should be carried out by:-

(a) a regional (or islands) council official,

(b) the sheriff clerk acting under the direction of the sheriff along the lines of the present scheme for administering children's damages,

(c) the Accountant of Court,

(d) either (a), (b) or (c) at the discretion of the appointing authority or depending on the value of the estate, or

(e) any other organisation or official.

(3) The fees charged for public management of large or moderate estates should be the full economic cost of providing the service. Small estates should be charged no fee or only a nominal fee. Views are invited as to what should be regarded as a small estate for this purpose.

(Paragraph 4.59)

34. It should be competent for the court or other appointing body:

(a) to make a property order whereby a nominated person is authorised to carry out one or more specified acts or transactions on behalf of the mentally disabled adult,

(b) to appoint a financial manager to deal with part only of the mentally disabled person's property or financial affairs, or

(c) to appoint a financial manager to deal with the person's entire estate.

The court or appointing body should be required to make the least restrictive order.

(Paragraph 4.63)

35. (1) A financial manager appointed to a mentally disabled person should have a responsibility to manage the person's financial affairs and estate within the scope of the powers conferred on appointment.

(2) Should a financial manager's liability for exercising or failing to exercise the powers conferred be governed by

(i) the existing law of delict, or

(ii) a new statutory provision along the lines that a manager should be liable for exercising or failing to exercise the powers conferred only if he or she acted without reasonable care or failed to act when it would have been reasonable to have acted?

(Paragraph 4.67)

36. (1) Where a financial manager fails to carry out his or her duties properly the court should have power, on application by the Accountant of Court or any person with an interest, to remove the manager and/or to modify (to nil if appropriate) the remuneration to which the manager would otherwise be entitled.

(2) The Accountant of Court should have power within limits specified by rules made by Act of Sederunt to modify a financial manager's remuneration if the manager's performance of his or her duties has fallen below the expected standard.

(Paragraph 4.70)

37. Any obligation entered into by a financial manager within the scope of his or her authority should bind the mentally disabled person and not the manager personally as long as it was made clear that the obligation was entered into in a representative capacity.

(Paragraph 4.71)

38. A financial manager in managing a mentally disabled person's property and financial affairs should always do so in the best interests of the person. In order to

establish what are the best interests the manager should, where appropriate and as far as is reasonably practicable, consult

(a) the mentally disabled person,

(b) members of the person's family and others who are interested in his or her welfare, and

(c) any personal guardian or tutor-dative appointed to the adult.

and in reaching any decision should have regard to the views expressed.

(Paragraph 4.76)

39. A financial manager should be entitled to allow the mentally disabled person to deal with any part of the property under management. In order to encourage such dealings and protect third parties an allowed dealing should not be challengeable on the ground of the mentally disabled person's lack of capacity.

(Paragraph 4.77)

40. (1) The court or other appointing body should, when appointing a financial manager, specify the powers conferred upon the manager in relation to the mentally disabled person's estate, and should be under a duty to specify the minimum appropriate in the circumstances.

(2) The powers should be capable of being conferred subject to any conditions or restrictions that seem appropriate to the other body. Such restrictions could include approval by the Accountant of Court.

(3) Styles of powers should be produced after consultation with interested people and organisations. Use of the styles should not be obligatory.

(4) Neither the court or other body nor the financial manager should have power to:

(a) make or alter a will for a mentally disabled person,

(b) create a trust on behalf of a mentally disabled person (other than an administrative trust as set out in Proposal 52), or

(c) exercise any powers the mentally disabled person possesses as trustee or executor.

(Paragraph 4.96)

41. (1) A financial manager should have statutory authority to invest (either directly or through a Personal Equity Plan or any other similar scheme) in any of the narrower or wider range investments specified in Schedule 1 to the Trustee Investments Act 1961, subject to any restrictions imposed by the authority appointing him or her.

(2) A manager should have statutory authority to retain any non-Trustee Act investments made by the mentally disabled person unless the appointing authority orders otherwise.

(3) A manager should have power to invest funds of the estate in non-Trustee Act investments only if the appointing authority on applicati8on grants such power.

(4) The existing law relating to the duty to consider the suitability and diversity of investments, and the need to obtain written advice from qualified persons should be applied to managers. The Accountant should consider the investments of the mentally disabled person (whether or not made by the manager) and give such directions as are necessary to the manager.

(Paragraph 4.107)

42. (1) The court or other appointing authority (or in circumstances prescribed by rules, the Accountant of Court) should have power to waive the requirement on the financial manager to lodge annual accounts for such periods as seem reasonable.

(2) The account should give a full and true picture of the income and capital of the estate. Should the form of the account be prescribed?

(3) An account which contains minor discrepancies (including the absence of receipts for up to a prescribed sum or prescribed proportion of the income) should be capable of being approved as it stands provided the manager has acted in good faith and approval would be in the best interests of the estate.

(4) Views are invited as to whether a manager's accounts should be capable of being certified by a solicitor or accountant instead of being subjected to audit by the Accountant of Court.

(Paragraph 4.110)

43. Financial managers should be subject to the supervision of the Accountant of Court. Views are invited on ways in which supervision could be more flexible or less burdensome, especially in relation to small and modest estates.

(Paragraph 4.119)

44. (1) Financial managers who act as such as part of their professional business should be entitled to reasonable remuneration as fixed by the Accountant of Court.

(2) Other financial managers should not be entitled to remuneration unless the court or other appointing body directs otherwise. Their outlays in connection with the administration of the estate should however be met out of the estate.

(Paragraph 4.123)

45. The Accountant of Court should be authorised to allow a professional financial manager a payment to account of remuneration if satisfied that a considerable

amount of work had been done by the manager (or the manager's firm) and that it would be reasonable to make a payment to account.

(Paragraph 4.124)

46. Financial managers of estates of mentally disabled persons should always be required to find caution. Views are sought on the desirability of the master policy scheme outlined above.

(Paragraph 4.129)

47. An order appointing or varying the appointment of a financial manager should require to be reviewed not later than the date specified in the order. The date should not be not more than give years after the date of the order. This mandatory review should not prevent the appointing authority reviewing or recalling an order earlier in appropriate circumstances on application by any interested person.

(Paragraph 4.131)

48. (1) The Accountant of Court should be empowered to terminate the appointment of a financial manager where the mentally disabled person's estate is of such a size that it can be administered by hospital authorities or the managers of residential accommodation provided by a local authority, or where the estate is below a sum specified by regulations (say £5,000) and other satisfactory methods of management can be found.

(2) On terminating a financial manager's appointment the Accountant should have power to direct the manager to hand over the estate to another person or body.

(3) Any person dissatisfied with the Accountant's decision to terminate the manager's appointment should be entitled to apply to the court or other body set up to deal with financial managers.

(Paragraph 4.133)

49. (1) An application may be made for recall of the financial manager's appointment on the ground that the criteria set out in Proposal 29 for the appointment of a financial manager (lack of capacity to understand implications of financial decisions or to act consistently with decisions and management would produce substantial benefits) are no longer fulfilled.

(2) In dealing with an application for recall on the grounds of recovery of capacity there should be no presumption that the mentally disabled person either has capacity or lacks capacity.

(3) An application under paragraph (1) above may be made by any individual or organisation interested in the mentally disabled person's estate or welfare.

(Paragraph 4.137)

50. On application by any interested party the court or other appointing body should be empowered to remove a financial manager whose relationship with the mentally disabled person or the person's family and carers is such that it would be in the best interests of the person that the manager ceased to act as manager. This ground would be in addition to any of the other presently recognised grounds for removal of curators.

(Paragraph 4.139)

51. On resignation of a financial manager a successor should be capable of being appointed by a simple procedure along the following lines.

(a) The proposed new manager should apply in writing to the appointing authority enclosing an affidavit that he or she had no substantial interest adverse to that of the mentally disabled person, and that the mentally disabled person does not oppose the change of manager.

(b) The Accountant of Court should submit a statement that the retiring manager's administration of the estate had so far been complete and correct.

(c) On receipt of these documents the appointing authority should intimate the proposed change of manager to the mentally disabled person's family, cautioners, and others the authority may direct intimation to be made to, giving them a period within which to object. In the absence of any objections the application should be granted without a hearing.

Views are invited as to whether the procedure should be restricted to cases where the proposed new financial manager is a solicitor or accountant.

(Paragraph 4.143)

52. (1) The court or other body may, on application, if it is satisfied that a person is wholly or partially incapable of dealing with his or her property and financial affairs by reason of mental disorder appoint a trustee or trustees to administer that person's estate.

(2) The purposes of the trust should be to apply the income and, if necessary, the capital of the estate for:-

(a) the expenses of the trust and the mentally disabled person's debts.

(b) the maintenance and benefit of the mentally disabled person.

(c) the maintenance of the mentally disabled person's dependants.

It should not be competent to apply to the court under section 1 of the Trusts (Scotland) Act 1961 for variation of these purposes. Views are sought on whether it would be useful for the trustees to be required to submit a financial management plan prepared in conformity with the statutory purposes to the court for approval.

(Paragraph 4.153)

53. (1) Hospital managers should continue to be entitled to administer money and personal possession of mentally incapable in-patients but only up to a prescribed amount in relation to each individual patient. views are invited as to what the prescribed limit should be.

(2) Should hospital managers be entitled to withdraw money from a mentally incapable in-patient's bank or building society account in order to spend it for that patient's benefit, and if so should there be any restrictions on the amounts that could be withdrawn?

(3) Funds in excess of the prescribed limit should be managed by the Public Manager or a financial manager.

(4) In deciding whether or not to certify that a patient is incapable of managing his or her affairs the doctor should consider the help that could reasonably be made available to the patient by the hospital, relatives, members of a voluntary organisation or otherwise.

(Paragraph 4.167)

54. The Public Manager to whom an in-patient's funds were handed when they exceeded the prescribed amount should be required to apply within three months to the court or other appointing body for a review of the patient's capacity and circumstances.

(Paragraph 4.168)

55. The Public Manager should be entitled to require the hospital to produce for auditing an account of their transactions with the money and personal possessions held by them on behalf of specified individual mentally disabled patients.

(Paragraph 4.169)

56. (1) The scheme of management by hospital authorities of their patients' money and personal possessions with the amendments proposed in Proposals 53 to 55 above should be extended to local authorities running residential homes in relation to their residents.

(2) Views are invited as to whether the scheme should be extended to residents or patients in private hospitals and registered nursing or residential homes.

(Paragraph 4.172)

57. (1) The manager of the bank at which the mentally disabled person has an account should be entitled, but not bound, to permit a named individual to withdraw money from that account.

(2) The bank should incur no liability for money withdrawn provided there had been presented

(a) a certificate by the mentally disabled person's general practitioner stating that the patient suffers from mental disorder to a substantial degree,

(b) a certificate by a solicitor or social worker who knows the mentally disabled person and his or her circumstances stating that he or she was being looked after by a relative or other individual (named in the certificate), and

(c) an undertaking by the named individual to use the money for the living expenses of the mentally disabled person or otherwise for his or her benefit.

(3) The bank manager should suspend or terminate withdrawals on becoming aware that the mentally disabled person was opposed to the withdrawals or the named individual might be abusing his or her position. The court or other body should have power, on application by any interested person, to suspend or terminate the scheme.

(4) Views are sought on whether the scheme should be extended to other items and if so which other items might be appropriate, and whether the arrangements relating to an individual mentally disabled person should be reviewed periodically (say every two years).

(Paragraph 4.178)

Part 5 Continuing Powers of Attorney for Financial Affairs and Personal Welfare

58. (1) Section 71 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 should be repealed with respect to powers of attorney granted after the commencement date of legislation implementing our recommendations.

(2) A post-commencement power should continue to have effect notwithstanding the granter's subsequent incapacity only if the document contains an express provision to this effect. A style should be prescribed for the express provision but it should not be mandatory to use the prescribed style.

(Paragraph 5.12)

59. (1) A CPA should be required to be in writing and signed at the end by the granter in order to be formally valid.

(2) Should any of the following additional requirements:

(a) a certificate by the granter that he or she has read the prescribed explanatory notes,

(b) a certificate by a solicitor (other than the attorney) that the granter has had the effect of the CPA explained and appears to understand it, or

(c) a certificate by a medical or other appropriate practitioner (other than the attorney) that the granter had at the time of signing sufficient capacity to understand the consequences of signing the CPA; be necessary for a CPA to be valid?

(Paragraph 5.21)

60. An attorney to be appointed by a CPA should not be qualified to act as a witness to the granter's signature of it.

(Paragraph 5.22)

61. It should not be a requirement of validity that a CPA be signed by the attorney(s) appointed.

(Paragraph 5.24)

62. There should be no limit on the value of an estate for which a CPA may be granted.

(Paragraph 5.26)

63. (1) It should be competent to appoint one or more persons to act as attorney under a CPA. An attorney must at the date of granting of the CPA not be bankrupt, under age or mentally incapable of acting as attorney. Two or more attorneys may be appointed jointly or jointly and severally. Alternate attorneys., who would act in the event of the first-named attorney dying or becoming incapable of acting, should also be permitted.

(2) Should it be competent to appoint a corporation as an attorney and if so should there be any restrictions as to the kind of corporation that could be appointed?

(Paragraph 5.33)

64. (1) An attorney acting under a CPA should not be permitted:-

(a) to charge any fees for acting as attorney,

(b) to make gifts out of the estate, or

(c) to see the granter's will,

unless the granter in the CPA authorises it.

(2) An attorney acting under a CPA should be permitted to use the estate for the benefit of those (including the attorney) whom the granter is obliged to aliment, but in the absence of any power to do so in the CPA, should not use the estate to benefit other people.

(Paragraph 5.39)

65. An attorney acting under a CPA should not be entitled to exercise any of the functions of the granter as trustee, executor, tutor or curator once the granter

becomes mentally incapable except that the power to resign (unless the granter is sole trustee) could be conferred.

(Paragraph 5.42)

66. Provisions should not be introduced requiring:

(a) the setting up of a new public register of CPAs with the registration authority being empowered to monitor and control the exercise of the attorney's functions,

(b) the registration of a CPA with an appropriate authority when the granter is or is becoming mentally incapable, or

(c) registration of a CPA in the Books of Council and Session within a specified number of days from the date of its execution.

(Paragraph 5.50)

67. The present rules relating to title and interest to bring an action of reduction of documents should apply to an action of reduction of a CPA.

(Paragraph 5.52)

68. (1) A person with an interest in the estate or welfare of the granter of a CPA should be entitled to apply to the court for an order requiring the attorney to produce accounts and receipts for his or her transactions. An application should not be competent as long as the granter remains mentally capable.

(2) The court should have power to order accounts and receipts to be produced for all or any part of the period from the date of execution of the CPA to the date of the application.

(3) Accounts produced should, if so ordered by the court, be audited by the Accountant of Court and the accounts (together with any audit report) should be available for inspection by the applicant and any other person having an interest.

(Paragraph 5.57)

69. (1) A person with an interest in the estate or welfare of the granter of a CPA should be entitled to apply to the court for removal of the attorney. An application should not be competent so long as the granter is mentally capable.

(2) Where the applicant is not also applying for appointment of a financial manager to the granter the court should have power to order the application to be intimated to the granter, his or her nearest relatives and the local authority.

(3) The court should order removal of the attorney if satisfied that removal would be in the best interests of the granter. The effect of removal of the attorney should be that any substitute attorney named in the CPA acquires authority to act.

(4) Where an application for the appointment of a financial manager is made while an attorney is acting under a CPA the court should appoint a financial manager only if satisfied that removal of the attorney would be in the best interests of the granter.

(Paragraph 5.63)

70. (1) The court should not have power to vary the terms of a CPA, or to allow the attorney to use the granter's estate in a way not authorised by the CPA or legislation.

(2) The court should have power, on application by the attorney or any person having an interest in the granter's estate or welfare, to:

(a) give directions to the attorney as to the exercise of his or her authority, or

(b) give any consent or authorisation which the attorney would have had to obtain from the granter if mentally capable.

(3) A special legacy should be adeemed where the property is disposed of by an attorney acting under a CPA only if the disposal was a necessary act.

(Paragraph 5.68)

71. (1) An attorney appointed by a CPA executed after the coming into force of the relevant legislation should be under a statutory duty to carry out the functions specified in the CPA.

(2) The standard of care the CPA attorney should adopt in carrying out the functions should be that adopted by a reasonably prudent person in managing his or her own affairs.

(Paragraph 5.74)

72. Should a sole or remaining attorney acting under a CPA be required to notify his or her intention to resign to:

(a) the granter, if capable, or

(b) if the granter is incapable, to the granter's nearest relative and the local authority in whose area the granter resides?

(Paragraph 5.79)

73. (1) Should new statutory provisions be enacted expressly enabling a CPA to come into effect after execution of the document on the occurrence of an event specified in the document?

(2) Where the document specifies how the occurrence3 of the springing event is to be ascertained should this be deemed to be conclusive as far as the attorney's authority is concerned?

(3) Where the event is the granter's becoming mentally incapacitated should legislation provide that if the method of certification specified in the CPA is unable to be used

or no method is specified, then certificates by two doctors or other appropriate professionals should be conclusive evidence of incapacity as far as the attorney's authority is concerned?

(Paragraph 5.86)

74. Any question as to the power of an attorney to act after the granter has lost capacity should be governed by the proper law of the power of attorney.

(Paragraph 5.93)

75. The following proposals should apply to powers of attorney executed before the date of commencement of any legislation implementing our proposals:

(a) Proposal 68 (power of court to require attorney to produce accounts)

(b) Proposals 69 and 70(2) (power of court to give directions to or remove attorney)

(c) Proposal 72 (duty of attorney to notify resignation).

but none of our other proposals in this section should apply.

(Paragraph 5.98)

76. Legislation should be introduced providing for the appointment of an attorney with authority to make decisions on behalf of the granter in the field of personal welfare after the granter's incapacity by means of a document called a welfare continuing power of attorney ("welfare CPA").

(Paragraph 5.101)

77. (1) A welfare CPA should continue to have effect on the supervening mental incapacity of the granter only if the document contains an express provision to this effect.

(2) The statutory requirements for valid execution of a welfare CPA should be the same as those for a financial CPA.

(3) It should be competent to appoint as personal welfare attorneys only one or more individuals who at the time of appointment were not under age, bankrupt or mentally incapable of acting.

(4) Joint, joint and several, and alternate appointments should be competent.

(Paragraph 5.103)

78. (1) It should be competent to empower a personal welfare attorney

(a) to consent or to withhold consent on behalf of the mentally incapable granter to medical treatment (except sterilisation, abortion and other forms of treatment prescribed by the Secretary of State for Scotland) and to request that treatment being given should be discontinued, and

(b) to consent to the granter's participation in non-therapeutic medical research.

(2) Doctors and others involved with the patient's health care should be obliged to seek the attorney's views in circumstances where they would seek the views of a mentally capable patient. The attorney's views should be taken into account by the doctors and others concerned but should not be binding on them.

(Paragraph 5.119)

79. Should a personal welfare attorney have power to the granter's admission to a hospital or other institution for treatment for a mental disorder? If so, should such power require to be expressly granted in the welfare CPA or should it be implied from a general power to take personal welfare and treatment decisions.

(Paragraph 5.120)

80. A personal welfare attorney should decide any matter within the scope of the powers conferred by the welfare CPA in accordance with the best interests of the granter after consideration of the granter's wishes or directions in the power of attorney or otherwise and all the other circumstances of the case.

(Paragraph 5.121)

81. (1) Should a welfare attorney appointed under a welfare CPA executed after the coming into force of the relevant legislation be under a duty to carry out the functions set out in the CPA?

(2) If a duty is to be imposed on a welfare attorney should the standard of care be that adopted by a reasonably prudent person in making decisions about his or her own personal welfare?

(Paragraph 5.122)

82. A personal welfare attorney should not have authority to make a decision in respect of a personal welfare matter while the granter is capable of making an informed decision in that matter.

(Paragraph 5.124)

83. Should personal welfare attorneys be subject to supervision and control by the Mental Welfare Commission of Scotland or any other body? What other powers and duties should the supervising body have in relation to them?

(Paragraph 5.126)

Part 6 Procedural Matters

84. Should all applications relating to the personal welfare and financial affairs of mentally disabled people outlined in Parts 2 to 5 of the Discussion Paper and in other legislation be heard by the courts, new Mental Health Tribunals or new Mental Health Hearings?

(Paragraph 6.9)

85. (1) If courts are to be the decision making bodies for applications in respect of mental disability, the courts initially concerned should be the sheriff courts.

(2) If tribunals or hearings are to be the decision making body for such applications, there should be at least one in each regional (or islands) council area, health board are, or sheriff court district.

(Paragraph 6.12)

86. (1) The Scottish courts should have jurisdiction to appoint a personal guardian or make other orders relating to personal welfare in relation to a mentally disabled person who is either resident in Scotland or domiciled in Scotland.

(2) The Scottish courts should have jurisdiction to appoint a financial manager to, or make other orders relating to property owned by, a mentally disabled person if that person:

(a) is domiciled in Scotland, or

(b) owns property situated in Scotland.

(3) The above criteria should also be used to select an appropriate sheriff court.

(4) A mentally disabled person should be regarded as domiciled in Scotland if Scotland is the country with which he or she has the closest connection.

(Paragraph 6.17)

87. (1) A court or tribunal hearing an application in relation to a mentally disabled person should have power to request a report or information relating to the mentally disabled person's welfare or affairs from any appropriate person or organisation.

(2) The court or tribunal should be required to appoint an appropriately qualified individual to safeguard the interests of the mentally disabled person unless it is satisfied that his or her interests are already adequately safeguarded.

(Paragraph 6.22)

88. (1) If the decision-making body is to be the sheriff court, the normal rules for appeal to the sheriff principal, the Court of Session and the House of Lords should apply.

(2) If the decision-making body is to be a tribunal or hearing, appeals, should be allowed to the sheriff along the lines of the provisions in paragraph 24(7) of Schedule 2 to the

Civic Government (Scotland) Act 1982 with a further appeal to the Court of Session on a point of law only.

(Paragraph 6.26)

89. Views are sought on whether the Mental Welfare Commission for Scotland should be under an express statutory duty of publicising and promoting any new legislation or procedures relating to the mentally disabled.

(Paragraph 6.27)

Part 7 Capacity and Competence in Private Law

90. Pending a review of restitution and recompense and the protection of third parties acting in good faith in void and voidable transactions, the existing law on transactions involving persons incapable by reason of mental disability of understanding their nature and effect should not be changed.

(Paragraph 7.13)

91. Suppliers of goods should be entitled to receive a reasonable price for necessaries sold and delivered to a mentally incapable person whether or not they are actually required by him or her at the time of sale and delivery unless the supplier knew that they were not required, and section 3(3) of the Sale of Goods Act 1979 should be amended accordingly.

(Paragraph 7.17)

92. If a manager has been appointed to manage all or part of the estate or affairs of a mentally disabled person the mentally disabled person should be deemed to be lacking any capacity to transact in relation to any estate or matters within the authority of the manager. But where the transaction is carried out by the mentally disabled person with permission of the manager or the court or other body it should not be challengeable on the ground of incapacity of the mentally disabled person.

(Paragraph 7.30)

93. Where a mentally disabled person is deemed to be lacking capacity to deal with property or enter into a particular transaction the position of the parties to the transaction and those deriving rights from them should be the same as if the mentally disabled person was in fact incapable of entering into that transaction.

(Paragraph 7.31)

94. Should a notice appointing a manager to a mentally disabled person be registrable in the Register of Inhibitions and Adjudications?

(Paragraph 7.32)

95. Where a personal guardian has been appointed to a mentally disabled person should it be provided that in relation to matters within the scope of the guardian's authority

(a) the mentally disabled person should be deemed to have no capacity to make decisions, or

(b) any decisions of the personal guardian should prevail over the decision of the mentally disabled person?

(Paragraph 7.38)

96. It should be provided that a mentally disabled person should not be presumed to be incapable of entering into a transaction in areas not falling within the scope of the manager's appointment.

(Paragraph 7.40)

97. Where a curator bonis has been appointed to a mentally disabled person that person should be presumed to be incapable of any transaction involving the estate and affairs under the curator's management.

(Paragraph 7.44)

98. A person should neither be deemed nor presumed to be incapable of entering into a valid marriage solely on the ground that a curator, financial manager, personal guardian, tutor-dative, or mental health guardian has been appointed to him or her.

(Paragraph 7.48)

99. (1) There should be no change in the existing law whereby a curator, mental health guardian or tutor-dative appointed to a mentally disabled person may object to his or her intended marriage under section 5(4)(d) of the Marriage (Scotland) Act 1977 and may be regarded as having sufficient interest to bring an action for declarator of nullity of the marriage, but is under no duty to take either step.

(2) If personal guardians and financial managers are to be introduced they should be in the same position as curators in relation to matters in paragraph (1) above.

(Paragraph 7.54)

100. (1) The appointment of a financial manager with limited powers, personal guardian, tutor-dative, or mental health guardian to a mentally disabled person should not give rise to any presumption of lack of testamentary capacity.

(2) It should be provided that the appointment of a curator or financial manager with full powers to a mentally disabled person should give rise to a rebuttable presumption that the person lacks testamentary capacity.

(Paragraph 7.63)