

## **Power of Attorney (PoA) (Scotland)**

### **Frequently Asked Questions - of those relying on a PoA**

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#### ***I've been presented with a photocopy of the PoA do I need to see the original?***

This will depend on your Company's policy. Some Organisations are happy to accept a photocopy as proof of the original. Some prefer to see the original and take their own photocopy. If this is the position of your Company, you may find the attorney unwilling to release the original, preferring to attend in person with it (where this is feasible) and have you take a copy, so the original can be handed straight back to them. This is because many attorneys relay tales of the original getting lost, or mislaid, when it leaves their possession; additionally they have so many organisations to have to present it to, largely concurrently, that they do not have the luxury of sending it to each and awaiting its return.

The Attorney may present you with an Endorsed Copy, (there is a separate information leaflet about this). This is a formally authenticated copy of the original, not a photocopy; the law places an Endorsed copy on equal footing to the original, so if you are presented with an Endorsed version then you do not need to ask for / see the original.

#### ***Do I need to see ID of the person claiming to be the Attorney? If so, what ID is acceptable?***

To ensure you are not revealing client confidential data to someone who is not the attorney it is good practice to ask the attorney for photographic ID and ask their permission to take a copy of this and hold it on the client's file. Anything with the attorney's name and face shown is sufficient. If you already have attorney ID on file you do not need to ask for it on each occasion.

#### ***How do I know if the powers cover what I need to do?***

Look at the PoA document, which lists the powers. If there is not a specific power which covers what you want, then have a look to see if there is a plenary (catch all) power.

*Example: you are agreeing a tenancy with an attorney but the PoA has no power which expressly says, "power to sign a tenancy". Can the attorney sign the tenancy? Can you rely on the signature of the attorney?*

It can be difficult for the PoA to cover every single eventuality, so the absence of an express power does not necessarily mean that the attorney does not have permission to sign the tenancy. Have a look for generic powers of a like nature e.g. do they have a power to 'sign and deliver deeds and documents' which is a general phraseology referring to agreements the attorney may be required to make, and which would cover a tenancy agreement. If you are still not sure, then see if there is a plenary power which you and the attorney can rely on. If you remain uncertain you should seek legal advice.

### ***How do I know if the PoA has been revoked?***

If you have concerns that a PoA may no longer be valid you can check by telephoning the Office of the Public Guardian (OPG) on 01324 678300 and ask for a public register search. Anyone is entitled to check the public register.

The public register will tell you if there is a PoA registered and who the attorney is/are, it does not however offer you any detail on the powers that are granted to the attorney.

### ***Can an Attorney under a continuing [financial] PoA act even though the granter has capacity and is also acting personally in relation to her/his own affairs?***

Unless there is anything in the document which indicates the commencement of the financial powers are deferred until capacity is lost, which is unusual, financial powers commence as soon as the PoA is registered with the OPG.

The granter however remains in charge, the attorney would only act at the granter's behest. So, for example, you have had a meeting with the granter in person, when you are next due to meet the granter is unwell and finds mobility difficult, the granter asks the attorney to attend on his behalf. You are free to treat the attorney as the proxy for the granter (although if the granter has not advised you that the attorney is acting in his stead at this meeting then you should check with the granter before accepting the attorney as his representative).

Assuming the granter has authorised the attorney's attendance then the attorney may agree any decisions, so long he has relevant powers within his PoA, but before acting on any decisions made by the attorney it is prudent to check back with the granter. At a later meeting the granter's condition may be more stable and he may attend in person.

It is confusing when granter and attorney can switch around like this to know who you are dealing with. The easiest way is to remember that until capacity is lost the granter remains in charge, so if you have any uncertainty you should double check with the granter.

***Where the Attorney is acting in relation to a welfare power, do we need to see evidence of incapacity?***

If the PoA requires medical opinion before the welfare powers can commence then yes. If the PoA allows for the attorney to make the decision on incapacity, or is silent on this, then medical opinion is not required.

***Would I be in breach of data protection laws to talk to the attorney?***

This will depend.

- If you are talking about an issue over which the attorney has no powers, then yes.
- If you are talking about a welfare matter that the attorney does have powers over, but the granter is not yet incapable then yes.
- If you are talking about a financial matter over which the attorney has powers, then no (assuming the commencement of the PoA for financial matters has not been deferred)
- If you are talking about a welfare matter power over which the attorney has powers and the granter is now incapable, then no.

***Can attorney agree something which benefits himself, or his family?***

An attorney is permitted to make a decision which benefits himself so long as all the other factors of the AWI are complied with – that is, in brief, that the decision also benefits the incapable person, it is the least restrictive intervention in the circumstances, the person has been supported to make their own decision on the matter, it is a decision which may have been the sort of decision the person would likely have made had they been able to do so, others' views have been sought on this.

*An example may be the attorney wishes to sell the incapable person's house to a family member.*

The efficacy of this may turn on the price that is to be paid for the house by the family member. If they are to pay market value, or a little less to reflect savings on advertising etc, then this is fine; if however the price is substantially less than market value, or even is to be essentially a gift, i.e. no exchange of money, then this is to the

detriment of the incapable person's estate so is contrary to the AWI principle of 'benefit' and so should not be a transaction that should go unchallenged.

There is a separate information sheet on the AWI principles.