

Power of Attorney Fact Sheet for Care Homes

General Information

What is a Power of Attorney (PoA)?

A PoA is granted by an individual, whilst still capable, nominating a person, or persons, of their choice to look after their affairs should they become unable to do so personally.

Powers

A PoA can grant financial and property powers and/or health and welfare powers; these can be combined in the same document (deed).

Financial powers can start immediately (if the granter wishes them to), welfare powers cannot start unless or until the person is incapable – in relation to the decision to be made.

Registration

In order for the PoA to be valid – it has to be registered with the Office of the Public Guardian (OPG). You can check if a PoA is registered, and who the attorneys are, by telephoning the OPG (01324 678300) and simply asking this question – there are plans to make the register an online facility, which would allow you to search it directly. You are not permitted to have any information beyond if there is a PoA and who the attorney is/are.

Role of Attorney

The Attorney is the representative of the incapable person. Crucially, they should make a decision that the person themselves would have, or would likely have, made had they been able to do so personally. This can sometimes create challenge when the attorney's view on the best/right course of action is different to the view the person themselves would have had.

FAQs

How do I know if the person claiming to be the attorney actually is?

An attorney, if they are seeking to rely on the PoA, will have a copy of it, you are perfectly entitled to ask to see this. Be wary of anyone who says they don't have a copy, can't find it, will bring it tomorrow but doesn't etc.

The front cover of the PoA will have a crest and be entitled 'Certificate of Authority'; it will show the name of the attorney and be signed by the Public Guardian – either Sandra McDonald, or more recently, Fiona Brown. The PoA document itself, with the powers granted to the attorney, sits behind this.

It is not uncommon for a person acting as DWP appointee – (someone appointed by the DWP to manage the person's DWP benefits) - to refer to themselves as the attorney. This is, most frequently, a misunderstanding on their part about the differing roles, rather than any deliberate attempt to pass themselves off as the attorney.

How do I know what powers the attorney has?

The PoA deed will list the powers. There is also, in most cases, a 'catch all' power, which tends to come before all the listed powers, and which says something along the lines of 'everything I would otherwise have been able to do myself'.

So to check if the attorney is authorised to conduct the element of business in question, check within the listed powers to see if the attorney has an express power which would cover the matter and if not check to see if they have a 'catch all' power.

Can an attorney just make whatever decision they want, if they have the relevant power?

No. There is a process that an attorney must go through before they simply take a decision for the person - even if they have the power to make this decision.

1. Assessing Capacity

Welfare powers only commence if the person is incapable – in respect of the decision to be made; so, if the decision is of a welfare nature the first thing an attorney should do is satisfy themselves that the person is not capable of making this decision for themselves. There is a separate Fact Sheet on Capacity Assessing if you wish more information on this.

2. Supporting Decision Making

Connected to this, before the attorney decides the person is incapable they must first have offered all support that may be necessary to allow the person to make their own decision. There is a separate Fact Sheet on Supporting Decision Making if you wish more information on this.

3. Respecting the rights, will and preference of the person

In making a decision for the person the attorney is obliged to respect the rights, will and preferences of that person. The decision should be one the person themselves would have made had they been able. This can present challenges where the attorney has a different opinion on something than the person themselves had/would have had. There is a separate Fact Sheet on Respecting Rights, Will and Preferences if you wish more information on this.

4. Complying with statutory principles

The Adults with Incapacity Act (AWI), the law governing the operation of a PoA, has a set of underpinning principles with which an attorney is obliged to comply. There is a separate Fact Sheet explaining what these are.

Do I have to comply with a decision of the attorney?

Not without your own consideration of the matter. You are legally obliged to follow the same steps outlined above. So, you must first satisfy yourself that the person is not capable of making the decision personally, having offered whatever support may be necessary to facilitate them to make their own decision if at all possible. You must also consider their rights, will and preference in respect of the matter, then ensure you are acting in accordance with the principles of the AWI.

So, if I don't have to comply with a decision of the attorney necessarily, what notice do I have to take of the attorney?

The AWI principles require you to take account of the views of relevant others and specifically of an attorney. The requirement to 'take account of the views' is just that, the opinion of the relevant other person must be regarded but does not necessarily have to be respected. You must give due weight to the views of this other person, which if they are the attorney would require a higher regard than for AN Other person, given an attorney is the person the now incapable individual nominated as the person that should represent them if and when they are unable to do so personally.

This works both ways – an attorney is obliged to take due regard of your views, you are classed as the primary carer and so they too have to give a higher regard to your opinion on something than AN Other less connected party – but once your view has been taken account of they do not have to respect this per se. In such cases an attorney is advised to make careful records of whose views that have considered, what deliberation they gave to these and why they have decided to set these views aside.

You are advised likewise, make sure your records would stand up to court challenge should the difficulty end up there.

Can I arrange for an independent advocate to come in to seek the person's views, even if the attorney is refusing this?

Yes. As mentioned above, you are legally required to support the person's autonomous decision making, to act in accordance with their will and preferences, respect their rights and act in accordance with the AWI principles; if you feel the assistance of an independent advocate would help you to fulfil your legal obligations then you are allowed to arrange this notwithstanding the view of the attorney.

You may however wish to take legal opinion on just what your instructions to the Independent Advocate should be, to be clear you are asking them to establish things, if this proves possible, which allows you to fulfil your own statutory compliance and that you cannot be criticised for instructing them on matters which deliberately create challenge to/with the attorney – accepting though that this may be unavoidable even if you are keeping clearly to your own statutory remit.

What if I disagree with the decisions an attorney is making?

If you haven't already got one, you would be advised to have a policy on supporting a person in your care to maintain their autonomy / independence. You would offer this to all key persons involved in the life of a new resident/patient/client/tenant. This policy should explain your role in promoting autonomous decision making. The policy should include a section on what happens in the event of disagreements, in this way the attorney is aware, ahead, of the position.

In the event of a disagreement arising there is, effectively, an escalation process.

1. Try to resolve the matter amicably with the attorney.
2. Remind the attorney of your legal obligations – offer them a second copy of your policy (assuming they had this when the person was admitted).
3. Can the involvement of others assist? Another attorney, another relative, a longtime friend, an independent advocate?
4. If this is essentially a dispute between two other parties eg two relatives, without seeming to take sides, you can signpost both as to where they can get

additional support eg the Local Authority, the Office of the Public Guardian, Citizen's Advice. The Code of Practice for Attorneys has a section on dealing with disputes.

5. Remind the attorney of their general legal obligations, including their obligation to have regard to your view – and the views of any other relevant others i.e. it is not just their own view that prevails.
6. If you are reaching an impasse you may wish to consider reporting the attorney to the Local Authority (for welfare concerns) or to the Office of the Public Guardian (for financial concerns). You can decide whether you advise the attorney of this, you are not required to.
7. If things have become sufficiently serious you may wish to apply to the Sheriff, under section 3 of the AWI, for direction on the matter. Anyone with an interest is permitted to make such an application. As the primary carer you are a person with an interest, so would satisfy this criterion. You are advised to take legal advice about how to formulate your request* and to be legally represented in court. You can decide whether you advise the attorney ahead, you are not required to, but they will be formally notified as part of the court process.

You may think, why should we go to this trouble – time and expense – for example if the dispute is between two other parties let one of them take the court action. Dependent on the circumstances this may indeed be fair comment but remember that you have legal obligations to your resident/patient and if the level of dispute means you are at stalemate such that you cannot fulfil your obligations it may be necessary for you to initiate the request for court direction.

*a request may be formulated as a direction to the attorney, or as a direction to you in how you should fulfil your role as primary carer. It should be clear what you are seeking direction on.