

Concerned about an attorney or guardian?

- The information in this leaflet is applicable to Scotland. Please contact me if you wish to know the position in England and Wales.
- For ease, this leaflet refers to attorney all the way through, but the same information will apply to a person appointed as a guardian.

Introduction

This leaflet helps you decide what to do if you have concerns about decisions being made by an attorney, or actions they are taking. It is in two sections:

1. Useful Information
2. A step by step guide to deciding on and progressing a challenge: if you are reading this leaflet this is probably the bit that you are most interested in and you may be tempted to 'cut to the chase' but it will make more sense if you have read the accompanying information first. So try and be patient.

Section 1: Useful Information

Don't know if the person is an attorney

It doesn't matter if the person is officially appointed or not, if you have concerns about the way one person is treating another you should do something about it.

If you wish to know/check if the person is appointed officially [eg as an attorney or guardian] you can find out by telephoning the Office of the Public Guardian (OPG) (01324 678300), telling them the name of the person about whom you have concerns and asking if they have a Power of Attorney (or guardianship). This level of information is public knowledge so the OPG will be able to tell you yes, or no, and if so, who is appointed. They are not allowed to offer any more detail than this.

Not sure that the attorney is mistreating the person

You don't need proof, a concern is sufficient. It is always better to report something early, even if it turns out to be nothing, than leave it, report it late and find out you were right all along and wished you done something sooner.

Helping you to Decide

There is a [Code of Practice](#) which an attorney should respect and thus which may help you decide if what the attorney is doing, or not doing, is ok. There is a similar [Code](#) for Guardians.

There are some general principles, detailed below, which the attorney is obliged to respect. A review of these may help you decide if the concerns you have are valid and may also offer you hints and tips on how to progress.

The Power of Attorney document itself lists the powers granted to the attorney, if you have access to this a good start point is to check if the attorney does have the power to make the decisions they are making – and then, that they are doing so in accordance with the general principles.

Sources of Advice

- The Code of Practice, mentioned above.
- The website of the [Office of the Public Guardian](#) has a lot of information which may assist. You can also telephone to ask for advice, 01324 678300.
- Various Support Organisations, e.g. [Alzheimer Scotland](#) or [Hourglass](#), formerly Action on Elder Abuse, have helplines that are able to offer support, advice and signposting.
- The Citizens Advice Bureaux are a good first port of call for many.
- The Mental Welfare Commission's also has a [website](#) and [helpline](#) which offers various information.
- Likewise, the [website](#) of the Scottish Consortium for Learning Disability contains a lot of helpful information.

Advocacy

An incapable person's 'voice' is to be heard and respected as much as you or I would wish our own view on something to be respected. This is enshrined in both Law and Convention. However, especially when two parties disagree, one party may not trust the other to represent the incapable person's views accurately. In such cases it can assist to use an independent person who is trained to advocate for those not able to do so personally.

You can contact [Scottish Independent Advocacy Alliance](#) to find names of advocates in your area.

I am one of the other Attorneys

It is not uncommon for one attorney to be the more active, or even more dominant; if the less active/dominant attorney then develops concerns about the way in which their fellow attorney is acting / managing the Power of Attorney how do they deal with this? This is one of the toughest situations.

Attorneys are [generally] appointed equally and have joint liability; so if Attorney 1 is doing something he shouldn't e.g. taking money inappropriately from the estate then Attorney 2 is equally as liable for the 'lost' sums, even though he is innocent of their misuse and indeed may not have even known about it.

If you are Attorney 2 you are strongly advised to do something. This leaflet will may help you decide what is best but sadly there are no easy solutions in this case.

Reporting Concerns

Communication with Attorney

Getting information to assist you have a more focused conversation with the attorney is always a good starting point and something which it is advisable to try before more formal measures are commenced. It may be that you wish to contact the attorney in writing rather than trying to have a verbal conversation with them. See the attached sheet of principles for the sort of information that it is good to be aware of to direct a conversation with the attorney.

Mediation

It may be that you feel such communication with the attorney would be pointless, as relations with the attorney have broken down. A suggestion to them for you to both agree to is mediation; i.e. that through an independent mediation expert you try and see if you can agree a way forward, even if this is with mutual

compromise. Getting to an agreed position is seen as 'benefit' to the now incapable person (see the principles below).

An independent mediator can be sourced from the [Scottish Mediation Network](#)

It may be that you think there is no point in this because the attorney won't agree; but this is no reason not to make the suggestion. If things get more formal it will stand you in good stead to have made a genuine approach to try and all other avenues to make things work.

Office of the Public Guardian (OPG)

The Public Guardian can investigate concerns about management of finances. This is a free service. There is a [Referral Form](#) on their website which you should use if possible, as the information from this gives them the best 'head start'. But it isn't vital, you can phone them (01324 678300) and simply report your concerns, or you can write out your concerns and email or send these if you prefer. Contact details are on the OPG website, linked above.

There are some occasions when the OPG cannot investigate

- *When you are the other attorney*

It may feel preferable to have an independent agency, like the OPG, check out the concerns you have about your fellow attorney but it is not the OPG's role to fulfil what is your responsibility as attorney, nor to mediate between attorneys. The OPG can however offer you support about what options you have personally to deal with things, so a conversation with them can assist.

- *When the person still has mental capacity.*

The OPG's authority comes from the Adults with Incapacity (Scotland) Act 2000, so there needs to be an "adult" "with incapacity" before the OPG are permitted to intervene.

The OPG have to check the capacity status first off, by way of obtaining a medical opinion; if the medical opinion advises that the person still has mental capacity the OPG cannot intervene.

There are cases however when the medical opinion says the person still has capacity but you know they are nonetheless vulnerable and you may feel they are being pressured by the attorney to agree something. Such cases should be reported to the Local Authority, see below.

- *When the concerns relate to welfare issues*

The OPG can only look at financial matters. The Local Authority can accept concerns about welfare matters. Oftentimes there are both financial and welfare matters, this doesn't mean you have to do two referrals, pick the one which is most prevalent, report it to that Body and they can refer the other element to the other Body.

Sometimes the finance and welfare issues overlap so much you can't decide which is the most prevalent; no matter, just report the matter to whichever Body and they will liaise with each other as required.

- *Where the concerns about the way an attorney was acting have become evident only after the person whose affairs were being managed has passed away.*

As mentioned, the OPG only have authority when there is "an adult" "with incapacity" so they cannot assist once the person has passed away. The person to assist in this case is the now Executor of the deceased person's estate. If this is the former attorney and you really think they should not be allowed to manage the sorting out of the estate then there are ways of removing/replacing an Executor but you are advised to speak to a solicitor about this.

Local Authority

The Local Authority, of the area in which the person about whom you are concerned lives, has authority to look into concerns about welfare and finance. They can do this for people who have lost capacity, as they have a role under the Adults with Incapacity (Scotland) Act 2000, but they can also investigate concerns about someone who remains mentally capable if that person is at risk of harm. This is not a subjective decision. The Adult Support and Protection (Scotland) Act 2007 governs this area, Section 3 defines 'at risk of harm' and this defines when a Local Authority can become involved.

As with any concern, a report is better made too soon than too late. Telephone the Local Authority, ask for the Adult Safeguarding Team, or if this draws a bit of a blank, ask to be put through to the Social Work Department; or, you can put your concerns in writing and email or send these if you prefer.

If you are not sure which local authority is the right one, go to the [Government website](#) and type in the person's post code – there is a post code finder attached to this site if you find don't know their post code – this will then tell you the local authority in question and provide a link to their website on which you will find the contact details.

Confidentiality

Don't expect to find out the full [or maybe even any of the] outcome following the report of a concern, or the involvement of a mediator or advocate. The Organisations and professionals involved are bound by an ethical code and duty of confidentiality so there will be certain things they are not permitted to tell you, even if you were the person that went to them in the first place.

Court Action

The Adults with Incapacity (Scotland) Act 2000 (AwI) allows "anyone with an interest" to take certain legal action. The phrase 'anyone with an interest' is not defined but tends to be interpreted fairly broadly. If taking legal action is something you think may be of value, you are advised to take legal advice about this (see below).

Section 20

Under Section 20 [of the AwI] 'anyone with an interest' can ask the Sheriff to request the attorney be formally supervised, or that certain powers are removed, or even that the attorney themselves is removed. Such an action can be taken by one attorney in respect of a fellow attorney. Your solicitor can advise you on the sort of information you would need to offer the Sheriff, to satisfy him/her that it was right to grant you what you are asking for.

You will see from the principles sheet, below, that there is a high bar placed on respecting the wishes of the person. The person, when capable, nominated the attorney to administer affairs for them, consequently a Sheriff will not be willing to remove, or otherwise place restrictions on an attorney, without sufficient proof that this is required.

Section 3

Anyone with interest can ask a Sheriff to direct an attorney in the exercise of their powers. This does not alter the relationship between attorney and incapable person, but does allow official legal/court direction in how the attorney should fulfil some element of their function.

A common reason for a Section 3 application is an attorney who is refusing to allow the now incapable person, for whatever reason, to see a particular family member or friend, when there is sufficient proof that the person, when capable, chose to spend time with this person. A Sheriff can be asked to direct the attorney to allow the friend or relative to visit – as this respects what would likely be the wish of the now incapable person.

Combination

A combination of section 20 and 3 can be used eg asking for the Sheriff to give direction to the attorney in the exercise of the attorney's function as well as asking for the attorney to be subject to ongoing supervision.

Costs

The cost of court action is something you always have to consider and something which your solicitor can advise you on.

Legal Advice

As has been mentioned above a number of times, there are some things on which you are advised to speak to a solicitor. You should find someone who has experience with complexities such as your own, not just someone who is familiar with drafting a Power of Attorney for example. Do not feel bad about asking how much experience the person has, you need to have confidence in them being able to advise you across the spectrum of measures that may be available to you.

You may be able to obtain legal aid by way of means tested advice and assistance but, in the main, you should be prepared to have to pay for legal advice. It may be, ultimately, that the cost could be reimbursed from the incapable person's estate, but there can be no guarantee on this. Your solicitor should offer you a steer, ahead, on how much s/he thinks any legal advice, or legal action, may cost.

Checklist on managing concerns about an attorney or guardian

1. Check if the Power of Attorney (PoA) is registered

If you have access to the document, does the PoA have a Certificate of Registration attached to the front signed by the Public Guardian – this would be Sandra McDonald before 1/8/18 or Fiona Brown thereafter.

If no, this is not a registered PoA and the attorney has no powers.

If you are not sure you can check by a phone call to the OPG (see section above 'Don't know if the person is an attorney')

2. If the PoA is registered, check the person is the attorney

If you have access to the document, is the person whom claims to be the attorney, named at the start of the document?

If no, they are not the attorney and they have no powers.

If you do not have access to the document, your phone call to the OPG, as above, will tell you if the person is appointed as attorney.

3. Check how the attorney is appointed.

Are they appointed alone, or with someone else. The PoA will tell you this. If you don't have access to the PoA the OPG can tell you this as part of your phone call.

If they are appointed with someone else you should report your concerns to that other attorney.

4. Has the 'activation' of the PoA been complied with?

There is no such thing as 'activation' per se but the word is the easiest way to describe actions that may need to be before the PoA can commence.

Where there are welfare powers, which is most PoAs, there needs to be a statement about when the welfare powers can start, as these cannot commence until the person is incapable. It may be that the granter is happy for the attorney to decide when they should start acting on the welfare powers and in which case there is no other 'activation' of the PoA required.

However, some granters wish the attorney to take medical opinion before they commence acting. If you have access to the PoA, have a read, about half way down the first page usually, and see what is said. If medical opinion is required it will follow the words "I have considered how my incapacity is to be determined"

You may then ask if the person is in receipt of that medical opinion, or, ask the person you are lodging your concerns with to check this. If medical opinion is required and the attorney hasn't got this then the welfare PoA is not 'activated' and thus the welfare attorney has no welfare powers at that point.

If you don't have access to the PoA you will not be able to find this out readily. If you are lodging a concern, with the Local Authority for example, it will be one of the first things they will check but you can ask the direct question as part of lodging your concern.

5. Does the attorney have the necessary/relevant power?

If you have access to the PoA you will be able to see a list of the powers that have been granted to the attorney. As well as the list, there may be a 'catch all' power at the head of the list, technically called a plenary power, which allows the attorney do anything the granter themselves could have done, or words to that effect.

It is difficult for a PoA to cover every single eventuality, so the absence of an express power does not necessarily mean that the attorney does not have permission. Have a look for generic powers which may cover the instance that has arisen. If you still don't see anything then see if there is a plenary power which the attorney could rely on.

If you don't have access to the PoA you will not be able to find this out readily. If you are lodging a concern, with the Local Authority for example, it will be one of the first things they will check but you can ask the direct question as part of lodging your concern.

6. Is the person incapable, in respect of the decision to be made?

Capacity, or lack of, is a critical factor.

Welfare powers cannot be used unless the person is incapable in respect of the decision to be made, or action to be taken. If a welfare power of attorney has come into force, because the person is generally incapable, yet the decision which has now to be made is one which the person is still able to make then they are not incapable in respect of this decision and the welfare attorney has no authority to make this decision for them.

You should ask the attorney how they have satisfied themselves the person is incapable in respect of this decision / action. If you believe the person to be capable you should be prepared to say on what basis you are saying this.

7. Has the person been given every support to make their own decision?

There the information leaflet on Supported Decision Making.

8. Is the attorney acting in compliance with the Code of Practice?

There is a Code of Practice which attorneys should respect when agreeing decisions for a person with incapacity. [Link to Code](#)

9. Does the decision / action respect the AWI principles?

See the information leaflet on the principles.

- Is the decision /action one which benefits the person?
- Is it the least restrictive way of achieving the outcome? ie is there another less impactful way of achieving the same outcome.
- What are the wishes and feelings of the person themselves? This can be drawn from behaviours, it doesn't necessarily need them to be able to explain things.
- What would their past views have been?
- What are the views of others? Have these been taken into account?

10. Does the decision respect the rights, will and preferences of the person?

See the information leaflet on this. We are required to respect the person's human rights, respect their will on a matter and their preferences. What account has the attorney taken of the person's rights? What would their preference be? Is there any will being expressed by the person, this again may be seen in behaviours ? Is there a Statement of Advance Choice which can offer assistance. Increasingly people are being encouraged to record their views, in advance, on

matters which may arise in future. These advance directions are not legally binding but can offer a clear position of the person. You may not have access to such a Statement, even if one exists, as this may be considered confidential but you can a) ask the question if there is such advance choice document and b) ask the supervising authority to satisfy themselves that the express wishes of the individual have been taken into account before any decision has been reached.

11. Is the decision a best interpretation of the person's wishes?

An attorney should not be making a substituted decision ie making a decision which accords with their view, where this would not have been the person's view. If it is not possible, despite every support, to get the person to make their own decision on a matter then the decision which should be followed should be the one which offers the best interpretation of what the person's views would likely have been in the situation – which you would draw from all of the factors above.

You can use this checklist to help you decide if you do have the basis of a formal challenge - be this to the attorney, to one of the supervising authorities, or directly to court.

If you do decide to progress with a challenge, you are advised to formulate this in terms of the legal requirements and the factual position, try to avoid emotion and subjectivity, hard as this can be.

Whether you decide to progress things at this stage, or not, you are advised to maintain clear records so you have these if/as you may need them.



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