

Differences with a fellow 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 power of attorney and “attorney” all the way through, but the same information will apply to a person appointed as a guardian, under a guardianship, where they have issues with a fellow guardian.

Introduction

A power of attorney (PoA) can offer welfare and/or property and financial powers. Often there is more than one attorney appointed. Typically, both, or all, attorneys have both sets of powers ie all can make welfare, property or finance decisions. It is generally considered a good thing to have more than one attorney, it offers additional protection but sometimes differences of opinion arise, even if only over certain things at certain times. Opinions can differ on so many things, but typically they concern what care the person needs, or what money should be spent on. This Information Sheet offers an approach for managing such differences.

It is testimony to the commitment of attorneys that there are not more disagreements, but if you are reading this leaflet it is likely that you find yourself in the regrettable position of having a difference of opinion with a fellow attorney. But also, given you are reading this leaflet, your focus is clearly on trying to resolve the difference, which is the best possible start.

It is easy when you are at loggerheads over an issue to lose sight of ‘the wood for trees’ so remember, the person who appointed you both, or all, as attorneys trusted you, their expectation was that you would work together, as a team, to protect them. I hope this leaflet is of assistance in allowing you to find a way forwards.

1

Supporting the person with making their own decisions

Before you (the attorney) agonise further over the differences that you have with a fellow attorney you should ask yourself – ‘have we (or I) done all we (I) can to support X to make their own decision on this matter’?

Prior to you intervening on the person’s behalf there is a requirement, which before long will become a legal obligation, for you to support the person to make their own decision. Making a decision which you think is right for them, referred to as substituted decision making, is not and will not be accepted, even when the substituted decision is made by you, as an attorney, acting under a lawful PoA.

You should not assume the person is not able to make a decision about whatever the issue is. An inability to make a decision is often referred to as a lack of capacity. Capacity is not all or nothing, black or white. Even in advanced stages of incapacitating illnesses, for example dementia, a person may have capacity for certain decisions, even if only on some occasions. Often decisions which are important to the person are decisions you find they can make, or at least input to. For example, they may not be able to decide what they wish to eat for tea, if food is of little interest to them and anyway they like most foods so they don’t mind what’s put before them, but they may be able to input to a decision on who visits, if this is important to them.

Keeping the person’s views central

When I am consulted in cases of disagreement I often hear ‘I think this is the best way forwards, but my fellow attorney disagrees, he thinks that is the best way forwards’. My question is “and what would X say is the best way forwards if he/she could offer a view?” It may sound harsh to say but it is not what you, or your fellow attorney, thinks is the best way forwards, it is what the person themselves thinks or would have thought.

I have mentioned above the importance of not making a substituted decision ie the decision *you* think is best for the person. As attorneys you must always place the person’s views at the centre of your thinking. It may be that the person cannot now offer a view but you should take into account their past wishes and feelings, or any preferences they may have expressed previously. The decision you make should be the best interpretation you can make of the decision they themselves would have made.

Objectivity

It is so easy when difficult decisions have to be made about a loved one to become emotional and subjective – you really have to challenge yourself to ask, ‘am I wanting this for them, or really, is it because I’m wanting it for me, because I can’t bear to think of it being a different way, its too upsetting?’.

As hard as it is, you have to look objectively at what is for the person’s benefit – and try to set aside what your preference would be.

Impartial views?

You should seek the views of others.

For example

- Do you have other siblings, who are not attorneys, but who have a view?
- Does your loved one have any siblings who may offer a view?
- Is there a good friend with whom your loved may have shared confidences with in the past, things they may not have shared with you?
- Does your loved one have a carer, district nurse or specialist nurse - do they have a view?
- Is there a social worker involved, do they have an opinion?

Sometimes an opinion of someone who has a different relationship with your loved one can offer a resolution.

Case Conference?

This is a grand way of saying would it be of value to get all parties in the room at the same time. This can be helpful where there are a number of services involved, as it allows each to hear the position of the other and take this into account in their consideration of the issue. The case conference should also include the granter of the PoA.

Expert assistance?

As part of supporting the person (point 1) and being clear of their views (point 2) you should consider if you need impartial expert assistance.

Independent Advocacy (IA)

Independent advocates offer a voice for the person, no longer able to necessarily offer their own voice/opinion on an issue. An IA can be particularly valuable if you feel the person is not telling you the how they truly feel, perhaps because they are trying to protect you; or the person is saying one thing to one of you and something else to another because they don't wish to upset either of you.

You can find an advocacy service in your area by visiting the [Scottish Independent Advocacy Alliance](#) website.

Speech and Language Therapists

These are clinical professionals who have expertise in communicating with people who have communication difficulties, from whatever cause. They even have techniques which support people who cannot communicate verbally to express their views. You can contact the [Royal College of Speech and Language Therapists](#) to find out more about speech and language services in your area.

3 Communication

A lack of, or poor, communication can be at the heart of a dispute. Before you decide you have reached an impasse with your fellow attorney, you should really challenge yourself on your communication; ask yourself “Am I sure I have explained my position clearly?” “and, the other side of communication, “am I sure I’ve truly listened to my fellow attorney’s view?” Have I genuinely made effort to see their position and not just dismissed it out of hand? If they have dismissed your view out of hand with making genuinely apparent effort to appreciate your point then consider if there is a way of restating this with them.

For example

- If you have emailed each other to this point, will telephoning work?
- If you have spoken on the phone, will putting something in writing make a difference
- Will changing your emphasis make a difference?
- Will meeting up with each, preferably in a neutral venue assist?

If you have any niggling doubts about any aspect of communication, then it is helpful to revisit this, as objectively as is possible.

Are you both clear of the actual decision on which you believe you have a difference, or has a tangent / red herring crept in – which can easily happen? If you do a

communication review, it's not uncommon to find a way forwards on which you can both agree, or at least agree to compromise.

Compromise

It is easy to say, but you should think about any possible compromise options, a bit of give and take may resolve things.

For health care decisions – compromises may be

- Applying for, or paying for, some hours of care each day
- A day, or number of days, per week for the person in day care
- Periodic respite care, to allow the carer a break
- Laundry service to assist with the amount of washing which may be required
- Provision of incontinence products eg waterproof mattress protectors and plastic draw sheets to reduce the amount of laundering that may be required
- Domestic support around the home, to reduce the general burden on the carer
- A befriending service to be with the person, allowing the carer some time off to be themselves, do what they want.

For financial decisions – compromises are generally around considering how you achieve the same outcome in a less expensive way

- eg if the dispute is the cost of a holiday for the person, not the fact that a holiday is being considered per se, would a less expensive holiday be an option.
- If the dispute is how much the care costs, is there adjustments to the package which would make the cost acceptable?

Mediation

When disputes are entrenched, or appear to be heading that way, mediation may prove to be of value. Mediators are trained professionals whose focus is to resolve disputes. A skilled mediator may be able to find compromise that you and your fellow attorney have not been able to see personally.

You can visit the website of the [Scottish Mediation Network](https://www.scottishmediationnetwork.org/) for more information.

Wider considerations?

It is appropriate to consider wider things of relevance; for example the costs, or the impact on, or risks to, others.

Considering the impact of doing versus not doing?

It is only right to consider the issue 'in the round', to look at both sides of the coin. Risks and benefits. A particular option may seem obvious, of clear value (benefit), but what are the downsides – are there any? How does one avoid these?

Time

Feeling like one needs to make a decision, today/this week etc can create unnecessary tension. If this is the case, consider if you can negotiate an extension of time. Having more time relieves the pressure, gives you longer to think, to be objective, to seek the views of others etc. and so more likely to come to a mutually agreeable solution.

Code of Practice

There is a [Code of Practice for Attorneys](#) of which you should be aware. It has a section on disputes which you should read.

Support

Finally in this section, it is important to mention how onerous the role of being an attorney is. The responsibilities are often underestimated, with many people finding it quite challenging when the time comes. If this is you, please be reassured that you are by no means alone. You may wish to look for sources of support, for example

- Your local carers centre
- Citizens Advice Bureau
- On line chat forums
- Websites eg Alzheimer Scotland, Age Scotland which offer an extensive range of information

Local Authority

You can seek assistance from the [local authority \(council\)](#) of the area in which the granter lives. The local authority has a responsibility to support attorneys on welfare matters, they can also allocate a social worker to your case if this is required.

Attorneys can sometimes be anxious about contacting the local authority and asking for assistance, thinking they will be judged, even perhaps not seen as a suitable attorney. This is not the case, quite the reverse, an attorney prepared to ask for guidance is seen as appropriate and professional.

Office of the Public Guardian (OPG)

The [OPG](#) has a responsibility to guide attorneys on financial matters. Again, please do not be anxious about telephoning them, they would rather you phone early and keep yourself right than get into a tangle.

Medical opinion

Especially if your disagreement relates to health or welfare issues you may feel that the views of a doctor may help. For example, if you are looking after your loved one at home but are torn about whether they should now go into care a view from the person's GP may help focus things. They may refer you to allied services eg physiotherapy or occupational therapy if they think these experts would be able to offer particular or additional support which may assist.

You may think a second, independent, specialist medical opinion may be of value if you already have one specialist view and still you are at an impasse. You can ask the [Mental Welfare Commission for Scotland](#) to nominate a second specialist.

Financial advice

If your disagreement revolves around financial issues the views of an independent financial advisor or money advice service may be of value. An internet search using these terms will bring up services in your area.

Legal advice

You may feel it necessary to take legal advice, even if just as a 'belt and braces'. If the PoA was drafted by a solicitor that solicitor may be able to assist with what the granter's intention had been but, dependent on just what it is you wish to ask, they may see it as conflict of interest to advise you as their client is(was) the granter and in which case they will suggest you seek an alternative advisor.

Court direction

A sheriff is permitted to direct you in the exercise of your function as an attorney. What this means is that you relay the impasse to the sheriff – you tell him/her what you believe is the right solution and why, you should include too the alternative view of your fellow attorney and why they see this as the preferred option; offering your views on their option ie why it is unacceptable to you and their views, as far as you are able, on the acceptability to them of your option. Critically, remember this is not about what either of you want but rather what the granter would have opted for had they been able, so you should also include the efforts you have made to support the person to make this decision for themselves and what you believe would be the views of the granter were they able to express these. You should include the measures you have taken, or things you have considered in your efforts to try and compromise to resolve things, albeit without success, and then ask the sheriff to direct on which of the solutions they see as the more appropriate.

This may be a last resort but it is a way of getting a definitive way forwards if all other efforts have proved fruitless. Whilst this course of action gets a definitive solution it may of course not be the solution that you had preferred. Once the sheriff has directed the way forwards you are obliged to follow that path, failure to do so may be seen as a contempt of court, which at its worse in as imprisonable offence. You are advised to take legal advice before embarking on this route, as well as to how best to frame your request to the court should you decide to proceed.

If you decide to proceed, I suggest that you tell your fellow attorney that you are now approaching the court, it may well focus minds, but even if it does not move the impasse it is preferable for your longer term relationship than them finding out once court papers are served on them – as they will be.

Costs?

You may be wondering about the cost of some of the things mentioned in this leaflet – some of the things are free e.g., contact with the local authority, OPG and citizens advice. For those with a cost, eg legal advice and court direction, if your PoA permits payment of such costs then you would be able to pay from the person's monies. You can always check this with the OPG first if you wish.

Getting legal advice and court direction, particularly, can sound expensive, but they may not be as costly as you assume. You should also bear in mind the costs of not getting to a definitive solution, including on financial costs – for example on your time and mental health.

Record Keeping

Many attorneys do not appreciate that they should be keeping a record of their actings. This becomes particularly important in the event of a dispute, in order that you can evidence the steps you have taken, the times you have met, the people you have involved, the experts you may have consulted etc in your genuine attempt to resolve the matter / reconcile your differences.

Conclusion

It is regrettable when attorneys are unable to resolve differences, which often stem from both wanting the best for the granter but seeing this from divergent positions. For the sake of the granter, who entrusted you both (all) with this vital role of protection, it would be preferable if you are able to find a mutually agreeable way forwards. Settling the disagreement quickly and effectively, with minimal stress - and cost is in everyone's best interest.