

How much authority does an attorney have?

Introduction

Those who have to rely on the authority of an attorney often have queries about what reliance they may place on the attorney's authority particularly where they disagree with the decisions being made, or instruction being issued, by the attorney. This Information Sheet seeks to steer Agencies through these queries.

Background Information

Incapacity

There is a separate information sheet on determining capacity.

In all situations one should start with a presumption of capacity (even if the PoA is 'active' and the person has a diagnosed condition which may make them incapable)

Section 1(6) of the Adults with Incapacity (Scotland) Act 2000 (the AWI) covers the definition of incapacity.

Incapacity is not all or nothing, there is not a point before which one is capable and after which one is incapable, nor is it linear i.e. that one may be capable of making lower level decisions but incapable of making higher level ones.

Capacity is decision specific i.e. one should assess capacity in respect of the decision to be made, at the time it has to be made.

If a welfare power of attorney has come into force, because the person is generally incapable, yet the decision which you are needing them to make is one 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.

Principles

There is a separate information sheet on the principles.

The AWI has a set of fundamental principles, in section 1(1) which underpin any intervention under the Act. An Attorney should respect these, and you should act in accordance with them if working with an attorney.

Code of Practice

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

Supported Decision Making

There is a separate information sheet on supporting decision making.

The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), which includes intellectual disability, has been ratified by the UK, meaning we are required to comply with its terms. This requires anyone working with a person with disability to support the individual's own decision making. In practice what this means is that you, as well as the attorney, should endeavour to obtain from the person their own views on a matter.

The United Nations have made it clear that substituting a decision for a person with incapacity is not acceptable, even if the substituted decision is given by an attorney acting under a lawful PoA.

Substituting means you making what you think is the best decision for them, as opposed to you making the decision you think they would have made.

If a supported decision is not possible then the decision should be one which respects the best interpretation of what the person's decision would have been.

Respect for Rights, Will and Preferences

There is a separate information sheet on rights, will and preferences.

The UNCRPD also requires us to respect the person's human rights, respect their will on a matter and their preferences. This aligns with the AWI principle of respecting the person's past or present wishes and the UN requirement to support the individual's autonomous decision making.

Responsibilities of an Attorney

The responsibilities of an attorney are not well understood, including by attorneys. The attorney's role, in summary, is to act for the person if they are no longer able to do so personally. In acting "for" the person they should act as that person would

have done, which may not be the way in which the attorney themselves thinks is right, such dilemmas present challenges for an attorney.

Many Attorneys make [false] assumptions of the responsibilities they have. You should not therefore take an attorney's say so without question. It is your responsibility to know the legal framework within which an attorney operates and challenge a situation where the attorney appears to be overstepping their lawful remit.

Power of Attorney Checklist

Do you already have a copy of the PoA, and confirmation of the attorney, on the client's file? If so you can proceed to point 2.

If this is the first meeting with the attorney and thus you are needing to check the legitimacy of the PoA then check

1. 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 you can proceed no further with the attorney.

2. If yes. Check the person you are dealing with, and who is claiming to be the attorney, is named on the front of the document and inside the document, in the first paragraph.

If no, they are not the attorney and you can proceed no further with them.

3. If yes, check how the attorney is appointed. (see point 5 of Headline Information). Can you take instruction from this attorney alone or are they, and therefore you, required to work jointly with another appointed attorney?
4. Read the document to see what powers the PoA gives to the attorney? Do they have a relevant power for you to continue to deal with them on the given issue? (see point 11 of Headline Information and examples in FAQs below).
5. Is the person incapable in respect of the decision to be made?

If no i.e. if they have capacity, then the person themselves should be your contact not the attorney.

If yes, i.e. they are incapable, in respect of the decision to be made, has every support been given before you reach this conclusion (see Supported Decision Making above)?

If yes, then you can continue to deal with the attorney, so long as you have satisfied yourself that they have the relevant power(s).

6. Is the attorney acting in compliance with the Code of Practice? (see above)
7. Does the decision respect the AWI principles? (see above)
8. Does the decision respect the rights, will and preferences of the person (see section on this above).

If you feel the answer to these latter questions is no then you should not proceed without challenge, you are not obliged to do what the attorney says simply because it is the behest of the attorney.

If you feel the answer to these latter questions (5,6,7and8) is yes, then you may proceed to action whatever the matter is on the authority of the attorney.

You should maintain clear records on any/all such decisions.

Frequently Asked Questions

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

It depends on your company policy but a photocopy is sufficient if you are satisfied that it is what it purports to be. There is a separate information leaflet in interpreting a PoA. There is no standard template so don't worry if the one you are looking at looks different. The checklist (see above) will help you assess its efficacy.

You should take a copy of the PoA for your client's record, advising the client and attorney that you are holding this on record.

If you have any doubts about the PoA that is being shown to you, then you are perfectly entitled to ask to see the original. A legitimate attorney will have a copy; be wary of anyone who says they don't have a copy, can't find it, will bring it tomorrow but doesn't etc.

If you still have anxieties, you can telephone the Office of the Public Guardian (OPG) on 01324 678300 and ask for a public register search.

The public register will tell you if the person you are dealing with is indeed appointed as attorney, it does not however offer you any detail on the powers that are granted to the attorney.

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.

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 what powers the attorney has?

The PoA will list the powers – the list of powers sits behind the Certificate of Registration. There is also, in most cases, a ‘catch all’ power (called a plenary 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 plenary power that they, and you, can rely on.

If there are two, or more, attorneys do they have to act jointly?

This will depend on the construction of the PoA.

If it appoints “A and B to be my attorneys” and says nothing other than this then A and B are appointed jointly, as a single unit as it were, and both must be involved in meetings, decisions, signing contracts etc.

If however there is any form of wording which suggests A and B may act independently of each other, for example “A and B to be my attorneys jointly and severally” or “A or B to be my attorney” then you may accept the authority of either.

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 OPG and asking for a public register search, details as above.

Can an Attorney under a continuing [financial] PoA act even though the granter has capacity and is also acting 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, about his tenancy, 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 him.

Is it sufficient to assume that an Attorney is, on the face of it, acting legitimately, and that the granter is still alive?

Yes, unless you have constructive knowledge to suggest otherwise e.g. you have had dealings with an executor for this customer (i.e. someone looking after a deceased person's estate). The responsibility is on the attorney, or executor, to advise of the death of the granter, not the person relying on the authority of the attorney (you) to check the granter is still alive.

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.

If the issue involves financial matters and we think the granter is now incapable (but we dealt with him personally previously) do we have to see the medical certificate/evidence of incapacity.

No, you can accept the attorneys say so that the granter is now incapable.

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.

Another common example may be: the incapable person is the tenant of a flat within a block of similar tenanted flats. There is an issue with one of the common areas, there is to be a tenants' committee decision on improvements to be made. Can the attorney 'vote' / have a say on the incapable tenant's behalf?

Again, 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 make such decisions for the incapable tenant. Have a look for generic powers of a like nature e.g. they may have a power to "buy, lease, sell and otherwise deal with any interest I may have in property of any kind or description". The reference to 'deal with any interest I may have in property of any kind; would be sufficient to cover this. If you remain unsure then have a look for a plenary power or contact your legal department for advice

Can I save a copy of the PoA on our Customer Relationship Systems or Case Management System for that customer?

Yes, this is good practice. You should advise both the customer, if this is possible, as well as the attorney, that you are holding a copy.

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 example may be the attorney wishes to assign the incapable person's tenancy to themselves.

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 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.

Another common example is 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, ie 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.