

**Investigation Service - Information for Attorneys**

**Legal Appointment**

The role of a financial attorney is a formal, legal appointment which can be a daunting responsibility. We are available to support and assist you as financial attorney in fulfilling your role effectively.

**Fiduciary Duty and Position of Trust**

The Scottish Government Code of Practice for Continuing and Welfare Attorneys (Code of Practice) advises that an attorney has what is known as a ‘fiduciary duty’ to the granter. This means that as attorney, you are in a position of trust in relation to the matters covered by your powers.

As attorney, you should not take advantage of your position nor put yourself in a position where your personal interests conflict with your duties. Other influences must not be allowed to affect the way in which you act as attorney.

As attorney the decisions you take must always benefit the granter.

You must not profit or get any personal benefit from your position, apart from receiving gifts where the power of attorney allows.

**Keeping Funds Separate**

Financial attorneys should keep the granter's funds separate from their own and from those of any other third party.

The Code of Practice sets out a range of guidance, for example, paragraph 4.3 requires attorneys to separate out the granter's resources and the attorney's resources:

* "The funds and assets you are managing still belong to the granter and you should usually keep the person’s finances separate from your own or anyone else’s….”
* Any attorney mixing a granter’s funds with their own funds could be seen to be in breach of paragraph 4.3 of the Code of Practice. Paragraph 4.34 sets out a requirement to record action taken:
* "You must keep the adult’s financial affairs strictly separate from your own and be ready to account for how you have spent funds belonging to the granter and what you have done with any payments due to the adult and made to you."

Attorneys mixing their own funds with those belonging to a granter may find themselves in a position where they are unable to accurately account for their activities. Meaning they could be deemed to be in breach of their duty as an attorney and held liable for any unaccounted for funds. In such circumstances, we may consider that the conduct of the financial attorney has breached the attorney’s fiduciary duty to the granter, as well as the Code of Practice.

**Gifts**

If the granter has made provision in their power of attorney to make gifts, e.g. at birthdays, Christmas and special occasions, the sums must be reasonable and in line with the granter’s available means and previous habits of gifting. Making gifts must not impact on the ability to pay costs or bills in relation to the granter’s needs. All gifts must be fully vouched for.

If considering gifting from the granter’s estate, you must think about the future implications of the gifting and be mindful that the granter must be left with ample funds for their future requirements. You may wish to seek legal advice should you consider future gifting.

**Deprivation of Capital**

We advise that should the granter require any future financial assistance towards care costs, the relevant Local Authority may consider any gifts made as the granter having deprived his/herself of capital.  This might then affect their entitlement to additional funding from their Local Authority towards future care costs.  Therefore if considering gifting you should also take into account the potential view of the Local Authority and possible inheritance tax implications.  Accordingly, it is recommended that you consult a solicitor or a financial advisor to ensure you have obtained proper professional advice regards any potential impact on yourself and the granter if you consider gifting.

**Financial Assessment Form**

If a granter has to move into residential care, filling out the financial assessment forms for the Local Authority falls under your duties as a financial attorney.  You must engage with the Local Authority to ensure fees are correct in order to protect the granter from any potential under or over payment; this is simply a matter of diligent administration. If an attorney chooses not to provide the Local Authority with this information then we would generally consider this to be a breach of the duties of a financial attorney.

**Third Parties Involved in a Granter’s Affairs**

As an attorney there may be occasions where it will be necessary for you to interact with other people involved in assisting or supporting the granter, such as care workers, Local Authority staff members, friends or other family members. These parties may be helping by getting shopping for the granter or assisting in some other financial aspect, such as paying window cleaners, gardeners or other bills. In these circumstances, you must remember that you are responsible for ensuring these tasks are carried out properly and that appropriate receipts, invoices etc. are kept and given to you as part of your record keeping duties.

**Cash Payments**

In the event that you may need to pay for goods/services by cash, in these circumstances we would recommend that you purchase a duplicate cash receipt book, the recipient of the cash should sign to confirm receiving the cash from you. This receipt book will be your record of all cash payments.

**Your Duties and Responsibilities as Attorney**

Please ensure you have read and understood the following important points.

1. You must respect the general principles of the Adults with Incapacity (Scotland) Act 2000, found in section 1.
2. You should consult and respect the Code of Practice for Continuing and Welfare Attorneys.
3. If called upon to act, you must ensure that every measure is taken to support the granter to make their own decision on any matter, or otherwise to allow them to exercise their legal capacity.
4. You must ensure that any decision made on behalf of the granter respects their rights, will and preferences and takes account of any known wishes and feelings, past or present.
5. You must communicate with relevant parties and take account of their views.
6. You must act within the scope of the powers granted to you.
7. You must keep appropriate records.
8. You are in a position of trust and must not take advantage of that position.

**Record Keeping Advice and Guidance**

The granter’s bank accounts should be in the granter’s sole name with you named as financial attorney, likewise the granter’s income should be paid into their own bank account and should be kept separate from your own.

If at any time you spend the granter’s funds or are involved with their financial affairs, you must keep a record of all transactions. This means you should keep all receipts, invoices or other documentation relating to any funds you spend or use on their behalf.

You also need to keep and monitor all bank statements. The granter’s bank account should operate with a debit card from which you should pay for items such as food, clothes, toiletries etc. We would recommend that the use of cash is kept to a minimum.

In addition, we would advise it is best practice to get as many regular bills as possible set up to be paid by Direct Debit or Standing Order. This will leave a clear transaction history on the statements which can then be corroborated by receipts and other records which you will be keeping.

These practices will help reduce the need for cash withdrawals or cheques which can be difficult to account for. This makes it much easier for you to show how you have spent funds belonging to the granter.

It is highly recommended that the Code of Practice for Continuing (Financial) and Welfare Attorneys are read in conjunction with this information leaflet. The Code of Practice has a wealth of information and advice about how to manage the financial affairs of a granter. This can be accessed via 🖰 [www.publicguardian-scotland.gov.uk](http://www.publicguardian-scotland.gov.uk/) or a hard copy may be obtained from 🕿 0131 244 3581.

**Contact Us**

We will be very happy to help if you need further assistance in carrying out your role as attorney. Please contact us:

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