

Power of Attorney, capacity and managing money

Due to the impact that Huntington's disease has on the brain and someone's cognitive ability, most people with the disease find that over time they need increasing support with decision making and money management. There are different ways to help with this, including formal options such as Power of Attorney and Guardianship, and less formal approaches such as joint bank accounts or registering authority with specific providers. We always recommend planning ahead to ensure your wishes are met and that the people you trust to make decisions on your behalf have the legal authority to do so if needed.

1. Capacity

Mental capacity is a complex issue but, in general, it is the ability to make and understand decisions as well as the consequences of taking or not taking that decision or action. There is a presumption of capacity in the law, such that it is always assumed that someone has capacity unless proved otherwise. Just because someone needs help, it does not mean that capacity is lost. Capacity may vary over time and depend on the decision being taken. For example, someone may not have the ability to make complex financial decisions but is able to consent to treatment or care arrangements.

You may not have mental capacity if you can no longer:

- Make or act on decisions
- Communicate decisions
- Understand decisions
- Remember decisions

2. Power of Attorney

Power of Attorney is a legal document that allows someone to make decisions on your behalf if you are unable to. It can only be set up when you have the capacity to choose who you want to deal with your affairs should capacity be lost. For this reason, we recommend having the document drafted as soon as possible.

When choosing an Attorney, it is best to choose someone that you know and trust, and it is important that they understand your future wishes and what is best for you so they are best able to ensure that these are met. There are two parts to a Power of Attorney document.

Continuing Power of Attorney

- This allows someone to make decisions and act on your behalf in relation to finances and property. It can include things such as bank accounts, managing benefits or buying and selling property.
- When setting this part up, you can choose whether you want this to start right away (even whilst you still have capacity) or later when you no longer have capacity. This enables someone to support you to manage your money even while you are able to make the key decisions.

Welfare Power of Attorney

- This allows someone to make decisions about your health and welfare. It includes decisions about medical treatment and care arrangements.
- This part never starts straight away and can only ever be used if you have lost capacity. This is because you should always be the person to make the key decisions about your health and welfare where you are at all able to do so.

Options when setting up Power of Attorney

You can have one person for both parts of the Power of Attorney or one person for each part. You can also have several people for either/both parts if you choose. It is worth considering more than one Attorney so that if one person is unable to act for you then the other appointed Attorney will be able to do so.

Setting up Power of Attorney

Whilst it is possible to write your own Power of Attorney document, we always recommend getting it set up through a solicitor or legal expert to ensure it is written correctly and will be a valid document when it is needed. As well as the legal fees, there is an £85 charge (cost at the time of writing) for registering with the Office of the Public Guardian and sometimes an additional charge for the certificate your GP or solicitor will sign to confirm you have capacity. If you have a low income then you may be entitled to Legal Aid to help cover the costs and an exemption with the registration fee. If you have concerns about how the costs will be met, then it is best to seek advice, as there may be other options or assistance in your area.

If there is no Power of Attorney

Whilst you still have overall capacity, there are some less formal options that can enable someone to support you with your finances. However, if you do lose the capacity to make decisions and there is no Power of Attorney in place, then it is more difficult and complex for someone to support you with your finances or decisions about your welfare. A court order such as Guardianship is usually required and this process can take a long time as well as being more expensive. It also means you do not have a say over who will be making the decisions and may not have had the opportunity to talk to them about your wishes.

3. Options if there is no Power of Attorney and you have capacity

Joint Bank Account

Setting up a joint bank account is one way that someone could help you manage your money. This can only be set up when you are able to make decisions about your money, however, it could also be helpful if you lose this ability as the joint account holder will be able to access the money and pay bills. Be aware that any money held in a joint account belongs fully to both joint account holders, so this will not be appropriate in all situations. It could also make it harder to separate finances, for instance, where a couple needs to claim benefits and manage their finances separately.

Authority given to specific providers

This is where you provide specific authority for a third person (such as a family member) to act on your behalf when dealing with different agencies or companies. For instance, authority can be provided directly to your bank to enable someone else to access the account and deal with the bank on your behalf. It is only possible to do this when you have the capacity to make decisions so that you are able to provide the authority, therefore it may not be a long-term solution.

Benefits appointee

This is an option to enable someone to deal with your benefits on your behalf if you are struggling to manage this yourself. It enables them to be able to deal with all phone calls and forms as well for them to receive payments on your behalf. It can be set up whilst you still have overall capacity to make decisions but are struggling to manage your finances yourself. *It is also an option when you lack capacity.* A benefits appointee is usually a trusted family member or friend but social services or an agency can also take on this

role where required (known as a Corporate Appointee). A benefits appointee is set up by contacting the benefits helpline for whichever benefits you are claiming. The benefit agency will then conduct an interview with you and the person who is requesting to become your appointee to determine if it is suitable.

4. Options if there is no Power of Attorney when capacity is lost

If you are supporting someone who has already lost the capacity to make decisions for themselves and are looking for more powers to enable you to make decisions for them, there are still options available. We do recommend taking legal advice to discuss the options further and consider what is most appropriate in the circumstances. You may also wish to seek guidance from your local authority Social Work department and/or the Office of the Public Guardian.

Guardianship

This is an option for people wanting to act on your behalf if you have lost the capacity to make decisions yourself. It provides the most long-term and wide-ranging powers for people in this situation. An application to court is required, which can be a lengthy process. It can include both financial and welfare powers, however, these are specified by the court and can be specific or wide-ranging, depending on what is deemed to be required in the circumstances. It is often for a specific length of time (usually three years) and renewal may be possible after this time has passed. A Guardian needs to report regularly on the financial affairs of the person and keep records of how their money has been managed. A local authority can also apply to be a Guardian. Legal advice is required to apply for Guardianship, and the costs can be considerable, however Legal Aid may be available.

Intervention Order

This is an option for people wanting to act on your behalf if you have lost the capacity to make decisions yourself. It can be used for one-off decisions such as selling a property, a move into residential care or to consent to a specific treatment. An application to court is required and therefore legal advice is required. This could be awarded for a financial or welfare decision, and the court order will remain in place until the agreed actions have been completed. This will need to be reported to the Office of the Public Guardian. A local authority can also apply to be an Intervener.

Access to funds

This is an option for people wanting to act on your behalf if you have lost the

capacity to make decisions yourself. It provides the power for someone to access your money and manage day-to-day expenses. An application to court is required, however, the process is designed so that legal advice is not required for this, and it is quicker to put in place than some of the other options. If the only income is from benefits, then a benefits appointee may be more appropriate. Again, an individual or an organisation can apply.

Management of residents' finances

This is for people in residential care who have lost the capacity to make decisions for themselves. The care home can apply for the power to access your money and manage day-to-day expenses.

5. Where to go for further information and advice

Legal advice

You can find a solicitor on the Law Society of Scotland website:

<https://www.lawscot.org.uk/>

To check if you qualify for Legal Aid, see the Scottish Legal Aid Board calculator:

<https://www.slab.org.uk/new-to-legal-aid/eligibility-estimators/>

Legal Aid solicitors can also be found on the same website:

<https://www.slab.org.uk/new-to-legal-aid/find-a-solicitor/>

Office of the Public Guardian

This is the public agency that is responsible for managing Powers of Attorney, Guardianships, Intervention Orders and authorisations granted under the Access to Funds scheme. They have a helpline and can provide information and guidance. There is also information about all the above processes and procedures/applications on their website.

<https://www.publicguardian-scotland.gov.uk/home>

Useful links and contact details

My Power of Attorney is an organisation promoting Powers of Attorney who have a range of information on their website and links to local organisations and agencies.

<https://mypowerofattorney.org.uk/>

The Citizen's Advice Scotland website includes information about Managing Affairs for someone else

<https://www.citizensadvice.org.uk/scotland/family/help-for-adults-in-the-community-s/managing-affairs-for-someone-else-s/>

Age Scotland has useful factsheets relating to Power of Attorney and mental capacity

<https://www.ageuk.org.uk/scotland/information-advice/legal-and-family-issues/power-of-attorney-and-mental-capacity/>

The Scottish Government website contains forms and guidance documents relating to adults with incapacity

<https://www.gov.scot/collections/adults-with-incapacity-forms-and-guidance/>

Updated November 2024

