

THE LAW SOCIETY
OF NORTHERN IRELAND



Guidance Note on Access and Disclosure of an Incapacitated Person's Will





ACCESS AND DISCLOSURE OF AN INCAPACITATED PERSON'S WILL

Aim of guidance

1. The aim of this guidance is to clarify when a solicitor can disclose a copy of a client's will to an Attorney acting on behalf of a Donor under the scope of a registered¹ Enduring Power of Attorney ("EPA") or a Controller² acting on behalf of a Patient³ and appointed by the Office of Care and Protection ("OCP"). The guidance applies to solicitors authorised to practice in Northern Ireland and who are regulated by The Law Society of Northern Ireland.

Who is your client?

2. A solicitor can accept instructions given by someone else, where the person providing the instructions has the authority to do so on behalf of the Donor or the Patient. This may be when that person is acting as an Attorney named in an EPA or as a Controller. Whether instructions come from an Attorney or Controller the solicitor's duty of care is to the person on whose behalf they act.

Duty of Attorneys and Controllers

3. The OCP has made it clear that Attorneys and Controllers have a duty when making financial decisions, so far as is reasonably possible, not to interfere with the succession plans made by the person for whom they act. Having knowledge of the contents of the Will and codicils(s) means that the Attorney / Controller may be in a better position to act in the best interests of the person for whom they act and in particular may:
 - (i) Take and act upon appropriate professional advice;
 - (ii) make appropriate investments;
 - (iii) apply to the Court for an order to save a specific legacy (so far as possible), where disposal of the asset is required;
 - (iv) apply to the Court for a Statutory Will to ensure that it reflects the intentions of the person who
 - (v) arrange for safekeeping and storage of the asset.

¹ EPA registered in accordance with The Enduring Powers of Attorney (Northern Ireland) Order 1987.

² Controller appointed in accordance with Order 101 of The Mental Health (Northern Ireland) Order 1986.

³ 'Patient' as defined in Order 97(1) of Part VIII of The Mental Health (Northern Ireland) Order 1986.

Scenarios of possible adverse outcomes which can occur without knowing the content of the Will

Jack's case

Jack has made a Will giving his house (currently worth £300,000) to his nephew, Paul, and the residue (about £20,000) to charity. He also made an EPA without any restrictions in favour of Paul.

Jack subsequently has a stroke. The EPA has been registered with the OCP.

Jack is no longer able to live in his own home and Paul decides that he must sell the house to pay for Jack's care.

The effect of selling the house is that when Jack dies the gift in the Will to Paul fails and he gets nothing. The charity benefits from the whole of the estate. This was not what Jack intended.

However, if Paul is aware of the contents of the Will, he can apply to the Court for a Statutory Will to be made so that Jack's testamentary wishes are followed.

June's case

June has made a Will in which she gives her friend, Margaret her premium bonds. At the time of making the Will these were worth £500. June's son, David is the sole residuary beneficiary. David is unaware of the contents of the Will.

June has dementia and lacks mental capacity to manage her finances. David is appointed as June's Controller. He decides he should invest £49,500 of June's money in premium bonds.

June dies. David discovers that Margaret will now get £50,000 premium bonds (much more than his mother ever intended) and he gets less than intended.

Had David been aware of the Will, he could have invested his mother's money differently, so as not to frustrate June's succession plans.

Disclosure of a Will to an Attorney acting under a registered Enduring Power of Attorney

4. The Will forms part of the financial affairs belonging to a Donor and so unless the Donor provides contrary instructions, the Attorney should be entitled to a copy of the Donor's Will should they request same.

To evidence compliance, it is advisable for the question of disclosure of the Donor's Will to be discussed and recorded at the time of making the Will and confirmed at the time of making the EPA. Having advised as to the consequences, instructions should be obtained as to whether disclosure is to be denied and if so, in what circumstances. This should be incorporated into the EPA.

Disclosure of a Patient's Will to a Controller

5. The OCP appoints a Controller to make property and financial decisions on behalf of a patient on a continuing basis under the authority of a Controllership Order. Throughout the duration of the Controllership, the OCP retains oversight of how the Controller manages the Patient's affairs and Controllers are required to seek specific authority to complete certain transactions such as making loans or gifts, buying or selling a house, varying investments or taking or defending legal proceedings. The terms of Article 103 of the Mental Health (NI) Order 1986 should be noted in this regard.

It may be of benefit to provide the Controller with sight of a Patient's Will, in order to inform the Controller when making financial or property related decisions. The Controller should therefore be entitled to a copy of the Patient's Will should they request same unless it is otherwise stated to the contrary in the Controllership Order. If there is such a restriction, it will be necessary to seek authority from the OCP before disclosing the Will. This may be done in a letter application to the Master [Care and Protection].

Instructions for non- disclosure

6. If the Donor / Patient has made it clear that his or her Will is not to be disclosed prior to his or her death, it should not be disclosed. If a specific court order has been obtained, requiring disclosure of the Will, the solicitor must comply with the order and disclose the Donor's / Patient's will. However, if the solicitor believes disclosure is not in the Donor's / Patient's best interests, the solicitor will need to seek authority from the OCP to challenge the order in the appropriate court. The solicitor may also ask OCP for authority for payment of his or her costs to be paid out of the Donor's / Patient's estate.

Incapacity restriction

7. If the EPA contains a restriction which prevents the Attorney from acting until the Donor lacks mental capacity to manage his or her property and financial affairs, the solicitor is advised to require of the Attorney sufficient evidence to satisfy himself or herself that the Attorney has authority to now act under the Power. As an EPA must be registered by the Attorney with the OCP when the Attorney believes the Donor has become or is becoming unable to manage his or her property and financial affairs, a registered EPA will be sufficient evidence of the Donor's mental incapacity.

The Will is the Donor's / Patient's property

8. The original Will is the Donor's / Patient's property and should be retained by the solicitor as part of the Donor's / Patient's papers, in accordance with the original retainer, unless ordered otherwise by the Court. If a Will is disclosed to an Attorney or Controller by a solicitor, then the solicitor must inform the Attorney or Controller of their legal obligations in respect of how the information contained in the Will should be treated.

Concerns about an Attorney or Controller

9. The solicitor should be cognizant of cases which cause concern to the solicitor and may wish to inform the OCP of their concerns if appropriate.

Contact details for the Office of Care & Protection [Patients]

Office of Care & Protection [Patients]

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