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 a property and financial affairs attorney or deputy appointed by the Court of Protection in circumstances where the client has lost mental capacity. The guidance applies to solicitors authorised to practise in England and Wales and regulated by the Solicitors Regulation Authority. The guidance may be used by other regulatory organisations if they wish to do so.

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 client. Where the client (also known as ‘the donor’) has made a power of attorney, he or she remains the client acting through their agent - the appointed attorney. A deputy appointed by the Court of Protection, will be acting on behalf of the person for whom they act, who lacks mental capacity, as a statutory agent. Whether instructions come from an attorney or a deputy, (in that role) the solicitor’s duty of care is to the person on whose behalf they act.

Duty of an attorney or deputy

3. The Court of Protection has made it clear that property and financial affairs attorneys and deputies owe 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/or codicils(s), means that the attorney or deputy is in a 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 lacks mental capacity and the relevant circumstances; and
   (v) arrange for safekeeping and storage of the asset.

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1. Indicative behaviour 1.25.
3. Attorney-General v The Marquis of Ailesbury (1887) App Cas 672; Re Joan Treadwell (30th July 2013). It is compatible with section 1(6) of the Mental Capacity Act 2005, which requires before an act is done or a decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person’s rights and freedom of action.
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 a Property and Financial Affairs Lasting Power of Attorney, without any restrictions in favour of Paul. This has been registered with the Office of the Public Guardian.

Jack subsequently has a stroke and is no longer able to live in his own home. 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 of Protection for either a statutory will to be made so that Jack’s wishes are followed or obtain an order for sale, which under the Mental Capacity Act 2005 ensures that the gift is saved. 4

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 are 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 deputy. 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 would have invested his mother’s money differently, so as not to frustrate June’s succession plans.

Instructions at time of making a will and a Lasting Power of Attorney

4. Solicitors have a duty to act in their client’s interests. The will forms part of the financial affairs belonging to the donor and so unless the donor provides contrary instructions, the attorney is entitled to a copy of the donor’s will. 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 Lasting Power of Attorney (LPA). Having advised as to the consequences, instructions should be obtained as to whether disclosure is to be denied, or the circumstances in which it is permitted. This should be incorporated

4 Schedule 2, paragraphs 8 and 9 of the Mental Capacity Act 2005 enables the preservation of an interest in property, which is disposed of on behalf of a person who lacks mental capacity under a court order, where that interest in property is the subject of a gift under the person’s will.
into the LPA or contained in a side letter. See the Law Society’s Practice Note on Lasting Powers of Attorney (May 2016).

Instructions for non-disclosure

5. If the client 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 client’s will. However, if the solicitor believes disclosure is not in the client’s best interests, the solicitor will need to seek a variation of the order, by submitting a Witness Statement to the Court of Protection which explains why the will should not be disclosed. The solicitor may also ask the Court of Protection for authority for payment of his or her costs to be paid out of the client’s estate.

Incacity restriction

6. If the LPA or Enduring Power of Attorney (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 Office of the Public Guardian, 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. This assumption cannot be made with a registered LPA, as registration does not indicate incapacity. The attorney should provide sufficient evidence to confirm that the donor lacks capacity to consent to the disclosure of the will.

The Will is the client’s property

7. The property and financial affairs attorney or deputy is the client’s agent and the will forms part of the property and financial affairs, which the agent is authorised to manage. As such, if there is no instruction to the contrary within the LPA, EPA or the Court order, a full copy of the will can be disclosed to the attorney or deputy, unless the disclosing solicitor has cause for concern (see paragraph 8 below). The original will should be retained by the solicitor as part of the client’s papers, in accordance with the original retainer, unless ordered otherwise by the Court of Protection.

Concerns about an attorney or deputy

8. There may be occasions where the solicitor is aware or has reason to believe that the attorney or deputy has acted, is acting or proposes to act in breach of his or her statutory and/or fiduciary duties as set out in Chapter 7 of the Mental Capacity Act 2005 Statutory Code of Practice. For example, where the solicitor has credible information which gives cause for reasonable concern that if the will were disclosed, there is a reasonable belief that the attorney or deputy may act or make a decision which is not in the best interests of the person for whom they act. In such circumstances, a solicitor may consider that it is not appropriate for the will to be disclosed, as it is not in the best interests of the

5 A witness statement should be made on form COP24 and can be obtained from https://formfinder.hmctsformfinder.justice.gov.uk/cop024-eng.pdf

client. In such case, the Refusal Notice in the Annex to this guidance should be given to the attorney or deputy. At the same time the solicitor should contact the Office of the Public Guardian and inform them of their concerns:

PO Box 16185
Birmingham
B2 2WH

opg.safeguardingunit@publicguardian.gsi.gov.uk
Telephone: 0300 456 0300

The nature of a concern raised to the Office of the Public Guardian will require disclosure of confidential information and is likely to be justified from a professional conduct perspective.

9. Examples of concerns include but are not limited to the following situations:

(i) The attorney or deputy wishes to transfer or has transferred the client’s assets to himself or herself or someone who is related or connected to them;
(ii) An indication of missing or converted assets;
(iii) The attorney or deputy has had an unexpected change in lifestyle or circumstance;
(iv) Care fees are not being paid;
(v) An investigation into and/or application for the attorney’s or deputy’s removal is in the process of being made;
(vi) The attorney or deputy refuses to disclose the residence of the client.

**Notification of disclosure to the donor**

10. It is both courteous and good practice to let the donor know in advance of sending the will to the attorney, that the attorney has requested a copy of the will and it is intended that it is to be provided to them. Letter 1 as set out in the Annex to this guidance should be sent to the donor, regardless whether or not the donor has mental capacity. The attorney should also personally inform the donor that he or she has requested a copy of the will. Letter 2 is a standard letter that can be used as a covering letter for sending the will to the attorney.

**Notification of disclosure to P by the deputy**

11. The Court of Protection appoints a deputy to make property and financial affairs decisions on a continuing basis, the wide terms of which enable the deputy to see a copy of will of the person for whom he or she has been appointed to act (‘P’). However, incapacity is not a continuing state, so even where the Court has appointed a deputy, P is not prevented from making decisions, where the deputy knows or reasonably believes P has capacity in relation to that decision. As such, it is for the deputy to ascertain whether P has sufficient capacity to make the decision for disclosure of the will or whether the deputy can rely on the Court order. It would be unduly onerous to require the deputy to provide medical evidence of capacity on each and every decision he or she makes, including capacity to consent to disclosure of P’s will, and so the solicitor is able to rely on

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7 Mental Capacity Act 2005, section 20(1).
the deputy’s request for disclosure. Letter 2 is a standard letter that can be used as a covering letter for sending the will to the deputy.

**The duty to consult the client**

12. Obtaining a copy of the will is a best interests decision, and where reasonably practicable, the attorney or deputy should involve the person for whom they act and let him or her know of any request sought to see a copy. Disclosure is a significant decision and as such, in the case of a deputy, would be expected to report this to the Office of the Public Guardian, when submitting his or her annual report.
Disclosure of Will: Refusal Notice

Date:

Request by an attorney or deputy for a copy of the will of the person for whom they act

Your request for disclosure of the will of the person for whom you act under an Enduring or Lasting Power of attorney or Deputyship Order has been denied at this time.

To obtain a copy of the will you will need to apply to the Court of Protection for a specific court order. Details of how to obtain an order can be found on www.gov.uk/courts-tribunals/court-of-protection, where the application forms can be downloaded.
Flow chart setting out the process where the donor has not given express prior consent to disclose his/her will

- **START**
  - Is the power effective only when the donor lacks mental capacity? **Yes**
  - Evidence of donor's mental incapacity must first be obtained
  - **No**
    - Is there reason to believe that the attorney has acted, is acting or proposed to act in breach of his or her MCA fiduciary and/or statutory duties? **Yes**
      - Send Refusal Notice to attorney
      - Raise concern with the OPG
    - **No**
      - Send Notification of request to donor of power (Letter 1)
        - Donor does not respond or agrees to disclosure
          - Disclose will- send Letter 2
        - Donor responds and refuses attorney copy of will
          - Do not disclose will
  - **No**

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           - Disclose will- send Letter 2
         - Donor responds and refuses attorney copy of will
           - Do not disclose will
Letter 1: Notification to the donor of request by attorney for a copy of the donor’s will

Dear [insert the name of the donor]

You may recall that you made an [Enduring/Lasting] Power of Attorney and appointed [insert the name of the attorney requesting the will] to act on your behalf in relation to your property and finances.

Your attorney has asked for a copy of your will [and codicil(s)] which this firm holds for safekeeping. Your attorney is allowed to see your financial papers and documents, which includes a full copy of your will [and codicil(s)] unless you decide you would prefer for [him/her] not to see it. By knowing its content your attorney is in a better position to make decisions in your best interests, taking into account your wishes as set out in your will.

If you do not want us to let your attorney have a copy of your will [and codicil(s)], and if you would like to discuss this further please telephone me on [insert telephone number] by [inset date8]. If I do not hear from you by that date I will let your attorney have a copy of your will.

Yours sincerely,

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8 Set a reasonable time scale, which should take into account statutory and bank holidays.
Letter 2: Letter to attorney or deputy with copy of the will [and codicil(s)]

Dear [insert the name of the requesting attorney/deputy],

Re: [insert client’s name]

As previously requested, I enclose a copy of [insert client’s name] will [and codicil(s)]. The original is held with this firm for safe keeping.

As [an attorney][a deputy] when making financial decisions you are under a duty, so far as is reasonably possible, not to interfere with the succession plans made by [insert client’s name]. You may wish to seek professional advice regarding this, particularly if you wish to sell or transfer assets, and make appropriate investments. There are occasions when a court order should be obtained to reflect [insert the client’s name]’s intention and reduce financial loss to an eventual beneficiary.

Please let me know if I can assist further.

Yours sincerely,
Acknowledgements

The authors would also like to thank the following for their invaluable input: Angela Johnson of the Office of the Public Guardian, Senior Judge Denzil Lush from the Court of Protection, Richard Munden, barrister of 5RB and Caroline Bielanska, Solicitor of Caroline Bielanska Consultancy