Support with money management

Managing household bills etc out of a bank or other account currently held in a sole name

Summary

Vulnerable adults often need support with personal finances when they are physically unable to get to a bank or other financial institution where they hold an account in their sole name.

Once the Assisted Decision Making (Capacity) Act (ADM Act) is fully commenced supporters can be formally appointed as Decision Making Assistants or Co-decision Makers and they will be supervised by the Decision Support Service. Currently however an option often suggested to such a person in need of support is to make their bank account a joint account with their intended supporter. Legally this can have certain unintended consequences which should be fully explained to the person. These consequences are set out in the Appendix. Alternative options are to set up a third party authorization on the account, which involves no change of ownership, or for the person to appoint a trusted party as their attorney under a Power of Attorney.

A third party authorization on an account may however not always be available in the financial institution in which the person has their account. Even where it is available best practice is to set out in writing the limits under which the third party can utilize the money in the account. (More information and guidance on this option is set out below under the heading "Agency or third party authority accounts").

Where this option is not available and a joint account is the only support option, it is imperative that there is evidence in writing of the reason for the account being "put into joint names", namely to facilitate the living and other expenses of the account owner only. (More information and guidance on this option is set out below under the heading "Agency or third party authority accounts").
If the option chosen is a Power of Attorney, best practice is to have set out clearly in it what property the donor wishes the attorney to manage, for what purpose and the limits under which the attorney must use that property. (More detail and guidance on this option is set out below under the heading "Powers of Attorney").

Both the third party authorization and the Power of Attorney will automatically terminate if the person loses the ability to manage their own money or give direction in relation to it. At that stage if the person has completed an Enduring Power of Attorney it should be registered. If not then an application to court (currently wardship) will be necessary.

As such the options outlined should be seen as **short term arrangements** only to be kept under constant review, both for potential financial abuse as well as for any change in the person's ability to make decisions regarding their own finances. Appendix 1 contains a flow chart of the various options available.

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Introduction
The delay in the full commencement of the ADM Act means that vulnerable adults have no statutory method, other than a Power of Attorney (where the attorney is not subject to any supervision), to support them to manage their own personal finances, and instead rely on ad hoc arrangements which are not always fit for purpose.

One of the arrangements which is often suggested when a vulnerable adult (the account owner) needs support to manage a bank account, currently held in their sole name, is to suggest "putting it into joint names". The suggested joint account holder is usually a relative or friend (third party) of the vulnerable adult who may in many cases be already assisting them in other ways. The purpose of putting the account into joint names is normally to enable the third party to pay the account owner's bills and generally support the person to manage their money. **It is essential that when a name is added to a person's account that the intention of the original account holder is clearly documented by the bank/financial institution with regard to such account, having first discussed the various options with the account owner.**

This is often done in ignorance of the serious legal (and potentially gift and inheritance tax consequences) of a transfer of assets from the name of the account owner (our client), into joint names with a third party.

Financial institutions should have experienced staff trained in the legal and taxation consequences of transferring financial accounts into joint names and they should be able to explain the issues to a customer in a way which the customer understands.

It is also possible that the financial institution does not offer the alternative of the appointment of a third party as an authorized signatory (see below for further detail on the under the heading "Agency or third party authority accounts") or that the staff will advise their customer to see their solicitor about preparing a Power of Attorney (see below for further detail on this under the heading "Powers of Attorney").

Agency or third party authority accounts
The best and safest way to ensure that the money in an account belonging to a person who needs support with their personal finances remains theirs, and is only used for their care needs, is to set up a third party authority (or signature) on their account.

A third party authority allows the account owner to select a third party (usually a trusted relative or close friend) to do their day-to-day banking **without** opening a joint account.

The third party is regarded in law as the account owner's agent. The account still belongs to the account owner, not to the agent, and the agent is bound to use the money in the account at the direction of the account owner and for their exclusive benefit.

Like any other agency agreement, there can be rules or limits imposed on the agent. In the context of a vulnerable account owner needing support with personal finances, those rules would include an agreed list of bills to be paid on the third party's authorization, and a weekly/monthly limit to the cash that can be taken out by the agent.

The account owner can at any stage cancel the authority of the third party by giving notice to the bank and to the third party.

A third party authority ceases automatically if the account owner lacks the capacity to make decisions around their finances or to direct the agent in matters concerning the money in the account.

If this occurs any Enduring Power of Attorney made by the account owner should then be registered to enable the attorneys appointed by the account owner to act on behalf of the account owner in relation to his or her finances.

It is recommended that when a person wishes to set up a third party authorization he/she should seek the assistance of the financial institution's Vulnerable Customer Service so as to ensure that their customer receives full information and it is done properly.

Where no third party authorization is offered
Not all financial institutions offer this third party authority for personal accounts[1].

In this eventuality the assistance of the bank's Vulnerable Customer Unit should **always** be sought because, if the adult needing support with their money management does not wish to see a solicitor in order to complete a Power of Attorney (see below under Power of Attorney), the only option then available to support the vulnerable account owner may be to put the account into joint names. If this is being done it is imperative that the original account owner and the person who is to become the joint owner with them (and preferably also the bank) must very clearly record in writing the fact that this is only being done for convenience and that the intention is that the account continues to belong to the original account owner and is to be used for their benefit only. This effectively makes it in law an agency account.[2]

It would be advisable to specifically state too that on the death of the original account owner the account is to be held for the benefit of their estate.

This is also the evidence that the allows the presumption of a "resulting trust" in favour of the original account owner to apply (see Appendix 2 below).

It would also be advisable to ask the bank or other financial institution to "red flag" the account so that any activity on the account by the second joint owner, beyond that which was agreed at the time the joint account was set up, is highlighted and brought to the immediate attention of the original account owner.

As with any other agency arrangement, if the original account holder lacks the capacity to make decisions around their finances or to direct the second joint account holder in matters concerning the money in the account, the agency arrangement automatically comes to an end.

Powers of Attorney
The second option for a person who needs support in managing their finances is to put in place a Power of Attorney (POA). This is often referred to as an "ordinary" or general" Power of Attorney provided for in section 16 of the Powers of Attorney Act 1996. It is completely different to an Enduring Power of Attorney (EPA) also provided for under the same Act. It is in fact the complete opposite to an EPA in that

[1] "Guide to Safeguarding your money now and in the future" - booklet published by Banking and Payments Federation Ireland
[2] www.keepcontrol.ie

a POA automatically ceases when the person creating it lacks capacity, unlike an EPA which is only capable of being brought into effect when the donor lacks capacity. The third schedule to the 1916 Act provides a specific wording for a POA. The wording simply appoints a person "to be my attorney in accordance with section 16". Whilst section 16 states that this wording is meant to be a guide only, some solicitors appear to use this general wording and do not limit the attorney's power in any way. This can lead to financial abuse as there is no requirement that the operation by an attorney under a POA be supervised.

As with the appointment of any agent, the attorney under a POA should be given clear instructions in the POA about exactly what assets of the donor they will, as attorney, have power over, how they are to exercise that power and for whose benefit. In the context of a vulnerable account owner needing the support of an attorney with personal finances, those instructions can include an agreed list of bills to be paid by the attorney out of a specified bank account and a weekly/monthly limit to the cash that can be taken out by the attorney.

Without these limitations an attorney could deal with all of the assets of the donor and, for example, sell their land or shares even though the intention of the donor was simply that the attorney be able to utilize their current account to pay household bills and expenses.

There appears too to be a belief that a POA gives the attorney appointed the right to make personal care and other personal decisions for the donor. It does not.

Attorneys under POAs also seem sometimes either unaware that a POA automatically terminates when the donor loses capacity OR are reluctant to relinquish their rights.

It is hoped that when a person who is in need of the assistance of an attorney to manage their finances while they still have capacity to direct the attorney in relation to them, will be told when visiting their solicitor to put the POA in place that, as the POA will automatically terminate if they lack capacity in the future, it is possible for them to also now put an EPA in place which can then be registered and enable the attorney/s appointed in the EPA to take over the management of the financial and personal affairs for the donor if and when he/she lacks capacity.

Banking arrangements during Covid 19

The Banking and Payments Federation of Ireland recently issued guidance on account management for older adults advised to "cocoon" in order to protect themselves from Covid 19[3].

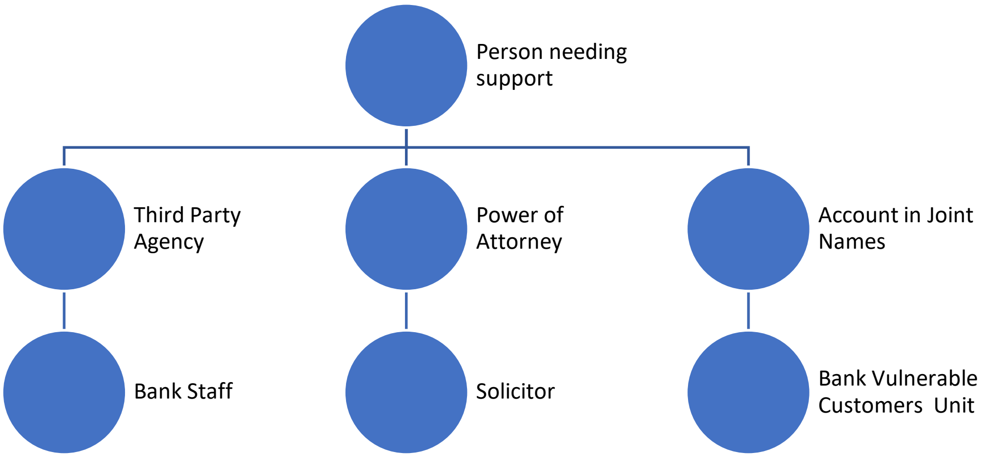
The Guidance note states that "all banks now have dedicated phone lines for their older and vulnerable customers during the Covid-19 crisis". The leaflet gives special numbers for "cocooning" older account holders to contact and promises that "your bank will be happy to take a call to listen to your concerns" and that "as a person who is cocooning, your call will be prioritized". It effectively means that financial institutions will take instructions over the phone from older account holders in relation to transactions on their account.

It is only to be hoped that this "special assistance" for older adults will survive the Covid 19 crisis and remain something that financial institutions continue to provide.

[3] https://www.bpfi.ie/wp-content/uploads/2020/04/BPFI-Guide-Cocooning-During-Covid-19-Final-Copy.pdf

Appendix 1

Person needing support with day to day money management



No matter what method is used the person needing support MUST give specific written instructions on what bills are to be paid out of their account and who is to have benefit of the money in the account.

Appendix 2

Legal Consequences of "putting an account into joint names":

Putting an account currently in the sole name of an individual, and where all of the money in the account belongs to them, risks triggering the legal concepts known as "presumption of advancement" and "resulting trust".

The "presumption of advancement" is a now archaic concept, but it still exists. It is a presumption that if a person (the donor) transfers property of any kind which is wholly theirs into the joint names of themselves and a third party, then they are presumed, unless the contrary intention is clear, to have given the property as an outright gift to the third party **IF** the donor is related to the third party as husband or father.

This means that if an account held in the name of an elderly male client is "put into joint names" with a child of his, then that child will by virtue of the operation of the presumption of advancement be regarded as having received a gift of it, hence the potential gift tax liability. The same presumption does not extend to a wife transferring property into joint names with her husband or a mother transferring property to a child!

The operation of the presumption could amount to unintentional financial abuse. The purpose of the transfer therefore needs to be clearly stated so that it is obvious that the presumption is not to apply.
For all other relationships, that is other than husband to wife and father to child, the equitable concept of a "resulting trust" applies.

This doctrine means that, unless otherwise stated, where an account belonging to one person (our client), is transferred into joint names with a third party, then that third party is automatically presumed to hold the account on a "resulting trust" for the benefit of our client. This means that the money is, by law held and should only be used for the benefit of our client during their lifetime, and after their death it forms part of their estate[4].

Our concern is however the availability of the money to our client during their lifetime.

The doctrine of resulting trust does suit a typical Sage Advocacy client (who is not related to the third party as husband or father) who needs support with personal finances because it operates to presume that the money in the joint account continues to belong to them. This doctrine can however be set aside if there is some evidence that it is not to apply. An example of this would be a daughter who claims that her mother who was the original account holder led her to believe that she, as a joint holder of the account, could spend money from the account on herself, as she deserved it for looking after her mother. It is necessary therefore to ensure that the presumption of resulting trust **is** to apply by having evidence in writing that the only reason the account was put into joint names was for convenience, and that it continues to belong to the original sole account owner and therefore is to be used for their benefit only.

[4] For a more detailed explanation of these equitable doctrines see https://www.lawsociety.ie/Solicitors/Practising/Practice-Notes/Joint-Bank-Accounts---Guidelines-for-Solicitors/#.Xlj6ZJX7Tcs

The doctrine of resulting trust will not however operate on a practical level to physically stop the third party using the money in the account for their own benefit.

The only certain way to avoid the pitfalls of these presumptions and ensure that the money is preserved for the original sole account owner who is now in need of assistance is to set up a third party authority on their account.