

PUBLIC GUARDIAN PRACTICE NOTE

Office of the
Public Guardian

SUBJECT: Gifts

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Title: Gifts: Deputies and EPA/LPA Attorneys

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1. Summary

The primary duty of a deputy or an attorney is to make decisions in the best interests of the person for whom they have been appointed (referred to as 'P'). The deputy / attorney has a duty to protect P's interests, to administer their financial affairs and property for P's benefit, to keep their own money separate from P's, and a duty not to take advantage of their position as deputy or attorney.

This Practice Note summarises the position of deputies and attorneys and gifts. It gives guidance on how they should approach this issue, but it must not be treated as legal advice.

There can be no generalised approach to gifts. Each decision must be made considering its own context and timing. As with all decisions a deputy or attorney makes, the overriding test is whether this is in P's best interests. Best interests must be determined on each occasion taking into account all the relevant circumstances

and in particular taking into account the steps outlined in s. 4 of the Mental Capacity Act: www.legislation.gov.uk/ukpga/2005/9/pdfs/ukpga_20050009_en.pdf

This Practice Note includes the practice and policies that the Office of the Public Guardian ('the OPG') follows when deputies or attorneys have exceeded their authority by making excessive gifts and explains the consequences of this.

2. What is meant by a Gift?

A deputy or an attorney makes a gift when they transfer money, property or possessions from P to themselves or to other people. It can include making an interest free loan, as the waived interest is in effect a gift.

A gift includes creating a trust of P's property and varying the will of a deceased person so as to divert P's interest in the estate to someone else by a deed of variation. Both of these require an application to the Court of Protection.

3. Deputies and Gifts

A deputy's main duty is to provide for P's needs. Their main focus should be on maintaining and providing for P.

A deputy's powers are set out in the Order appointing them as a deputy. Deputies should carefully check the terms of their Order and seek advice from the OPG or from solicitors if they need clarification of their powers.

A deputy has no power to make gifts other than that contained in their Order of appointment. Most Deputy Orders give quite limited powers to make gifts. A deputy order usually allows the deputy to:

- Make gifts on customary occasions to relatives or persons connected to P provided that the value of the gift is not unreasonable having regard to all the circumstances and, in particular, the size of the estate
- Make gifts to charities which P might have made, provided that the gift is not unreasonable having regard to all the circumstances and, in particular, the size of the estate

A deputy is not obliged to make gifts.

A deputy who wants to make gifts of money or property which exceed the terms of their order - whether or not they will benefit directly or indirectly - must apply to the Court of Protection for authority to make the gift.

4. Attorneys and Gifts

Registered Enduring Powers of Attorney (EPAs)

An EPA attorney's main duty is to provide for P's needs. Their main focus should be on maintaining and providing for P.

The Mental Capacity Act says that an EPA attorney may:

- Make gifts of a seasonal nature, or on an anniversary of a birth, marriage or civil partnership;
- These seasonal or anniversary gifts may be made to persons (including the Attorney) who are related to or connected to P;
- Make gifts to any charity to whom P made or might have been expected to make gifts.

The value of each gift should not be unreasonable having regard to all the circumstances and in particular the size of P's estate.

An attorney is not obliged to make any gifts.

The attorney is obliged to follow any restrictions or conditions in the EPA about gifts.

The restrictions on gifts also apply to unregistered EPAs, provided P still has capacity to make decisions, and has agreed to the EPA being used by the attorney.

Registered Property & Financial Affairs Lasting Powers of Attorney (LPA)

A Property & Financial Affairs LPA attorney's main duty is to provide for P's needs. Their main focus should be on maintaining and providing for P.

The Mental Capacity Act prescribes that an attorney has no authority to make gifts except in the following limited circumstances:

- A Property & Financial Affairs LPA attorney may only make gifts on customary occasions.
- Customary occasions are the occasion or anniversary of a birth, a marriage or the formation of a civil partnership, or any other occasion on which presents are customarily given within families or among friends or associates.
- These gifts may be made to persons (including the attorney) who are related to or connected with P.
- Gifts may also be made to any charity to whom P made or might have been expected to make gifts.
- The value of each gift should not be unreasonable having regard to all the circumstances and, in particular, the size of P's estate.

An Attorney is not obliged to make any gifts.

The Attorney is obliged to follow any restrictions or conditions in the LPA about gifts.

5. Applying to the Court of Protection

Deputies and attorneys should apply to the Court of Protection where they want to make gifts which they do not have the authority to make under their deputy order or

their EPA / LPA. The Public Guardian cannot approve a gift or a loan. Only the Court of Protection can do this.

The Court of Protection cannot give informal advice on whether a deputy or attorney can make a gift. A formal application must always be made. Application forms can be obtained from the Court or from the HM Courts & Tribunals Service website. <http://hmctsformfinder.justice.gov.uk/HMCTS/FormFinder.do>

Practice Direction F to Part 9 of the Court of Protection Rules 2007 explains the procedure relating to gift applications. http://www.justice.gov.uk/downloads/courts/court-of-protection/Court_Rules_2007.pdf

6. Guidance on Gifts: Deputies and Attorneys

The Mental Capacity Act does not define what is a “reasonable” or “unreasonable” gift. Deputies and attorneys are expected to decide how much is reasonable. It is not possible for the Public Guardian to give precise figures or guidance.

The reasonableness of a gift depends very much on P’s particular circumstances which includes consideration of their liquid capital; whether they own a property and what will happen to it; their income and expenditure and whether there is a sizable gap between the two; their care and accommodation costs and whether these are likely to change; their age and life expectancy; their future needs; the terms of their Will and so on.

Any gift or transfer of real property, (e.g. land or a house) either the whole property or a part share, is almost certainly outside the powers of the deputy or attorney (notwithstanding P’s previously expressed wishes) and the deputy or attorney will need to apply to the Court of Protection for authority to make the gift or transfer.

Deputies and attorneys may choose to gift personal possessions or furniture of modest or sentimental value to family members, for example when disposing of the contents of P’s house, provided that the items are of modest value. Items of significant monetary value should not be gifted unless authorised by the Court.

It is suggested that deputies and attorneys consider the following factors when deciding whether to make a gift: (This is not an exhaustive list.)

The occasion of the gift

Does the gift relate to a customary occasion such as a birthday, anniversary or some recognised family occasion?

Does the gift relate to charitable giving?

If neither of the above, it is likely that the deputy or attorney will need to apply to Court. For example, most gifts made for tax planning purposes require a court application.

The amount of the gift

Is the proposed gift for a reasonable amount? This should be a reasonable amount that would normally be incurred on a customary occasion or in relation to charitable

giving. Is it affordable? Is it line with the sort of gift which P used to make before they began to lose capacity to make their own decisions? Will it impact on P's future needs? Is the amount reasonable taking into account all of P's current circumstances?

P's Financial Circumstances

The deputy or attorney should consider P's financial circumstances, not simply in terms of their capital / savings but also their present and future needs. The issues to be considered include (and this is not an exhaustive list):

- Whether P's income covers their usual expenditure? If not, how much is the shortfall?
- How much are the total assets?
- The cost of P's care and accommodation
- Whether P owns a property and what will happen to it
- P's likely future financial needs and how these may change (for example, whether entitlement to Continuing Health Care funding will be reviewed in future)

The Recipient(s) of the Gift

Is the deputy / attorney treating members of the family equally in making gifts? If not, is there a good reason for this?

Is the deputy / attorney taking advantage of their position by making gifts only to themselves and not considering making gifts to others?

Is the deputy / attorney proposing to make gifts to persons who are not relatives and who are not closely connected to P? Did P make gifts to them before they began to lose capacity to make their own decisions?

P's Will

If the deputy or attorney is aware of the contents of P's Will, they should try to take this into account when considering gifts, as this may be an indication of P's wishes. However, taking the Will into account does not mean a deputy or attorney can gift P's assets according to the Will in P's lifetime.

7. Deputies and Provision for the Needs of Others

Most Deputy Orders enable the deputy to make provision for the "needs" of anyone who is related or connected to P. The deputy may only do this if P had provided for those needs in the past or if P might have been expected to provide for those needs.

Most Deputy Orders do not define what is meant by "needs" but it is generally intended to cover situations such as maintaining spouses or dependent relatives and other circumstances where there is evidence that P has made financial provision for others for particular reasons in the past and that they would be likely to do so again in the future.

The deputy should apply to the Court if there is any doubt as to whether they can rely on this provision in the Order.

The deputy must comply with any restrictions in the Order.

8. Attorneys and Provision for the Needs of Others

Enduring Powers of Attorney

The Mental Capacity Act allows an EPA attorney to benefit themselves or other persons if P might be expected to provide for his or that person's needs. The Attorney may do whatever P might be expected to do to meet those needs.

The Mental Capacity Act does not define what is meant by "needs" but it is generally intended to cover situations such as maintaining spouses or dependent relatives and other circumstances where there is evidence that P has made financial provision for others for particular reasons in the past and that they would be likely to do so again in the future.

The attorney should apply to the Court if there is any doubt as to whether they can rely on this provision in the EPA.

The attorney must comply with any restrictions in the EPA.

Lasting Powers of Attorney

The Mental Capacity Act does not expressly permit an LPA attorney to benefit themselves or other persons by providing for their needs. However, the Court of Protection has confirmed that an LPA attorney may provide for the needs of family members if P is legally obliged to maintain them, as in the case of P's spouse, civil partner or minor child. An application to Court will be necessary if an attorney wishes to maintain anyone else.

9. P's Capacity to Make or Authorise Gifts

A deputy order or registered EPA / LPA does not necessarily prevent P from making or authorising gifts themselves. Deputies and attorneys are expected to use care and caution where P expresses a wish to make gifts. There are specific legal tests of capacity to make a gift and it is advisable to seek legal advice and / or to arrange for a mental capacity assessment to be carried out to ensure that P has the capacity to make this decision, especially where a substantial gift is proposed.

Section 3 of the Mental Capacity Act requires P to be able to understand the information relevant to the decision, retain that information, use or weigh that information, and communicate his decision in order to have the capacity to make a decision. The information relevant to a decision includes information about the reasonably foreseeable consequences of deciding one way or another and of failing to make the decision. Further guidance can be found in the Mental Capacity Code of Practice.

The Public Guardian may ask the deputy or attorney to explain the steps they took to ascertain that P had the capacity to make or authorise the gift.

Wherever possible deputies and attorneys should try to involve P in the decision making process when gifts are contemplated. Even if P lacks capacity to make the decision, they may have views on matters affecting the decision, and on what outcome would be preferred. Their involvement can help work out what would be in their best interests. The Mental Capacity Act Code of Practice includes guidance on how to approach this (5.21-5.24): www.justice.gov.uk/downloads/protecting-the-vulnerable/mca/mca-code-practice-0509.pdf

10. The Consequences of Making Unauthorised Gifts

The Public Guardian can investigate and ask for an account of any gifts made. Both deputies and attorneys should keep a record of any gifts made and the circumstances of such, so that they are in a position to give an account if asked. A deputy should include the detail of gifts in any annual account they submit to the Public Guardian.

If the deputy / attorney makes excessive gifts, the Public Guardian may:

- Apply to the Court of Protection for removal of the deputy or attorney (and, if appropriate, ask the court to arrange for a deputy or new deputy to be appointed)
- Apply to the Court of Protection for the security bond of a deputy to be called in
- Instruct the deputy/attorney to apply for retrospective approval from the Court of Protection in circumstances where such an application would have a reasonable prospect of success
- Request the deputy/attorney to seek the return of the gifts and restitution of P's assets
- Refer the matter to the police or other relevant regulatory or safeguarding bodies.

A new deputy may be authorised to take legal action to recover the money gifted. In some cases the Police may be asked to investigate.

Deprivation of Assets

If the local authority arranges for P to enter a care home on a permanent basis, P will be means tested to see whether they should make a contribution towards the cost of their care. The local authority calculates this using their income, savings and other capital.

Transferring an asset out of P's name does not necessarily mean that it will not be taken into account in this means test. The local authority can, when assessing a resident's eligibility for assistance, look for evidence of deliberate, or intentional, deprivation of capital and assets.

The same principles apply where there is a deprivation of assets with a view to claiming means-tested benefits.

Security bond – Deputies

Most deputy orders require the deputy to take out a security bond. The bond is a form of insurance which protects P's estate against financial mismanagement by the deputy.

If a deputy makes excessive and unauthorised gifts of money and property, the Public Guardian – or any other person with a sufficient interest – may apply to the Court of Protection for an order enforcing the bond to recover the loss.

If the Court makes such an order, the insurance company will reimburse P but they will seek to recover the money personally from the deputy. The insurance company may take further Civil Court proceedings against the deputy to achieve this.

The Criminal Law

Where excessive and unauthorised gifts have been made by a deputy or an Attorney, the Public Guardian will consider asking the Police to investigate.

Fraud by Abuse of Position is a criminal offence under Section 4 of the Fraud Act 2006. This applies to anyone who holds a position in which they are expected to safeguard, and not act against, the financial interests of another person. Deputies and attorneys are in this position.

The Fraud Act makes it a criminal offence to dishonestly abuse that position, where the person intends to make a gain for themselves or others, or to cause a loss to P, or to expose P to a risk of loss.

11. Deputies: Supervision and Investigation

Supervision

The Public Guardian supervises deputies. The degree of supervision varies according to the circumstances of the case.

Where the Public Guardian considers that a deputy has exceeded their authority by making unauthorised gifts or charging unreasonable expenses, the Public Guardian may increase the deputy's supervision level. The Public Guardian may also take action to ensure that the deputy complies with their duties, for example by warning the deputy and advising them how to approach this in future. In serious cases the OPG Compliance Unit may be asked to investigate.

Investigation

Section 58 of the Mental Capacity Act 2005 and Regulation 41 of the LPA, EPA and Public Guardian Regulations 2007 give the Public Guardian power to investigate complaints and concerns about a deputy's failure to comply with their duties and to require the deputy to supply information and documents.

Outcomes

Occasionally the matter can be resolved by the deputy or whoever has received unauthorised gifts paying back the money. The deputy may be given a warning and their supervision level increased. Sometimes the Public Guardian will ask the deputy to apply to the Court for retrospective approval to gifts. In the most serious cases, the

Police may be alerted and the Public Guardian may apply to the Court of Protection for an order:

- Discharging the deputy or
- Suspending the deputy and freezing accounts and / or
- Directing the deputy to account and supply information to the Public Guardian and / or
- Enforcing the security bond

The Court may arrange a hearing before a judge which the deputy will be expected to attend to explain their actions.

12. Attorneys: Compliance and Investigation

Investigation

The OPG Compliance Unit investigates concerns the way in which an attorney is exercising their powers. Section 58 of the Mental Capacity Act and Regulation 46 - 48 of the LPA, EPA and Public Guardian Regulations give the Public Guardian powers to investigate attorneys and to require attorneys so supply information, accounts, and documents.

Where the Public Guardian concludes that an attorney has exceeded their authority by making excessive gifts or charging unreasonable expenses, the Public Guardian may take action to remedy the situation.

Outcomes

Occasionally the matter can be resolved by the attorney or whoever has received unauthorised gifts paying back the money. The attorney may be given a warning. Sometimes the Public Guardian will ask the attorney to apply to the Court for retrospective approval to gifts. In the most serious cases, the police may be alerted and the Public Guardian may apply to the Court of Protection for an order :

- Revoking the EPA/LPA and, if appropriate, arranging for the appointment of a deputy to investigate further and consider whether funds can be recovered, or
- Suspending the attorney's authority and freezing accounts and / or
- Directing the attorney to account and supply information to the Public Guardian or to the Court

The Court may arrange a hearing before a judge which the attorney will be expected to attend to explain their actions.

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