

STEP Guidelines: Lasting Powers of Attorney and Deputyship

Dealing with a person's property and investing their money – a guide for Attorneys and Deputies

These guidelines summarise the position of a deputy or an attorney, highlighting the key areas of which you need to be aware. Ignorance of the law is no excuse before the court so it is important that you understand your duties and the consequences of not carrying them out properly. Remember these guidelines only highlight the areas of concern and you may need to get legal advice or carry out further research if you still have questions.

Remember: your primary duty is to involve the person in decisions about their affairs wherever possible and to act in the best interests of the person for whom you have been appointed.

Section 4 *Mental Capacity Act 2005* sets out the steps to take in that regard:
www.legislation.gov.uk/ukpga/2005/9/section/4

The *Mental Capacity Act 2005* Code of Practice gives further guidance that should be followed:

www.gov.uk/government/uploads/system/uploads/attachment_data/file/497253/Mental-capacity-act-code-of-practice.pdf

1. What does the Deputyship order or the Power of Attorney document actually say?

Deputyship Order

The Deputyship Order you receive will set out your specific powers and limitations, usually in section 2. Read and understand it.

Your powers could apply to any aspect of the person's (P's) life e.g. finance and/or personal welfare. Usually where you have been given financial responsibility, the Order will state that a Deputy should take investment advice especially where P has substantial assets. The Order may well contain powers or restrictions about dealing with P's property.

You should:

- Always make decision in P's best interests
- Only make decisions within the scope of the Court order
- Respect the principles in the *Mental Capacity Act* (below)

Power of Attorney

The Lasting Power of Attorney document must be registered with the Office of the Public Guardian before you can use it.

If the document doesn't specify restrictions on the decisions an Attorney can make, the Attorney can make decisions in respect of any aspects of the P's property and financial affairs.

For both Deputyship and Attorneyship, your powers may be sole, joint or joint and several. If they are joint, you must always act alongside your Co-Deputy or Attorney.

If P has investments consider the points below about using or continuing to use P's investment advisor.

2. Mental Capacity Act 2005 ('the Act')

Main principles

- P is assumed to be mentally capable of making all decisions for himself unless or until shown otherwise.
- A finding of lack of capacity for one decision does not mean P cannot make other decisions for himself.
- P is only treated as unable to make a decision once all practical steps have been taken to help P come to that decision him/herself and P is still unable.
- An unwise or eccentric decision doesn't mean someone is incapable.
- Any act done on behalf of P must be done in his or her best interests
- Before the act is done or decision made, regard must be had as to whether the same purpose can be achieved in a way that is less restrictive P's rights and freedoms.

When does someone lack capacity?

Section 2 of the Act defines when someone lacks capacity. In short, it says that someone lacks capacity if they are unable to make a decision because of brain impairment or difficulty with functioning of the mind.

Section 3 of the Act states that someone is unable to make a decision where they are unable to understand, retain, or weigh the information necessary to make that decision.

Remember that the ability to make decisions is time and issue specific; a person may be able to make decisions about paying an electricity bill, but not investing their funds.

3. Issues

Keeping separate bank accounts and holding assets in P's name

- Attorneys and Deputies should generally keep P's money separate to their own*.
- This includes investments. If you make an investment on behalf of P, you must do so in their name where at all possible.

- If you are unable to register the investment in P's name, and so hold them in your own name you must make a declaration of trust that acknowledges P's interest in the asset. You will need to seek legal advice in this respect.
- Wherever appropriate you should seek professional investment advice.

* Where, for instance, a husband and wife have always operated a joint account, this can continue on the same basis as before if considered appropriate. It may be wise to seek advice before making significant withdrawals if they are not for P's benefit and out of character with what has been done before P lost capacity.

CASE: *Re Buckley*

In the case of *Re Buckley*, the Attorney made an investment in her own name rather than her donor's and had her Power of Attorney revoked.

http://www.mentalhealthlaw.co.uk/media/Re_Buckley_%282013%29_MHLO_13_%28LPA%29.pdf

Bank accounts

The British Banking Association, Building Societies Association has produced helpful guidance in conjunction with the OPG 'Guidance for people wanting to manage a bank account for someone else', which should be consulted particularly if you have any problems.

<https://www.bsa.org.uk/document-library/press-and-public-affairs/press-releases/3rd-party-mandate-guidance>

Buying property or shares in property from P

- You are not allowed to profit from your role as Deputy or Attorney in any way. This includes not putting your own interests before those of P.
- You will need to apply to the Court of Protection for their authority to buy one of P's assets or to sell it to a family member, even if it is at market value or they would want you to do it.

Occupation of the property of P

- As a Deputy or Attorney you cannot act in a way that causes a conflict of interests. Living in the same house *may* cause a conflict between your personal role and your role as deputy or attorney. If you have any concerns you should seek advice. It is possible to obtain permission to do so but you must apply to the Court.

Where a family member lives with P it will be sensible to have an agreement setting out the basis for this including what should happen if P moves out for any reason and responsibility for paying utilities etc.

- If there is an independent third party living in the house to act as a carer, there should be a contract of employment. You will have to consider employment liability insurance, National Insurance, PAYE Income tax and pension responsibilities.

- If there is joint ownership of the property with P then it is important to check the title and clarify what will happen to the property on the death of P. You may need to put a Trust in place.
- If you are to be employed, you will need the permission of the Court.
- If P had a tenancy or lease of a property in their sole name or jointly with you, and you or someone else continues to occupy, you and not P are responsible for the rent etc. after P has moved out. The same considerations apply if P occupies a property under the terms of a trust.

Paying for extensions and home improvements so that P can live with you

Remember that you must not benefit from your position. Perhaps the best way to consider this scenario is by reference to the case *Public Guardian v AW and DH* below.

CASE: *Public Guardian v AW and DH*

The Attorney in this case renovated her home to cater for the needs of her mother, using £183,000 of her mother's estate. It was held that this was a disproportionate amount and her LPA was revoked. Her mother, due to the onset of dementia, had been unable to stop the spending of more money. AH's home underwent significant improvements, including the fitting of a new kitchen.

<http://www.bailii.org/ew/cases/EWCOP/2014/28.html>

If you decide to make such renovations and improvements, these guidelines recommend that:

- You acknowledge the beneficial interest of P in your home. If extensions have been made it is important to recognise that this doesn't belong to you solely and ensure the title to the land reflects this.
- You shouldn't make these decisions on your own if there are other Attorneys.
- It is best to apply to the Court when making such decisions to protect the interests of both parties.

Renovations/improvements to P's property

Does your EPA, LPA or Deputyship enable you to incur the cost?

The primary consideration must be the best interests of P.

- If P is still living there, does the expense make it easier for him/her to do so?
- Is the expense proportionate and affordable for P given other expenditure and income?
- If the property is unoccupied make sure you have documented your reasons and your budgets for carrying out the work. The case of *Re HC* may help to give guidance (*Re HC* [2015] EWCOP 29).
- Consider contacting the OPG for guidance or applying to the Court for authority.

Making gifts

If you transfer money, property, or possessions from P to yourself or to others you are making a gift. There can be no generalised approach to making gifts.

- The safest option is to make no gifts out of the estate of P.
- Typically a Deputy has the power to make gifts on customary occasions to relatives or persons connected to the individual e.g. birthday gifts. It must be a reasonable gift having regard to the size of the estate.
- Deputies usually have the power to make gifts to charities which P might have made gifts to. Again it must be reasonable and proportionate.
- The powers of an attorney are not express but are in line with those of a Deputy.
- The OPG have issued guidance on this – **02/2012 – Gifts**, and **OPG2 – Giving gifts for someone else** – which you should consult.

(<https://www.gov.uk/government/.../public-guardian-practice-note-gifts>)

If in doubt, apply to the Court.

Meeting needs

An Attorney under an EPA (but not an LPA) or a Deputy can meet certain people's *needs* in certain limited circumstances. The OPG have issued guidance on this: **02/2012 – Gifts**, which you should consult (see link above).

It is not permissible for an Attorney or a lay Deputy to pay an allowance to a family member without first obtaining the Court's approval. The OPG has issued guidance on this: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/524111/PGnote_2016_05_family_care_payments.pdf

Consequences of unauthorised gifts (i.e. made beyond your powers)

The Public Guardian can:

- Revoke your deputyship or Power of Attorney.
- Request the return of gifts and compensation for the assets.
- Refer the matter to the police.
- Require you to apply for retrospective approval from the Court if it seems likely that you would have been able to obtain it.

CASE: *The Public Guardian v MJ and JM in the matter of GM*

In this case, MJ and JM were deputies for Gladys Meek, an elderly lady suffering with dementia and living in a care home. The deputies made lavish gifts to themselves with a value of up to £55,000 each, including handbags and laptops out of the estate of Gladys. This was held not to be in her best interests or within the scope of the Deputy Order. It is not a licence to loot as the Judge put it. They were removed from their position and discounted in the will of Gladys Meek.

[http://www.mentalhealthlaw.co.uk/Re_GM:_MJ_and_JM_v_The_Public_Guardian_\(2013\)_EWHC_2966_\(COP\),_\(2013\)_MHLO_44](http://www.mentalhealthlaw.co.uk/Re_GM:_MJ_and_JM_v_The_Public_Guardian_(2013)_EWHC_2966_(COP),_(2013)_MHLO_44)

Recovery of expenses and being paid generally

An Attorney or Deputy may recover out of pocket expenses they incur but should not pay themselves or other family members a wage or salary without first getting approval from the Court of Protection. The Office of the Public Guardian has issued guidance on this matter:

- <https://www.gov.uk/government/.../public-guardian-practice-note-gifts>
- <http://www.courtprotectionhub.uk/cases/december-07th-2015>

Keeping accounts

- Property & Affairs Deputies are required by the Order appointing them to keep and annually (or more frequently if requested) submit to the Public Guardian correct accounts for all financial transactions on P's behalf.
- You have to report each year to the Public Guardian with their form number OPG102 or OPG103 as appropriate. A professional Deputy must also complete the OPG105 outlining future likely costs.
- Property and Affairs attorneys should keep clear accounts and records for all transactions on P's behalf. There are no reporting requirements but the OPG can ask for records at any time.

Investment

- Again you have an obligation to act in P's best interests.
- You must keep financial records.
- Check what authority your EPA, LPA or Deputyship Order gives you.

In *Re Buckley* the Attorney invested assets in her own reptile business and was penalised. Judge Lush referred to the duties of trustees that invest. These include the following:

- Obtaining and having regard to proper advice, generally from a Financial Advisor.
- The requirement to review and vary the investments as appropriate
- Ensuring the suitability of the investments
- The need to diversify investments
- The need to keep P's assets separate from your own

Develop an understanding of P's needs, income and outgoings and capital resources. Also consider if there might be one off items of significant expenditure (or receipts e.g. an inheritance). Consider cash flow modelling for an idea of how long funds might last and the impact of one off expenses.

Deputyship standards

The OPG issued standards in 2014 for Professional Deputies:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504356/SD5-Deputy-standards-professional-deputies.pdf.

These bear careful reading and implementation to ensure you are acting in P's best interests and can demonstrate this to the OPG.

Professional Attorney guidance

In August 2016, OPG issued a draft practice note for consultation in respect of good practice by fee-paid professionals who agree to be appointed as an attorney under a Lasting Power of Attorney. This may well be introduced largely as drafted given the proposals and so it would be sensible to adopt the proposals.

Discretionary fund management

If your authority does not specifically give power to use or continue use a Discretionary Fund Manager (DFM) then you may need to apply to the Court of Protection for the necessary authority. Check the position with the DFM and OPG.

Choosing an independent financial advisor (IFA)

An IFA should be acting in your best interests, and therefore in the best interests of P.

Questions to ask the financial advisor before employing them would include:

- Are you fully independent or 'restricted' in relation to the advice you give?
- What qualifications do you have as an IFA?
- What experience do you have of managing and advising on funds for Deputies and Attorneys?
- How do you charge for your advice – both initial advice and on-going monitoring and advice – please give a clear breakdown of all charges involved?
- How do you select investments?
- What measures do you use for assessing 'risk'?
- How have your investments and portfolios for Deputies and Attorneys performed over the last five years?
- How long has the firm been in business? How long have you been at this firm? How many advisors are there in the firm regularly doing this work?

You should also make sure that the firm is reputable and financially sound and has no outstanding claims against it. There is an organisation called [SOLLA](#) (the Society of Later Life Advisers) that has a register of advisors who specialise in helping elderly people.

You may well want to meet with two or three different firms both to make sure you get on well with the advisor but also that you feel the investment proposals are consistent.

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