



PRACTICE NOTE

Giving gifts: a guide to the legal background for deputies and attorneys

Summary

This practice note gives detailed guidance on how deputies and attorneys should approach giving gifts on behalf of the person they act for (often called ‘the person’ in this practice note).

The note explains the legal framework to gifting and the approach the Office of the Public Guardian (OPG) takes when deputies or attorneys go beyond their authority to give gifts.



Scope of this practice note

This practice note applies to all attorneys appointed under a registered lasting power of attorney (LPA) for property and affairs or under an enduring power of attorney

(EPA). It also applies to deputies appointed by the Court of Protection to manage the property and affairs of someone who lacks capacity to make decisions.

Principles of gifting

Deciding whether to make a gift is an important part of being a deputy or attorney. Gifts can help to preserve the relationships with the family and friends of the person whose finances you are helping to look after.

However, deputies and attorneys need to be aware of the strict rules on gift-making. As a deputy or attorney you have limited powers to make gifts on the person's behalf and you may need to seek the authority of the Court of Protection when you do.

Attorneys acting under an LPA and deputies appointed by the Court of Protection have broadly similar duties when making decisions about gifting under either the Mental Capacity Act 2005 ('the act') or their deputyship order, or both. Attorneys acting under EPAs have similar but not identical duties.

Before making a gift, you must consider whether the person:

- has mental capacity to understand the decision to give a gift
- can take part in the decision

There is no single approach to gifts that applies to every deputy and attorney. Attorneys and deputies have to make each decision considering its own context and timing. As with all decisions a deputy or attorney makes, the main test is whether it is in the person's best interests.

The law says you have to act in the person's best interests. You work out the best interests on each occasion, taking into account all the relevant circumstances. In particular, you must follow the steps outlined in section 4 of the act, which you can read at:

www.legislation.gov.uk/ukpga/2005/9/section/4

Attorneys must also follow the terms (instructions) of the specific EPA or LPA they are acting under.

OPG produces a general guide to gifting for deputies and attorneys at:

www.gov.uk/government/publications/giving-gifts-a-guide-for-deputies-and-attorneys

What does the law mean by a gift?

For a deputy or attorney, a gift is when you move ownership of money, property or possessions from the person whose affairs you manage to yourself or to other people, without full payment in return.

A gift can include:

- making an interest free loan from the person's funds, as the waived (dropped) interest counts as a gift
- creating a trust of the person's property
- selling a property for less than its value
- changing the will of someone who's died by using a deed of variation to

redirect or redistribute the person's share in the estate (meaning someone's property and money)

For any of these steps, you need to apply to the Court of Protection before you go ahead. The Court of Protection has the power to either approve or refuse your application.

If the court hasn't authorised payments from the person's estate for care that someone gives them, those payments may also count as a gift. For more information, see OPG's practice note on family care payments at:

www.gov.uk/government/publications/public-guardian-practice-note-family-care-payments

Capacity to make a gift

Before making any decision on gifting, you must try to find out whether the person has the mental capacity to make the decision themselves. If the person has capacity to make a gift, then they should normally make the gift themselves, rather than tell you to make it on their behalf.

This is because:

- as a deputy, your authority is strictly limited to making decisions that the person lacks capacity to make

- as an attorney, you are restricted by the legal limits on your gift-making authority, even if the person seems to have capacity and has instructed you to make a gift on their behalf

The Mental Capacity Act 2005 sets out how to assess capacity, which is a process with several stages. To have capacity to make a decision, section 3 of the act says the person has to be able to:

- understand the information relevant to the decision

- retain that information (hold on to it in their mind)
- weigh up or use that information
- communicate their decision

Information relevant to the decision includes information about what might happen if they do or don't make the decision.

A medical opinion about the person's capacity may be helpful when you or others are unsure.

You can find more guidance on assessing capacity in chapter 4 of the Mental Capacity Act Code of Practice at:

www.gov.uk/opg/mca-code

If you consider that the person has capacity to make a gifting decision, you should keep a record of the steps you took to make sure they did. The Public Guardian may ask you at any stage to explain your decision, or others could challenge you later.

Even if the person apparently has capacity to make a gift, you must still use care and caution when they express a desire to make one. If a substantial gift is involved, you may need to seek advice or arrange for a mental capacity assessment, or both.

Involving the person in the decision

Where the person lacks capacity to decide about a gift, you must still either consult them or encourage them to participate in decision-making – or both – as a way of working out their wishes or feelings about the gift.

Even if the person lacks capacity to make the decision, they may have views on it and prefer one choice rather than another. Involving them can help to work out what is in their best interests.

However, it may be reasonable to give less weight to the person's wishes and feelings if it's not in their best interests to do so. It all depends on the decision in question.

The [Mental Capacity Act Code of Practice](#) goes into more detail in paragraphs 5.23-5.24 about how to involve someone without capacity in making decisions.

Accepting a gift yourself

Take particular care if you are thinking of accepting a gift for yourself from

the person's estate. You must not take advantage of your position as deputy

or attorney to benefit yourself.

If you do accept a gift for yourself, the Court of Protection can look carefully at whether the person had capacity and may decide you went beyond your authority.

In the case of *PG v DH* [2014] EWCOP 15 (15 July 2014), Senior Judge Lush decided that the facts pointed to the 'donor' of a power of attorney (the legal term for the person who made it) lacking capacity to agree to a loan her son had

taken out on her property. In this case, the donor's loan counted as a gift to her son.

Senior Judge Lush commented that:

... even if VH had the capacity to make the gift, it was reprehensible [wrong] of him [the attorney] to have accepted it... and shows that when faced with a conflict between his interests and his mother's, he would place his own interests first.

The general rules about gifts

The general rule for deputies and attorneys about giving gifts is simple: apart from some exceptions, the law says **you must not make gifts** from the person's estate.

For attorneys acting under a registered property and financial affairs LPA, these exceptions are set out in section 12(2) of the act. To count as an exception, the gift must satisfy **all three points** below. It must be:

1. given on a **customary occasion** for making gifts within families or among friends and associates (for example, births, birthdays, weddings or civil partnerships, Christmas, Eid, Diwali, Hanukkah and Chinese new year)
2. to **someone related or connected to the person** or (if not a person) to a

charity the person supported or might have supported

3. of **reasonable value**, taking into account the circumstances in each case and, in particular, the size of the person's estate

For attorneys acting under an EPA, the exceptions are set out in paragraph 3(3) of schedule 4 to the act. They are similar to the exceptions for an LPA but slightly narrower in what they allow. For EPA attorneys, an acceptable gift must satisfy **all three points** below. It must be:

1. of a **seasonal nature** (for example, a Christmas present) or be given on the anniversary of a birth, marriage or civil partnership
2. made to **someone** (including the

attorney) **related or connected to the person** or to a charity the person supported or might have supported

3. of a **not unreasonable value**, taking into account all the circumstances and, in particular, the size of the person's estate

The restrictions on gifts also apply to gifts made by attorneys acting under **unregistered** EPAs, if the person still has capacity to make decisions and has agreed to the attorney using the EPA. You would be breaking your authority if you acted against the wishes of a donor with mental capacity.

Attorneys must also follow any restrictions or conditions set out in the

What is a reasonable gift?

The Mental Capacity Act 2005 does not define what is a 'reasonable' or 'unreasonable' gift when it comes to assessing whether a proposed gift is within the authority of an attorney or deputy to give. You are expected to decide how much is reasonable. OPG cannot give precise figures or guidance.

To work out whether or not a gift is reasonable, you must consider:

1. The impact of the gift on the person's financial situation. You must consider not only their current and future income, assets, capital and savings but also their present and future

EPA or LPA about gifts. Note that the donor of an EPA or LPA can only **restrict** the powers the law gives attorneys – the donor can't **expand** those powers.

If an attorney wants to make a gift that falls outside the restrictions in the law or in the EPA or LPA, they must apply to the Court of Protection for approval.

For deputies appointed by the court, the power to give gifts is stated in their deputy order. This is normally similar to an attorney's statutory (legal) authority.

As a deputy or attorney, you don't have to give any gifts and must not let others pressure you into giving them.

needs. Consider whether their income covers their usual spending and will continue to do so in the future – and whether the gift would affect that.

2. Whether making the gift would be in the person's best interests.

A best interests decision is not the same as asking what the person would decide if they had capacity. You have to think about:

- whether the person was in the habit of making gifts or loans of a particular size before they lost capacity

- the person's life expectancy
- the possibility that the person will have to pay for care costs or care home fees in future (for example, whether their entitlement to NHS continuing care funding will be reviewed and could be removed if their condition is likely to improve)
- the amount of the gift – it should be affordable and no more than would be normal on a customary occasion or for a charitable donation
- the extent to which any gifts might interfere with the inheritance of the person's estate under his or her will, or without a will if one has to be created
- the impact of inheritance tax on the person's death

This is not a complete list – there may be other things to consider relevant to the person's particular circumstances.

Gifts of property

Any gift or transfer of real property (for example, land or a house) – either the whole property or a part share – is almost certainly outside of your powers as a deputy or attorney, despite what the person might have said when they had mental capacity. To make such a gift, you are likely to have to apply to the Court of Protection for permission.

You may choose to gift personal possessions or furniture of modest or sentimental value to family members – for example, when disposing of the contents of the person's house.

You shouldn't give items that are worth a lot, unless authorised by the Court of Protection.

Who are the gifts for?

In deciding whether gifts are reasonable, you should also consider whether:

- you are treating members of the family equally – if not, is there a good reason?
- you are taking advantage of your position by making gifts only to yourself or your family and not considering making gifts to others
- a proposed gift is for someone who is not a relative of the person or closely connected to them – if not, the gift may be beyond your authority
- the person made gifts to someone before they lost capacity, and so would it be reasonable to give gifts to them now?

The person's will

You can take the contents of a person's will into account when making gifting decisions, as it is an indication of the person's wishes. In his judgment 'Re Joan Treadwell deceased [2013] COPLR 587', Senior Judge Lush commented at paragraph 88:

In the context of someone's property and financial affairs, I can think of no written statement that is more relevant or more important than a will.

The Law Society and the Society of Trust and Estate Practitioners have guidance on when a solicitor can disclose (reveal) a copy of a client's will at:

www.step.org/guidance-notes

However, taking the will into account does not mean that you can gift the person's assets in the way the will says in their lifetime.

Applying to the Court of Protection

If you want to make a gift that you lack the authority to make under your deputy order or power of attorney, you will need to apply to the Court of Protection. OPG cannot approve a gift or a loan – only the court can.

However, the Court of Protection has recognised that there are exceptions to this rule. Those exceptions are when you would go beyond your authority to make a gift but in such a minor way that it doesn't justify a court application – as long as the person's estate is worth more than £325,000. These exceptions are often called 'de minimis exceptions'.

In the case of MJ and JM and the Public Guardian [2013] EWCOP 2966, Senior Judge Lush said the exceptions can be taken as covering the annual Inheritance Tax exemption of £3,000 and the annual small gifts exemption of £250

per person, up to a maximum of, say, 10 people when:

- a) the person has a life expectancy of less than 5 years
- b) their estate is worth more than the nil rate band for Inheritance Tax purposes (currently £325,000)
- c) the gifts are affordable, taking into account the person's care costs, and won't adversely (negatively) affect their standard of care and quality of life
- d) there is no evidence that the person would be opposed to gifts of this value being made on their behalf

Being able to gift small amounts up to the Inheritance Tax exemption without the permission of the court doesn't mean that you can carry out Inheritance Tax

planning without the court's permission.

Neither can you rely on other Inheritance Tax law exemptions to avoid applying to the court for permission to give a gift.

In the case of *Re PC: The Public Guardian v AC and Anor* [2014] EWCOP 41 (05 November 2014), Senior Judge Lush stated that attorneys who want to make larger gifts for Inheritance Tax planning purposes – such as setting up monthly standing orders to themselves – should apply to the Court of Protection for an order under section 23(4) of the act.

The 'de minimis' exceptions do not apply either in circumstances set out in the case of *The Public Guardian v C* [2013] EWCOP 2965 (22 January 2013). These include:

- loans to the attorney or to members of their family
- investments in the attorney's own business
- sales or purchases below value
- any other transactions where there is a conflict between the interests of the person and the attorney's own interests

In this case, Senior Judge Lush said attorneys should be aware of their legal responsibilities and that ignorance was no excuse.

Although *The Public Guardian v C* was a judgment given in a lasting power of attorney case, the senior judge applied the same principles as applied in the case of *MJ and JM and The Public Guardian*, which involved deputies.

The Court of Protection cannot give unofficial advice on whether a deputy or attorney can make a gift. You always have to make a formal application to the court. Download court application forms at:

www.gov.uk/courts-tribunals/court-of-protection

Or you can call the court on 0300 456 4600.

The Court of Protection publishes practice directions that add to the Court of Protection Rules 2017 at:

www.judiciary.gov.uk/publications/court-of-protection-practice-directions

The rules say what the court can do.

Practice direction 9A explains the process of applying to the court to make a gift.

Practice direction 9D sets out a short procedure for routine and simple applications by existing deputies and attorneys. It also lists situations where this short procedure would be appropriate.

In most applications for authority to make gifts, the person whose finances you manage will be ‘joined as a party’ (officially included in the case). The Official Solicitor (someone who represents people without mental capacity) will be appointed to act as the person’s ‘litigation friend’ to make decisions about the application for them.

To find out more about litigation friends, visit:

www.gov.uk/litigation-friend

Providing for others’ needs

Most deputy orders potentially allow a deputy to look after the ‘needs’ of anyone related or connected to the person. Similarly, paragraph 3(2) of schedule 4 to the act allows EPA attorneys to benefit themselves or others if the person might have provided for those needs themselves.

The Mental Capacity Act 2005 does not directly say that an LPA attorney can benefit themselves or other people by providing for their needs. However, the Court of Protection has confirmed in some cases that an LPA attorney may provide for the needs of family members if the person is legally obliged to maintain them – for example, in the case of the person’s husband or wife, civil partner or a dependent child. This may include the attorney themselves, if they are a dependant.

The Official Solicitor will consider the evidence and do their own investigations to decide whether the proposed gift is in the person’s best interests. Their investigation may include arranging to meet the person to discuss their views about the gift.

In the case of *The Public Guardian’s Severance Applications (Rev1) [2016] EWHC COP 10* (19 June 2017), District Judge Eldergill considered the difference between a gift and a payment to meet a person’s needs. He concluded in the case of PG (reported at paragraphs 126-154) that an LPA donor could legitimately require her attorney to meet her disabled daughter’s needs from her estate without seeking authority from the court, as this was meeting a need rather than making gifts.

However, the judge advised (at paragraph 152g) that:

In order not to allow for any doubt at all, a prudent [careful] donor may wish to make the matter explicit [completely clear] by including a condition or statement in their LPA

about future provision for the needs of specified persons [looking after them in the future].

You may normally rely on this provision only if one of these points applies:

- the person had provided for those needs in the past
- it's reasonable to conclude that the person would have provided for those needs

'Needs' are not defined in the act but are generally intended to cover:

- situations such as maintaining

spouses (a wife or husband) or dependent relatives

- other circumstances where there is evidence that the person 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

You should apply to the court if there is any doubt about whether you can rely on this provision to make payments to someone who is financially dependent on the person.

What happens if you make unauthorised gifts?

OPG can investigate and ask for an explanation of any gifts or financial transactions you make for the person as a deputy or attorney.

You should make sure that you keep the person's money and property separate from your own or anyone else's, unless you have long held joint accounts. Keep a record of transactions you make on their behalf, particularly if you live with them and share any costs or bills.

You should keep a record of gifts and the situation you make them in, so that you can explain the gifts if you need to. Deputies should include details of gifts in their annual report they submit to OPG.

Section 58(1)(h) of the act and Regulation 41 of the LPA, EPA and Public Guardian Regulations 2007 give OPG power to investigate complaints and concerns about the way a deputy or an attorney is carrying out their duties. OPG can require the deputy or attorney to supply information and documents.

If you make gifts that go beyond your authority without getting approval from the Court of Protection beforehand, OPG may:

- apply to the court to have you removed from your role as deputy or attorney (and, if appropriate, ask the court to appoint a new deputy)

- apply to the court to suspend you temporarily from your role as deputy or attorney and to freeze the accounts of the person for their protection
- apply to the court for a deputy's security bond (a kind of insurance) to be called in – the bond provider would then seek repayment from you personally
- instruct you to apply to the court for retrospective approval of the gift (approval after you have given it) – this is normally only in circumstances where OPG considers that such an application would have a reasonable chance of success
- ask that you return the gifts or try to return the gifts made to others
- refer the matter to the police or other organisations with legal powers

The court may arrange a hearing before a judge, where you'll be expected to go to explain your actions. The judgment may be reported and, in some cases, your anonymity may be lifted (meaning you may be named publicly).

A new deputy or attorney may be authorised to take legal action against you to recover the money you spent on gifts or the actual gifts themselves.

Deprivation of assets

If the local authority arranges for the person to enter a care home permanently, it will assess their income, savings and capital (other forms of wealth, such as property and shares) to see whether they should contribute towards the cost of their care.

Transferring an asset out of the person's name doesn't necessarily remove it from this assessment. When assessing whether a resident qualifies for assistance, the local authority can look for evidence of deliberate so-called deprivation of capital and assets.

In the case of *Yule v South Lanarkshire Council* [2001 SC 203; 2001 SCLR 26],

the applicant's mother had transferred her house, her sole capital asset (meaning a significant item of property), to her granddaughter without payment. After an accident 16 months later, she entered a residential nursing home and applied for public funding for the accommodation fees, which was refused.

The court said the local authority was right to conclude from the information they had that there had been deliberate disposal of capital.

The principles above also apply when someone uses deprivation of assets to claim means-tested benefits.

Deputies and security bonds

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

If you make unauthorised gifts of money and property, the Public Guardian – or anybody else with relevant interest in the case – may apply to the Court of

Protection for an order enforcing the bond to make up for what you spent.

If the court makes such an order, the insurance company will reimburse (pay back) the person but they will try to get the money back from you personally as the deputy or former deputy. The insurance company may take further action against you in a civil court to achieve this.

The criminal law

Where a deputy or attorney has made large unauthorised gifts, 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 where they are expected to look after, and not act against, the financial interests of another person. Deputies and attorneys are in this position.

The act makes it a criminal offence to dishonestly abuse that position, where you intend to make a gain for yourself or others, to cause a loss to the person or to expose the person to a risk of loss.

Read Court of Protection judgments online at:

www.bailii.org/ew/cases/EWCOP/

For further advice:

Office of the Public Guardian

Email: customerservices@publicguardian.gsi.gov.uk

Telephone: 0300 456 0300

Website: www.gov.uk/opg