



Office of the
Public Guardian

Public Guardian guidance

Giving Gifts

Summary

This guidance helps deputies and attorneys understand how to approach giving gifts on behalf of the person they act for.

Purpose and scope

This guidance 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.

It 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.

The Office of the Public Guardian (OPG) may amend this guidance at any time, particularly to stay in line with new Court of Protection judgments.

Principles of gifting

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.

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

However, you 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. This is because the [Mental Capacity Act 2005](#) ('the Act') only allows you to give a gift in certain circumstances. Attorneys and deputies may give occasional gifts of small amounts on customary occasions to anyone connected to the person. Gifts must be reasonable, affordable and in the person's best interests. 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 Act or their deputyship order, or both. Attorneys acting under EPAs have similar but not identical duties. Attorneys must also follow the terms (instructions) of the specific EPA or LPA they are acting under.

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. 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 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](#).

Capacity to make a decision on gifting

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 the decision 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, 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.

Mental capacity is decision specific. This means someone who has capacity to make one decision may lack capacity to make another.

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 independent legal advice or arrange for a mental capacity assessment, or both.

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](#).

Involving the person in the decision

If the law permits a gift to be made (see 'What can be given as a gift'), the deputy or attorney must involve 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.

What can be given as a gift

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

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 EPA or LPA about gifts. Note that the person who made the EPA or LPA can only restrict the powers the law gives attorneys – the person can't expand those powers.

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. The majority of court orders include a 'general authority' which is usually located in section 2 of the order, although some orders give specific authority.

The general authority of a deputy to make gifts is very similar to section 12 of the Act:

1. make gifts on customary occasions to people who are related to or connected with the person provided that the value of the gift is not unreasonable having regard to all the circumstances and, in particular, the size of the estate
2. make gifts to charities which the person might have made, provided that the gift is not unreasonable having regard to all the circumstances and, in particular, the size of the estate

As a deputy or attorney, you don't have to give any gifts and must not let others pressure you into giving them. Attorneys and deputies can receive gifts, but only where section 12(2) of the Act or the deputyship order allows it.

Deputies and attorneys may wish to seek independent legal advice if uncertain about what can be given as a gift.

What is a reasonable gift?

The [Mental Capacity Act 2005](#) does not define 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. If you are concerned that the gift may not be within your authority to give you must make an application to the Court of Protection.

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 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
3. The current and future needs of the person, such as full-time care

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 – see 'Deprivation of assets' section in this guidance)
- 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
- the relationship between the person the LPA, EPA or deputyship order is for and the person the gift is for
- any record of the person's wishes and feelings such as a will or preferences and instructions expressed in their LPA

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

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 unless it is to a charity to which the person may have donated to
- the person made gifts to someone before they lost capacity, and so would it be reasonable to give gifts to them now?

Take particular care if you are thinking of accepting a gift for yourself from the person's estate. See 'Making a gift to yourself'.

Wishes and feelings

These are written expressions of the person's wishes, usually contained within an LPA, will or other statement of intention. Any known wishes and feelings must be considered as part of any best interests decisions and can help determine whether a gift is likely to be reasonable. However, making a best interests decision is not simply doing what the person would have done themselves when they had mental capacity.

If the person has recorded an expression of a wish that their funds be used in a certain way, the attorney or deputy should consider those wishes when making decisions on their behalf. However, the attorney or deputy must always act in the person's best interests and must weigh wishes and feelings against all of the other relevant circumstances such as affordability and reasonableness. You may decide the person's wishes cannot be carried out to protect their well-being.

Preferences and instructions

LPAs and EPAs allow the person making it to express certain preferences and instructions, also referred to as conditions and restrictions, regarding how their attorneys should act. Attorneys should always read preferences and instructions in the context of the MCA 2005 when considering gifting decisions.

Preferences are a written record of wishes and feelings for LPA attorneys to consider as part of the best interest decision making process. Preferences are known as conditions in an EPA.

Instructions are actions LPA attorneys must carry out as part of their responsibilities to the person. Instructions are known as restrictions in an EPA.

In the case of *Re: Various Lasting Powers of Attorney* [2019] EWCOP 40 Judge Hilder said a 'donor' of an LPA (the legal term for the person who made it) cannot include an instruction that authorises a gift that would not be allowed under the restrictions in section 12 of the Mental Capacity Act 2005. This is because the attorney must make decisions in the donor's best interests and such instructions could prevent them from doing so. However, if the donor wants to express a wish for the attorney to use their funds to benefit someone else this can be included as a preference. This allows the attorney to consider the preference as part of making a best interests decision, but they are not obliged to follow it.

The person making an LPA or EPA can only restrict the powers of the attorney and cannot expand them.

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.

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.

The attorney or deputy must always act in the person's best interests and must weigh wishes against all of the other relevant circumstances such as affordability and reasonableness.

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](#).

Providing for others' needs

A maintenance payment is not considered to be a gift under the Mental Capacity Act 2005. Use of the person's funds to benefit someone else is not a gift when there is an obligation to maintain someone else.

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 use the person's funds to benefit someone else when the attorney is under a degree of obligation to use the funds in that way.

In the case of *Re Various Lasting Powers of Attorney* [2019] EWCOP 40 Judge Hilder said that the person might be obliged to maintain someone else because of:

- general law (such as spousal maintenance obligations) or
- the effect of section 4(6) of the Act

Section 4(6) of the Act states that the attorney must consider the person's past and present wishes and feelings, and in particular, any relevant written statement made by the person when they had capacity (such as an expression of wishes in an LPA).

The attorney must also reasonably consider a maintenance payment to be in the best interests of the donor at the time the payment is to be made. This is why it is important to consider the person's financial situation.

If a donor's estate can no longer protect their own interests *and* also benefit someone else, the attorney may conclude that the wish cannot be fulfilled. A best interests decision maker only needs to consider the wishes, feelings, values and beliefs of the person. They do not need to action them (see 'Wishes and feelings').

You may normally provide for others' needs 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, husband or civil partner) or dependent relatives
- situations when 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

Judge Hilder advised (at paragraph 68 of Various Lasting Powers of Attorney):

“However, in the absence of either capacitous demonstration of such beliefs and values, or express statement of wishes in the instrument, where the use of funds under contemplation gives rise to a conflict of interest on the part of the attorney, the attorney should make an application to the court for prior authority pursuant to section 23(2) of the Act.”

You should apply to the Court of Protection if it is not clear whether there is an obligation to maintain someone else (either under general law or according to the wishes and feelings of the person) or if it is not clear whether payments are reasonable.

Attorneys may find it helpful to refer to Judge Hilder's [Using Donors' Funds to Benefit Others: An Attorney's Decision Tree](#).

EPA attorneys can maintain someone other than the person who made the EPA if the person might have provided for someone else's needs themselves (see paragraph 3(2) of [schedule 4 to the Act](#)). However, the attorney can only do this to the extent that the person who made the EPA might be expected to provide for or meet the other person's 'needs', and no further. You should apply to the Court of Protection first if the proposed payments go beyond what would reasonably be expected.

Most deputy orders allow a deputy to look after the 'needs' of anyone related or connected to the person.

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

Family care payments

In some situations, it is preferable for a family member to provide care to the person. If the court hasn't authorised payments from the person's estate for that care, those payments may count as an unauthorised gift.

For more information, see [OPG's guidance on family care payments](#).

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. This includes gifting the proceeds (amount received after sale) of the person's property.

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.

Giving loans

Attorneys and deputies must not take advantage of their position or put themselves in a position where their personal interests conflict with their duties.

Attorneys appointed under an LPA or EPA do not have authority to take loans from the person's funds for themselves or anyone else. The general authority in a deputy order does not include authority to take loans and deputies must not unless they have specific authority from the Court of Protection.

Deputies and attorneys must apply to the Court of Protection for authorisation if they wish to take a loan.

Any loan taken for you or anyone else from the person's funds without authorisation will be treated as an unauthorised gift by OPG. OPG can't approve loans or repayment plans and we may ask you to repay the amount immediately or refer you to the Court of Protection for removal from your role as attorney or deputy.

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 – only the court can.

You should wait until you have an answer from the Court before making the gift. Below is a list of examples where a deputy or attorney must apply to the Court of Protection first:

- Creating a trust of the person's property
- Varying the will of someone who has died by using a deed of variation to redirect or redistribute the person's share of the estate

- Investments in the person's own business
- Selling or buying property below market value
- Any other transactions where there is a conflict between the attorney or deputy's own interests and the person's interests

Attorneys and deputies must also apply to the court where other payments are made that are not included in the Act's gifting exceptions or the deputy court order. Some examples include:

- If there is any doubt about whether LPA attorneys or deputies should make the decision to maintain someone other than the person
- Making a loan, with or without interest, from the person's money, as the attorney or deputy does not have authority to do this
- Where an attorney or deputy wishes to make a payment that could be seen as unreasonable or not in the person's best interests

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](#). 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.

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.

[Find out more about litigation friends](#).

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.

The de minimis exceptions

The Court of Protection has recognised that there are situations where a gift goes beyond the authority of a deputy or attorney, but to such a minor degree that it doesn't require an application

to the Court. These are often called 'de minimis exceptions' and only apply if the person's estate is worth more than £325,000.

Other factors to consider would be: the person's life expectancy; whether 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, and whether there is any evidence that the person would be opposed to gifts of this value being made on their behalf.

The 'de minimis' exceptions do not apply in the 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.

Making unauthorised gifts

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.

OPG investigations

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

[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.

Making a gift to 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. Deputies and attorneys must not allow any other influences to affect the way they act, and decisions should always benefit the person.

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), the judge 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.

The judge 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.”

Senior Judge Lush

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 payments which they claim are gifts, the Public Guardian will consider asking the police to investigate.

There are various criminal offences that a deputy or attorney might be charged with. For example, 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.](#)

For further information

Office of the Public Guardian
PO Box 16185
Birmingham B2 2WH

Telephone: 0300 456 0300 (+44 (0)203 518 9639 outside the UK)

Relay UK (if you cannot hear or speak on the phone):
18001 0300 123 1300

Phone line open Monday to Friday 9am to 5pm (Wednesday 10am to 5pm)

Email: customerservices@publicguardian.gov.uk

Online: www.gov.uk/opg