

## Deputyship and Power of Attorney (*ref 15*)

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### **What is the Office of the Public Guardian?**

The Office of the Public Guardian (OPG) carries out the administrative functions of the Court of Protection, which protects and administers the property and financial affairs of persons who are incapable of managing and administering their property and affairs by reason of mental disorder.

The OPG help and advise the families and advisers of the person who is incapable, especially when they need to apply to the Court of Protection to protect the interests of the client or if they are managing the incapacitated person's financial affairs. When the Court has considered the application, it may appoint someone, called a deputy, to manage and administer the person's affairs whilst they are unable to do so themselves. They will assist the deputy in completing their duties properly, at the same time supervising their actions to ensure that they are acting in the best interests of the incapacitated person.

### **How Does This Relate to People with Learning Disabilities?**

There are a substantial number of people with learning disabilities who can **manage their own affairs with support**. Priority should be made to support people to do this, especially if they have no large financial resources to take care of. If people are able to do this with support then they would not come within the jurisdiction of the Court of Protection.

It may be possible for a person with a learning disability to understand the concept of **handing over to another person responsibility** for all their financial affairs. Providing he or she has the capacity to understand the nature and effect of the power, they can make a **Lasting Power of Attorney (LPA)**. There are two types of LPA – a **Property & Affairs LPA** and a **Personal Welfare LPA**. These are separate Powers of Attorney, and can be held by different people. The OPG's leaflet on LPA's provides more details of the criteria for determining a person's capacity to make an LPA. However, some people with learning disabilities may, (by the nature of their disability), **lack legal capacity**, (i.e sufficient understanding in all circumstances to enter into a valid and enforceable contract and therefore are unable to make an LPA). If they have property or a large amount of money the Court of Protection will consider the **appointment of a Deputy**.

## What is Mental or Legal Capacity?

Legal capacity is the term used to describe the ability of someone to enter into a legally binding contract and matters such as wills or LPA's.

The *Mental Capacity Act 2005* has laid down the legal framework in which questions of capacity should be determined. There is also substantial practice guidance set out under the *Act* to help in any dealings where people's capacity is in question, or where they have no legal capacity. The *Act* takes, as its starting point, an assumption that everyone has sufficient capacity to deal with financial affairs and personal issues, unless there is evidence to the contrary. In matters relating to housing, it is possible to say that:

- The essence of legal capacity is that somebody understands the nature of the obligations and risks that they are entering into i.e that in renting a house a rent has to be paid regularly or the individual risks being made homeless.
- People understand that they have a choice to enter into the contract or not.

For more information on the *Act* see our *Factsheet Mental Capacity Act 2005 (ref 22)*

## If the Capacity is in Question What Can I Do About it?

When entering into a **purchase agreement for housing and capacity is an issue**, there are a number of alternatives that may enable the transaction to proceed even though capacity is in some doubt. These include:

- **Provide extensive instruction** about the issues obligations and risks to the individual concerned.
- **Use simple illustrated documentation** e.g. an accessible tenancy agreement.
- **Joint ownership or tenancy with someone who does have capacity**. Note that in the case of joint ownership the person does not have to live in the property so for example another member of the family can jointly own with a disabled relative.
- The **disabled person grants** another individual (usually a relative) Lasting Power of Attorney. The argument is that to grant Lasting Power of Attorney requires less understanding than necessary to understand the implications of purchase or mortgage. The LPA will need to be registered once the Attorney starts to act on behalf of the individual granting the power.
- In extreme cases a **Deputy can be appointed by the Court of Protection**. Some legal experts argue that anyone can contract to rent or purchase a property because this is a 'necessary' in a legal sense and so covered by the *Mental Capacity Act*.

If someone who is dealing with a person with whom they have doubts as to whether they have capacity to enter into a transaction or to manage their affairs, they should seek legal advice or contact the Office of the Public Guardian.

## What is a Deputy?

A Deputy is someone who is appointed by the Court of Protection to handle the day to day running of the person's finances and property. The powers of a Deputy can relate to dealing with the financial affairs and/or the personal and welfare issues of the person without capacity. The Court sets out the scope of the Deputy's authority.

## When is a Deputy Appointed?

The Court of Protection will usually appoint a Deputy when a client is deemed to lack mental or legal capacity and has:

- more than £16,000 in cash after payment of debts, or;
- property to be sold or purchased
- a level of income that the Court considers necessitates the appointment of a Receiver

A formal application to the Court of Protection must be made using the appropriate forms, which can be downloaded from the website of the Office of the Public Guardian - [www.publicguardian.gov.uk](http://www.publicguardian.gov.uk).

### **How is a Deputy Appointed?**

The Court of Protection prefer a close family member to act as a Deputy as they are far more likely to have the person's best interest at heart. However, anybody can be considered by the Court of Protection to be appointed as Deputy. They may be a relative, friend, neighbour or professional representative, such as a solicitor, accountant, local authority officer. The person making the application may seek their own appointment, or they may ask for the appointment of someone else.

There are occasions when the Court of Protection is unable to appoint a suitable deputy as explained above, in such circumstances the Court will first consider whether a member of its professional panel of deputies would be suitable to act and, if this would not be in the client's best interests, will appoint the Chief Executive of the Public Guardianship Office to act as Deputy of Last Resort.

When the Court of Protection appoints the Chief Executive of the OPG, the client's affairs will be assigned to a caseworker who is a member of staff of the OPG. It is the caseworker, under delegated responsibility from the Court, who has day-to-day responsibility for running the client's financial affairs.

An application to the Court of Protection for the appointment of a deputy must be supported by a Medical Certificate, stating that in the doctor's opinion, the patient is incapable of managing and administering their property and affairs by virtue of mental disorder as defined in *Section 1* of the *Mental Health Act 1983*.

Following his or her appointment, the Deputy will automatically receive information and details of all the literature the OPG produce in connection with the day-to-day management of the affairs of a client under their care. The information also gives details of the various help lines available to deal with any problems encountered.

Each client and Deputy is assigned to a team of caseworkers, who are the main point of contact with the OPG and Court, and who are happy to give advice.

### **What are the Powers of a Deputy?**

The powers of a Deputy can relate to dealing with financial affairs of a person who is incapable (the client) and/or dealing with personal and welfare issues, e.g. where the person will live. Someone can have different people acting as deputies with these two different powers. The scope of any powers is clearly set out in the Order appointing the Deputy. The Deputy can only do what they are authorised to do by the OPG.

A Deputy is expected to consult regularly with the person concerned to find out their views on how their money is spent. Any disagreement in how money should be spent should be referred to the caseworker of the OPG.

As a general rule the Deputy can sign forms on the client's behalf. In most cases, eg. signing receipts for income received, the Deputy will sign in their own name not in the name of the client. There are some formal documents, where the OPG's prior authority may be needed.

## **What are the Duties of a Deputy?**

During the course of a Deputy's appointment, he or she will be required each year to submit an account of the money received and spent on the client's behalf. Supporting documents will be required, including bank statements.

The Deputy's main duties are to:

- Act at all times in the best interests of the client
- Safeguard the client's assets
- Open a deputy account at a local bank or building society
- Claim from the Benefits Agency all social security benefits to which the client is entitled
- Take out Security in the manner approved by the Court and to pay any bond premiums as and when required
- Prepare accounts annually or as required
- Ensure the client's funds are being used to provide him/her the best quality of life
- Ensure that all income is collected and bills are paid on time
- Arrange safe-keeping of all deeds, documents of title, testamentary documents and other valuable items
- Keep any property in a reasonable state of repair, secure and adequately insured
- Deal with the client's income tax and other tax matters
- Notify the OPG of any changes in the client's financial situation, for example if they inherit money or property
- Inform the DVLA if the client holds or applies for a driving licence
- Advise the OPG if there is a likelihood of the client getting married, divorced or involved in other legal proceedings
- Advise the OPG if the preparation of a will is being considered
- Co-operate with any Court of Protection Visitor
- Obtain OPG authority before dealing with any capital money
- Inform the OPG of the client's death, or change in circumstances, such as change of address and the level of accommodation fees payable
- Comply with all Orders and directions made by the Court

Deputies must pay the relevant PPG fees from the client's funds as and when necessary.

As stated above it is the Deputy's duty to keep the client's property secure and in a reasonable state of repair. Minor repairs up to a total cost of £500 a year can be carried out without referring to the OPG. This expenditure is usually met out of the client's income. When more substantial repairs are required, or if insufficient income is available, then OPG authority is required before any work can begin. For repairs costing more than £500, the Receiver must produce at least two competitive estimates.

If a Deputy wishes to renew an existing tenancy or commence letting a property, authority must be sought. A property jointly owned by the client and another party cannot be sold until a new trustee is appointed in place of the client.

OPG approval is needed before any sale or disposal takes place of client's furniture, effects and personal possessions.

A Deputy must never reveal to anyone during the client's lifetime the contents of the client's Will, without the prior and specific approval of the Court or the OPG.

## **What if a Deputy is Not Appointed?**

In some circumstances, when the Court considers the Deputy application, it may decide that it is not necessary to appoint a Deputy, but will instead make a Short Order. A Short Order will usually apply where the capital value of the client's estate does not exceed £16,000 and there is no property to be sold.

A Short Order may authorise the person making the application to:

- a) receive occupational/private pensions or trust income;
- b) receive all or part of the client's money held in bank or building society accounts;
- c) pay nursing home fees or other charges, debts, expenses and any solicitor's costs; and
- d) provide for the safe custody of documents and valuables such as furniture and jewellery

## **What is a Lasting Power of Attorney?**

An Lasting Power of Attorney is a private legal document that enables someone (the donor) to appoint one or more persons, called Attorneys to manage their financial affairs and property, either now or in the future. This document is very often made by elderly people who anticipate the onset of illness.

## **When is a Lasting Power of Attorney Made?**

The person making a Lasting Power of Attorney (LPA) needs to be mentally capable of understanding the meaning and effects of the LPA they wish to execute. It may be possible for a person with a learning disability to understand that making an LPA will give another person responsibility for all their financial affairs. This in turn allows the appointed Attorney to apply for a mortgage or property on their behalf. This can then be route to buying property even where legal capacity is in question.

## **What Powers Does This Give the Attorney?**

Under a Property and Affairs LPA, an Attorney has the authority to deal with the donor's financial affairs and property. A Personal Welfare LPA gives an Attorney the power to make decisions about his or her welfare for example, where the donor should live or decisions on healthcare matters.

An Attorney cannot make a Will on behalf of the donor. If the donor does not have the capacity to make a Will, but one is needed, an application can be made to the Court for the making of a *Statutory Will*.

An LPA is a very powerful legal document. Careful thought should be given regarding the power that will be given to the Attorney because they can have wide powers and are not usually supervised in their dealings with the donor's affairs. You may wish to consider appointing more than one Attorney, appointing Attorneys to always act jointly, or adding restrictions or conditions to the LPA. Solicitors and professional advisors should be able to advise you on the various options that you may wish to include.

## **What are the Duties of the Attorney?**

Attorneys must act in the best interests of the donor and consider the donor's needs and wishes as far as possible. They have a duty to keep the donor's money and property separate from their own and other people. They have a duty to keep accurate accounts of all their dealings and transactions on the donor's behalf, and to be ready to produce them at any time. The donor's money and other assets must remain in the donor's name.

The Court of Protection can call on Attorneys to account for their dealings at any time where the LPA is registered or where it needs to be registered. There is a Code of Practice to which attorneys must have regard when they are acting on behalf of the donor - this can be downloaded from the [OPG website](#).

Professional Attorneys, such as solicitors, accountants or banks are entitled to charge for their services. Non-professional Attorneys would not be expected to charge, although they should not be left out of pocket, either.

## **How is a Lasting Power of Attorney Made?**

A pack containing all the forms and guidance necessary to set up either type of LPA can be downloaded from the OPG website - [www.publicguardian.gov.uk](http://www.publicguardian.gov.uk).

## **When Must the LPA be Registered?**

An LPA has to be registered with the OPG before it can be used. The donor can register an LPA while they have the capacity to do so. Attorneys can register an LPA at any time. This does not change the nature of the Attorney's powers but it does mean that Attorneys are answerable and accountable to the Court of Protection if their actions are called into question. It also means that the power cannot be terminated by the donor or the Attorney without the consent of the Court or the PGO. Attorneys do not have to supply medical evidence of the donor's incapacity, unless there is a condition written into the power that requires this. A donor is entitled to be informed of the application to register the EPA. The majority of EPA's made by people with a learning disability will need to be registered.

## **What Fees are Payable to the Public Guardianship Office?**

In the instance where a fee is required, the following amounts apply:

- The appointment of a Deputy costs £125.
- Registration of an LPA is £150 (for each type of LPA).
- In order to search an LPA a fee of £25 is payable.

There are also various exemptions or remissions available against these costs. These are based on the finances of the person without capacity, not the Attorney.

The person will not have to pay fees if they are on any of these benefits: Income Support, Housing Benefit, Council Tax Benefit, Income based Job Seeker's Allowance, Pension Credit Guarantee, some Working Tax Credits, & there are no substantial compensation payments due to the person.

There will be a lower rate of fee payable even if none of the above apply, if the person is on a low income.

Whilst the fee amounts and reductions mentioned in this fact sheet are believed to be correct at the time of printing, we advise you to contact the PGO to confirm fees payable before sending any money.

Full details of fees are available from the OPG Customer Services on 0845 330 2900 or their website – [www.publicguardian.gov.uk](http://www.publicguardian.gov.uk). (The OPG also have a practice note for guidance on solicitor's fixed costs, which can be requested on the same number).

## **How Do I Contact the Office of the Public Guardian?**

If you have an enquiry about someone who needs help to manage their financial affairs, then you may wish to contact OPG services:

Office of the Public Guardianship

Archway Tower

2 Junction Road

London

N19 5SZ

Tel: 0845 330 2900

Fax: 020 7664 7705

Text phone: 0207 664 7755

E-mail: [customerservices@publicguardian.gsi.gov.uk](mailto:customerservices@publicguardian.gsi.gov.uk)

Website: [www.publicguardian.gov.uk](http://www.publicguardian.gov.uk)

## **The OPG Has Information to Help You**

The following documents and forms can all be downloaded from the OPG's website - [www.publicguardian.gov.uk](http://www.publicguardian.gov.uk)

Making a Lasting Power of Attorney

Registering a Lasting Power of Attorney or Enduring Power of Attorney

Asking the Court to make a decision

Guidance Booklets

If you require further information or have other queries contact Housing Options.

Housing Options, Stanelaw House, Sutton Lane, Sutton, Witney, Oxfordshire, OX29 5RY, United Kingdom  
Telephone: +44 (0)845 4561497 E-mail: [enquiries@housingoptions.org.uk](mailto:enquiries@housingoptions.org.uk)

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