



Direct payments factsheet – 5

Direct payment: Mental capacity

Mental capacity

Mental capacity is about people's ability to make decisions about their life. This includes people's ability to make decisions about their financial affairs or their own welfare. There are ways that people can make provision for the future when they may lack capacity. There are also ways that people can make decisions on behalf of people who do not have the capacity to make the decisions themselves. The Office of the Public Guardian (OPG) has the job of protecting people who lack the mental capacity to make decisions for themselves.

Mental Capacity Act 2005

The Mental Capacity Act 2005 for England and Wales provides a framework to empower and protect people who may lack capacity to make some decisions for themselves. It makes it clear who can take decisions in certain situations and how they should go about this. It also allows people to plan ahead for a time when they may lack capacity.

Areas covered include major decisions about someone's property and affairs, healthcare treatment and where the person lives, as well as everyday decisions about personal care (such as what the person eats). The Act states that everyone should be treated as being able to make their own decisions until it is shown that they can't. The Act also aims to enable people to make their own decisions whenever they are capable of doing so. The Act states that a person's capacity to make a decision will be decided at the time that a decision needs to be made.

Capacity to consent to direct payments

Currently adults must have the capacity to consent to direct payments. Parents can consent to receive direct payments on behalf of their children. The guidance states:

'Councils may make direct payments only with the consent of the person concerned, or, for disabled children aged under 16, with the consent of a person with parental responsibility, usually a parent.'¹

Councils can be flexible about how they interpret the giving of consent. There are also some examples of consent to direct payments being given on behalf of people who lack the mental capacity to consent themselves.

The guidance states:

‘Obtaining consent might be a process involving continuing discussion, rather than a single event.’²

This means that your social worker may need to discuss this with you over a period of time rather than at one meeting.

Capacity to manage direct payments

Decisions must also be made about whether you can manage direct payments (with or without support). If you have the capacity to make decisions about your direct payments, then you are entitled to receive the necessary support to do this.

Different options for dealing with issues around capacity

There are different options depending on whether you have capacity or not. These options have been split into ones for people who currently have capacity (see section 1) and ones for people who lack capacity (see section 2).

1. Options for people who currently have capacity:

Ordinary Powers of Attorney

This is the traditional way of appointing an Attorney under the Powers of Attorney Act 1971 to manage the Donor’s property and financial affairs. This power can no longer be used if and when the Donor ceases to have mental capacity.

Lasting Power of Attorney (LPA)

The facility to make a Lasting Power of Attorney (LPA) was made available from October 1st 2007. This can only be made by people who currently have mental capacity. It allows a person to choose someone now (the Attorney) that they trust to make decisions on their behalf if they lack mental capacity in the future or no longer wish to make decisions themselves. The decisions could be about both property and financial affairs or about personal welfare.

If you want an Attorney to be able to make both financial and welfare decisions on your behalf, you will need to create two separate LPAs. This means that an Attorney could consent to direct payments on behalf of someone (a welfare decision) as well as manage the direct payments (a financial decision). An LPA is only created once it is registered with the Office of the Public Guardian (OPG). There will usually be a fee to register the LPA, though there are some exceptions.

Enduring Power of Attorney (EPA)

It is no longer possible to make a new Enduring Power of Attorney (EPA). However, if someone already has an EPA, it is still valid. A person can use an EPA to hand over power to someone else to make decisions about their financial affairs and property. An EPA cannot cover decisions about welfare. The Attorney (the person who makes decisions on behalf of someone) will need to register the EPA if they think that an individual is starting to lose mental capacity.

An Attorney under an EPA could manage someone's direct payments on their behalf as this is a financial matter. An Attorney would not be able to consent to direct payments on behalf of someone as this is a decision about welfare which cannot not covered by an EPA.

2. Options for people who lack capacity:

Using a 'nominee'

It is possible for direct payments to be paid to a third party ('nominee') on behalf of someone who receives direct payments. This 'nominee' will be responsible for the day-to-day management of the direct payments. The guidance states:

'Some people may need help with managing the money. The payment may be made to a third party (nominee) for the recipient and day-to-day management of finances may be delegated in this way. However, the person to whom the direct payment is made must have control over how services are delivered.'³

Deputies and the Court of Protection (COP)

The Court of Protection can give individuals the power to make decisions about the finances and personal welfare of someone who lacks mental capacity. These individuals are called Deputies. The Court will set out what areas deputies can make decisions about. The Court also has the power to make declarations about whether someone has the capacity to make a particular decision. There will usually be a fee to apply to the court and to appoint deputies but there are exceptions to this.

Independent Living Trusts (ILT), Independent User Trusts, User-controlled Trusts (UCT)

ILTs and UCTs can be set up on behalf of people who lack the capacity to both consent to and/or manage direct payments. A trust could be set up when it is clear that someone will benefit from receiving direct payments rather than a service from social services. A trust must have at least 3 trustees. The direct payments money still belongs to the direct payments user. The money is controlled by the trustees who are unpaid. These trustees might be family, friends, a solicitor, an accountant or an advocate.

Trustees have legal authority to make decisions but the direct payments user should remain at the centre of decision-making. The trust can employ staff, operate a bank account and manage the direct payments money. They must ensure that the direct payments user's needs are met. Trustees take on a considerable amount of responsibility and can spend a lot of time on trust-related work.

Health and Social Care Act 2008

This Act received Royal Assent in July 2008. The Bill will allow for a 'suitable person' to consent to direct payments on behalf of a person who lacks capacity to consent to direct payments. This may be useful for young people who lack capacity as they go through transition (when individuals move into adulthood). We expect people to be able to consent to direct payments in this way in 2009.

Case study

Jennifer is a deafblind woman with learning disabilities. She lives in her own flat. Jennifer lacks the capacity to make decisions about her personal welfare and financial

affairs. Decisions are made on her behalf by her parents playing two roles, the first as Deputies under the Court of Protection, and the second as trustees of her Independent User Trust. Her cousin is the third trustee as trusts must have at least three trustees.

Jennifer's parents have been made Deputies by the Court of Protection. This application was conducted in writing, so they did not have to attend the Court. They were also exempted from any fees. Having the authority of the Court behind them can make things easier for the deputies when they need to make sure Jennifer receives the right support. As Deputies, Jennifer's parents must also make annual reports to the Court of Protection. So far this has involved writing a brief report and demonstration of expenditure.

An Independent User Trust was set up to manage her welfare and finances. Jennifer's parents and cousin are the three trustees. The trust was set up using a template from In Control; trustees say this was relatively quick to do.

Direct payments pay for all of Jennifer's human support. An on-line chat room facilitates contact between the trustees and the staff that support Jennifer on a daily basis. Staff rotas, handover notes, budgets, household instructions and other information can be accessed by both the trustees and staff. This supports good communication between staff and trustees and promotes continuity of support for Jennifer. Trustees must keep accounts and manage Jennifer's money and banking. The trustees must report back to the council about how Jennifer's direct payments are spent.

Being trustees and Deputies presents Jennifer's family with an amount of unpaid work. However they feel that it is worth the effort and that they would always be involved in a considerable way in making decisions about or monitoring Jennifer's support however it was funded and organised. They are relatively free to make decisions about the support Jennifer receives and feel that the support is centred around her needs.

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Resources:

Direct Payments Guidance: Community Care, Services for Carers and Children's Services (Direct Payments) Guidance England 2003

The Department of Health,
Richmond House,
79 Whitehall,
London, SW1A 2NS

Telephone: 020 7210 4850
Email: dhmail@dh.gsi.gov.uk
Web: www.dh.gov.uk

Direct Gov

Web: <http://www.direct.gov.uk/en/DisabledPeople/index.htm>

Office of the Public Guardian

Archway Tower,
2 Junction Road,
London, N19 5SZ

Telephone: 0845 330 2900
Textphone: 020 7664 7755
Fax: 020 7664 7705
Email: customerservices@publicguardian.gsi.gov.uk
Web: <http://www.publicguardian.gov.uk/index.htm>

Trusting Independence (a guide to Independent Living Trusts)

By Andrew Holman & Catherine Bewley, 2001, £6.00

Values into Action,
Oxford House,
Derbyshire Street,
London, E2 6HG

Telephone: 020 7729 5436
Fax: 020 7729 7797
Email: general@viauk.org
Web: www.viauk.org

In Control

4 Swan Courtyard,
Coventry Road,
Birmingham, B26 1BU

Telephone: 0121 708 3031
Email: web_enquiries@in-control.org.uk
Web: www.in-control.org.uk

Endnotes:

- ¹ Direct Payments Guidance, Department of Health, paragraph 42, page 14
- ² Direct Payments Guidance, Department of Health, paragraph 44, page 14
- ³ Direct Payments Guidance, Department of Health, paragraph 51, page 15