

Direct payment's factsheet – 6

Direct payments: receiving direct payments on behalf of an adult who lacks the capacity to consent to direct payments

About this factsheet

Due to recent changes to the law, Sense has published this factsheet in addition to the current Sense factsheets 'Direct payments: an introduction' and 'Direct payments: mental capacity'. In due course, Sense will publish a new edition of the Sense direct payments and self-directed support factsheets.

Introduction

It is now possible for someone to receive direct payments on behalf of an adult who lacks the mental capacity to consent to receive direct payments. This person will act as a 'suitable person' and will receive the direct payments. They will be responsible for managing the direct payments and buying services to meet an individual's needs. This factsheet outlines how this could work for you and gives some examples. Local councils should be able to give you more information. A suitable person receiving direct payments is one way to meet the social care needs of people who lack the capacity to consent to them, including:

- Young people as they become adults;
- People with dementia;
- Others adults who lack the capacity to consent such as some people with learning disabilities or acquired head injuries.

Some people may lack capacity to make a decision on a permanent basis, whereas others may have fluctuating capacity, so sometimes they will be able to make decisions about direct payments and sometimes they will not.

One way for someone to prepare for a time when they may lack capacity in the future, is to give a family member or friend Lasting Power of Attorney (LPA) to make decisions on their behalf. If the LPA is registered with the Office of the Public Guardian and they lack the capacity to make decisions, then the Attorney may be able to receive direct payments on their behalf.

Deciding if someone lacks the capacity to consent to direct payments

The Mental Capacity Act 2005 outlines the steps that professionals should take to assess whether someone lacks the capacity to make a decision. Councils should assess this on a decision-by-decision basis and must not make assumptions that people lack capacity because they have a particular impairment or are a certain age.

Councils should start from the assumption that someone has the capacity to consent to direct payments and all practicable steps should be taken to help someone make this decision. Only then can they decide that someone lacks the capacity to make this decision.

It is important not to confuse the capacity to consent to direct payments and the capacity to manage them. For example, someone may be able to decide that they would like to receive direct payments, but may not have the capacity to manage the paperwork or decide how to spend their direct payments. Such individuals can receive support with making decisions or delegate responsibilities to someone else.

Case study: An adult with learning disabilities who has the capacity to consent but needs support to decide how to spend her direct payments

Julie has a moderate learning disability as well as sight and hearing impairments. Her social worker tells her about direct payments. He takes time to make sure Julie has understood what

receiving direct payments involves and is satisfied that Julie has the capacity to decide to receive direct payments. Julie says that she finds it difficult to decide on a provider to meet her needs so she asks for an independent advocate to assist her in making this decision. So even though she has the capacity to agree to direct payments, she receives support when deciding how to spend them.

Becoming a 'suitable person'

Firstly, it must be a choice for you to become a suitable person; you should not be pressured into taking on this role. In most cases, the suitable person will be a family member or close friend. Choices for the suitable person include someone who has been given a Lasting Power of Attorney (LPA)¹, Enduring Power of Attorney (EPA)² or someone who is a court-appointed Deputy with the appropriate remit. If there is no-one with these roles or no-one that is willing to take on the role of the suitable person, then others could be considered. This might be a willing family member, friend or professional.

Checks on a suitable person

If a family member or close friend (who has been involved in providing care or support) wants to become the suitable person, they do not have to have a CRB check. If the potential suitable person is not a family member or close friend, he or she will need to have a CRB check. For example if the suitable person is going to be an independent care broker or solicitor who does not know the individual.

The suitable person's responsibilities

¹ A Lasting Power of Attorney (LPA) 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.

² 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.

If you become a suitable person, you must follow good practice in making decisions on behalf of someone who lacks capacity and act in their 'best interests'. Even though they may lack capacity to make this decision about direct payments, they should be consulted as far as reasonably practicable and they may have the capacity to make other decisions. The individual should maintain as much control and independence as possible. You may also need to consult other people who are close to them as well as health and social care professionals where this is appropriate.

You must also use the direct payments in the way you agreed with your council. If you employ staff to provide services, you must ensure that you act lawfully as an employer. You must tell your council if you think that the person you receive direct payments for is able to make their own decisions again.

Your rights as a suitable person

You can decide to give up acting as a suitable person. In the future you may no longer want to carry on in this role. You are also entitled to ask for support to help you manage the direct payments. You are also entitled to use the council's complaints procedures. Sense has a range of factsheets that you may find useful when you receive direct payments; see the Resources section below.

Your council's responsibilities

When deciding on a suitable person, councils must take into account the views of

- Anyone named by the individual as someone to be consulted regarding direct payments being paid on their behalf to a suitable person or matters related to their personal welfare;
- Anyone who currently cares for the individual or has an interest in their personal welfare;
- As far as is practicably possible, the individual themselves;
- Any representative or surrogate of the individual, this would include people who have been given EPAs or LPAs or who are court-appointed Deputies.

Councils should make sure that an individual's assessed needs can be met through direct payments and that a suitable person is

able to manage the direct payments. Councils must recognise the unique position of adults who lack capacity and look at how to manage risks when a suitable person receives direct payments on behalf of someone who lacks capacity.

Case study: A parent receiving direct payments on behalf of their adult son

Andrew is an 18-year old deafblind man with profound learning disabilities. While he was a child, Andrew's parents received direct payments to pay for a self-employed intervenor.

As part of preparations for the transition planning process, Andrew's family and key professionals discussed the different options for support for Andrew as an adult. This included support for when he left home and whether the direct payments and the current arrangement with the freelance intervenor could continue when he moved into a supported living scheme.

Steps were taken to assess whether Andrew could consent to receive direct payments himself. After all practicable steps were taken, it was decided that Andrew lacked the capacity to make this decision. Therefore it would be possible for someone to act as a suitable person and receive direct payments on behalf of Andrew once he became an adult. After thinking about the impact on Andrew and himself, Andrew's father decided that he would be willing to become the suitable person. He registered as a Deputy via the Court of Protection. In the future Andrew's father may no longer want to be the suitable person and he is entitled to give up this role.

Case study: A family member receiving direct payments on behalf of an older deafblind person who lacks capacity

Anne is a deafblind woman. She became deafblind as she grew older and started to use direct payments to employ a communicator guide. She lives with her daughter Susan and when planning for the future, she decided to give Susan Lasting Power of Attorney for both financial and personal welfare decisions. Anne has now developed dementia and is unable to consent to receive direct payments herself. Therefore Susan can become a suitable person and receive direct payments on behalf of her mother. Susan is happy to take on this role and employs the communicator

guide herself. She receives support from the local direct payments support service that manage staff payroll and work out the quarterly tax and National Insurance payments.

People with Lasting Power of Attorney or Deputies acting as a 'surrogate'

People who have been given an LPA or are a Deputy do not have to take on the role of the suitable person. If you already have an LPA which covers powers relating to decisions about securing community care services or you are a Deputy with the appropriate remit, you are considered a 'surrogate'. This means that the council must consult you on who becomes the suitable person.

Case study: Someone with an LPA acting as the 'surrogate'

A few years ago Mustafa, a deafblind man, gave his partner an LPA that covers securing services to meet his care needs. Mustafa now lacks the capacity to consent to direct payments. His partner doesn't want to take on the role of the suitable person. Given the remit of the LPA, his partner qualifies as a 'surrogate'. The council must therefore consult his partner about who should act as the suitable person. The council and partner agree that they would like an independent care broker to be the suitable person. The broker must undergo a CRB check.

November 2009

Resources

Sense's 12 factsheets on direct payments and purchasing your own support (Published September 2008)

Sense Information Service
101 Pentonville Road, London, N1 9LG.
Telephone: 0845 127 0060
Textphone: 0845 127 0062
Fax: 0845 127 0061
Email: info@sense.org.uk
Web: www.sense.org.uk

**A guide to receiving direct payments from your council
(September 2009)**

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

**Lasting Power of Attorney, Enduring Power of Attorney,
becoming a Deputy and acting in the best interests of
someone who lacks capacity**

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>

Sense, Getting a Result! A workbook with information about the transition process and ideas to encourage greater participation from families and young people.

Sense, Getting a Result DVD A DVD for professionals to illustrate how young deafblind people, with a range of individual communication needs, can participate if they are given the right environment.

A transition guide for all services

Department for Children, Schools and Families

Sanctuary Buildings, Great Smith Street, London, SW1P 3BT.

Telephone: 08700 002 288

Textphone: 01928 794 274

Email: info@dcsf.gsi.gov.uk

Web: www.everychildmatters.gov.uk

Transition Information Network

Council for Disabled Children,

8 Wakley Street, London, EC1V 7QE.

Telephone: 020 7843 6006

Fax: 020 7843 6313

Email: TIN@ncb.org.uk

Web: www.transitioninfonetwork.org.uk