



Giving gifts for someone else

A guide for attorneys and deputies

This guide covers:

- what counts as a gift
- who can give gifts for someone else
- when you can give gifts
- changing the limits on gift-giving
- what happens with unauthorised gifts

Giving gifts with confidence

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

However, you need to be aware of the strict limits on gift-giving as a deputy or attorney. These rules help to look after the best interests of the person you are making decisions for.

Remember that you don't have to give gifts as a deputy or attorney (unless the court order or lasting power of attorney says you do). You shouldn't let others pressure you into giving gifts for the person whose financial affairs you are looking after.

This guide will help you to give gifts within your authority as a deputy or attorney. It also looks at how you can apply to change the limits set on your gift-giving and what happens if you make unauthorised gifts.

In this guide we talk about the 'person' you are making gift-giving decisions for. That's because most rules apply to both deputies and attorneys. Elsewhere you might have seen the person called the 'client' or the 'donor'

What is a gift?

What counts as a gift in your role as a deputy or attorney may be broader than you are used to. Gift-giving is not just:

- using the person's money to buy something for someone else (including you) on a birthday or other 'customary occasion'
- giving the person's money or possessions to another person

Gift-giving in this case also includes:

- donations to charities
- paying someone's school or university fees
- living rent free or at a 'friends and family' rate in a property belonging to the person
- selling the person's home to someone at less than market value
- creating a trust for someone from the person's property
- giving someone an interest-free loan from the person's funds (the 'lost' interest counts as a gift)

This guide is only for deputies and attorneys making financial decisions for someone else. Deputies and attorneys making health and welfare decisions can't give gifts as part of their role

Example: When a loan counts as a gift*

Sanjiv is 72. He has Alzheimer's disease and lives in a care home. His granddaughter Meera is his deputy. Meera wants to borrow several thousand pounds from her grandfather to help pay for her medical studies.

Meera asks a solicitor, who draws up a formal loan agreement and advises her that she should get approval from the Court of Protection because of the size and nature of the gift.

Meera is puzzled by this: she points out that she plans to pay the money back and says that her grandfather was proud of her achievements at school and wanted her to become a doctor. She thinks that the loan agreement protects Sanjiv's best interests.

The solicitor points out that the loan agreement provides for small repayments over a long period of time. As no interest is being paid on the loan, the law treats this as a gift. The terms of the loan may not be in Sanjiv's best interests.

The solicitor says that, even if the loan did include interest, it would need approval from the Court of Protection because Meera was arranging it for herself – meaning there was a potential conflict of interest with her role as deputy.

Meera applies to the court to seek its decision on the loan.

* The examples in this guide use imaginary characters and situations to help you with your decision-making as a deputy or attorney

Who can give gifts?

The person decides

The main rule is that the person whose property and finances you are looking after should decide whether to give a gift – if they have mental capacity.

Mental capacity means being able to make a particular decision at the time it needs to be made.

How to tell when someone has mental capacity

The law sets out tests of mental capacity that you can apply to gift-giving. When trying to judge whether the person understands a gift-giving decision, ask yourself whether they can:

- understand all the important information about the gift (what it is, who it's being given to, its value)
- hold on to that information long enough to make a decision
- weigh up all the available information to make a decision
- communicate their decision

If the person is unable to do one or more of these four things, then they may lack mental capacity to decide about a gift.

Note, though, that just because someone makes what seems an unwise decision about a gift, it doesn't mean they lack mental capacity. We all make unwise decisions from time to time.

Unsure about mental capacity?

If you're unsure about the person's mental capacity, then you mustn't make a gift to yourself or anyone else on their behalf until you have a better picture of their ability to make decisions.

You could arrange a mental capacity assessment by a GP or psychiatrist to find out whether the person can make their own decisions. Such an assessment may be especially important when deciding whether to give gifts of some value.

The Office of the Public Guardian (OPG) may ask you what steps you took to find out whether the person had mental capacity. OPG has authority over deputies and attorneys and looks after the best interests of people without capacity.

Helping someone to decide

If the person's mental capacity changes and they sometimes can make decisions about things such as gifts, you must try to involve them in gift-giving decisions.

Involving the person might mean taking time to help them to communicate. You might need to:

- use sign language or pictures to help the person to decide about which gifts to give or who to give them to
- choose a time of day when the person more often has mental capacity – in the morning, say

- pick a location where the person feels comfortable – perhaps at home – to ask for their input on gift-giving

If the person can't decide

Only when you are sure the person can't make – or help to make – their own decisions about gifts, can you decide for them.

If you believe it's in their best interests to give gifts, think about:

- the person's wishes, views and values and how these might affect what they would give
- what family members and friends think they would have wanted
- whether they might regain capacity and be able to make decisions about gifts then
- their current needs – just because someone used to give very generous gifts, can they afford to now?

Example: Thinking about affordability

Hannah is elderly and lives in a care home. Sometimes she can make decisions but often she can't. Her nephew David is her attorney. He wants to give Hannah's granddaughter Ruth a batmitzvah present from her.

Before she started to lose her ability to make decisions, Hannah was very generous. However, her care home fees are eating into her savings and David is worried about how to meet these costs in the future.

Although Hannah would have liked to have given a generous present, David decides that it is in her best interests to give something more modest. This way, Hannah has been helped to celebrate her granddaughter's coming of age ceremony, as she'd have wanted, but her money and her future are safeguarded.

Who can you give gifts to and when?

Unless the power of attorney or deputy order says otherwise, you can make a gift only if it's either:

- to a family member, friend or acquaintance of the person on a 'customary occasion'
- to a charity

In both cases, it's essential the gift is of reasonable value given the size of the person's estate (all the money and property they own).

‘Customary occasion’

A customary occasion means, for example, a birth, a birthday, a wedding or civil partnership or an anniversary.

It also includes occasions where families, friends or associates customarily give gifts, such as Christmas, Eid, Diwali, Hanukkah or Chinese new year.

Relations, friends and charities

A gift can go to a relation of the person, such as a wife, brother or niece. It can also go to someone connected with the person, such as a friend or colleague.

Or the gift can go to a charity that the person might have given to if they had mental capacity.

The gift can't go to a person or organisation unconnected to the gift-giver.

Reasonable value

When deciding whether a gift is reasonable, ask yourself:

- did the person used to give gifts of this value when they had mental capacity?
- would the gift affect the person's ability to meet their living expenses, now and in the future?
- what is the person's life expectancy – and will they have enough funds for the remainder of their life?
- does the gift reflect what the person has said they want to leave to people in their will?

Gifts must always be well within what the person can comfortably afford. ‘Affordable’ varies a lot from person to person. A £200 gift has a bigger impact on someone with £9,000 than someone with £90,000.

If you give a gift on the person's behalf that isn't of reasonable value, you could be breaking the law.

Keep a record of the gifts you give on the person's behalf. As a deputy, you'll need to record them in your annual report. As an attorney, OPG might ask you to account for gifts you have made.

‘Deprivation of assets’

Deputies and attorneys can't give the person's property away as gifts, or spend their money on gifts, to avoid contributing to care home costs. The law calls this ‘deprivation of assets’.

When local authorities check a person's assets to see how much they should pay for care, they may include things if you have deliberately given them away to avoid paying.

You also shouldn't give things away as gifts to make the person qualify for benefits or for government help with care costs.

Example: Deciding when a gift is reasonable

Patrick is Joe's deputy. The men, who are in their early 60s, have been close friends since childhood. A couple of years ago, Joe suffered a major stroke, which left him unable to care for himself and make decisions.

Patrick has been made redundant and is struggling financially. Joe has enough money to last for many years.

Patrick wants to take money from Joe's savings to sort out his financial problems. Joe has helped Patrick out like this in the past. Joe is also leaving nearly all his money and property to Patrick in his will. Patrick feels strongly that, if Joe were still able to understand and make decisions, he'd be happy to help Patrick now.

Patrick reads the court order appointing him as deputy and decides that he should check first. He rings OPG and finds out that his deputy's authority is limited to spending reasonable amounts on customary occasions.

A deputy also must not take advantage or gain personal benefit from their position – nor must an attorney. If Patrick wants to give himself a large amount of Joe's money, he needs to ask the Court of Protection.

After thinking it over, Patrick decides not to go to court and not to go ahead with the gift to himself.

Changing when you can give a gift

If you want to change the limits on the gifts you can give as an attorney or deputy, you need to apply to the Court of Protection.

People apply to the court for gifts to people or organisations not authorised in their power of attorney or deputy order.

OPG can't approve a gift by an attorney or deputy; only the Court of Protection can.

Loans

Unless the deputy order or power of attorney says otherwise, to make an interest-free loan from the person's funds or a loan to yourself you need to apply to the Court of Protection.

Interest free loans are treated as gifts, because the interest you would normally pay counts as a gift. Like other gifts, they have to be reasonable and to go to someone connected to the person.

So, do I need to apply to the court?

If you can answer 'yes' to all three questions below, you don't need permission from the Court of Protection to give a gift:

- 1) Is the gift to someone related to, or connected with, the person – or to a charity they might normally have given to?
- 2) If the gift is to a person, is it being made on a customary occasion?
- 3) Is the gift of reasonable value, given the size of the person's estate and their expected future needs?

If you give a gift beyond your authority

If you make a gift that goes beyond your powers as a deputy or attorney, OPG might:

- launch an investigation
- give you a warning
- ask you to pay back money or return gifts
- tell you to apply for 'retrospective approval' from the Court of Protection (meaning you ask the court to approve a gift you have already given)
- in the most serious cases, apply to the court to have you removed as a deputy or attorney
- alert the police or other organisations that look after the person's best interests – abusing your position as a deputy or attorney might count as fraud

If you're a deputy, OPG might also:

- increase its supervision of you
- apply to the Court of Protection to have the security bond 'called in' (meaning you might have to pay the client back for any money or property they have lost)

Remember, the rules on giving gifts are about protecting the person's best interests. Think carefully when giving gifts – your role is to look after the person's financial interests with even more care than your own

Questions?

Contact the Office of the Public Guardian in the first case for more information about gift-giving:

Phone: 0300 456 0300

Email: customerservices@publicguardian.gsi.gov.uk

Monday to Friday 9am to 5pm; Wednesday 10am to 5pm

Address: PO Box 16185

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