



Direct payments – Acting as an authorised person

Herefordshire Council has a duty to offer direct payments to people who lack capacity where they have an authorised person acting on their behalf to receive and manage such payments, and where it is in their best interests to have direct payments.

Being appointed as an authorised person

Both the Care Act 2014 and the Statutory Guidance sets out clearly who can be considered an authorised person in terms of receiving a direct payment on behalf of a person who lacks the relevant mental capacity to manage one themselves. It outlines what conditions have to be met before the local authority can progress with a Direct Payment and make payments to the authorised person if requested. An authorised person, is someone who manages a direct payment on behalf of someone with eligible care and support needs, who lacks mental capacity. This could be a friend or family member. An authorised person who receives a direct payment is legally responsible for managing it, and for complying with all the obligations that come with having a direct payment.

An authorised person is usually already appointed as a representative for the person with needs, for example someone with:

- Registered Lasting Power of Attorney (LPA) for 'Property and Affairs' or 'Personal Welfare', or
- Court of Protection Deputyship.

This does not however automatically include a DWP appointee but due consideration over their suitability can be considered.

Where no one is already appointed as a representative for the person with needs, we can consider if the person who wants to act as authorised person might be suitable to do so.

The details of an authorised person are recorded in the support plan of the person with needs. The authorised person should be included in all reviews of the direct payment. They must sign the relevant agreement confirming that they understand their role and responsibility.

Conditions to be met by the authorised person

As with all direct payments, the council must be satisfied that the beneficiary's needs are met by means of the direct payments and that the recipient (in this case the authorised person) is capable of managing the direct payments.

To help ensure that the authorised person does not mismanage or misuse the direct payments, the Regulations set out a number of conditions that the council should require of the authorised person before it makes direct payments to that person on someone else's behalf.

- Unless the council is satisfied that it is necessary to satisfactorily meet the person's needs, direct payments must not be used to secure services from the spouse, civil partner or partner of a person lacking capacity. Neither can they be used to secure services from a close relative, spouse or partner of a close relative of the person lacking capacity who is currently living in the same household as the person lacking capacity.
- There may be occasions when the council decides that it is necessary for the authorised person to use the direct payments to secure services from a member of the family of the person lacking capacity. However, such situations are exceptional and the council must be satisfied at all times that arrangements are made in the best interests of the person lacking capacity. In such cases, the personal relationship must be declared to the Direct Payment Team prior to employment commencing.
- The authorised person manages the direct payments on behalf of the person lacking capacity, on the understanding that in doing so, they must act in the best interests of that person at all times. This includes, as far as is reasonably practicable, encouraging and permitting the person lacking capacity to have the fullest input possible into decisions affecting them.
- The authorised person will be required to take all practical steps to ensure that all decisions are taken in the best interests of the person who lacks capacity. This may involve consulting other people close to the person lacking capacity, or health and social care professionals where appropriate. This is to ensure that the service recipient can maintain as much control and independence as possible, the authorised person should be required to notify the council as soon as they believe the person may have regained capacity.

Principles of best interest

A person trying to act in the best interests of someone lacking capacity should:

- do whatever is possible to permit and encourage the person to participate, or to
- improve their ability to participate, as fully as possible, in acts and decisions;
- try to identify and take into account all the things that the person who lacks capacity would take into account if they were acting for themselves, including their past and present wishes and feelings and any beliefs and values which would be likely to influence their decisions;
- not make assumptions about what might be in the interests of the person lacking capacity simply on the basis of the person's age, appearance, condition or behaviour;
- assess the likelihood of the person regaining capacity;
- consult others when making decisions, including anyone previously named by the person as someone to be consulted, anyone engaged in caring for the person, family members, close relatives, friends or others who take an interest in the person's welfare, any attorney appointed under a lasting power of attorney made by the person and any deputy appointed by the Court of Protection to make decisions for the person; and
- for any major decisions, make sure a record is kept of the process of working out the best interests of that person.

Where disputes arise

The authorised person may face disagreements with others involved in or concerned for the welfare of the person lacking capacity to consent. Family members, partners and carers may disagree between themselves about how direct payments should be spent, or they may have different memories about what views the person expressed in the past. Carers and family might disagree with a professional's view about the person's care or treatment needs.

The council will support the authorised person to balance these concerns and decide between them. The council will include the person who lacks capacity (as much as they are able to take part) and anyone who has been involved in earlier discussions. It may or may not be possible to reach an agreement at a meeting to air everyone's concerns, but

any decision will always be in the person best interests, following the best interests' principles in the 2005 act.

Advocacy

An advocate may be useful in providing support for the person who lacks capacity to consent either in terms of deciding who should act as an authorised person on their behalf or, subsequent to that decision being made, how the direct payments should be used to meet the assessed needs. Advocates may be especially appropriate if: - the person who lacks capacity has no close family or friends to take an interest in their welfare; - family members disagree about the person's best interests; - family members and professionals disagree about the person's best interests; - the person who lacks capacity has already been in contact with an advocate; or - there is a concern about the protection of a vulnerable adult.

Approaches to risk

People lacking mental capacity may not be able to exercise the same level of choice and control as other direct payment recipients. However, direct payments can still provide a vital means of ensuring that choices about the persons care and support can be made by those who are best placed to understand their needs and preferences and who know how to involve them as much as possible in decisions to support their best interest.

The council will take steps to develop a comprehensive risk management strategy, to ensure that where a person is lacking capacity, and may not only be more vulnerable to abuse, but also less able to tell people when it is happening that such circumstances inform the support plan and subsequent arrangements for monitoring and review. It is likely that reviews may need to be conducted more frequently and in person rather than on the telephone, particularly in the early stages of the direct payments being made. The council can consider involving other people known to the person lacking capacity, particularly those consulted when the authorised person was first appointed, as well as independent advocates where appropriate.

The Care Act 2014 and the Mental Capacity Act Code of Practice specify that independent mental capacity advocates (IMCA's) can be used in care reviews where the person concerned has no one else to be consulted.

Safeguarding

There are various legislative provisions that have been put in place to support safeguarding measures for adults lacking mental capacity. The regulations specify that if the authorised person is not the spouse, civil partner, partner, close relative (or spouse or partner of a close relative) or friend involved in the provision of care of the person lacking

capacity, then the council will obtain a DBS check for that authorised person, as a further protective measure for the person lacking capacity.

For example, the authorised person may be an independent care broker or a solicitor acting as a professional deputy, who may not previously have been personally known to the service recipient.

Anyone caring for a person who lacks capacity for the purpose of the Mental Capacity Act 2005 who wilfully neglects or ill-treats that person can be found guilty of a criminal offence under the act punishable by up to five years in prison, or a fine, or both.

In addition, the Fraud Act 2006 created a new offence of 'fraud by abuse of position'. This may apply to a range of people including attorneys under a lasting power of attorney (LPA) or enduring power of attorney (EPA) or Deputies appointed by the Court of Protection to make financial decisions on behalf of a person who lacks capacity.

Someone acting as an authorised person receiving direct payments may be guilty of fraud if they dishonestly abuse their position, intend to benefit themselves or others, and cause loss or expose that person to the risk of loss.

Without discouraging people from taking up the role of authorised person, the Council should also make clear to anyone considering the role the consequences of financial misconduct or other forms of neglect or ill treatment.

The independent mental capacity advocate service was set up as a consequence of the 2005 Act to support and represent the views of particularly vulnerable people who lack the capacity to make important decisions about serious medical treatment and changes of accommodation, and who have no family or friends that it would be appropriate to consult about those decisions.

For more information; see department of health, making decisions: the independent mental capacity advocate (IMCA) service (2007), Section 44 of the Mental Capacity Act 2005, and Section 4 of the Fraud Act 2006 guidance on direct payments.

The regulations also provide Councils with the power to impose other directions on the authorised person if the Council believe that it is necessary to ensure the best interests of the person requiring services to impose other conditions, then this should be done.

Fraud prevention privacy notice

If a person receives financial support from Herefordshire Council to pay for care, the personal information we collect from them, and anyone acting on their behalf as an authorised person will be shared with fraud prevention agencies who will use it to prevent

fraud and money-laundering and to verify identity. If fraud is detected, you could be refused certain services, finance, or employment. View further details of how your information will be used by us and these fraud prevention agencies, and your data protection rights, at www.herefordshire.gov.uk/fraudprivacy.

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