

Gifts

Regulated by Section 12(2) of the Mental Capacity Act 2005

“There is no generalised approach to gifts. Each decision must be made considering its own context and timing. As with all decisions a deputy or attorney makes, the overriding test is whether this is in the donor’s best interests”

(Office of the Public Guardian guidance – September 2015)

The only time an attorney can make gifts is:

- In accordance with any conditions/restrictions in the Lasting Power of Attorney.
NOTE: A donor can restrict or exclude the statutory powers around gifting in their Lasting Power of Attorney but they CANNOT extend them
- On customary occasions (eg. Birth, Marriage, Birthdays, Christmas etc.) to persons (including himself) who are related or connected with the donor
- To any charity to which the donor made or might have been expected to make gifts.

Any gift over and above this needs to be authorised by the Court of Protection

Examples of gifts:

- Selling home or assets for less than market value
- Allowing loans at low interest
- Allowing someone to live rent free or low rent
- Creating a Trust/varying a will to divert the donor’s interest (Court of Protection authorisation needed)

Remember: 5 statutory principles of the Mental Capacity Act 2005

1. Assumption of capacity – unless established, they lack capacity
2. Not to be treated as unable to make a decision unless all practicable steps to help them to do so fail
3. Not to be treated as unable to make a decision just because it is an unwise one
4. The decision made must be in the donor’s best interests
5. The decision must be the least restrictive of the donor’s rights and freedoms

Capacity to make a Gift – Section 3 of the Mental Capacity Act 2005

Does the donor:

- Understand all the important information about the gift (what it is, who it is being given to, its value?)
- Hold on to that information long enough to make a decision
- Weigh up all available information to make a decision
- Communicate their decision

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

NOTE: Just because someone makes what seems an unwise decision about a gift, it doesn't mean they lack capacity.

Gifts must be reasonable:

- Did the donor previously give gifts of this value when they had capacity?
- Would the gift affect the donor's ability to meet living expenses now and in the future?
- What is the donor's life expectancy? Will they have enough funds?
- Does the gift reflect what is in their will?

B E W A R E D E P R I V A T I O N !!

The Court of Protection has the power under Section 16 and Section 18 of the Mental Capacity Act 2005 to authorise gifts.

If there is any doubt, apply to the court for permission


Jargon!

Donor:	the person who made the Power of Attorney
Attorney:	the person/people appointed by the donor in the Power of Attorney

Moore & Tibbits
Solicitors

a member of
 QualitySolicitors

 01926 491181

 debbiea@moore-tibbits.co.uk

 www.qualitysolicitors.com/moore-tibbits

34 High Street, Warwick CV34 4BE

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