

## **Self Directed Support Factsheet – 6**

### **Direct payments and personal budgets: 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. People who have limited capacity or lack capacity can still have access to direct payments or personal budgets but there are some differences to people who have capacity.

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.

The two main issues are whether someone has the capacity to consent to receive direct payments and/or whether they have the capacity to manage the direct payments. These are separate issues; for example it is perfectly possible for someone to be able to consent to receive direct payments but then be unable to make decisions about managing direct payments.

Personal budgets should be available to pay for services for adults in England who lack capacity but there must be a clear process for how they will be involved as much as possible in decisions about their support.

## **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 and 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**

Some people may need extra time to be able to consent to direct payments. Councils can be flexible about how they interpret the giving of consent. The guidance states:

‘Obtaining consent might be a process involving continuous discussion, rather than a single event.’<sup>1</sup>

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

### **A ‘suitable person’ for someone who lacks the capacity to consent to receive direct payments**

If someone lacks the capacity to consent to direct payments, a ‘suitable person’ can receive direct payments on their behalf. For more information see Sense’s factsheet ‘Direct payments: receiving direct payments on behalf of an adult who lacks the capacity to consent’.

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<sup>1</sup> Dept. of Health, 2009, Direct Payments Guidance, para. 52, 21

## **Capacity to manage direct payments**

Separate from whether someone has the capacity to consent to direct payments is whether someone can make decisions about managing their direct payments (with or without support). Someone can have the capacity to consent to direct payments but then lack the capacity to make decisions about managing them. If you do have the capacity to manage your direct payments, then you are still entitled to receive the support to do this.

## **Using a 'nominee' to manage direct payments**

When someone has the mental capacity to consent to direct payments but needs additional support to manage them, the direct payments can be paid to a 'nominee' who can help the person to manage the direct payments and the nominee will be responsible for the day-to-day management of the direct payments.

## **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.

## **Setting up a trust**

There are a number of different types of trusts. A trust is legal mechanism whereby one or more persons, the trustees, are obliged to look after and deal with assets (the trust property) for the benefit of the beneficiary. A trust must have at least 3 trustees. The trust deed will establish the obligations of the trustees and how they are to benefit the beneficiaries. Trusts can be set up to suit the individual need of a situation, including managing direct payments or a personal budget. Trustees have the 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 beneficiary's needs are met. Trustees take on a considerable amount of responsibility and can spend a lot of time on trust-related work. Different kinds of trusts that can be set up to manage direct payments or a personal budget include Independent Living Trusts, Independent User Trusts and User-controlled Trusts.

## **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. The cousin is willing to recruit other trustees if the parents do not want, or are unable to.

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.

## **Resources**

### **Office of the Public Guardian**

Post: PO Box 15118, Birmingham, B16 6GX.

Telephone: 0300 456 0300

Textphone: 020 7664 7755

Fax: 0870 739 5780

Email: [customerservices@publicguardian.gsi.gov.uk](mailto:customerservices@publicguardian.gsi.gov.uk)

Web: [www.publicguardian.gov.uk](http://www.publicguardian.gov.uk)

### **Trusting Independence (a guide to Independent Living Trusts)**

By Andrew Holman & Catherine Bewley, 2001, £6.00

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

Telephone: 020 7729 5436

Fax: 020 7729 7797

Email: [general@viauk.org](mailto:general@viauk.org)

Web: [www.viauk.org](http://www.viauk.org)

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