



**FLINTSHIRE COUNTY COUNCIL
DIRECTORATE OF COMMUNITY SERVICES
(Direct Payments Team)**

Direct Payments 'Suitable Person' Guidance

1. Introduction

From April 2011 changes in respect of regulations regarding the Direct Payments Scheme took place. The Health and Social Care Act 2008 amended the Health and Social Care Act 2001 to extend the scope of Direct Payments to include adults lacking capacity to give their consent to a direct payments arrangement.

The new guidance allows a mechanism for those who lack the capacity to consent to a Direct Payment to still be able to access the service via the use of a 'Suitable Person'.

The new regulations will also extend the Direct Payments scheme to people with mental health problems who are subject to mental health and certain criminal justice legislation.

These changes in the law have made it possible for someone to receive direct payments on behalf of an adult who lacks mental capacity 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 persons assessed care needs. In most cases this will be a family member, or a close friend already involved in the care of the service user. However, a 'Suitable Person' could be one of the following:

1. Someone who has been awarded **Lasting Power of Attorney (LPA)** but it is unlikely that a financial Lasting Power of Attorney on its own, will be sufficient.
2. Someone who has been appointed a **deputy** for the person needing services by the **Court of Protection** under section 16 of the Mental Capacity Act 2005
3. Someone who has offered to act as a 'Suitable Person' – This will need to be agreed by the care manager and the appropriate Local Authority senior designated officer
4. Someone agreed by the Local Authority to act as a Suitable Person
5. An organisation/3rd party appointed by the Local Authority – e.g. Direct Payments Support Scheme Provider

2. Deciding if someone lacks the capacity to consent

The Mental Capacity Act 2005 presumes that a person has capacity unless it is established otherwise. Each person has to be assessed on an individual basis in relation to the decision to be made. A person lacks capacity if at the material time he/she is unable to make a decision because of impairment of, or a disturbance in the functioning of, the mind or the brain.

The Mental Capacity Act 2005 outlines the steps that professionals should take to assess whether someone lacks the capacity to make a decision. Flintshire County Council must 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 of a particular age.

Once it is established and recorded that the person lacks capacity to consent to a Direct Payment then it may be appropriate for a 'Suitable Person' to receive the Direct Payment on their behalf.

If the service user regains capacity and it is permanent they will need to consent to receiving Direct Payments. The Direct Payments to the 'Suitable Person' should not be terminated until the new arrangements are in place.

3. Deciding who the 'Suitable Person' should be

There is no suitability test required for a representative who would normally be first choice as a 'Suitable Person'. If the representative or surrogate does not wish to act, Flintshire County Council needs to identify an alternative person.

If the representative who is also a surrogate does not want to act as the 'Suitable Person' the surrogate together with the Local Authority needs to consider an alternative 'Suitable Person'. Where the surrogate and Flintshire County Council cannot agree who the 'Suitable Person' should be, the surrogate has a power of veto.

If there is neither representative nor surrogate the Local Authority has the power to decide whether or not an identified person should act as the 'Suitable Person'.

The following steps can be used to determine the 'Suitable Person'.

The first steps should involve consulting with a number of individuals e.g. family, friends, peers, professional and other interested parties:	
STEP 1	<ul style="list-style-type: none"> • Before consideration is given to anyone becoming a 'Suitable Person' the Local Authority must establish if there is a person appointed by a court who is willing to be the agreed 'Suitable Person'. (See representative and surrogate section)
STEP 2	<p>The Local Authority so far as is reasonably practical and appropriate must consult and take into account the views of:</p> <ul style="list-style-type: none"> • Anyone named by the direct payment beneficiary as someone to be consulted on • Anyone currently engaged in caring for the person lacking capacity or interested in their personal welfare <p>Any representative or surrogate of the person lacking capacity</p>
STEP 3	<ul style="list-style-type: none"> • The third step is to consider the past and present wishes and feelings of the person who lacks capacity as far as is reasonable to ascertain. • This should include their beliefs and values that

	<p>would be likely to influence the person's decisions if the person had capacity and any other factors that the person would be likely to consider if they were able to do so.</p> <p>This should be in line with the code of practice as outlined in the Mental Capacity Act 2005</p>
STEP 4	<p>An enhanced criminal record certificate (Criminal Record Bureau) must be available in respect of the proposed recipient for:</p> <ul style="list-style-type: none"> • Personal Assistance employed by the 'Suitable Person' for the provision of care for the individual. • An individual who will have overall responsibility for the day to day management of the Direct Payment on behalf of a corporate body or an unincorporated body of people. <p>It is important that Local Authorities consider all Protection of Vulnerable Adults safeguards and that good practice is adopted in accordance with the Interim Policy Procedures for the Protection of Vulnerable Adults from Abuse 2011 . Additional local practice may be formulated in conjunction with Adult Protection Safeguarding unit.</p>
STEP 5	<p>Where there is no identified 'Suitable Person' the local authority may appoint an organisation or 3rd party as a potential 'Suitable Person' where appropriate</p>

Flintshire County Council must be satisfied that:

- The service user's needs are able to be met by making the direct payment to a 'Suitable Person'.
- The "Suitable Person will act in the service user's best interests when securing services for the service user.
- The 'Suitable Person', is capable of managing the direct payment by themselves or with support and assistance.
- It would be appropriate to make the direct payment to the identified 'Suitable Person'.
- Appropriate contingency plans are in place to cover the care needs of the service user in the event of the 'Suitable Person' being temporarily or permanently unable to fulfil their role.

5. Becoming a 'Suitable Person'

The decision to become a 'Suitable Person' is an important one. The prospective 'Suitable Person' should be given enough relevant information to enable them to make a decision and they should not be pressured into taking on this role.

Once all reasonable steps have been taken and satisfied, the Local Authority can make the direct payment with the consent of the 'Suitable Person'.

The 'Suitable Person' receiving the Direct Payment on behalf of the service user must agree and accept certain responsibilities. These responsibilities should be clearly outlined in the contractual agreement between the Local Authority and proposed '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 are not required to have a DBS check. If the potential 'Suitable Person' is not a family member or close friend, he or she will need to have a DBS check.

6. The 'Suitable Person's' responsibilities

The 'Suitable Person' must follow good practice in making decisions on behalf of someone who lacks capacity to consent to a direct payment and act in their 'best interests'. Even though they may lack capacity to make decisions regarding direct payments, they should be consulted as far as is reasonably practicable and they may have the capacity to make other decisions. The 'Suitable Person' must ensure that the person who they are representing maintains as much control and independence as possible.

The 'Suitable Person' must use the direct payments in line with the agreement entered into with Flintshire County Council. If staff are employed to provide services, the 'Suitable Person' must ensure that they act lawfully as an employer.

7. Reviewing

In accordance with the Direct Payments guidance and Community Care legislation, reviews should be completed at least annually. However, it is beneficial and good practice for a Local Authority to review the Direct Payments regularly to ensure the 'Suitable Person' is continuing to work in the service users' best interests and to ascertain the service user capacity status.

The review should always focus on achieving the agreed outcomes for the service user rather than on services being delivered in a certain way.

Alternatively reviews can be completed:

- At least once within the first year of the Direct Payments being made
- At appropriate intervals not exceeding 12 months thereafter
- Where the Local Authority has reasonable grounds that the person no longer lacks capacity

- Whenever the Local Authority has been notified that the direct payment has not been used to purchase services for which it was made
- When there are concerns regarding the 'Suitable Person' not acting in the best interests of the person lacking capacity or their ability to manage the direct payment
- When a person had capacity but is now believed to no longer have capacity
- Where there are any safeguarding concerns or Protection of Vulnerable Adults issues, mismanagement of funds, etc

In view of the responsibility held by the 'Suitable Person' to act in the service users best interests the WAG Direct Payments Guidance suggests that where a person lacks capacity or has fluctuating capacity the reviews are completed on a more regular basis than a standard review.

7. Termination of the Direct Payment Arrangement

It is important for Direct Payments packages to be terminated in line with Local Authority policy and procedures. It is important to remember that where Personal Assistants are employed there will be statutory obligations with regard to their employment status and notice periods.

The Local Authority may decide to terminate the payments when:

- the 'Suitable Person' is no longer entitled to Direct Payments
- the Service User no longer meets the assessed eligible community care need
- the Local Authority is no longer satisfied that the Service User's needs can be met by means of a Direct Payment
- the 'Suitable Person' is not acting in the Service User's best interests
- the 'Suitable Person' is not capable, or no longer capable, of managing the Direct Payment
- the Suitable Person does not comply with their obligations as detailed above
- it is no longer appropriate for the Direct Payment to be made to the 'Suitable Person' identified
- the Service User regains long term capacity
- it is contrary to the Service User's best interest
- the Service User and/or 'Suitable Person' no longer wishes to manage the Direct Payment arrangement

This list is not exhaustive.

8. Repayment of Funds

Where the Local Authority is not satisfied that the Direct Payments have not been used to secure the provision agreed or that the Suitable Person has not complied with their obligations the Local Authority will in most cases require payment or part payment to be repaid.

9. Other Changes Introduced by the New Regulations

Previously many individuals who were subject to compulsory measures under the mental health legislation were excluded from receiving Direct Payments. Councils now have the same duty to offer Direct Payments to eligible people who are subject to mental health legislation with some exceptions. Please refer to the WAG Direct Payments Guidance and regulations 2011 or FCC Direct Payments Policy.

10. Neglect or Fraud

Whilst the local authority will not want to deter or discourage people from taking up the role of Suitable Person, it is advisable that any potential Suitable Person is given relevant and appropriate information before they accept the responsibilities of becoming an agreed Suitable Person. One of the key areas they must be briefed on is their responsibility with regard to neglect and fraud.

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

The Fraud Act 2006 also created a new offence of 'fraud by abuse of position'. This may apply to a range of people including those with Lasting Power of Attorney, Enduring Power of Attorney or Deputies appointed by the Court of Protection. This provision will apply to a 'Suitable Person' who may also be guilty of fraud if they dishonestly abuse their position.

Practitioners must be satisfied that the potential 'Suitable Person' is aware of what constitutes abuse both by themselves and others.


12. Planning for Loss of Capacity


Some service users may be concerned about losing mental capacity in the future. Practitioners may want to assist or signpost the service user to the relevant person or organisation who will be able to help the service user to:

- Consider awarding Lasting Power of Attorney to a family or friend etc
- Discuss and consider how an application to the Court of Protection for Deputyship works
- Create a statement of wishes and preferences (advanced directive) that can be referred to in the future, as appropriate

Practitioners must be aware that if someone is in receipt of Direct Payments and it is likely they will lose capacity in the future they must be advised to make appropriate arrangements for when this happens.

Appendix 1 – Additional Information

 Note: **Direct Payment Regulations** - The new Direct Payments Regulations which allows people who lack capacity to consent to receive a direct payment must be implemented in conjunction with the Mental Health Act 2005 to ensure good practice regarding suitable risk management and safeguarding.

 Note: **Service Users without capacity** - Direct Payments should not be made to someone who lacks capacity unless the payments are made via a Suitable Person, trust or managed account etc


 Note: **Fluctuating Capacity – Who is the employer?**


Where a person **has capacity** at the start of the Direct Payment, but then has a period of fluctuating capacity, the employer is the Service User

Where the Service User is **without capacity** prior to the initiation of a Direct Payments arrangement, the employer is the 'Suitable Person'. Direct Payments should not be made to someone who lacks capacity unless the payments are made via a 'Suitable Person', trust or managed account etc

Where the Service User has **fluctuating capacity** at the start of the Direct Payment, a 'Suitable Person' could be appointed and will remain the employer

Where the Service User **regains capacity** permanently, there is a need to establish that they are consenting to receiving Direct Payments; the Direct Payments to the 'Suitable Person' should not be terminated until the new arrangements to pay the Service User direct, are in place.


 Note: **Fluctuating Capacity - Frequency of reviews** - It may be beneficial where the service user has fluctuating capacity to have more regular reviews. The suggested frequency for a review of a Direct Payments package where a 'Suitable Person' has been agreed and/or where the service user has fluctuating capacity is six weeks, three months, 6 months and then yearly.


 Note: **Examples of when someone is not suitable –**
Protection of Vulnerable Adults and Safeguarding concerns


Where there may be conflicts of interest


Where there are unsatisfactory Criminal Records Bureau checks


Or where the Local Authority may have other significant reasons or concerns


 Note: **Safeguarding Considerations** - There may be times when a person is not considered appropriate to act as a 'Suitable Person' - where, for example, there are Safeguarding and/or Protection of Vulnerable Adult concerns, Criminal Record Bureau issues, a conflict of interest, financial issues and or other concerns. This list is not a comprehensive list and each Local Authority may wish to have additional criteria to determine the final decision.


 Note: **DBS** - If family members are to be considered as a potential 'Suitable Person' or employed as PA's the Local Authority may require them to obtain a DBS check before the Direct Payment begins.


 Note: **Local Authority decisions on the appointment of the Suitable Person** - The Social Care Practitioner may be the initial person to identify and work with a potential 'Suitable Person' but before the Direct Payment is agreed and made to the 'Suitable Person' the appropriate senior designated officer will need to agree.

 Note: **Payments to a 'Suitable Person'** - The 'Suitable Person' would not normally receive any benefit, financial or otherwise for taking on the role of 'Suitable Person'. However, there may be exceptional circumstances where it would be appropriate for payment to be made to the 'Suitable Person'. Any such arrangement must be agreed by the appropriate Local Authority senior designated officer.

 Note: **Assessed Charge** - It is the 'Suitable Person's' responsibility to ensure that any assessed charge the service user would normally be liable for is paid to the Local Authority. Local arrangements apply. This should be recorded in the Local Authority contractual agreement.

 Note: **Change in status of 'Suitable Person'** - If it is established that someone is no longer appropriate to be the 'Suitable Person' this should automatically trigger a review.

 Note: **Continuity of Care Provision** - When terminating a Direct Payment arrangement this should not have an impact on the overall care required and provided to the service user.

 Note: **Frequency of reviews** - It is likely that reviews are completed more frequently in the early stages of a Direct Payment being started. The recommended frequency for a review of a Direct Payments package where a 'Suitable Person' has been agreed is six weeks, three months, 6 months and then yearly. Historically, some Direct Payments may have been set up inappropriately; this can be for a range of reasons. However, at the next review practitioners should decide whether or not Direct Payments should continue to be paid this way or an alternative e.g. 'Suitable Person'.

 Note: **What is a representative or surrogate?**

A 'Suitable Person' may be a representative or surrogate of the service user.

A surrogate is a Deputy or Donee (as above), whose powers consist of or include powers relating to decisions about securing provision of community care services within the meaning of S46 of the 1990 Act. A financial lasting Power of Attorney on its own is unlikely to be sufficient to be a Surrogate.

Where Flintshire County Council has deputy status for a person they will be able to nominate a 'suitable person' and this is likely to be a 3rd party organisation.

 Note: **What is a Nominee?**

The term 'Suitable Person' should not be confused with the term nominee. A nominee will manage the Direct Payments on behalf of a person with capacity. A nominee's role is to support the service user with the administration of the Direct Payment. A 'Suitable Person's' role carries far more responsibility than a nominee's and will include managing the Direct Payment on behalf of the service user and making choices about the care and support the service user receives via the Direct Payment

Checklist for appointing a Suitable Person

Name of Service User		Address	
ID Number		Date of Birth	

Proposed Suitable Person

First Name	Surname	Address	Relationship to Service User	Legal Status (see advisory Notes 1)	Suitable Person agreed Yes/No	signed and printed (designated senior manager)

Proof of Identity of Suitable Person	Document (see notes)	Identification Number (e.g. passport of driving licence number etc)

People consulted with re Suitable Person role

First Name	Surname	Address	Relationship to Service User	Legal Status (see notes)

Reason why _____ was chosen to be Suitable Person e.g. legal status, knowledge of service user, named in statement of preference/wishes. In addition state why this is in the Best Interests of the Service User named above.

Practitioner Name _____

Practitioner Signature _____

Practitioner Job Role _____

Date _____

Senior Designated Manager _____