



**West of Berkshire Safeguarding Adults Board
Bitesize Learning Session**

**Legal decision making powers and advocacy – Bitesize
Learning Session
15th November 2021**

Housekeeping

- Microphones and cameras switched off .
- The session will be recorded and potentially added online, if you have any concerns about this please contact Lynne.Mason@Reading.gov.uk
- For specific questions on presentations please use chat function, unless invited to speak, there will be a Q&A session at the end where all presenters will be available.
- There will be a opportunity to ask more general questions at the end of the session, you will be asked to do this by asking your questions raising your virtual hand. Please be mindful of confidentiality.
- At the end of the session please email Lynne.Mason@Reading.gov.uk to confirm your attendance and provide feedback.

Speakers for Today

Leanne Palethorpe	Practice Consultant for Adults / AMHP / BIA Wokingham Borough Council	What is an LPA and what are their decision making powers.
Carl Borges	Adult Safeguarding Hub Practitioner, Adult Social Care Wokingham Borough Council	When and how to bring in advocate when there is an LPA
Elizabeth Porter	Lead Nurse for Safeguarding Adults , Royal Berkshire NHS Foundation Trust	Managing challenging conversations with an LPA
Suzanne Rhodes	Senior DoLS Professional, Reading Borough Council	Guidance on how to address concerns regarding an LPA
Naheed Qureshi	Social Worker and BIA Assessor, Reading Borough Council	
Q&A Session	Opportunity for delegates to ask presenters questions, please use chat function.	

LPA Role



What is an LPA? Legal document that allows someone to make decisions for someone else, or act on their behalf, if they are no longer able to because they have lost mental capacity.



2 types:

Property & Financial Affairs:

- buying and selling property
- investing money
- paying bills and mortgage
- claiming, receiving and using benefits
- arranging repairs to property
- (can be used before donor lacks capacity)

Health & Welfare:

- where person should live
- contact with the person
- day to day care
- medical care
- social activities, leisure, education

LPA Role – Appointing an LPA

Choose attorney (can be more than 1 person)

Husband, wife, partner, friend, relative, professional

Make LPA

Online or paper forms
Signed by: donor, attorneys, witnesses, certificate provider
(to confirm making LPA by choice and understand what they are doing)

Notify people

LP3 form
They'll have 3 weeks to raise any concerns with OPG.

Register LPA with OPG

Sign completed LPA form & send to OPG

How much it costs

Current cost is £82 to register each LPA unless get reduction or exemption

LPA Role



LPA cannot be used until registered with Office of Public Guardian & stamped on every page.
Check it is registered by going to:
<https://www.gov.uk/find-someones-attorney-deputy-or-guardian>

Both donor and attorney must be over 18 & have capacity to execute & operate it respectively

All attorneys are subject to the MCA section 1 principles & the MCA section 4 best interests checklist:

1. Assume capacity of donor
2. Take all practicable steps to enable them to make own decision
3. Consult with others
4. Consider the donor's past & present wishes, beliefs & values

Role and Duties:

- Duty of care in decision making
- Duty to act in good faith and not take advantage of their position
- Duty to carry out donor's instructions & respect confidentiality

Deputyship Role

Must be
over 18

What is a Deputy? Person or holder of a specific post appointed by Court of Protection to manage finances or make decisions about health & welfare of someone who lacks capacity who has not appointed an LPA.

Only if necessary & person being appointed has required skills & knowledge

Must consent to being a deputy

Property & Financial Affairs:

Person has savings or property which require ongoing management.

Health & Welfare:

Court is of a view that a deputy is necessary to lead on health & welfare decisions (rarely appointed – court makes decisions).

Slower & more expensive than appointing LPA

Appointeeship Role

Appointeeship is an alternative way of managing finances on behalf of someone who lacks capacity.

An appointee is responsible for managing a person's benefits, and also for paying bills and managing a small and limited amount of savings in case of unforeseen circumstances.

Appointeeship is not part of the Mental Capacity Act.

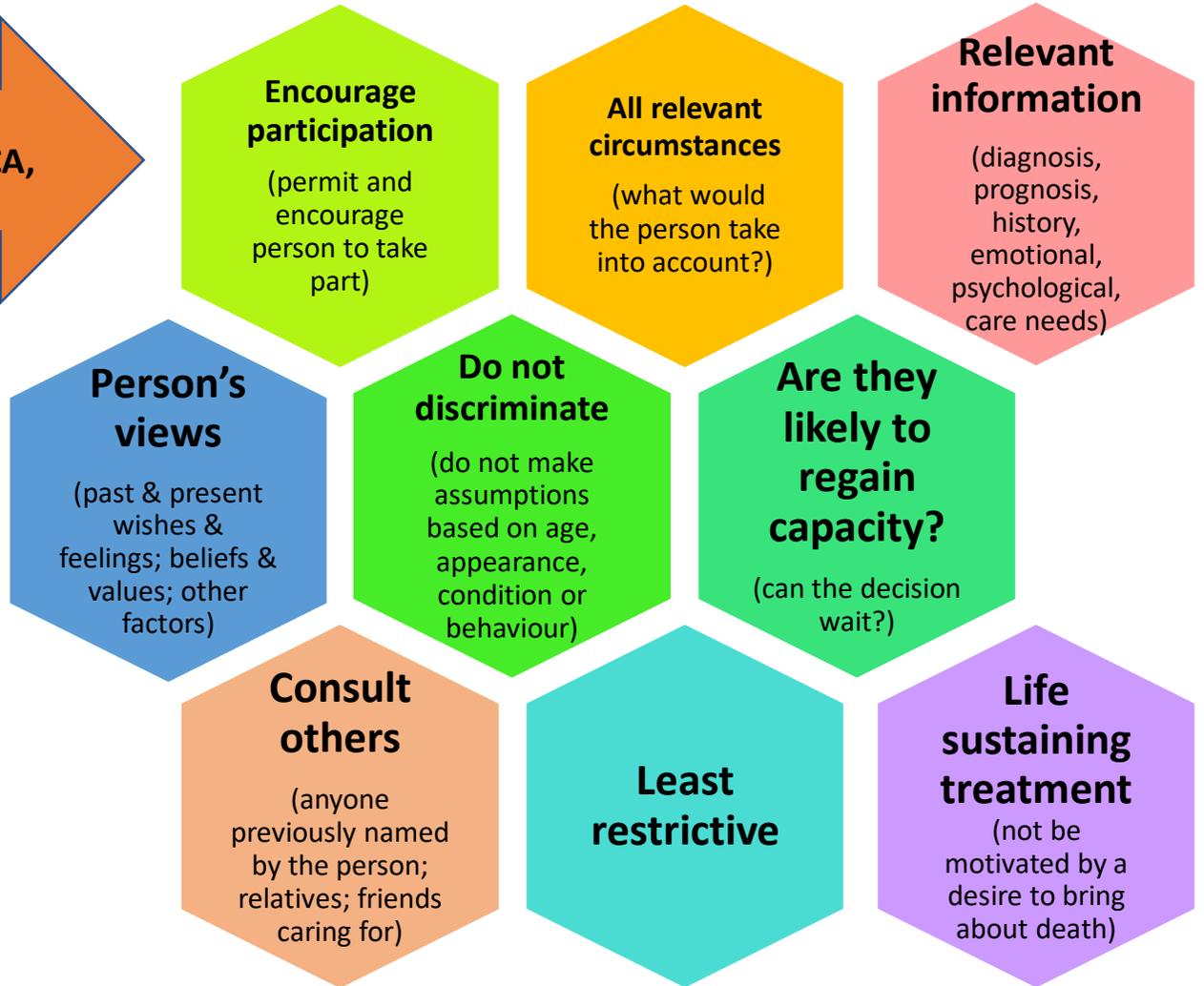
It is arranged through the Department for Work and Pensions (DWP)

Appointeeship may be the best course of action if the person has a low level of financial assets, is in receipt of benefits and doesn't have any other sources of income.

Best Interest Decisions

If an LPA has been made and registered, or a deputy has been appointed, the attorney or deputy will be the decision maker where the doner lacks capacity for decisions within the scope of their authority

Must consider Best Interests Checklist (MCA, section 4)





How could an LPA be limited in scope?

Donor can appoint several attorneys to act jointly (all appointed must agree) or jointly & severally (any attorney has authority to act individually)

Donor can limit decisions or add requirements for attorney

Others can challenge decisions if not in best interests of donor – CoP through OPG

Does not apply to treatment for mental disorder regulated under MHA, part 4

If an advance decision has been made after appointment of attorney, the attorney cannot consent to treatment refused by the advance decision



When and how to bring in advocate when there is an LPA

Carl Borges, Adult Safeguarding Hub Practitioner, Adult Social Care,
Wokingham Borough Council

Who qualifies for the support of an Independent Care Act Advocate

L.A.'s must arrange an independent advocate to facilitate the involvement of a person in their assessment, in the preparation of their care and support plan and in the review of their care plan, if two conditions are met:

- the person has *substantial difficulty* in being fully involved in these processes
- there is *no one appropriate available* to support and represent the person's wishes.

When does the advocacy duty apply?

The advocacy duty will apply from the point of first contact with the local authority and at any subsequent stage of the assessment, planning, care review, safeguarding enquiry or safeguarding adult review.

Judging 'substantial difficulty'

Local authorities must consider, for each person, whether they are likely to have substantial difficulty in engaging with the care and support process. The Care Act defines four areas where people may experience substantial difficulty.

These are:

- understanding relevant information
- retaining information
- using or weighing information
- communicating views, wishes and feelings.

Who is an ‘appropriate individual’ to assist a person’s involvement?

L.A. must consider whether there is an appropriate individual who can facilitate a person’s involvement in the assessment, planning or review process, and this includes four specific considerations.

The appropriate individual cannot be:

- already providing care or treatment to the person in a professional capacity or on a paid basis
- someone the person does not want to support them
- someone who is unlikely to be able to, or available to, adequately support the person’s involvement
- someone implicated in an enquiry into abuse or neglect or who has been judged by a safeguarding adult review to have failed to prevent abuse or neglect.

When should an independent advocate be appointed?

An independent advocate must be appointed to support and represent the person for the purpose of assisting their involvement if these two conditions are met and if the individual is required to take part in one or more of the following processes described in the Care Act:

- a needs assessment
- a carer's assessment
- the preparation of a care and support or support plan
- a review of a care and support or support plan
- a child's needs assessment
- a child's carer's assessment
- a young carer's assessment
- a safeguarding enquiry
- a safeguarding adult review
- an appeal against a local authority decision under Part 1 of the Care Act (subject to further consultation).

When should an independent advocate be provided to support a person in difficulty?

There are times when an independent advocate should be provided for a person who has substantial difficulty even though they have an appropriate individual (family member, carer or friend) to support them.

These are:

- where a placement is being considered in NHS-funded provision in either a hospital (for a period exceeding four weeks) or in a care home (for a period of eight weeks or more), and the local authority believes that it would be in the best interests of the individual to arrange an advocate
- where there is a disagreement between the local authority and the appropriate person whose role it would be to facilitate the individual's involvement, and the local authority and the appropriate person *agree* that the involvement of an independent advocate would be beneficial to the individual.

The Care Act: Safeguarding adults

The Care Act 2014 sets out a clear legal framework for how local authorities and other parts of the system should protect adults at risk of abuse or neglect.

Local authorities have new safeguarding duties.

They must:

- **lead a multi-agency local adult safeguarding system** that seeks to prevent abuse and neglect and stop it quickly when it happens
- **make enquiries, or request others to make them**, when they think an adult with care and support needs may be at risk of abuse or neglect and they need to find out what action may be needed
- **establish Safeguarding Adults Boards**, including the local authority, NHS and police, which will develop, share and implement a joint safeguarding strategy
- **carry out Safeguarding Adults Reviews** when someone with care and support needs dies as a result of neglect or abuse and there is a concern that the local authority or its partners could have done more to protect them
- **arrange for an independent advocate** to represent and support a person who is the subject of a safeguarding enquiry or review, if required.

Any relevant person or organisation must provide information to Safeguarding Adults Boards as requested.

The six safeguarding principles

It is important that at all points, the six safeguarding principles are considered in determining the next course of action:

- **empowerment** - people should be supported and encouraged to make their own decisions and give informed consent
- **prevention** - it is better to take action before harm occurs rather than waiting until it does occur
- **proportionality** - the response should be the least intrusive and the most appropriate to the risk presented
- **protection** - there should be support and representation for those in greatest need
- **partnership** - services should work with their communities to produce local solutions; communities have a part to play in preventing, detecting and reporting neglect and abuse
- **accountability** - safeguarding practice should be accountable and transparent.

What is safeguarding?

The Statutory Guidance issued under the Care Act², published in October 2014, states that adult safeguarding ‘means protecting an adult’s right to live in safety, free from abuse and neglect’ (Section 14.7).

Who does adult safeguarding apply to?

- In the context of the legislation, specific adult safeguarding duties apply to *any* adult who:
 - has care and support needs and
 - is experiencing, or is at risk of, abuse or neglect and
 - is unable to protect themselves because of their care and support needs.
- Local authorities also have safeguarding responsibilities for carers and a general duty to promote the wellbeing of the wider population in the communities they serve.

Who does Adult safeguarding apply to?

(continued)

- Safeguarding duties apply regardless of whether a person's care and support needs are being met, whether by the local authority or anyone else.
- They also apply to people who pay for their own care and support services.



Managing challenging conversations with an LPA

Elizabeth Porter, Lead Nurse for Safeguarding Adults , Royal Berkshire
NHS Foundation Trust

Case Study Discussion

Legal decision making powers and advocacy

When concerns emerge: warning signs and how to escalate.

LPA – Health and Welfare and Finance

Warning signs, what to look out for

How to escalate

Office of the Public Guardian

Case Law

A lasting power of attorney (LPA) is a legal document in which someone (the donor) gives another person (the attorney) the right to help them make decisions, or take decisions on their behalf.

There are two types of LPA, for: property and financial affairs and health and welfare.

LPA for property and financial affairs

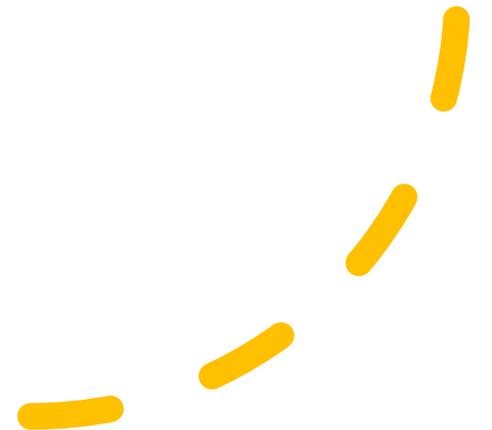
- This LPA can be used to appoint attorneys to make decisions such as:
- buying and selling property
- operating a bank account
- dealing with tax affairs
- claiming benefits
- LPA for health and welfare

An LPA for health and welfare can be used to appoint attorneys to make decisions on, for example:

- where the donor should live
- day-to-day care (for example, diet and dress)
- who the donor should have contact with
- whether to give or refuse consent to medical treatment
- The LPA can only be used once the donor has lost mental capacity to make a personal welfare decision for themselves.

The warning signs

These are examples of events which might raise concerns about whether the attorney's powers are being used properly.

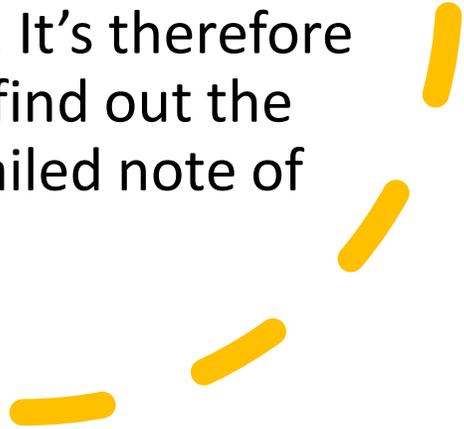


General Concerns

- Gone against wishes of donor. Has the donor's voice been heard?
- hasn't done something the donor has instructed them to do
- haven't been acting in the donor's best interests
- misuse the donor's money or make decisions to benefit yourself
- does something that goes against the donor's human or civil rights
- the donor isn't being treated well
- the donor made the LPA under pressure or they were tricked into it.



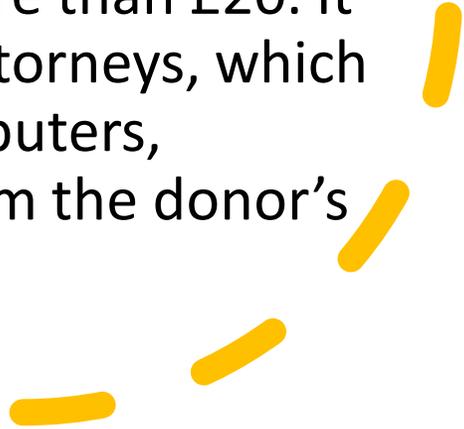
Assessing
whether
undue
pressure is
being used to
make an LPA –
The Law
society 5th
June 2020.

- It is a legal requirement that an independent person must form an opinion that at the time when the donor signs the LPA:
 - they understand its purpose and the scope of the conferred authority
 - no fraud or undue pressure is being used to induce the donor to create the LPA
 - Remember that a core principle of the Mental Capacity Act 2005 (and the common law) is that a decision you consider unwise may still be a decision that the client can make with capacity. It's therefore important that you probe carefully to find out the driver for the decision and keep a detailed note of your discussion.
- 

Excessive gifts

- Whilst attorneys are allowed to make gifts to people related to or connected with the donor, including themselves, these gifts should only be on customary occasions (for example birthdays, Christmas, etc) and should not be unreasonably large. The gifts should also not be disproportionate to the pattern of giving the donor did when they had capacity.

In Re GM, the attorneys gave family members £1000 each for Christmas. It was later revealed that although the donor had regularly given gifts while competent, these were usually no more than £20. It was held that the gifts made by the attorneys, which included gifting themselves cars, computers, expensive handbags and jewellery from the donor's house, were invalid.



Loan applications or credit cards taken out in the donor's name

- This could raise concerns about potential misuse of the attorney's powers, particularly if the donor does not benefit from the loans or credit cards.
 - In *Re Harcourt*, Mrs Harcourt's daughter became an attorney after her mother lost capacity. Suspicions were raised when the care home manager became aware of letters about bank loans and credit card applications being taken out by the daughter in her mother's name. The matter was consequently investigated and it was revealed that the daughter had abused her powers of attorney in order to make personal financial gains.
- 

High risk
investments
or investment
in a business
the attorney
owns or has
an interest in

Investments must be in the donor's best interests and in particular, must not benefit the attorney. An investment in the attorney's own business would be a serious cause for concern.



Failure to pay the donor's expenses or a general lack of money made available to the donor

This would raise concerns that the attorney is not properly administering the donor's financial affairs. It is important for attorneys to actively manage the donor's affairs as this is the purpose of the LPA.



Failure to keep the donor's money separate

Attorneys should keep the donor's and their own money separate. Failure to do this would raise concerns about whether the attorney is acting properly.



What can be done?

- If the donor has sufficient capacity, they can cancel the LPA by signing a Deed of Revocation and notifying the attorney;
- Is an advocate required? And or consultation with other family members?
- Professional curiosity.
- Conflict of interest.
- If the donor does not have capacity, you can contact the Office of the Public Guardian in the first instance and ask them to investigate the concerns;
- If you have sufficient evidence regarding the abuse, you could make an application to the Court of Protection for an order that the LPA is cancelled and a deputy is instead appointed to manage the vulnerable person's finances. It is advisable to seek legal advice before court proceedings are started.
- Report to the LA – Adult Safeguarding Team.
- Report to the Police if a crime has been committed.

Office of the Public Guardian

The Office of the Public Guardian (OPG) helps people in England and Wales to stay in control of decisions about their health and finance and make important decisions for others who cannot decide for themselves.

- OPG is an executive agency, sponsored by the Ministry of Justice.
- help people plan for someone to make decisions for them, should they become unable to do so because they do not have mental capacity
- support people to make decisions for those that do not have the ability to decide for themselves
- Carry out the legal functions of the Mental Capacity Act 2005 and the Guardianship (Missing Persons) Act 2017.

- Taking action where there are concerns about an attorney, deputy or guardian
- registering lasting and enduring powers of attorney, so that people can choose who they want to make decisions for them
- maintaining the registers of attorneys, deputies and guardians
- supervising deputies and guardians appointed by the courts, and making sure they carry out their legal duties
- looking into reports of abuse against registered attorneys, deputies or guardians



Office of the Public Guardian

- In general, where there is suspected financial abuse by an attorney, the Office of the Public Guardian (“OPG”) should be informed immediately. The OPG will investigate thoroughly and then, if appropriate, take steps to intervene such as cancelling the EPA/LPA, freezing the donor’s assets, arranging for a new attorney to be appointed, or referring the matter to the Court of Protection.

How to report

- Include in your report:
- the donor or client's details (including full name, address and date of birth)
- the date you first noticed the concern
- any evidence you have to support the concern – for example, financial records
- what you know about the donor or client's mental capacity, including copies of any mental capacity reports or names of who might have these
- your contact details

Report a concern about an attorney, deputy or guardian

- Contact the Office of the Public Guardian if you have concerns about:
- a registered lasting power of attorney
- a registered enduring power of attorney
- a deputy appointed by the Court of Protection
- a guardian for someone who is missing
- Your concern could be about, for example, the misuse of money or decisions that are not in the best interests of the person they're responsible for.

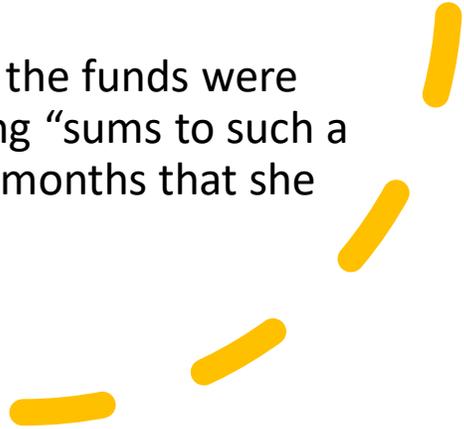
Other ways to report a concern

- You can also contact:
 - Jobcentre Plus for concerns about benefits
 - your local adult social services for concerns about care or safeguarding
 - the Care Quality Commission or the Care Inspectorate Wales if you're concerned about someone who's living in a care home
 - **Call 999 if someone is in immediate danger or your local police if you think someone has committed a criminal offence.**
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Case

Example: R v TJC [2015]

Don't need evidence of specific fraudulent transactions.

- case of R v TJC [2015] EWCA Crim 1276. In this case it was held that it is possible to bring a charge against an attorney if there is 'abuse of position' under Section 4 of the Fraud Act 2006.
 - The Court held that the circumstances would need to show that there is evidence of a general deficiency in the donor's funds as a result of withdrawals made by an attorney. In this case, the Court of Appeal held that it was not necessary for the prosecution to present evidence of specific fraudulent transactions, i.e. identifying each withdrawal against expenditure.
 - What was sufficient in this case was demonstrating that the total value of withdrawals by the Attorney (totalling approximately £75,000), exceeded the reasonable sums that would have been incurred over specific periods in providing for the donor given their needs.
 - In this case, although it was accepted that some of the funds were spent on the donor, the Attorney had been spending "sums to such a degree and in such high quantities in certain given months that she could not possibly have been acting honestly".
- 

Case Law Examples:

- *The Public Guardian v AW and DH* [2014] EWCOP 28, Senior Judge Lush revoked an LPA as the donee had used a substantial part of P's estate on improvements to the donee's house (where P lived) and payments for the donee's care of P without having sought the court's authority, without obtaining the agreement of the co-donee and without recording or protecting P's interest in the property. She had also severely restricted contact between P and the co-donee and her family. (The donees were sisters and P their mother).

Case Law continued:

- In *The Public Guardian v Marvin* [2014] EWCOP 47, P had appointed his son as attorney for finance and affairs and health and welfare. The Public Guardian became concerned because the attorney had delegated his finance and affairs role to P's partner and P's home was no longer registered in P's name, and brought an application for revocation of both powers of attorney.
- As regards P's property and affairs, the attorney, Marvin, accepted that he had acted beyond his authority pleading ignorance of the rules and guidance. He was remorseful and agreed that his attorneyship for finance and affairs should end but asked that he be appointed joint deputy with a panel deputy.
- Senior Judge noted that there had been no misappropriation of P's funds, no suggestion that the attorney had abused P in any way, and no suggestion that he was taking advantage of his father by undue influence.
- Senior Judge Lush agreed to the unusual joint appointment, accepting that that was in P's best interests and that with the added supervision that a deputyship entails and ready access to advice from the panel deputy, there would be no concerns in relation to P's finances.

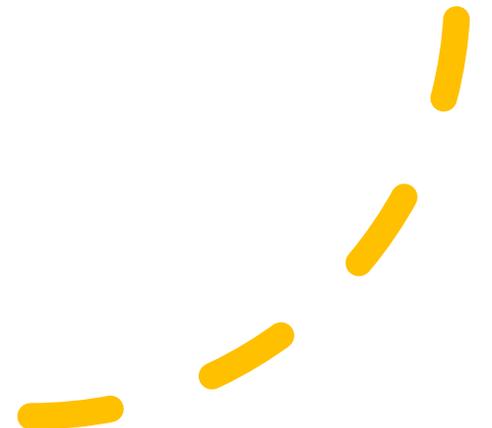
Case Law Examples:

- case of
- Re ARL [2015] EWCOP55
- Re EG [2015] EWCOP6



If you do not have all of this information, you can still report a concern.

- The Office of the Public Guardian will then check if it has the legal authority to investigate.
- Office of the Public Guardian
opg.safeguardingunit@publicguardian.gov.uk
Telephone: 0115 934 2777
Textphone: 0115 934 2778
Monday to Friday, 9:30am to 5pm
Wednesday, 10am to 5pm
Find out about call charges
- Office of the Public Guardian
PO Box 16185
Birmingham
B2 2WH





West of Berkshire
Safeguarding Adults Board
Reading, West Berkshire & Wokingham

Any questions?



- ❖ Berkshire Safeguarding Policy and Procedures: [Home Of Berkshire Safe Guarding For Adults \(berkshiresafeguardingadults.co.uk\)](http://berkshiresafeguardingadults.co.uk)
- ❖ Line Manager
- ❖ Safeguarding Lead
- ❖ Legal Teams
- ❖ Thames Valley Police
- ❖ To confirm an LPA is registered by visiting <https://www.gov.uk/find-someones-attorney-deputy-or-guardian>
- ❖ To Report a Concern to Office of the Public Guardian (OPG) opg.safeguardingunit@publicguardian.gov.uk, Telephone: 0115 934 2777, [Report a concern about an attorney, deputy or guardian - GOV.UK \(www.gov.uk\)](http://www.gov.uk)
- ❖ Consider escalation where appropriate [SAB Escalation Process](#) and [MARM](#)



Any further Questions or want to share examples of good practice?

<http://www.sabberkshirewest.co.uk/practitioners/>

<https://www.berkshiresafeguardingadults.co.uk/>

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Please provide your feedback

Feedback will help the partnership in its future delivery of its bitesize learning program. Please complete the following short [form](#).