



The Court of Protection

Appointing a Deputy for a Person Who Lacks Mental Capacity

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1. What is the Court of Protection?

The Court of Protection is an institution based in London which was established by the provisions of the Mental Capacity Act 2005. The Court looks after the rights of people who lack the mental capacity to make decisions regarding their property, affairs or personal welfare.

The Court of Protection has a number of powers, which enable it to protect vulnerable people, for example, the power to;

- decide if someone has the capacity to make a decision for themselves,
- make decisions on financial and welfare matters where someone lacks the capacity to make the decisions themselves
- appoint a Deputy to make decisions on the vulnerable persons behalf, and to ensure that the Deputy acts correctly.
- remove a Deputy, if the Court deems the Deputy has acted incorrectly.
- decide on the validity of a Lasting or Enduring Powers of Attorney

2. How does the Court Of Protection differ from the Office of the Public Guardian>

The Court of Protection and the Office of the Public Guardian (' the OPG') are essentially the same institution and their names are often used interchangeably. Whilst the Court makes all the decisions, the OPG handles the on-going administration. Both the Court of Protection and the OPG work together, but with separate defined roles.

3. When Would The Court Appoint A Deputy?

A Deputy is appointed when an individual's affairs need to be looked after because that individual is not capable of making decisions for themselves. Every individual has the right to appoint someone of their choice to look after their affairs on their behalf, should they at some point in the future lose the capacity to manage their affairs themselves. This is achieved by making a Lasting Power of Attorney ('LPA').

However, where a person loses mental capacity and no LPA has been made, an application must be submitted to the Court of Protection asking the Court to appoint a Deputy to act in the same way for that individual as an Attorney would.

4. What does 'lacks mental capacity' mean?

Defined in the Mental Capacity Act Code of Practice, a person lacks capacity if *“they lack the capacity to make a particular decision or take a particular action for themselves at the time the decision or action needs to be taken”*

Loss of mental capacity can occur in a number of ways, the most common of which is when an elderly person suffers from one or more of the various forms of dementia in a moderate to advanced stage. Other common conditions causing a person to lack capacity include; brain injuries, post-traumatic stress disorder and severe forms of cerebral palsy.

In order for a Deputy to be appointed, a person must lack the capacity to appoint an Attorney for themselves under an LPA, and must also lack the capacity to manage either their financial property and affairs in general and/or their personal welfare decisions.

5. Who decides if someone lacks capacity?

Initially and in the case of a person who has the capacity to make an LPA ('the Donor'), the Certificate Provider signing the document will sign only when they are satisfied that the Donor is fully aware of their actions and the consequences of making the LPA. Ultimately it is the Court who decide.

Where there are any doubts or suspicions that the Donor lacks capacity, medical evidence should be sought from a professional e.g. the Donor's GP or Consultant or other Health Care Worker.

Where the medical evidence states that person lacks capacity the Court will find this most persuasive for the appointment of a Deputy.

6. What if someone lacks capacity? Does that mean they can't make any decisions themselves?

No, not necessarily. The legal tests for capacity are very much 'issue specific' e.g. someone who lacks the capacity to manage their financial affairs in general may have sufficient capacity to make a Will. More commonly, someone may have the capacity (usually only just) to make an LPA appointing an Attorney, but at the same time lack the capacity to manage their property and affairs in general.

7. What does a Deputy do?

A **Property and Affairs Deputy** looks after someone's financial affairs e.g. paying bills, dealing with cash assets, dealing with income received, and taking over bank accounts.

A **Health and Welfare Deputy** makes important decisions or takes necessary actions to ensure the physical safety and wellbeing of the person lacking capacity. It should be noted however, that this type of Deputyship is much less common than a Property and Affairs Deputyship as it will only be required in the most difficult cases where decisions and actions cannot be carried out without the court's authority. e.g. where the person who lacks capacity is felt to be at risk of serious harm if left in the care of family members.

A Deputy can do all the things an Attorney can do, including, selling land and property owned by the person who lacks capacity (with the Court's permission), provided, it is assessed by the Court to be in the person's best interests to do so. However, where the person who lacks capacity is the joint owner of any land or property, a separate application must be submitted under S.36(1)Trustee Act 1925 to appoint a new Trustee to deal with the sale (please refer to our Infodoc COP Trustee FAQ)

A Deputy has to account to the Court at all times. Any major decision e.g. selling someone's property, cannot be undertaken without the prior permission of the Court's being granted.

Every year the Deputy has to provide a 'Deputies Report' to the Court. The Report provides the Court with information on decisions that the Deputy has made on that person's behalf and also provides summary accounts for the Court to approve.

8. Who can be a Deputy?

In theory, anyone over 18 can be someone's Deputy. However, the Court want to ensure that the person being appointed is suitable and it is therefore prudent to give careful consideration as to who is to be appointed as Deputy. By way of example, the Court may not be prepared to appoint a proposed Deputy who has previously been declared bankrupt or found guilty of a criminal offence.

Usually the Deputy will have a connection to the person who lacks capacity, e.g. a family member or close friend or it may be that the Court will agree to the appointment of a Professional Deputy such as Solicitor or Accountant etc. However, it is unlikely that the Court would appoint a Deputy for someone who was a stranger to the person in question and was not a professional Deputy.

9. I have an elderly relative in a Care Home and I have been asked by Social Services whether that relative has made a Power of Attorney. I do not think they have. What do I do?

You should first establish whether the relative has made an Enduring Power of Attorney ('EPA') or an LPA? This can be quite difficult, particularly where this is not immediately obvious. For example, the relative may have stored the original EPA or LPA with other personal effects in a bank deposit box or

with a firm of solicitors. However, even where details of the solicitor or bank holding the relatives documents are available, there can still be difficulties in relation to client confidentiality.

Where it is believed that the relative has not made an EPA or an LPA, it should be established whether that person has the capacity to do so. Please note; on October 1 2007, the Enduring Power of Attorney was replaced by the Lasting Power of Attorney.

A Lasting Power of Attorney, like an Enduring Power of Attorney, allows someone to make decisions for you if you are unable to do so. Whilst an Enduring Power of Attorney that was made and signed before October 1 2007 can still be used, it is not now possible to create a new EPA.

Establishing a person's capacity may require a visit to the care home to see the relative in person. However, it is more usual if, during conversation about the relative it becomes apparent and seems probable that relative lacks capacity, then an appointment / consultation with a medical professional should be arranged. The medical professional will charge a fee for assessing the relative and for completing the necessary Court forms.

In summary, if the relative is deemed to have the capacity to make an LPA then this should be arranged without delay and if not, then an application should be submitted to the Court to appoint a Deputy (and where necessary a Trustee).

10. What is the procedure to appoint a Deputy?

As the Court will not accept jurisdiction without medical evidence (in the required form) the medical professional must complete Form COP3 which will be submitted to the Court with 'the other forms' required by the Court (see below).

The medical professional is usually the relative's GP or a psychiatrist. Sometimes it may be appropriate for a psychologist, a registered occupational therapist or similar professional to complete the form.

The 'other forms' provide details to the Court about the type of Order being asked for, details about the person applying to be appointed as Deputy and, finally (and most importantly), details about the person who lacks capacity.

The Application is then sent to the Court of Protection and subject to the Court being satisfied with the information provided, the Court will make an Order appointing the Deputy.

11. How long does it take?

Once the application is received by the Court it will take approximately 2 to 3 months for a Deputy to be appointed. The most common delays occur prior to the sending the application to the Court. Our experience in dealing with such matters has taught us to submit all the forms TOGETHER as if they are submitted separately, they tend to get lost in the Court offices.

Furthermore, as we require information from third parties to complete the forms (e.g. medical evidence from the medical practitioner) we will not submit the application until we are in possession of the medical evidence in the required form.

Should circumstances dictate (e.g. in an emergency situation) we can ask the Court to treat our application as urgent and to expedite same for us as quickly as possible.

12. How much does it cost and who pays for it?

Responsibility for paying the fees falls upon the person making the application or appeal. However, the Court may decide that the applicant can recover the fee(s) from the person to whom the application relates (e.g. the person who lacks capacity)

Approximate Fee Disbursements

There are a number of costs associated with the Court of Protection for Property and Affairs Deputyships. Save for the fee charged by the medical practitioner which is at the discretion of the individual, the Court fees were amended in February 2011 and are outlined below:

1.	Medical Evidence Fee this fee is 'circumstance dependent' and may be more	£ 50. - £ 500.	Where the medical practitioner charges a fee for completing the, medical evidence (usually form COP3)
2.	Application Fee	£ 400.	Payable on making an application to start Court proceedings, or on making an application for permission to start proceedings
3.	Appeal Fee	£ 400	Payable on filing an appellant's notice appealing a Court decision or seeking permission to appeal a Court decision
4.	Appointment of Deputy Fee	£ 125	Payable once and following appointment of Deputy

5.	Hearing Fee	£ 500	Payable where the Court has held a hearing to decide the application and has made the final Order, declaration or decision
6.	Copy of document fee	£ 5	If you require additional copies of an Order
7.	Annual Supervision Fee	£0 - £800	Most likely Supervision Fee for a Deputy looking after an elderly relative is £ 175 per annum
8.	Security Bond This must be taken to cover the Deputy's actions as Deputy and is payable annually	Set by Court The cost of the Bond is assessed on the value of those assets which belong to the person who has lost capacity (the greater the value of the assets, the more responsibility the Deputy will have thus the higher the bond) The cost of the Bond is likely to be at least £ 200.	The start rate is 0.5% (£25 premium for a £5,000 bond) with the rate reducing to 0.25% at £40,000 (£100) and continuing at that rate e.g. £25 for each £10,000 - up to £150,000 (£375.00. Above that, rates gradually reduce to 0.2% for a bond of £250,000 (£500) or above A £500,000 bond requires a £1,000 premium and a £1M bond, £2,000. This is the limit of a bond for a lay deputy, but a professional deputy can obtain greater cover at the continuing rate of 0.2% of the bond value.
9.	Supervision Fee There are 4 types/levels of supervision: Type 1 Highest Level Type 2A Intermediate Type 2 Lower Level Type 3 Lowest Level	£ 800.00 £ 350.00 £ 175.00 £ 0.00	This is payable annually, starting at the end of the first year. When making the Deputyship Order, the Court will assign what they believe is to be the most appropriate level of supervision to the Deputyship. This can change during the life of the deputyship.

Our fees for making the application to appoint the Deputy will be advised on a case by case basis, and will be confirmed in writing when we take your initial instruction. In the meantime we trust the table below will give you an idea of the costs and other fees associated with a Deputyship application.

All advice given and work carried out, up to and including the date of Deputyship Order (not including administration fees which will be advised on a case by case basis)	£ 900
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Appointment of Trustee (Applications under sections 36 (9) or 54 of the Trustee Act 1925 or section 20 of the Trusts of Land and Appointment of Trustees Act 1996 and section 18(1) (j) of the Mental Capacity Act 2005 (not including administration fees which will be advised on a case by case basis)	£ 400
Deputy/Trustee obligations on the Anniversary of the Court Order	TBC
Annual Reporting	
Assisting the Deputy with the preparation of the Annual Report and submission of same to the Office of the Public Guardian	£ 250
Arranging for the preparation of an HMRC Income Tax Return	TBC
<p>Conveyancing Fees</p> <p>Where a Deputy or other person authorised by the court is selling or purchasing a property on behalf of the person who lacks capacity, fixed rates of 0.15% will apply but is subject to a minimum sum of £350.00 and a maximum sum of £1,500.00 plus disbursements</p> <p>*Exception Where the sale or purchase is by trustees, costs will be agreed with the Trustees</p>	TBC*

Exemptions

If the person making the Application to the Court of Protection is in receipt of any of the following means-tested benefits and has not been awarded damages of more than £16,000, which were disregarded when determining eligibility for the benefit, they are eligible for a full Fee Exemption:

Income Support

- Employment and Support Allowance (income related)
- Income-based Job-Seeker's Allowance
- Pension Guarantee Credit element of State Pension Credit
- A combination of Working Tax Credit and either Child Tax Credit, Disability Element Working Tax Credit or Severe Disability Element (within the Working Tax Credit). This does not include Disability Living Allowance or Invalidity Benefit;
- Housing Benefit
- Council Tax Benefit (not the 25% single person reduction or exemption);
- Local Housing Allowance. In order to apply for an exemption of fees, you must enclose copies of recent letters (dated within the last three months) confirming receipt of the benefits above, such as letters from the DWP or benefit

Where the person making the Application has a **Gross Annual Income** of **less than £12,000**, they will be eligible for a 50% reduction of the fee. Gross annual income is derived from:

- Employment,
- Non-means-tested benefits (Attendance Allowance and Disability Living Allowance),
- Pensions and
- Interest from Capital Investments.

To enable us to apply for a Fee Remission for you, we will need 'proof' of your Gross Annual Income, such as wage slips, bank statements, statements from a pension provider or any other statements that are available. The evidence provided should cover a period of at least three months.

Disclaimer

The information provided herein is based on legislation, in operation at the time of publication, which may subsequently have changed and whilst every care has been taken in its production, New Patch can accept no responsibility for any action undertaken or refrained from as a result of the information provided. The information provided is for general guidance purposes only and does not negate the need to obtain specific professional advice in relation to your individual personal circumstances