

# Court of Protection

The Court of Protection has jurisdiction over the property, financial affairs, personal health, and welfare of people who lack mental capacity to make these decisions for themselves.

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AvMA thanks Zoey Phillips, Court of Protection Solicitor at Hay and Kilner LLP for preparing this self help guide for us.



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### What is the Court of Protection?

The Court of Protection as we know it today was established by s 45(1) of the Mental Capacity Act (2005) which came into force on 1 October 2007. The court now has jurisdiction over the property, financial affairs, personal health, and welfare of people who lack mental capacity to make these decisions for themselves.

The Mental Capacity Act (2005) and the Court of Protection Rules (2007) set out the framework for the operation of the court.

Under section 16 of the Mental Capacity Act (2005), the Court can also appoint deputies to make decisions on behalf of the person lacking capacity.

### When will the court of protection become involved?

The court will become involved when a person loses capacity, and does not have a power of attorney in place. The court is able to appoint a deputy for someone who has lost capacity.

The Court of Protection can also make orders to give additional powers to an attorney who is dealing with the affairs of a donor under a Lasting Power of Attorney.

### What is a Power of Attorney?

A Power of Attorney, often called a Lasting Power of Attorney ("LPA") or Enduring Power of Attorney ("EPA") if made before 2007, are legal documents created by a person, also known as the donor, whilst they have mental capacity.

The purpose of an LPA/EPA is to allow the donor to give another person or multiple people, known as an attorneys, power to make decisions on their behalf if they later lose the mental capacity to make those decisions for themselves.

This means that the donor can choose who they would like to help them make decisions if they become unable to due to illness/loss of capacity. Many people will put an LPA in place if they are concerned that they may develop dementia.

### How is a deputyship different from an LPA?

Both of the above give broadly speaking the same authority and powers to act, the key difference is when each option is put in place. Any person who has capacity can put in place a Power of Attorney, which will come into force should they lose capacity. The advantage of this is that a person can choose who they would like to be their attorney and they can even authorise the attorney(s) to help them with financial matters before they lose capacity.

An LPA can only be put in place by someone **before** they lose capacity. If a person has already lost capacity, then they are no longer able to make a decision themselves as to who they would like to appoint as their attorney(s). Similarly if someone loses capacity quickly or unexpectedly, for example due to an accident or a rapid onset of dementia, they can no longer appoint an attorney.

In this case, a deputyship is needed. The court of protection will appoint an individual to act as deputy for the person who has lost capacity.

It may also be that a person's attorneys pass away, or no longer wish to act as attorney. In this case, the attorney can step down and a deputy can be appointed instead.

LPAs and Deputyships give broadly speaking similar powers, but deputyships are much more regulated. A deputy has more duties and responsibilities than an attorney such as submitting formal annual accounts .

### Health and Welfare decisions

A Deputyship is most commonly appointed to make decisions about property and financial affairs only.

It is possible for a Health and Welfare Deputyship to be granted, though this is rare. Most welfare decisions can be made without the need for Court approval and a Health and Welfare Deputyship is generally only required in extremely difficult situations or where a series of linked decisions need to be made

The reason a health and welfare deputyship is rarely granted is because most decisions relating to this area can be made using the best interests principle.

Section 4 of the Mental Capacity Act has a best interests checklist, which sets out what a decision maker must consider before making a decision for someone who lacks capacity.

For example, a family member, social worker or medical care team can make decisions without a deputy if they follow the checklist below:

1. Consider the wishes and feelings of the person who lacks capacity. This includes any current wishes as well as any that were expressed prior to losing capacity. Consideration needs to also be given to any particular beliefs or values that person has.
2. The decision maker must then consider all relevant circumstances, such as:
  - That person's age
  - Whether that person would normally make this decision themselves
  - Whether they are likely to recover capacity in the near future
  - Who is currently involved in the care or will be in the near future
3. The decision maker should consider whether the loss of capacity is temporary, if it is likely that the person will regain capacity it may be that the decision can be put off in the short-term. For example, in episodes of mental illness
4. The decision maker should support the involvement of the person in making that decision, for example discussing this in the way that is most appropriate to that person. This could be with the use of visual aids etc.
5. The decision maker should also consider views of any carers, family, friends or other people who may have an interest in that person's welfare.

If there is a disagreement about whether a decision is in a person's best interests, a family member or friend is able to go to the Court of Protection to settle the disagreement.

### Who can be a deputy?

Anyone over the age of 18 can be a deputy. Though often a family member or close friend will take on the role. If there are large sums of money involved then it may be preferable for a professional deputy to be appointed, who will be experienced in dealing with such sums.

### What does "lacks capacity" mean?

A person can lack capacity to manage their property and finances in several different ways. Someone may lack capacity due to sustaining a brain injury at birth, or a person may acquire a brain injury throughout their life which causes them to lose capacity.

Conditions such as dementia can mean that someone becomes very vulnerable in relation to their finances and with therefore be deemed to have lost capacity.

If someone is vulnerable to financial manipulation, or lacks sufficient understanding to manage their money it is likely they will not have capacity. Often someone with dementia will forget to pay their bills or struggle to access banking systems and manage their funds. People who suffer with dementia can be extremely vulnerable to financial scams or manipulation. Having a deputy appointed for them gives them a layer of protection.

It is important to note that acquiring a brain injury alone does not mean that someone lacks capacity. A person may have suffered a brain injury but retained capacity. Similarly if someone has suffered an injury which causes them some form of physical disability for example losing the ability to communicate verbally it should never be assumed that this person lacks capacity.

A suitably qualified professional will need to formally assess the person who may or may not lack capacity and evidence of this will need to be submitted to the court as part of a deputyship application.

### What does a deputy do?

A deputy's role is ever evolving, and the role of a lay deputy (a family member or friend) is very different to that of a professional deputy (normally a solicitor or other professional).

A lay deputy will often be appointed for an elderly relative. Their role will normally consist of making sure any care home fees, rent, utilities or other living expenses are paid. A deputy is authorised to access and manage that person's bank accounts and can budget their money accordingly. The deputy must keep records of any decisions they have made, and ensure that they are acting in that person's best interests at all times.

The deputy will need to keep bank statements and record their spending of that person's money as each year the deputy is required to submit an annual report to the Office of the Public Guardian.

Normally a lay deputy will be responsible for lower levels of funds or more straightforward deputyships.

In situations where a person has received a large sum of money in compensation for an injury which has caused them to lose capacity, for example an accident at work or in cases of medical negligence, the court often prefers a professional deputy to be appointed.

This is simply due to the fact that there will be much more work involved in terms of lifetime financial planning, more complex care needs to manage and fund, short, medium and long term investment planning and in many cases the management and funding of ongoing therapies.

### What is the Office of the Public Guardian (OPG)?

The OPG is a regulatory body that supervises deputies (both lay deputies and professional deputies). They ensure that deputies are carrying out all of their duties correctly and will investigate any concerns raised about the conduct of a deputy.

Anyone can contact the OPG if they are concerned about the conduct of a deputy. There is no formal time limit for raising an issue however any issue should be reported immediately.

Examples of deputy conduct which could cause concern are suspected mishandling of funds, sums of money being unaccounted for, the deputy being uncontactable, or not making payments for care or utility bills etc.

Each year deputies are required to submit a report to the OPG detailing all decisions they have made and any money they have spent. The OPG can help deputies with any queries they have about their duties and responsibilities.

### What is the process for applying to become a deputy?

The process can seem daunting but a solicitor can help you to complete the application. A person who would like to become a deputy must first formally notify at least three people who are connected to the person who lacks capacity, that the application is going to be made. These three people can either consent to the application, or if they wish to oppose it then the matter will be listed for a court hearing.

The person who is believed to lack capacity must also be notified of the application and given the opportunity to respond. There is a specific application form called COP14PADEP which is [available online](#). The proposed deputy will fill this form in, explaining that they would like to be appointed as a deputy. This form can then be given to the person who is believed to lack capacity. This should then be explained in the most appropriate way.

This is often done in person, by the person applying to be deputy or a close family member or friend. A simple conversation setting out what is happening is often sufficient, though visual aids, written confirmation and any other appropriate measures should be taken to explain this in the best way possible for that individual.

The individual can then complete the final section of this form indicating if they agree to, or oppose having a deputy appointed. It may be that the person does not wish to, or is unable to respond. In this case the proposed deputy or person who is notifying the individual can explain what steps they took to notify them, any verbal response given or if no response was given at all.

Once this has been done an application will be completed, giving details of the proposed deputy, details of the person who lacks capacity, details of all financial circumstances and any assets or property held.

This will then be sent to the court of protection along with evidence of that person's level of capacity, completed by a suitably qualified professional such as a GP or social worker.

The deputy must also complete a deputy declaration, giving undertakings to the court to act with integrity and to carry out their duties to the best of their ability.

### How long does the application process take?

Often the application itself can be completed in a few weeks. Once it has been submitted the court will consider the application before issuing a Deputyship Order. The length of time this takes depends on the court, to date straightforward applications are taking anywhere from 16 weeks up to 12 months to reach a conclusion.

### **What happens after a deputyship order is received?**

A person will not be authorised to act as a deputy until the deputyship order is received. Once the deputy has received the order appointing them, they can take this to any bank/building society or other financial institution to gain access to that individual's accounts and begin managing their funds. The deputy can if they wish set up new bank accounts under the deputyship or close existing accounts.

It is extremely important for the deputy to keep that person's funds entirely separate from their own, and to keep records and receipts for any purchases made.

It is very important that a deputy follows any requirements set out in the order, for example often an order will prohibit the deputy from buying or selling properties without further explicit approval. The deputy must make sure they are acting within the powers given to them by the court.

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