

The Court of Protection and the deputy

What is the Court of Protection?

The Court of Protection is a Superior Court of Record, which has the authority to make decisions on behalf of a person who lacks capacity to make those decisions himself. Decisions may relate to a person's property and affairs as well as welfare.

The Court can exercise its jurisdiction by delegating authority to make decisions to another person, a deputy. It has the following functions:

- a appointing a deputy and defining the extent of the deputy's authority
- b dealing with any matters that are outside the scope of the deputy's authority
- c resolving any issues or problems that cannot be dealt with by the deputy
- d appointing a new deputy or discharging an existing deputy where the person no longer lacks capacity.

The powers of the Court and the authority and role of a deputy are governed by the Mental Capacity Act 2005, the Code of Practice and the Court of Protection Rules.

The contact details for the Court of Protection are:

Court of Protection, PO Box 70185,
First Avenue House, 42-49 High Holborn,
London WC1A 9JA

Phone number 0300 456 4600

The Public Guardian

Once appointed, the Court of Protection is no longer involved unless a new application has to be made. A deputy must however report at least annually to the Public

Guardian who is responsible for the supervision of the deputy.

The contact details for the Public Guardian are:

Office of the Public Guardian, PO Box
16185, Birmingham B2 2WH

Phone number 0300 456 0300

What is a deputy?

Where a person lacks capacity, the Court can appoint a deputy to make those decisions which the individual lacks capacity to make. In practice, the Court will usually appoint a deputy with widely drafted powers to manage and administer the person's property and affairs. The Court is likely to give a professional deputy wider powers than a non-professional, such as a family member, but the power can for instance extend to the sale of property. With such wide powers, a deputy has a great deal of autonomy as to how to act and does not need to defer to the Court each time a decision needs to be made. This would be overly burdensome and expensive. But a deputy cannot act at whim and has a wide range of legal and moral responsibilities towards the individual. For instance a deputy must:

- act in the person's best interests, having regard to the statutory requirements of the Mental Capacity Act and Code of Practice
- act as the statutory agent of the person (the deputy is not acting on their own account but as a representative)
- act in a fiduciary role, so that the person's interests always take priority (a

Head Office
Heathervale House
2-4 Vale Avenue
Tunbridge Wells
Kent TN1 1DJ
T 01892 510000
F 01892 540170

Thames Gateway
Corinthian House
Galleon Boulevard
Crossways Business Park
Dartford
Kent DA2 6QE
T 01322 623700
F 01322 623701

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- deputy cannot for instance make a profit from their role)
- consolidate the person's assets and preserve their separate character (i.e. so that they are not mixed with any other person's property)
- act only in respect of those matters which the person lacks capacity to determine and aim to involve the person as much as possible in the decision-making process
- work with the person, relatives, carers, healthcare professionals and others concerned with supporting the person's welfare
- obtain financial advice from a regulated adviser, arrange and monitor investments and manage budgets
- take out an insurance bond to protect the assets under his control
- keep accounts and report each year to the Public Guardian
- complete tax returns.

A deputy's authority is limited by any restrictions or conditions in the order which appoints them as well as their legal and fiduciary obligations to the individual. Neither the Court nor a deputy has authority to make a decision which that individual has capacity to make in person.

Certain powers are also expressly reserved to the Court, in particular:

- the making of a settlement or a will
- the making of a gift (other than a small gift or the provision of maintenance for someone whom the person may be expected to provide for)

- the issue of legal proceedings
- the making of welfare decisions (unless there is a separate order authorising a welfare deputy to make those decisions)
- making decisions relating to any role that the individual may have as a trustee. Most commonly, this situation will arise where the individual owns property jointly with someone else.

The role of a lawyer

The practical tasks facing a deputy are extensive, and the role of a deputy is an important one that carries a great deal of responsibility. Often a close relative or friend will take on the role of acting as the deputy. But where the case is complicated by the size or value of the estate, there is family conflict or there is no one willing or able to take on this role, a lawyer can be appointed to act as a professional deputy. There is also a Court panel of independent deputies who are appointed if there is no one else able to act.

A professional deputy is not only experienced in the legal requirements of this role; the professional deputy also has an absolute duty to act in the best interests of the client and therefore avoid any actual or potential conflict of interest including where family and friends are financially involved; they will often have their own commitments and interests, especially where they are acting as carers as well.

Where you are appointed to act as deputy, the same responsibilities apply to you. We are able to use our own experience to support you and the person for whom you are appointed to act whether in the application process, the administration of the estate, preparing tax returns and / or

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annual accounts, or just being available to deal with specific problems or disputes as and when they arise.

Acting in a person's best interests

The requirement to act in a person's best interests is a fundamental part of the Mental Capacity Act. A deputy is required by the Act to act in that person's best interests. If the person has capacity to make his own decision, that right must be respected and he must be allowed to make it, even if that decision is an unwise one

Where the person cannot make a decision, then the decision maker must follow the statutory principles set out in the Act. Thus the decision maker must not make a decision merely on the basis of (a) the person's age or appearance, or (b) a condition of their, or an aspect of their behaviour, which might lead others to make unjustified assumptions about what might be in their best interests. The decision maker must consider all of the relevant circumstances and, in particular, take the following steps:

- a consider; (i) whether it is likely that the person will at some time have capacity in relation to the matter in question, and (ii) if it appears likely that they will, when that is likely to be
- b so far as reasonably practicable, permit and encourage the person to participate, or to improve their ability to participate, as fully as possible in any act done for them and any decision affecting them
- c consider, so far as is reasonably ascertainable; (i) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by them

when they had capacity), (ii) the beliefs and values that would be likely to influence their decision if they had capacity, and (iii) the other factors that they would be likely to consider if they were able to do so

- d take into account, if it is practicable and appropriate to consult them, the views of; (i) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind, (ii) anyone engaged in caring for the person or interested in their welfare, (iii) any donee of a Lasting Power of Attorney (LPA) granted by the person, and (iv) any deputy appointed for the person by the Court, as to what would be in the person's best interests.

Application procedure

Application

An application is made using the standard application form (COP1) together with:

- a detailed questionnaire setting out the nature and extent of the person's property and financial commitments and other personal circumstances (COP1A)
- a medical certificate (COP3) addressing the person's lack of capacity to make the decisions in question
- a Deputy's Declaration (COP4) to show the applicant's suitability to act and agreement to carry out the responsibilities of the Deputy
- fee of £385.

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Following an application

Once the application has been filed the Court will generally issue the application and require notice to be given:

- personally to the person concerned
- by post (or personally) to the person's next of kin.

The Court requires the applicant to identify at least three people to be notified of the application, who are likely to have an interest in being notified. This will often be according to their closeness to the person. For example where a person has two adult children and three siblings then, unless there is good reason not to do so, both children must be notified and every member of the next class even though more than three people in total have been notified.

Each person notified must be given a short notification form and a form for acknowledgement of service, which must be filed within 14 days if the person notified wishes to object to the application.

The applicant must complete a certificate of notification to inform the Court of who has been notified and when notices were given.

Once the forms have been filed, the Court will have a clearer picture of the nature of the estate and whether the case is complicated or contested. In most cases the application is unopposed and the Court will make the order appointing the deputy and setting the deputy's security. Once security is in place, sealed copies of the order are issued enabling the deputy to start carrying out their responsibilities.

Security

Every deputy must provide security to protect the person's estate against any negligent or criminal loss to the estate. This is effected through an insurance bond which allows the Court to call in the full amount covered. An annual premium is charged to the person's estate. While this may appear costly, it does provide a degree of protection and reassurance that there is a safeguard against a 'worst case scenario' especially where money, which is there to pay for care, is no longer available.

Contentious applications

Occasionally a person will object to the proposed choice of deputy, perhaps because there are concerns about that person's competence and suitability or because there is a family dispute and potential conflict of interests. In a dispute the Court will usually issue directions requiring detailed evidence from the parties and, possibly, an independent report from a doctor, social worker or Court of Protection Visitor. The parties may also agree a compromise choice of deputy, such as another relative or a solicitor.

If there is no consensus as to whether the application should be withdrawn or allowed to proceed, the application will be listed for a hearing before a judge. The Court will usually require the parties to agree on a choice or appoint a panel deputy to act.

Costs where a deputy is appointed

Where we are acting for a person whose affairs are under the jurisdiction of the Court of Protection, it is for the deputy to instruct us and agree our terms. To ensure

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consistency with this area of our practice, the basis on which our fees are charged and the other costs payable are as set by the Court.

These costs are generally payable from the person's estate.

Fixed costs

If an application is straightforward, then a lawyer may take costs as laid down by the Court as 'fixed costs' without submitting costs for detailed assessment. These are reviewed by the Court from time to time. At present, the following fixed costs may be applied:

- a work up to and including the date upon which the Court makes an order appointing a deputy for property and affairs - £950 (plus VAT)
- b annual management fee where the court appoints a professional deputy for property and affairs, payable on the anniversary of the court order - for the first year £1,670 (plus VAT); for the second and subsequent years £1,320 (plus VAT)
- c preparation and lodgement of the annual report or annual account to the Public Guardian - £265 (plus VAT)
- d preparation of a simple HMRC income tax return - £250 (plus VAT)
- e preparation of a complex HMRC tax return - £600 (plus VAT).

Assessment of costs

Most cases we are involved with are likely to be more complex and outside the scope of "fixed costs". Costs may then be agreed with the deputy and if they are not agreed or the costs are incurred in proceedings where

the Court so directs, then costs must be assessed. The assessment process involves the Senior Courts Costs Office (SCCO) examining the file and determining that costs have been claimed fairly and charged at the correct level. The costs certificate issued by the SCCO provides authority for the deputy to pay our fees.

Guideline rates

The costs that can be claimed on assessment are by reference to the hourly rates of the persons dealing with the case, and our work in this matter will be charged on this basis. The hourly rates are set by the Court. The current Published Guideline Hourly Rates applicable from 1 April 2010 (and still current) are as follows:

- 1 Partner/senior solicitor (over eight years post qualification experience) - £217
- 2 senior solicitor (over four years post qualification experience) - £192
- 3 other experienced Solicitor/Legal Executive and assistants of equivalent experience - £161
- 4 Trainee solicitors, paralegal and assistant of equivalent experience - £118.

These rates can be reviewed by the Court periodically.

Disbursements and other expenses

The main disbursements and further expenses which are payable on an application to the Court of Protection or in further proceedings are as follows:

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- 1 medical certificate – the fee payable to a doctor for providing medical evidence which can vary widely
- 2 application fee - where an application is made to the Court then a fee of £385 is payable; if an attended hearing is ordered the a further fee of £500 is payable
- 3 assessment fee – where costs are assessed by the Court an assessment fee of £115 (£225 if the costs claimed exceed £3,000) is payable by each party having their costs assessed
- 4 costs draftsman's fee for preparing a detailed bill of costs
- 5 counsel's fees (if instructed); and
- 6 miscellaneous disbursements such as travel costs, courier fees, commissioner's or notary's fees etc.

When a deputy is appointed for a person who lacks capacity then please note the following fees that are payable from the person's estate:

- a deputy appointment fee (on making the order appointing a deputy) £100
- b supervision fee – a fee of £320 is payable to the Public Guardian each year (unless the estate is very small and subject to 'minimal supervision' in which case a reduced fee of £35 is payable)
- c security bond premium – the Court sets the amount of security (insurance) which must be provided by a deputy and depends on the size of the estate. The cost of the premium each year, charged by the Court's bond provider Howden UK

will be calculated at a rate of 0.075% of the security level set by the Court for the initial premium, and first and second anniversaries of the bond. This will reduce to 0.05% for the third and fourth anniversaries, with no further premiums payable thereafter, from the fifth anniversary (i.e. from the start of year six onwards)

d there are remissions and exemptions available for certain of the fees listed above, depending on the financial circumstances of the person to whom the application relates; details of these can be provided on request.

How Thomson Snell & Passmore can help

We have a great deal of experience in this area of practice. We have a dedicated team of lawyers specialising in Court of Protection work. Partners in the firm, both personally and as Directors of our Trust Corporation act as the professional deputy in over 250 cases. Our Court of Protection team has been ranked by Chambers and The Legal 500, two independent legal directories, in the top tier for Court of Protection work in the UK. We are one of only three firms in the country to achieve this status.

Eddie Fardell is named in Chambers 2018 in the 'Ranked Lawyer' list, as a Band 1 'Leader in their Field', in Court of Protection Property and Affairs work (one of only five practitioners to achieve this ranking nationally). Brian Bacon is ranked as a Band 2 'Leader in their Field', also in Court of Protection Property and Affairs work. Partner Catherine Fuller was also noted as a 'next generation lawyer' in The Legal 500.

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We are confident that our own experience in making decisions as professional deputies, as well as advising clients on all aspects of Court of Protection proceedings, will be of service to any person considering the role of a deputy, applying to be appointed deputy, acting as a deputy or challenging an appointment of such.

Disclaimer

This information sheet has been prepared to highlight some key issues relating to the Court of Protection and the deputy. It is intended to be for general guidance only and is not a substitute for specific advice. It is based upon our understanding of the legal position as at July 2018 and may be affected by subsequent changes in the law.

If you require further information, please contact: Eddie Fardell or Brian Bacon on 01892 510000 or by email:



eddie.fardell@ts-p.co.uk



brian.bacon@ts-p.co.uk

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