

## The Court of Protection and the professional deputy

### Introduction

Thomson Snell & Passmore Trust Corporation is frequently appointed by the Court of Protection to act as a professional deputy for a person who lacks capacity to make decisions. That person is our client. For the client and for many others involved in the client's life, there is a new and unfamiliar way of dealing with decisions. This information sheet sets out to explain briefly how decisions are made, our role in making decisions and how our work is charged.

There are remissions and exemptions available for some of these fees; details of these can be provided on request.

### 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 individuals who lack capacity to make decisions for themselves. 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 client 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 to make all or some of their own decisions, 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. When a professional is appointed, this will usually for instance extend to the sale of property. Following recent case law, professional deputies are now required to seek the court's specific authority in relation to a wider number of

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issues, where this previously fell within a deputy's general authority to act. It is therefore helpful to think ahead when making the deputyship application and to consider any change of circumstances which may be likely for the person. Alternatively any necessary additional authority can be sought at a later stage.

With relatively 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.

A deputy cannot act at whim and has a wide range of legal and moral responsibilities towards the individual. For instance a professional deputy must:

- act in the client'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 client (the deputy is not acting on their own account but as a representative)
- act in a fiduciary role, so that the client's interests always take priority
- consolidate the client'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 client lacks capacity to determine and aim to involve the client as much as possible in the decision-making process
- work with the client, relatives, carers, healthcare professionals and others concerned with the client'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 their 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, and in such cases, a separate Order from the Court may be required. This would relate in particular to:

- 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 professional deputy

The practical tasks facing a deputy are extensive, and the role of a deputy is an important one that carries a great deal of

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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 a family conflict or there are no family members willing or able to take on this role, a lawyer can be appointed to act as a professional deputy.

In particular, where a case involves an individual who has suffered an acquired brain injury and will require a deputy to manage a large damages award, the Court will in the majority of cases prefer that a professional is appointed as deputy. Usually, this will be a lawyer who has suitable experience in managing a significant settlement following litigation.

In these circumstances, the costs of having a professional appointed are usually claimed as part of the claimant's special damages.

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, whom may often have their own commitments and interests, especially where they are acting as carers as well.

Although a professional deputy's authority will be limited to the client's property and affairs, there is a natural link between a client's welfare and the use of a client's finances. This often means that a professional deputy, who is acting in the best interests of a client, will be expected to work closely with family members as well as any carers, case managers, doctors and other health professionals to ensure that the client's needs are being met.

### 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.

Brian Bacon is ranked as a Band 1 'Leader in the Field' in Chambers 2022 in Court of Protection Property and Affairs work (one of only seven practitioners to achieve this ranking nationally). He is also named as a Leading Individual in The Legal 500. Catherine Fuller was also noted as a 'next generation partner' in The Legal 500.

Cases we deal with range from complex personal injury awards for young adults and children to elderly clients with dementia in care. We also act for lay deputies, attorneys and relatives in all aspects of Court of Protection proceedings, including contested applications for the appointment of a deputy and the making of settlements, lifetime gifts and statutory wills, and applications under the Trustee Act.

Our aim is to be sensitive to the needs of each client and to the fact that we have to balance a number of requirements: the financial interests, welfare and wishes of the client (which may not always be wise or practical), and the interests and views of relatives and carers, who will have the day to day responsibility of caring for them.

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### Acting in a client's best interests

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

Where the client 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

- d 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 professional deputy appointed for the person by the Court, as to what would be in the person's best interests.

### Costs where a professional deputy is appointed

Where we are acting for a client under the jurisdiction of the Court of Protection, the basis on which our fees are charged and the other costs payable in the case are set by the Court.

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

#### Fixed costs

If an application is straightforward, then a solicitor may take costs as laid down by the Court, known 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 professional 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

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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 with which we are involved are likely to be more complex and outside the scope of 'fixed costs.' Where the matter does not fall within the fixed costs limits, 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 professional deputy to be paid. Generally costs for ongoing administration work are assessed once a year, by reference to the date on which the professional deputy was appointed. In periods where a case is particularly complex and time-consuming, then costs may be assessed every six months.

### Payments on account

Under a practice direction of 1 April 2017 a professional deputy may take costs on account based on the work carried out in each quarter, so long as the costs taken do not exceed 75% of the estimated costs for the year. These costs are subject to assessment at the end of the year.

### 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 and have recently been reviewed. The rates which now apply, as of 1 October 2021, are as follows:

- 1 Partner/senior solicitor (over eight years post qualification experience) - £261
- 2 senior solicitor (over four years post qualification experience) - £218
- 3 other experienced Solicitor/Legal Executive and assistants of equivalent experience - £178
- 4 Trainee solicitors, paralegal and assistant of equivalent experience - £126

These rates are expected to 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:

- 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 £371 is payable; if an attended hearing is ordered then a further fee of £494 is payable
- 3 assessment fee – where costs are assessed by the Court an assessment

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fee of £87 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.

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

- a professional deputy appointment fee (on making the order appointing a professional 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 professional 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.

### Factors affecting costs

The factors affecting the level of costs in each case will vary according to the unique circumstances of the case. It is very hard to anticipate in advance what costs are likely to be incurred, possibly over many years. Below are some of the factors that can affect the costs in a case where a client's property and affairs are managed by a professional deputy:

- the ability of the client to make decisions for themselves: a client who can make decisions or participate in decisions will require more involvement than one for whom all decisions must be made as a matter of course
- any behavioural or psychological issues affecting the client
- the size of the estate: while a large estate may require more management, a limited award may also require more detailed consideration of budgets
- where the client lives: a client living in their own home will require more support than a client living in care
- the involvement of the family: a caring and supportive family may take care of the client's day to day needs and reduce the professional deputy's involvement (conversely, a dysfunctional or distant family will increase the deputy's involvement)
- the needs of the family: a client may also be supporting directly (as dependants) or indirectly (as occupiers of the same property) relatives who may have needs and interests of their own

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- the extent of the disabilities which may affect whether a property needs to be specially adapted, what level of care is required and what special equipment is needed
- the part played by a case manager: a good case manager who works with the client, family and carers can ensure that a care regime runs smoothly and that the professional deputy is not concerned with day to day issues
- the more activity in a case in dealing with the client, the family, the carers, equipment and service providers, the greater the cost
- the first few years of a case are often the most time-consuming as the client and the family adjust to new surroundings or care; in most cases it is expected that a routine will be established that becomes easier to manage as time goes on
- the level of supervision set by the Public Guardian: a higher level of supervision may require the completion of more detailed reports, meetings with Visitors of, and correspondence with, the Office of the Public Guardian
- any changes in the client's circumstances that require additional work or a further application to the Court.

It is therefore difficult to estimate costs in any particular period, and it is the role of the SCCO to ensure that costs are properly incurred and the work is charged at the right level of experience and expertise.

Where we are acting for the client in a personal injury claim, future deputyship costs are included within the claim. A detailed statement will usually be served on behalf of the claimant setting out estimates of future costs.

### Disclaimer

This information sheet has been prepared to highlight some key issues relating to the Court of Protection and the professional deputy. It is intended to be for general guidance only and is not a substitute for specific advice. It is based upon our legal understanding of the legal position as at November 2021 and may be affected by subsequent changes in the law.

If you require further information, please contact Brian Bacon, Rosalind Hamlyn, Catherine Fuller or Tom Hall on 01892 510000 or by email at:



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