

Can you obtain an Emergency Power of Attorney?

November 2023



In reality, the answer is no. Instead, you need to apply to the Court of Protection to become a Deputy, or the Court of Protection may appoint a Panel Deputy if no one is suitable or available to take on the role. Private client solicitor Herman Cheung looks at the complexities of not having a lasting power of attorney in place.

Accidents and illness can strike at any time, not just later in life, and at times, this can result in an individual losing mental capacity and the ability to make their own decisions. In such cases, the UK's [Court of Protection](#) steps in to protect the interests of these vulnerable individuals and make important legal decisions on their behalf.

In this comprehensive guide, we will explore the role of the Court of Protection, the appointment of deputies, the concept of mental capacity, and the process of making legal decisions.

Understanding the Court of Protection

What is the Court of Protection?

When circumstances lead to individuals losing the mental capacity to make their own decisions, the Court of Protection comes into play. The Court of Protection is a specialist court in England and Wales which safeguards the interests of vulnerable individuals who cannot make decisions about their finances, compensation, health, and welfare. It was established under the [Mental Capacity Act 2005](#) and has the authority to make crucial decisions for these protected individuals.

The Powers of the Court of Protection

The scope of the Court of Protection's powers is extensive. They cover various aspects of decision-making and the protection of vulnerable individuals. Some of the critical roles of the Court of Protection include:

- Assessing an individual's mental capacity to make decisions
- Appointing Deputies to act on behalf of protected persons
- Granting permission for one-off decisions on behalf of protected persons
- Making decisions regarding statutory wills or gifts
- Determining cases involving deprivation of liberty under the Mental Capacity Act 2005

Mental Capacity and Its Implications

Defining Mental Capacity

Mental capacity refers to an individual's ability to make sound decisions about not just their everyday life but also about life-changing matters while understanding the implications of those decisions at the time. According to the Mental Capacity Act 2005, a person lacks mental capacity if they cannot make decisions "because of an impairment of, or a disturbance in the functioning of, the mind or brain." Therefore, under the Act, if a person cannot understand information, use it to reach a decision, or communicate their decision, they are considered to lack mental capacity.

Reasons for Lack of Mental Capacity

There are various reasons why someone may lack mental capacity, including old age and dementia, extensive learning difficulties, serious illness, and personal injuries. Serious injuries, especially those affecting the head or brain, can lead to a loss of mental capacity. In such cases, the Court of Protection may appoint a Deputy to decide on behalf of the individual during legal proceedings or following a compensation payout. The lack of mental capacity can be temporary or permanent.

The Appointment of Deputies

What is a Deputy?

The Court of Protection can formally appoint an individual as a Deputy to make decisions on behalf of a protected person. A Deputy acts as the legal representative for the protected person and carries out their responsibilities under the Court's Deputyship Order and the Mental Capacity Act 2005.

Deputies can be close relatives, such as spouses or parents, or professionals, such as solicitors (like RIAA Barker Gillette or a court-appointed panel deputy).

The role of a Deputy is crucial in managing the financial and welfare affairs of the protected person.

Types of Deputy Applications

There are two main types of Deputy applications: property and financial Deputies and health and welfare Deputies. Property and financial Deputies handle matters related to financial decisions, such as selling or buying property, claiming benefits, and meeting all other aspects of the protected person's financial needs. Health and welfare Deputies decide where the person lives, their daily care, medical treatment, and care arrangements. The Court of Protection specifies the scope of a Deputy's authority in the Deputyship Order.

The majority of Court of Protection applications relate to property and financial affairs. Generally, the Court considers healthcare professionals best placed to make decisions on behalf of a protected person. Therefore, a health and welfare Deputy is usually only appointed to decide about a specific issue or a series of linked welfare decisions.

Roles and Responsibilities of a Deputy

Once appointed, a Deputy has a range of responsibilities and duties to fulfil. Some of the critical roles and responsibilities of a Deputy include:

- making financial decisions and managing the protected person's property and financial affairs;
- ensuring the protected person's financial needs are met, including paying bills and providing for dependents;
- making decisions regarding the protected person's health and welfare, including care arrangements and consent to medical treatment;
- regularly assessing the protected person's mental capacity to make decisions; and
- seeking the Court's approval for decisions outside the scope of the Deputyship Order.

Decision-Making Process in the Court of Protection

Assessing Mental Capacity

One of the primary functions of the Court of Protection is to determine whether an individual has the mental capacity to make specific decisions. This assessment is crucial in establishing whether a person can make decisions independently or requires the assistance of a Deputy. The Court follows the Mental Capacity Act 2005's guidelines to assess individuals' capacity and make decisions in their best interests.

As part of any application to the Court of Protection, you must have and submit a medical practitioner's or social care professional's report to support your Deputyship application.

Making Statutory Wills

In cases where an individual lacks the mental capacity to make a Will or to amend their existing Will, the Court of Protection can make a Will on the protected person's behalf, known as making a Statutory Will.

You can apply to the Court of Protection with a draft Will and ask for the Court's authorisation for a third party to sign the protected person's Will on their behalf. Where possible, the Court of Protection will consider evidence of

the protected person's past and present wishes and feelings and whether making the Will would be appropriate and in the protected person's best interest. The Court considers each application on a case-by-case basis. The application is not straightforward, and you will need to serve notice of the application to all parties that may be affected.

Making gifts

A Deputy cannot make gifts on the protected person's behalf without specific permission from the Court of Protection.

It is possible to ask the Court of Protection for permission to allow the Deputy to make gifts on behalf of the protected person if the Deputy can show that the gifting is in the protected person's best interest and that it is something they would have considered doing if they did not lack the necessary capacity.

Deprivation of Liberty under the Mental Capacity Act 2005

An individual's liberty can be taken away in certain circumstances, usually as a last resort. The Court of Protection has the authority to decide on the deprivation of liberty. For example, the Court may limit an individual's freedom by preventing them from moving freely without supervision, either in their own home or a care home. You must apply to the Court of Protection if it is necessary to deprive an individual of their liberty for their safety or the safety of others. The Court will carefully assess the circumstances and determine whether the deprivation of liberty is in the individual's best interests.

The Importance of a Lasting Power of Attorney

Planning for the Future with a Lasting Power of Attorney

To avoid the Court of Protection intervening in the event of a loss of mental capacity, individuals can set up a Lasting Power of Attorney (LPA). An LPA allows individuals to choose someone that they trust to make decisions on their behalf if they cannot in the future. By appointing an attorney through an LPA, individuals can protect their best interests and ultimately control who decides matters for them. While you retain mental

capacity, you can discuss and relay your wishes to your attorneys.

The Benefits and Limitations of Lasting Powers of Attorney

Having an LPA provides peace of mind and security in knowing that you chose the person to make decisions on your behalf. Creating and registering an LPA is less costly and time-consuming than involving the Court of Protection, and it streamlines the decision-making process. However, it is essential to note that LPAs have their limitations, such as the need for mental capacity at the time of creation and the potential for abuse if the appointed attorney does not act in the individual's best interests.

A well-drafted LPA can include bespoke safeguarding provisions which allow you to limit or extend the powers you confer on your attorneys.

The Court of Protection and Compensation Claims

Involvement of the Court of Protection in Personal Injury Claims

In cases where an accident results in a person losing mental capacity, and they wish to pursue a personal injury claim, the Court of Protection becomes involved. The Court may appoint a Deputy to act on behalf of the injured person during the legal proceedings or after awarding the compensation. The Deputy becomes the point of contact for the personal injury solicitor and ensures that the compensation is managed appropriately in the protected person's best interests.

Role of Deputies in Compensation Claims

Deputies play a crucial role in compensation claims by ensuring they meet the protected person's financial and welfare needs. They may assist in securing compensation on behalf of the protected person and make decisions regarding the funds' use. In cases where a protected person lacks the mental capacity to manage their finances, the Deputy may set up a personal injury trust to protect the compensation from being means-tested and accessed incorrectly.

Setting Up a Personal Injury Trust

When a personal injury compensation award needs to be protected, a Deputy can establish a personal injury trust. A personal injury trust ensures the compensation is ring-fenced and not considered for means-tested benefits or care assessments. It provides a safeguard for the protected person's financial future. It allows them to benefit from the compensation without affecting their eligibility for support.

Applying for Court of Protection Assistance

How to Apply to the Court of Protection

If an individual requires assistance from the Court of Protection, the proposed Deputies must follow various steps to make an application. They can apply online through the official government website or by contacting the Court of Protection directly. It is essential to provide all relevant information and supporting documentation to support the application and ensure that the Court comprehensively understands the situation.

If you are missing any relevant information or documents, the Court of Protection may make an interim order to allow you permission to request further information from the appropriate third parties.

You should seek advice from solicitors or legal professionals to avoid unnecessary delays with your application.

Short-term and Long-term Help

The Court of Protection can offer short-term and long-term assistance depending on the individual's circumstances. Short-term help may involve appointing a Deputy for a specific decision or a limited period to make decisions on behalf of the protected person, such as managing their finances while they cannot. Long-term help may involve appointing a Deputy for ongoing decision-making, covering financial and welfare matters, when the protected person lacks the mental capacity to make these decisions themselves.

Frequently Asked Questions

Who can Become a Deputy?

Anyone over the age of 18 can become a Deputy. However, the Court of Protection prefers to appoint family members or close friends who have a personal

connection to the protected person. But, there may be reasons why the Court of Protection cannot appoint such relatives or friends. When applying to become a Deputy, you must undertake any duties and responsibilities at the standard the Court expects.

If no suitable family member is available, it is possible for a professional, such as a solicitor or accountant, to be appointed as a Deputy. The critical consideration is that the appointed Deputy acts in the protected person's best interests and has the necessary skills and knowledge to fulfil the role.

Can Multiple Deputies be Appointed?

Yes, the Court of Protection allows for the appointment of multiple Deputies. They can act jointly, meaning all Deputies must agree on decisions, or jointly and severally, meaning Deputies can make decisions individually or together. However, the Court generally discourages appointing more than three individuals as Deputies to avoid complexities, increased costs, and potential delays. Having multiple deputies allows for the burden to be shared between the Deputies so that they are more manageable.

What are the Limitations of a Deputy's Powers?

Deputies have certain limitations on their powers. For example, they cannot make decisions regarding life-sustaining treatment, create or amend a will, or make significant gifts using the protected person's money. Deputies cannot hold money or property in their own name on behalf of the protected person. Any decisions made by the Deputy must be in the protected person's best interests and aligned with the Mental Capacity Act 2005 principles. You may need to return to the Court of Protection to seek further authority to manage the protected person's affairs.

Expert Advice and Support

Seeking Legal Guidance and Support

Navigating the Court of Protection process and understanding the legal implications can be complex. It is essential to seek legal guidance and support from experienced professionals specialising in Court of Protection matters. Solicitors and legal advisors can provide personalised advice, assist with applications, and ensure compliance with the relevant laws and regulations. They can also help address any concerns or disputes

related to decision-making. Our private client team can support and guide you through the process.

Conclusion

Without a valid, Lasting Power of Attorney in place, when accidents result in individuals losing their mental capacity, the Court of Protection plays a vital role in protecting the person's interests and making decisions on their behalf. With the appointment of Deputies and the involvement of the Court, vulnerable individuals can receive the necessary support and guidance to manage their finances, welfare, and legal matters. Planning for the future with tools like Lasting Power of Attorney can also give individuals a sense of control and peace of mind. Seeking expert advice and support is crucial to effectively navigating the Court of Protection process and ensuring the best outcomes for those in need.

Speak to [Herman Cheung](#) today if you have any questions or want to discuss making Lasting Powers of Attorney or a Deputyship application to the Court of Protection.

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Note: This article is not legal advice; it provides information of general interest about current legal issues.

