

Court of Protection Guide



A practical guide on Court of Protection and Deputyships

Introduction]

The world of Court of Protection and deputyships can be daunting to the uninitiated. Individuals affected and their family members and loved ones involved in the process are often dealing with stressful and emotive circumstances and feel burdened with responsibility. This guide aims to explain the background to the Court of Protection and deputyships and, additionally, considers the role and importance of Wills in the process.

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THE ROLE OF A DEPUTY

Deputies are appointed by the Court of Protection to assist people who lack mental capacity to make particular decisions and who have not appointed an attorney to make such decisions for them (when they had capacity to do so). These can be decisions in relation to the person's property and financial affairs or in relation to their health and welfare.

If somebody lacks mental capacity to manage their financial affairs or to make decisions about their own health and welfare then somebody has to have some form of legal authority to enable them to make these decisions for the incapacitated person.

In the absence of a validly appointed attorney for either type of decision making, only the Court of Protection has authority to appoint somebody to assist the mentally incapacitated person with managing their finances or health and welfare.

A deputy can be appointed as a financial deputy or separately as a health and welfare deputy. The role of deputy is very much like that of an attorney except the appointment is made by the Court, not by the incapacitated person.

TYPES OF DEPUTYSHIP RESPONSIBILITY

There are two types of deputyship, covering responsibility for decisions in two different areas. A deputy could be appointed with respect to either or both of the following:

1. Property and Financial affairs – for example paying bills, selling or buying a house
2. Personal welfare – for example making decisions about medical treatment, contact with family etc.

Note: You cannot become someone's personal welfare deputy if they're under 16. If you think the court needs to make a decision in such cases, please seek legal advice.

TYPES OF DEPUTY

There are also two types of deputies, Lay Deputies and Professional Deputies:

LAY DEPUTIES

A lay deputy is usually a family member (though it may be a friend) of a person who lacks the ability to make decisions for themselves. People may lack mental capacity for a whole range of reasons, common reasons include:

- they've had a serious brain injury or illness
- they have dementia
- they have severe learning disabilities or other mental health difficulties

How to become a Lay Deputy

A prospective lay deputy makes an application to the Court of Protection to become a deputy for the person in question. If successful, the applicant is empowered to make decisions on their behalf.

Attention is needed to clarify whether the lay deputy needs to make just one or two significant decisions requiring a decision or declaration from the Court. In these circumstances an interim order will be needed. If global decisions are required, this will need a general widely drawn order.

A lay deputy can request authorisation for property and affairs or health and welfare decisions to be made.

Naturally, many lay deputies may seek advice from professional deputies if they feel it is needed in order to ensure best interests.

Find out more on how to become a deputy: <https://www.gov.uk/become-deputy>

Fees for Lay Deputies

There is an application fee of £365. If you are applying for both types of deputyship you will need to pay this fee for each. If the Court decides you need a hearing, there is an additional fee of £485. There will also be annual supervision fees to pay.

PROFESSIONAL DEPUTIES

Appointing a professional deputy

If the vulnerable person has sufficient capacity, they may appoint their own professional deputy, alternatively family members may agree to appoint a professional deputy.

It is also possible for the Court of Protection to appoint a professional deputy. This may be:

- because there is no-one available or willing to be a Lay Deputy.
- because of abuse of powers by a deputy or attorney. For example, an attorney under a Power of Attorney has abused the person who gave them the power (the donor) either financially and/or in relation to their care.

A professional deputy is often a practising solicitor with the skills and expertise to deal with the challenges of the role. It is key to remember that the deputy must always act in the best interests of the client whilst potentially their primary relationship may be with family members.

Professional deputies must adhere to the regulatory guidance released by the Office of Public Guardian (OPG), which requires proposed expenditure and prospective annual costs to be submitted to the OPG a year in advance, and be aware of the need to review capacity in accordance with the Code of Practice which accompanies the Mental Capacity Act 2005. In particular, they consider on an ongoing basis whether the deputyship is still required, or whether the person may or should be discharged from the auspices of the Court of Protection.

Panel Deputies

Some professional deputies are called 'Panel Deputies'. There is a list of Panel Deputies who are appointed by the Office of the Public Guardian. The Court of Protection chooses deputies from this list when no one else is willing or able to act as a deputy for someone who lacks mental capacity.

Panel Deputies frequently act where donors of Enduring or Lasting Powers of Attorney have been abused financially, or regarding their care. They may assist the Public Guardian (OPG) in investigations into wrongdoing regarding the vulnerable party's affairs.

Duties as a Professional Deputy

Duties as a professional deputy often include:

- Purchasing a property
- Arranging for a property to be purchased and/or adapted to meet the person's needs
- The purchase of an adapted vehicle; aids and equipment
- Ensuring that the person is receiving all benefits that they are entitled to
- Employing a case manager to oversee a care team
- Arranging holidays with support staff
- Preparation of a Will or a Statutory Will (for people aged 18 and over)
- Submission of annual accounts to the Office of the Public Guardian and arranging for the completion of annual tax returns as appropriate

- Being aware of safeguarding concerns or risks around neglect or financial abuse and the need for 'best interests' decisions or applications for aspects outside the deputy's authority such as for gifts or loans. The deputy must also be aware of deprivation of liberty aspects and to advise where appropriate for necessary legal authorisations.

Reasons for Appointing a Professional Deputy

There are a number of reasons to consider appointing a professional deputy which include:

- Professional deputies have experience of dealing with deputyship responsibilities, the Court of Protection and understand best practice and regulation
- They should have a network of key contacts to facilitate smooth running of required tasks for example care managers, therapists, financial advisors, banking requirements
- Legal fees are independently overseen and there is a duty to keep costs as low as possible
- Peace of mind, that an experienced professional is looking after the client's best interests. Supported by the fact professional deputies will have security bonds protecting the assets of the client and indemnity insurance.

Fees for Professional Deputyships

Fees for professional deputyships are set by the government and are banded by location of the deputy. Professional deputy costs are fixed however, if the costs exceed the fixed fees the deputy order usually allows for the professional deputy to have their costs assessed by the Senior Court Costs Office (SCCO). The SCCO charge a fee of £85 for assessing deputyship costs.

They can be found here: <https://www.gov.uk/guidance/senior-courts-costs-office-fees>

Wills and Deputyships

MAKING A WILL

A Will is designed to set out your wishes in relation to the distribution of your estate on your death. It is always sensible to make a Will as it is your way of ensuring that your estate passes to the people you want to receive your estate. If a Will is not made then the law dictates to whom your estate will pass to. This is known as the rules of intestacy.

The impact of intestacy is that your estate may not pass to the people you want it to pass to.

Many people assume that if they are married for example, that their assets will pass to their spouse. This is not always the case and the absence of a Will can often cause complications for your surviving spouse.

The person making a Will is known as the testator if they are male, or the testatrix if they are female.

Making a Will provides certainty for your loved ones, not only in relation to your estate but also issues such as who you want to appoint to administer your estate (your executors), your funeral wishes and the distribution of cherished personal possessions which may not necessarily have any monetary value but may hold great sentimental value for you and your loved ones.

To be valid, certain formalities have to be followed when signing a Will. These are often overlooked in home-made Wills and it is therefore sensible to involve suitably qualified professional to help you make your Will to ensure there are no issues with validity and to ensure you have considered all of the relevant issues, which are often overlooked if professional advice is not sought.

Wills can become outdated as your circumstances or wishes change, so always remember to review your Will from time to time to ensure that it does reflect your current wishes and circumstances.

When you write a Will, you are often provided with a copy for safekeeping. Although this provides clarity for your loved ones, these copies may get lost which can lead to your family and loved ones in a situation where they cannot locate the original. Registering your Will on The National Will Register provides additional protection that your Will can be quickly and easily located in the future. When a Will is registered, it records the existence of the Will and where the original is stored.

MAKING WILLS AS A DEPUTY

If you are a deputy, whether lay or professional, and need to arrange a Will, one of the first steps is to establish whether a Will is already in place. You may already know this or be able to find out directly, but often you can confirm this by performing a Certainty Will Search which searches for Wills registered on The National Will Register and for Wills that have not been registered in geographically targeted locations.

Establish Capacity

As a deputy, you always have to consider the capacity of the person you are acting for, as they may be able to take decisions regarding Wills and depending on circumstances their capacity may change over time.

If your assessment is that the person you are acting for has capacity, has made a Will and that it's valid, then no further action is required if you are satisfied that the Will reflects their current wishes and circumstances and is appropriate in light of that. If your assessment is that they have capacity but it transpires they haven't made a Will, then they can go about making one in the normal way.

If your assessment is that they do not have capacity, then your options are as follows. First establish the existence of a Will.

4.1 If a Will is discovered

It is then your responsibility as a deputy to gather evidence to establish if the Will is up-to-date – for example it may leave items to someone already deceased – and also if it is reflective of the believed current intentions of the person. This will require gathering evidence and documenting any information you can regarding the client's wishes. It is vital that as much evidence as possible is obtained in relation to the incapacitated person's testamentary wishes and feelings are now, and as were expressed in the past, as well as their personal circumstances, family structure, the nature and extent of their finances, their age and their life-expectancy.

If you conclude that the existing Will is satisfactory you may leave it in place. If you believe it isn't reflective of the client's current wishes then you will need to consider a Statutory Will.

4.2 If no Will is in place.

The deputy will need to establish if the rules of intestacy will achieve the result that the incapacitated person may have wanted anyway. If not, then again it may be necessary to apply for a Statutory Will.

STATUTORY WILLS

In order to make a valid Will a person has to have sufficient mental capacity to understand what they are doing in this regard – this is known as testamentary capacity. If someone lacks testamentary capacity it is possible to ask the Court of Protection to authorise a Will to be made for them - this is known as a Statutory Will.

The Official Solicitor is usually appointed to represent the person for whom the Will is proposed in the proceedings.

A Statutory Will is designed to reflect, as closely as possible, what it is believed the incapacitated person would do if they had capacity to make the Will themselves, taking into account all of the relevant circumstances.

The Statutory Will process tends to be quite long and expensive, even where the application is uncontested. However, if somebody lacks testamentary capacity and they do not have a Will, or they have a Will but this requires updating, the only option is to apply to the Court of Protection for a Statutory Will.

Statutory Will applications are often made by the attorney or deputy for the incapacitated person. However, just because somebody has an attorney or deputy acting for them, this does not necessarily mean that they lack testamentary capacity so always ensure that it has been established that the person lacks testamentary capacity before considering a Statutory Will. The Court will expect any applicant for a Statutory Will to have looked at all of these aspects in detail.

The information contained in this guide is meant for information purposes only and you should seek your own legal or professional advice where applicable.

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