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THE COURT OF PROTECTION AND DEPUTYSHIPS

**A GUIDE FOR THE FAMILIES OF THOSE IN NEED
OF ASSISTANCE WITH THEIR FINANCIAL AFFAIRS**

CONTENTS

INTRODUCTION	2
LEGAL FRAMEWORK	3
UNDERSTANDING YOUR CONCERNS	4
THE OPTIONS FOR CHILDREN	4
THE ROLE OF THE DEPUTY	5
APPOINTING A DEPUTY	6
HOW WE CAN HELP YOU	7
A STEP BY STEP GUIDE	8
THE DEPUTY'S ROLE IN LITIGATION	9
UNDERSTANDING THE DEPUTY'S ROLE PRE-SETTLEMENT	9
FAQS	10

INTRODUCTION

The scope of this booklet is to provide some useful background information for the family and friends of individuals who already have or are likely to receive substantial compensation for personal injury.

It is not intended to be a substitute for a face-to-face meeting but simply to help you understand what the Court of Protection team at Penningtons Manches Cooper can do to support you if your family member does not have the capacity to manage their own property and affairs.

We work as a team to deliver this support to you and your relative at what may be a stressful and difficult time.

Our team members have met and worked with many families since the Mental Capacity Act was implemented and the role of the deputy was defined by the new legislation in 2005.

In our experience, the questions and concerns put to us are often similar and we hope that this booklet may help to answer some of those questions.

We look forward to working with you.



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THE LEGAL FRAMEWORK

Before we get into the detail of the procedure for appointing a deputy, this is a short introduction to the Mental Capacity Act (the Act), the Court of Protection, the role of the deputy, and the definition of 'lack of capacity'.

THE MENTAL CAPACITY ACT 2005 (THE ACT)

The provisions of the Act came into force in 2007 and replaced the previous powers under the Mental Health Act.

The Act is designed to protect vulnerable people who may not be capable of making all their own decisions. It makes it clear that, when someone is being assessed in respect of their capacity to make a specific decision, that person must be given the appropriate level of assistance to enable them to make that decision themselves.

The Act sets out who can make decisions in specific situations and the principles that must be followed when doing so.

The legislation is implemented by the Court of Protection and supported by the Code of Practice which provides guidance to anyone who works with or cares for people who may lack capacity to make particular decisions.

THE COURT OF PROTECTION (COP)

The COP is a specialist court which deals with decision making for people who do not have capacity to make decisions themselves. It is a separate branch of the High Court from the court which is dealing with your relative's litigation claim.

The COP can appoint a deputy to make decisions on behalf of someone who lacks capacity.

THE OFFICE OF THE PUBLIC GUARDIAN (OPG)

The OPG is the administrative arm of the COP. It supervises court-appointed deputies, keeps registers of deputies and investigates complaints against a deputy.

WHAT IS A DEPUTY?

A deputy is appointed by an order of the COP. A deputy will be given ongoing legal authority to make decisions on behalf of an individual who lacks capacity to make particular decisions. A deputy can be appointed for 'property and finances' or 'health and welfare' decisions or both. It is much less common for the court to appoint a deputy to make health and welfare decisions. The court prefers to make these decisions itself on a case-by-case basis.

A property and finances deputy will be appointed to look after a person's financial affairs if the individual is deemed incapable of making decisions about their financial matters themselves.

WHAT IS MEANT BY 'LACK OF CAPACITY'?

A person's capacity refers specifically to their ability to make a particular decision at the time it needs to be made. Capacity is an issue-specific matter. This means that if someone is unable to make a decision in respect of one matter, it does not necessarily follow that they are unable to make all decisions in respect of all their financial affairs.

Before a deputy can be appointed, the COP has to be satisfied that the person lacks the relevant capacity to make a specific decision for themselves. This will need to be determined by medical evidence.



UNDERSTANDING YOUR CONCERNS

We appreciate that, as family members, you will have had a very active role in your relative's care and general wellbeing. Our aim, in taking on the responsibility of financial decision making, is to take some of the pressure away from you, enabling you to continue to make the key decisions and support your relative on a day-to-day basis.

As a property and finances deputy, we would have no authority to make health and welfare decisions. However, inevitably, there will be some overlap and in making financial decisions we will always have to consider the wider implications. We will need to work together to ensure that all decisions are made in the best interests of your relative.

The appointment of a deputy ensures that your relative retains financial independence while having someone to step in and make decisions in their best interests if necessary. It is our aim to work closely with you to find the level of financial independence that is suitable for your relative.

In many cases, these concerns are being voiced by the parents of a young child who is unlikely to have capacity on becoming an adult, where involvement in decision making will have greater significance.

THE OPTIONS FOR CHILDREN

Let us look at the options if your child is going to receive a compensation award for personal injury. Not surprisingly, it is often very difficult to determine whether a young child will have capacity to manage their finances when they reach 18.

Typically, as part of the litigation process, a medical professional will be asked to comment on the likelihood of your child having capacity.

There are three main scenarios:

1. IF YOUR CHILD IS LIKELY TO HAVE CAPACITY AT AGE 18

If a medical professional believes that your child is likely to have capacity at 18, the COP does NOT have the authority to appoint a deputy.

There are two options available for the payment and use of your child's compensation award:

- a) to pay the money into the court dealing with the litigation; or
- b) to set up a trust so that the money can be withdrawn from the court. The trust would have to be approved by the court dealing with the litigation claim.

Assuming that your child is then judged as having capacity when they reach 18, they would then be absolutely entitled to the money.

2. IF YOUR CHILD IS NOT LIKELY TO HAVE CAPACITY AT AGE 18

If a medical professional considers that it is unlikely that your child will have capacity to manage their finances at 18, then the COP has the power to make financial decisions on your child's behalf. The COP has two options available:

a) to appoint a deputy; or b) to approve a trust.

Although it is within the COP's powers to set up a trust for a child who is unlikely to have capacity at 18, the default position is that an application should be made for the appointment of a deputy.

To persuade the COP to approve a trust instead of appointing a deputy, it would be necessary to provide reasons why a trust would be more appropriate for your child.

3. IF IT IS UNCLEAR WHETHER YOUR CHILD WILL HAVE CAPACITY

This is a slightly grey area. Sometimes it happens that, in the early stages of litigation, it is considered that a child is likely to have capacity on reaching 18. In these circumstances, a trust would usually be approved by the court dealing with the litigation.

As the litigation progresses, more evidence may be gathered which indicates that your child is not likely to have capacity on reaching 18. In these circumstances, it would be appropriate for an application to be made to the COP to convert the trust to a deputyship.

THE ROLE OF THE DEPUTY

The role of the deputy can be challenging and time-consuming, particularly where the funds to be managed are substantial. One advantage of having a professional deputy is that they will be familiar with the requirements for running the deputyship. They will also have the knowledge and expertise needed to instruct case managers, manage awards for claimants and set up care regimes.

In our experience, family members often find that a professional deputy can provide valuable support and assistance, relieving the pressure of dealing with financial matters and enabling friends and relatives to focus on the continued practical support needed. A professional deputy can also provide the peace of mind that the award for which you have fought is secure and is being used to best effect for your child or relative. All decisions made by the deputy will be made in consultation with the parents or other appropriate family members.

Once the deputyship order has been made, the deputy is authorised to deal with all aspects of the person's finances including collecting in benefits, managing bank accounts and dealing with day-to-day expenditure. Depending on the scope of the deputyship order, the purchase of larger items such as a property may require further authority from the COP.

We would work with you and your relative to agree a budget for expenditure. It is a good idea to start this process as soon as possible as the budget is often required by the COP as part of the application process.

The budget is very important both at the outset and on-going, particularly where a person has received an award for personal injury. It is very important for the deputy to plan the income and expenditure and investment of the funds, so that your relative's long-term future is secure.

Although the COP may ask to see a budget of day-to-day expenses, it does not oversee the management of that budget. This would be our role as a deputy.



APPOINTING A DEPUTY

WHO CAN BE APPOINTED A DEPUTY?

A deputy must be over 18 years old. A deputy would often be a friend or relative of the person who needs help to make their decisions. It may be considered appropriate for a professional such as a solicitor to be appointed, particularly if complex decisions need to be made or there are likely to be large sums of money to manage.

If a claim is being made, then the cost of a professional deputy can usually be claimed as part of the compensation.

WHEN SHOULD A DEPUTY BE APPOINTED?

The appointment of a deputy will not be considered until a medical expert has expressed their opinion as follows:

- Where the claimant in the litigation is an adult - that the claimant does not have capacity to manage their financial affairs
- Where the claimant is a child (under 18) - that the claimant is unlikely to have capacity at age 18.

The application to appoint a professional deputy is usually made when it is felt that the claimant and their family would benefit from the assistance of a professional deputy. This may be on receipt of an interim payment or following the final settlement of a claim.

The process may also be initiated once a defendant has admitted liability so that the deputy is in place to manage any interim payments received.

WILL THE DEPUTY MAKE ALL THE DECISIONS FOR YOUR RELATIVE?

The appointment of a property and finances deputy does not mean that the deputy will make all financial decisions for your relative. The Code of Practice states that a deputy has a duty to consult. A deputy must only make a decision if your relative cannot make it for themselves. For example, your relative may not be able to manage a large award following a litigation claim or understand the consequence of investments but they may be able to manage small amounts of money on their own. It is therefore important that the deputy consults and gives your relative the opportunity to make decisions on specific matters if appropriate.

One of the key principles in the Act is that any decision made on behalf of someone who lacks capacity must be in their best interests.

The Act makes it clear that, when someone is being assessed in respect of their capacity to make a specific decision, they must be given the appropriate level of assistance to enable them to make that decision themselves.

WHAT HAPPENS IF YOUR RELATIVE RECOVERS SOME CAPACITY?

Part of the process of capacity assessments requires that a person's capacity should be reviewed often to establish not only if they have recovered capacity to make their own decisions, but also to observe their rights to liberty and to give them an opportunity to make decisions for themselves where possible.

If it is thought that someone has regained sufficient capacity to make all their own financial decisions (and if there is medical evidence to support this) then an application could be made to the COP to discharge the deputy.

HOW LONG WILL THE APPOINTMENT OF THE DEPUTY LAST?

The COP may restrict the length of time a particular appointment will last. An example of where the court may do this is where a deputy is appointed for a child. Sometimes the court will include a limitation in the order so that the child has to be reassessed on reaching 18.

WHAT ARE THE MAIN DAY-TO-DAY TASKS OF A DEPUTY?

The deputy will manage a wide range of financial affairs including routine matters such as:

- the management of the deputyship bank account
- setting up new standing orders
- altering existing standing orders and direct debits
- monitoring statements
- settling invoices
- dealing with monthly allowances.

SOME EXAMPLES OF THE DEPUTY'S INVOLVEMENT:

- Liaising with financial advisors and relatives to consider your relative's long term financial needs, arranging the investment of funds and then dealing with reviews and valuations of any investments
- Setting up bank accounts, payment of routine bills, budgeting and general
- financial management and monitoring of cash flow.
- The purchase of a home for your relative and/or organising alterations and adaptations

- Approving the set-up of a care regime and, where the care regime is not managed by a third party, arranging contracts of employment, payment of tax and payroll services together with on-going monitoring once a care regime is in place
- Completing an income and capital gains tax return and dealing with HM Revenue & Customs.

HOW WE CAN HELP YOU

It is our aim to ensure that you are closely involved in the procedure for the appointment of the deputy. We also want you to have the chance to ask any questions at the earliest possible stage. The deputy will meet with you as soon as possible and introduce you to the rest of the deputyship team.

The deputyship team at Penningtons Manches Cooper includes partners, assistant solicitors and support staff.

Whether the position of deputy is vested personally in one of our partners or if they are acting through our own trust corporation, PennTrust, your day-to-day contact would be with the deputy in the areas of decision making and the solicitors and support staff within the team depending on the task in hand.

Routine matters such as the management of the deputyship bank account in respect of setting up new standing orders, altering existing standing orders and direct debits, monitoring statements, settling invoices and dealing with monthly allowances would be appropriately dealt with by a financial case manager.

The purpose of this team structure is to ensure that costs are incurred at a rate appropriate to the level of the complexity of the work being carried out.



A STEP BY STEP GUIDE TO THE APPOINTMENT OF A DEPUTY

These are the steps to appoint a deputy to manage the property and financial affairs of a person who lacks the capacity to do so:

- 1. Assessment of capacity:** An application cannot be made for the appointment of a deputy until a formal assessment of capacity has been carried out by a medical professional. The medical professional will be asked to comment on whether your relative has capacity to manage their property and financial affairs (or, for a child, whether your child is likely to have capacity when they reach 18).
- 2. Application:** The application for appointment of a deputy is a formal court application. We would liaise with you and other relatives to put together all the information needed and draft the paperwork. The COP will usually deal with the application 'on paper'. This means that they will not request a hearing and will make an order based on the information that we provide to them.
- 3. Appointment:** Once the COP has considered the paper application, it will be in a position to make an order appointing a deputy. It may be some months after the application is received by the Court before the order is made. A general order would give the deputy such powers as investing funds, paying invoices, and buying and selling property.
- 4. Supervision:** The Office of the Public Guardian (OPG) is responsible for the day-to-day supervision of and support to deputies and attorneys. Once a deputy has been appointed, the COP therefore 'hands over' responsibility for supervising the deputy to the OPG.

The COP requires all deputies (whether lay or professional) to put in place some form of security such as a guarantee bond to cover any loss as a result of the behaviour of the deputy. A professional deputy would also have the added protection of professional indemnity insurance.

5. Accountability: The deputy will have to keep detailed records of any payments made on your relative's behalf. At the end of every deputyship year (which coincides with the issue of the deputyship order), the deputy has to file a report with the OPG showing all income and expenditure during that year and a general summary of all activities during that period.

6. Costs: There are certain costs that are fixed by the COP and OPG. In brief these are:

- Application fee for the appointment of a deputy
- Supervision fee
- Fee for appointment of deputy
- Security bond (this is variable but is decided by the COP).

There are then the legal costs of managing the deputyship. The costs will depend on the level of input required from the professional deputy. Professional deputies' charges are based on the amount of time they spend. The deputyship team will record all their time spent on the file. The time is recorded at set hourly rates which are determined by the COP.

All time spent is recorded and assessed by the COP at the end of every deputyship year (ie the anniversary of the deputyship order). When costs are assessed, the COP will consider whether the time recorded is reasonable and justified.

The costs of a professional deputy would usually form part of the claim for damages in the litigation process.

THE DEPUTY'S ROLE IN LITIGATION

At Penningtons Manches Cooper we are used to working with litigating solicitors pre-settlement.

We appreciate that the role of a professional deputy is important in ensuring the successful management of interim payments, implementation of appropriate care plans and also in purchasing and adapting property.

UNDERSTANDING THE DEPUTY'S ROLE PRE-SETTLEMENT

It is the role of the litigating solicitors to run the claim but a professional deputy can help in a number of ways, such as:

Managing interim payments: When an interim payment is received, the deputy will work closely with the litigation team and family to ensure that the money is being managed effectively to assist the claim. This can be done by setting budgets and ensuring, as far as possible, that the money is spent on items and activities that may be recoverable by the claimant.

Overseeing a care plan: A deputy will also consider the care needs which have been identified by any care expert instructed in the litigation. They can then liaise with family members to establish a care plan and/or regime for the claimant.

Purchasing property: It is common for a property to be purchased following receipt of an interim payment. The deputy can buy a house for the claimant and arrange for any adaptations which need to be made, subject to funds being available.

Witness statements: A deputy will often provide a witness statement - similar to an expert report - to the court. In this, the deputy will set out their projections for the deputyship costs in subsequent years. The litigating solicitors can then include these costs in the claim and try to recover these.



FREQUENTLY ASKED QUESTIONS

WHAT IS THE DIFFERENCE BETWEEN A CASE MANAGER AND A DEPUTY AND WILL MY RELATIVE NEED BOTH?

For someone who cannot manage their property and financial affairs, a deputy is necessary. Having a case manager is a choice. Where it is considered appropriate to have a case manager, the deputy would be responsible for appointing the case manager and would work closely with them on an on-going basis. The case manager would be involved in the co-ordination of rehabilitation, care and support regimes including sourcing therapies and carers. It is the deputy who has legal authority to enter into legally binding contracts – such as directly employing a carer on behalf of your relative. The case manager would not be directly involved in financial decisions and financial management issues would be confidential to the deputy.

The deputy is the 'budget holder'. The case manager would be accountable to the deputy who would ultimately oversee any plan implemented by the case manager and monitor the financial implications.

Court of Protection case managers are different from case managers in this context. A COP case manager is part of the deputyship team and assists the deputy with day-to-day issues which arise on the deputyship file.

WILL I BE INCLUDED IN DECISIONS?

It is the duty of the deputy to consult with family, friends and any other individuals closely involved in your relative's life.

CAN MY RELATIVE STILL HAVE THEIR OWN BANK ACCOUNT?

Yes, if it is considered that the individual has capacity to operate their own bank account. Under the Mental Capacity Act 2005, capacity is 'issue-specific'. This means that, although someone may not have capacity to manage their compensation award, they could still have capacity to operate a small bank account.

WHAT HAPPENS IF MY RELATIVE REGAINS CAPACITY?

If your relative improves enough to make their own decisions, you can apply to the COP to discharge the deputy on the basis that a deputy is no longer necessary.

IN WHAT CIRCUMSTANCES DO A DEPUTY'S DUTIES CEASE?

A deputy can be appointed to manage someone's affairs during their whole lifetime or can be substituted if required. The appointment of a deputy and their duties cease if the following occurs:

- where your relative ceases to lack capacity
- if the court appoints a new deputy
- on death of the deputy
- if the deputy is declared bankrupt.



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