

**A guide for Deputies appointed by
the Court of Protection**

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Part A: Introduction

About this booklet

This booklet provides guidance for people who have been appointed by the Court of Protection to the role of Deputy. It provides an overview of your duties and the consequences of not carrying them out responsibly.

As a Deputy you are legally responsible for acting and making decisions on behalf of a person who lacks capacity to make those decisions for themselves.

Where you experience complex or difficult decision-making involving finance, property, serious medical treatment, social care or personal welfare (for example where a person must move house or into care) we recommend you seek independent legal and/or other professional advice.

Key words and phrases used throughout this document are explained at Part I: Glossary. All publications mentioned can be downloaded from our website - see contact details at Part H.

This booklet is also available in 'easy read' format.

Mental Capacity Act 2005

The Mental Capacity Act 2005 (the 'Act') empowers people to make decisions for themselves as far as is possible. It protects vulnerable people who may not be capable of making all their own decisions for reasons including dementia, learning difficulties, mental health problems, stroke or head injuries.

The Act sets out who can make decisions in which situations and the principles they must follow when doing so. It also sets out ways that people can plan ahead for a time when they may lack capacity.

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Everyone working with or caring for an adult who lacks capacity must comply with the Act.

Five statutory principles of the Act

The Act is underpinned by five statutory principles that provide a benchmark for decision-makers and carers:

1. Every adult has the right to make their own decisions and must be assumed to have capacity unless it is proven otherwise.
2. People must be given all appropriate help before they can be considered unable to make their own decisions.
3. Individuals have the right to make unwise decisions, including decisions that others may consider eccentric.
4. Anything done for or on behalf of a person who lacks capacity must be in their 'best interests' - see page 14.

5. Anything done for or on behalf of a person who lacks capacity should be the least restrictive of their basic rights and freedoms.

Code of Practice

The Code of Practice (the 'Code') provides information and guidance for everyone affected by the Act, and explains how the Act works in practice. It describes the responsibilities of those who work with and care for adults who lack capacity, including family members, professionals and carers.

As a Deputy you must be familiar with and have regard to the Code. If at any time you are involved in civil or criminal Court proceedings and it appears you have not complied with the Code, this failure will be taken into account when deciding the case.

You can download the Code from our website or you can purchase it from The Stationery Office (0870 600 5522 or www.tso.co.uk).

Court of Protection

The Court of Protection makes decisions and appoints Deputies to make decisions in the best interests of those who lack capacity.

Office of the Public Guardian

Under the Act the Public Guardian (supported by the Office of the Public Guardian) is responsible for:

- supervising Court-appointed Deputies;
- keeping registers of Deputies, Lasting Powers of Attorney (LPA) and Enduring Powers of Attorney (EPA); and
- investigating complaints about Deputies and Attorneys acting under a registered EPA or LPA.

Part B: What happens when I become a Deputy?

What are my powers, duties and responsibilities as a Deputy?

The Deputy order you receive when you are appointed sets out your specific powers in relation to the person who lacks capacity. They will depend on the needs of the person and ultimately the Court's decision.

Your powers may apply to any aspect of the person's life, including their finances, personal welfare and consenting to medical treatment and social care interventions.

The document **COP4: Deputy's declaration** sets out the main duties and responsibilities of Deputies. You can download it from our website or call us for a hard copy.

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The decisions you make as a Deputy can have a major impact on the person who lacks capacity. You should carry out your responsibilities sensitively, responsibly and rigorously, and always:

- make decisions in the person's best interests;
- make only those decisions authorised by the Court order;
- have regard to all relevant guidance in the Code;
- adhere to the Act's five statutory principles; and
- apply a high standard of care when making decisions.

The Office of the Public Guardian expects that you will advise of any change in contact details for yourself or the person for whom you have been appointed Deputy.

Chapter 8 of the Code provides more detail about the role of Court-appointed Deputies.

What should I do with the Court order?

After the order is made you will receive a number of certified copies of the document. You should carefully check for errors, including spelling mistakes. If there are errors, return all copies to the Court for amendment.

You are given a number of copies so that when required you can provide a copy to people or organisations to prove you have authority to make certain decisions on behalf of the person who lacks capacity.

You may wish to provide a copy of the order to certain people and organisations in advance so they know to come to you when decisions need to be made.

Part C: Decision-making as a Deputy

What decisions should I make and when should I make them?

Your actions and decisions as a Deputy will depend on what the Court has specified that you should do in the order appointing you.

Before making a decision is important to consider whether the person could make that decision themselves with some assistance or under certain circumstances.

You should consider whether:

- there are particular times of day or locations that the person feels more at ease and is more able to make decisions;
- the information could be communicated in a more understandable way, for example using pictures, photographs, audio, video or sign language;
- all choices and alternatives have been communicated to the person; and
- anyone else such as a relative or friend could assist or support the person to make a choice or express a view.

How do I assess someone's capacity to make a decision?

You are not expected to be an expert in assessing capacity, however when making a decision on behalf of someone else you must reasonably believe that the person lacks capacity to make that decision or give consent at the time it was needed.

The steps you take to determine whether the person lacks capacity will depend on the individual circumstances of the case and other factors such as the urgency of the decision.

You do not necessarily need to follow formal processes such as involving a professional to make an assessment, however if somebody challenges your assessment you must be able to describe your reasoning and why you believe the person lacked capacity to make the decision in question.

More detailed information about assessing capacity can be found in chapters 2, 3 and 4 of the Code.

How do I decide what is in someone's best interests?

Everything done to or on behalf of a person who lacks capacity must be in that person's best interests. This is the same whether the decision is minor, for example deciding what to wear, or major, for example deciding on particular healthcare or medical treatment.

Working out what is in someone's best interests can sometimes be difficult, and the Act requires you to follow certain steps to help you make that decision. If you follow these steps and do everything you reasonably can to work out what the person's best interests are, you are fulfilling your obligation as Deputy.

Things you should consider include:

- involving the person who lacks capacity as much as possible in any act or decision;
- considering any values, views, beliefs, wishes and feelings they may have expressed in the past;
- consulting others such as family, friends, carers, Attorneys or other Deputies about their views on the person's best interests; and
- identifying any other factors the person may have considered if they had the capacity to do so.

After considering the information you have available you then make your decision about what you think the person's best interests are.

Chapter 5 of the Code has more detailed information about establishing best interests.

When will the new Independent Mental Capacity Advocate service be needed?

In cases where:

- a decision is required about serious medical treatment or long-term accommodation moves; and
- your authority is limited to just property and affairs; and
- the person has no family or friends to represent them;

an Independent Mental Capacity Advocate (IMCA) should be appointed by the local authority/health authority to make the decision on behalf of the person who lacks capacity.

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Further information about IMCAs can be found in chapter 10 of the Code.

What if I have a conflict of interest?

You should not make major decisions where there is a conflict between your personal interests and the interests of the person who lacks capacity. For example if you or a member of your family wishes to purchase a property belonging to the person who lacks capacity, you will need a Court decision about whether the sale should go ahead.

If you are unsure about what to do you should follow best interests principles, seek legal advice and/or contact the Office of the Public Guardian who can direct you to other sources of information.

Part D: When not to make decisions

What if the decision I wish to make is not in the Court order?

If a decision you wish to make on a person's behalf is not included in your Court order, or you feel your powers do not allow you to carry out your duties effectively, you may apply to the Court to either:

- make the particular decision required; or
- change your Deputy powers so that you can make the decision required.

The booklet **COP42: Making an application to the Court of Protection** explains how to make a Court application and is available to download from our website.

Are there restrictions on my powers as a Deputy?

There are a number of restrictions on Deputy powers. In particular Deputies have no authority to make a decision or take action:

- if they believe the person has capacity to make that particular decision for themselves;
- that is intended to physically restrain the person, unless it is necessary to prevent them coming to harm and the restraint is reasonable and proportionate;
- if it goes against a decision made by an Attorney acting under a Lasting Power of Attorney granted by the person before they lost capacity; or
- to refuse the provision or continuation of life-sustaining treatment for a person who lacks capacity to consent. Only the Court can make such a decision.

Part E: Legal Matters

How is a person who lacks capacity protected from financial loss?

If you are appointed as a Deputy responsible for property and affairs, the Court may require you to provide some form of security, for example a guarantee bond, to cover any loss as a result of your behaviour.

The Court will determine the level of security required, which will be proportionate to the amount of funds you are handling.

The Court may also ask you to provide regular reports and accounts to the OPG.

How is a person who lacks capacity protected from abuse?

The Act introduces two new criminal offences: ill treatment and wilful neglect of a person who lacks capacity. The offences can apply to anyone caring for a person who lacks capacity including family, health, social care, hospital or care home staff, Attorneys or Deputies.

A person is guilty of an offence if they ill-treat or wilfully neglect the person they care for or represent. Penalties range from a fine to a sentence of imprisonment of up to five years, or both.

Am I protected from liability as a Deputy?

If you act within the terms of the order that appointed you as a Deputy, and comply with the Act and the Code, it is unlikely that you would incur legal liability.

If you act outside the terms of your authority or do not carry out your responsibilities properly you will be held accountable for your actions. For example if you fail to claim benefits to which the person is entitled, or spend their money other than for their benefit, the Court will consider that you have caused the person financial loss. Under these circumstances the Court may decide to enforce the security bond or authorise someone to bring an action against you.

If you enter into a transaction with a third party on behalf of the person who lacks capacity, for example you hire a workman to repair their house, you are not personally liable for payment. You are considered the agent and the person is the principal who is liable for payment.

Part F: Will I receive support and supervision as a Deputy?

What does the Office of the Public Guardian do for Deputies?

The OPG is responsible for ensuring that Deputies act in the best interests of the person who lacks capacity and follow the directions of the Court.

The level of support and supervision the OPG allocates to a Deputy is decided after carrying out an assessment of the individual circumstances of the case, based on:

- complexity of the affairs of the person who lacks capacity;
- types of decisions that need to be made;
- care requirements of the person who lacks capacity; and
- the relationship between the Deputy and the person who lacks capacity;

There are four levels of supervision.

Type 1 is close supervision involving regular contact with the Deputy. Type 2A is an intermediate level of supervision for Property and Affairs Deputies, involving monitoring of new Deputies or short term interventions. Type 2 is lighter touch supervision involving sample monitoring of cases. Type 3 applies to Property and Affairs Deputies who manage limited assets and who the OPG will only contact periodically.

Supervision may involve:

- the OPG providing ongoing support to you when carrying out your role;
- you submitting reports to the OPG when the Court directs you to; and
- a Court Visitor checking how the Deputyship is being managed.

The level of support and supervision you receive will regularly be assessed to see if it is still relevant to your circumstances.

Separate guidance about Deputy supervision is available to download from our website or you can call us for a hard copy.

Are fees payable for supervision?

Yes, supervision fees for OPG supervision are statutory, which means they are set by Parliament. They are based on the cost of providing support services to both the Deputy and the person who lacks capacity. Supervision fees are payable from the funds of the person who lacks capacity.

For more information, you can download the booklet **OPG506: Fees, exemptions and remissions** from our website.

Can I employ professionals to help me?

You are permitted to employ professionals such as solicitors, accountants and regulated financial advisers to assist you in carrying out your role as Deputy. Fees are payable from the funds of the person who lacks capacity.

You are not permitted however to delegate your responsibilities to another person. For example you can obtain advice about selling a property or completing an annual account or tax return; however it would not be appropriate to employ a solicitor simply to carry out your responsibility to pay fees to a nursing home.

Will I be reimbursed for my expenses?

The Act allows you to be reimbursed for reasonable expenses incurred when acting as a Deputy. Examples of expenses include telephone calls, travel and postage.

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Expenses are not payment for your time spent while acting as a Deputy – this is called remuneration and can only be claimed if the Court order specifically states it. If you wish to receive remuneration you should ask the Court to consider this in your initial application.

The expenses you are entitled to claim and what is considered reasonable will vary according to the circumstances of each case. It depends on what you are required to do and also the value of the estate of the person who lacks capacity.

The OPG expects that you will only claim reasonable and legitimate expenses. If you claim more than £500 in expenses per year the OPG may require you to explain your expenses in detail and frequently.

If your expenses are considered unreasonable you may be asked to repay them, and in extreme cases the OPG may apply to the Court to cancel your appointment.

Part G: When do a Deputy's powers end?

There are several circumstances under which a Deputy's powers may end.

They include:

The person who lacks capacity recovers

If the person improves enough to make their own decisions, the Deputy order will still remain in force unless it expires or is discharged by a subsequent Court order.

The order ends

When the Court order expires it becomes invalid. If the person who lacks capacity needs decisions made on their behalf after this date then you or someone else must apply for a new order.

The person who lacks capacity dies

If this happens, your role as a Deputy ends. You should notify us immediately and advise us who the person's legal representatives are so we can finalise our involvement.

If you took out a security bond for acting as a Deputy it will remain in force for seven years, however you will not have to pay further premiums. If there are funds held at the Court Funds Office, the legal representatives must contact the Court Funds Office directly.

The Deputy dies

If you die during your term as Deputy, your legal representatives should advise us immediately. You should ensure you have made these arrangements in advance, and we may require a final account of your dealings and transactions as Deputy.

The Deputy retires

If you are unable or no longer wish to continue as a Deputy you should apply to the Court to have your order discharged. It will then be necessary for someone else to apply to be appointed if a Deputy is still needed.

The Court discharges the Deputy

There are different reasons why the Court might make an order to end your role as a Deputy. You may have requested this yourself or the Court may have reason to believe you have not carried out your duties correctly or you have not acted in the person's best interests.

Part H – Contact us

Contact us

Office of the Public Guardian
PO Box 15118
Birmingham
B16 6GX

Phone Number: 0845 330 2900

Fax Number: 020 7664 7705

Email: customerservices@publicguardian.gsi.gov.uk

Website: www.publicguardian.gov.uk

DX: 744240 Birmingham 79

Textphone: 020 7664 7755 (If you have speech or hearing difficulties and have access to a textphone, you can call us for assistance.)

International Calls: +44 20 7664 7000

International Faxes: +44 20 7664 7705

Disclaimer

OPG and Court staff can provide advice about OPG and Court processes only, and cannot provide legal advice or services. We recommend that you seek independent legal advice where appropriate. Information in this publication is believed to be correct at the time of printing, however we do not accept liability for any error it may contain.

Part I – Glossary

Attorney	Someone appointed under either a Lasting Power of Attorney (LPA) or an Enduring Power of Attorney (EPA) who has the legal right to make decisions within the scope of their authority on behalf of the person (the Donor) who made the Power of Attorney.
Best interests	Any decisions made or anything done for a person who lacks capacity to make specific decisions must be in the person’s best interests. There are standard minimum steps to follow when working out someone’s best interests. These are set out in section 4 of the Mental Capacity Act. See also chapter 5 of the Code of Practice.
Capacity	A person’s capacity (or lack of capacity) refers specifically to their capacity to make a particular decision at the time it needs to be made.
Code of Practice	The Code of Practice is practical guidance to support the Mental Capacity Act. It explains how the Act will operate on a day-to-day basis and offers examples of best practice to carers and practitioners.
Court of Protection	The specialist Court for issues relating to people who lack capacity to make specific decisions.

Deputy	Someone appointed by the Court with ongoing legal authority as prescribed by the Court to make decisions on behalf of a person who lacks capacity to make particular decisions as set out in Section 16(2) of the Mental Capacity Act.
Enduring Power of Attorney (EPA)	A Power of Attorney created under the Enduring Powers of Attorney Act 1985 appointing an Attorney to deal with the Donor's property and financial affairs. Existing EPAs will continue to operate under Schedule 4 of the Mental Capacity Act, which replaces the EPA Act 1985.
Lasting Power of Attorney (LPA)	A Power of Attorney created under the Mental Capacity Act (see Section 9(1)) appointing an Attorney to make decisions about the Donor's personal welfare (including healthcare) or deal with the Donor's property and affairs.
Mental Capacity	See 'Capacity'.

Office of the Public Guardian	The Public Guardian is an officer established under Section 57 of the Mental Capacity Act. The Public Guardian will be supported by the Office of the Public Guardian, which will supervise Deputies, keep a register of Deputies, LPAs and EPAs, and investigate any complaints about Attorneys or Deputies. The OPG replaces the Public Guardianship Office (PGO) that has been in existence since 2001.
Personal welfare	Personal welfare decisions are any decisions about a person’s healthcare, where they live, what clothes they wear, what they eat and anything needed for their general care and well-being. Attorneys and Deputies can be appointed to make decisions about personal welfare on behalf of a person who lacks capacity. Many acts of care are to do with personal welfare.
Property and affairs	Any possessions owned by a person (such as a house or flat, jewellery or other possessions), the money they have in income, savings or investments and any expenditure. Attorneys and Deputies can be appointed to make decisions about property and affairs on behalf of a person who lacks capacity.
Public Guardian	See ‘Office of the Public Guardian’.

