

Court of Protection and The Mental Capacity Act 2005

This fact sheet explains some of the issues surrounding the new Court of Protection, the Office of the Public Guardian and the Mental Capacity Act 2005.

What happens if I lose my mental capacity and I have not made any arrangements for loss of mental capacity?

If this happens and you have not made any arrangements (such as an LPA or advance directive) for what should happen if you lose mental capacity, it might be necessary for the Court of Protection to become involved. The Court of Protection can make decisions about what would be in your best interests in a specific situation, or it can appoint someone called a deputy to make decisions on your behalf.

Mental Capacity Act 2005

With the implementation of the Mental Capacity Act substantial changes came into force which provide a legal framework to help empower people to make their own decisions and to make clear what actions carers and family members can take if you lose capacity.

Mental Capacity

Mental capacity means being able to make and communicate your own decisions.

Someone might lose their mental capacity due to them having had a stroke, head injury or having developed a mental illness including dementia and then be unable to make certain decisions.

Five principles on capacity and decision making

- **Presumption of capacity**

A person must be assumed to have capacity to make their own decisions unless it can be established that this is not the case.

- **The right to be supported to make a decision**

All practicable steps must be taken to help a person to make their own decision before anyone concludes that they do not have the capacity to do so.

- **The right to make unwise decisions**

A person should not be treated as being incapable of making a decision just because they make an unwise decision.

- **Best interests**

Any act done or decision made, for or on behalf of a person who lacks mental capacity must be done or made in their best interests.

- **Least restrictive intervention**

Before making a decision on behalf of someone without mental capacity, all alternatives must be considered and the option chosen should be the least restrictive of the person's rights and freedom of action.

What is The Court of Protection?

The Court of Protection has received enhanced status and an extension of its jurisdiction. The court is a superior court of record and has the same rights, powers, privileges and authority as the High Court.

What does The Court Of Protection do?

The Court is responsible for issues about property and affairs and welfare and health care and has powers to:

- make declarations, decisions and/or orders affecting people who lack, or are alleged to lack, mental capacity
- appoint deputies to act and make decisions on behalf of people who lack capacity
- remove deputies or attorneys acting under a Lasting Power of Attorney (LPA) who act improperly
- determine the validity and give directions in respect of LPAs and Enduring Powers of Attorney (EPA)

What is The Office of the Public Guardian?

This is situated in London and has the prescribed statutory functions for the administration and registration of LPAs, the supervision of deputies and investigations.

The functions which it will undertake will be:

- registration of LPAs and EPAs
- establishing and maintaining a register of orders appointing deputies
- supervising deputies appointed by the Court
- dealing with security which the Court requires a person to give for the discharge of his functions
- receiving reports from donees of LPAs and deputies appointed by the Court
- reporting to the Court on such matters relating to proceedings
- dealing with enquiries from deputies/donees
- commissioning and processing reports

Appointment of a Deputy

The title of a court-appointed deputy replaces the old title of receiver. Any existing receiver will now be known as a deputy and his or her powers will remain largely unchanged. The new system covers personal welfare, as well as financial decisions, subject to the application in respect of each decision of the five principles detailed overleaf.

Like attorneys, deputies can make decisions on your behalf if you lack capacity. They must always make decisions in your best interests, following the other principles of the Mental Capacity Act and having regard to the code of practice. The Office of the Public Guardian supervises deputies and can give guidance on their role.

The person appointed as a deputy is usually a relative or friend of the person but anyone can apply to be appointed as a deputy. The Court of Protection will look at whether it is in the patient's best interests to have a deputy, and whether the person applying to be appointed is suitable. To apply to be a deputy, you must make an application to the Court of Protection.

If you would like more information, please contact:

Mark Dunkley
Partner
Head of Trusts & Probate
DD: 0116 257 4402
E: mark.dunkley@harveyingram.com

Harvey Ingram LLP
20 New Walk
Leicester
LE1 6TX

T: 0116 254 5454
F: 0116 255 4559

W: www.harveyingram.com

These notes are the copyright of Harvey Ingram LLP and may not be reproduced or disseminated in any way without the consent of Harvey Ingram LLP. These notes do not constitute legal advice and are of a general nature only. In any specific circumstances, legal advice should be sought.

Always part of the solution

www.harveyingram.com