

BVA

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— S O L I C I T O R S —

Court of Protection



Everybody Matters

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GUIDE TO CLIENTS ON COURT OF PROTECTION

Deputyship

The Court of Protection looks after the rights of people who lack the mental capacity to make decisions regarding their property, affairs or personal welfare. The Court of Protection is there to protect vulnerable people.

If someone is mentally incapable of making a particular decision at a particular time and they do not have a Lasting Power of Attorney or Enduring Power of Attorney in place, then the matter can be referred to the Court of Protection.

In the vast majority of cases the people who need help from the Court of Protection are elderly relatives who are suffering from some form of dementia or people who have suffered a brain injury.

In such a case, an application can be made to the Court of Protection for someone to be appointed as a “Deputy” and he/she will then be authorised to manage the person’s financial affairs and property on an ongoing basis.

A Deputy can only act under a Court Order from the Court of Protection. This Order sets out the Deputy’s powers and entitles the Deputy to act on behalf of the person lacking capacity.

Why set up a Deputyship?

A Deputyship maybe required for a person who lacks mental capacity and who has assets that need to be administered or decisions taken about their personal welfare.

So, for example, there may come a time when a person with dementia will need a Deputy to collect their income and benefits and sell assets in order to pay care home charges. Or, say, a person with acquired brain injury would need a Deputy to administer a Court settlement to pay for an ongoing care regime, or make decisions about medical treatment.

Types of Deputyship

A Deputy can be appointed by the Court to act as:

- A Property and Affairs Deputy - making decisions about property and financial affairs, including the sale and purchase of real property
- A Personal Welfare Deputy - making decisions about health and personal welfare, including treatment options. However the Deputy cannot refuse consent to life sustaining treatment

Who can be a Deputy?

Any person over the age of 18 can be a Deputy. Any prospective Deputy must declare any criminal convictions or bankruptcy arrangements to the Court when applying to become Deputy and these could lead to the application being refused. In many cases a spouse, partner or close relative will be the Deputy. In cases where there is no-one able or willing to take on this role a professional Deputy such as a Solicitor can be appointed.

What are the Powers and Duties of a Deputy?

A Deputy’s powers derive from the Deputyship Order made by the Court of Protection and the Deputy cannot exceed those powers. The order may give wide powers to the Deputy, or it could set limits to those powers, for example providing that large items of expenditure or investment cannot take place without further permission of the Court.

The Deputy’s duties are set out in the Mental Capacity Act 2005 and in particular follow the general principles set out in the Act:

- A person must be assumed to have capacity unless it is shown otherwise
- A person cannot be treated as unable to make a decision until all practicable steps have been taken to help him, without success
- A person cannot be treated as lacking capacity merely because he wishes to make an unwise or eccentric decision
- Any decisions made on behalf of a person must be in the person’s best interests
- Before making a decision, consideration must be given as to whether its purpose can be achieved in a way that is less restrictive of the person’s rights and freedom

In addition to following these general principles, the Court of Protection places numerous obligations on the Deputy, as a safeguard to the person lacking capacity. These include obtaining a security bond, complying with supervision by the Court and filing annual reports and accounts.

Supervision and Termination of Deputyships

When a Deputyship Order is made, the Office of the Public Guardian will allocate the Deputyship to a category of supervision. This may range from close supervision (particularly for new cases in the first or second year) to a light touch supervision in straightforward cases. The Deputy’s reporting obligations will depend on the level of supervision.

A Deputyship Order is terminated when the person lacking capacity dies or recovers capacity, or if the order is limited in time and expires. It can also be discharged by order of the Court of Protection or on application by the Deputy, if he wishes to retire or resign.

How Can We Help?

Beroze Bana acts as a Deputy where no other person is willing to take on this role. She accepts instructions to act as a professional Deputy and is always happy to discuss individual cases on a no-obligation basis.

We can also help prepare applications on behalf of prospective Deputies, liaising with the Court of Protection regarding applications, assisting Deputies in managing their Deputyships and in making further applications to the Court when required.

Statutory Wills

When someone lacks the necessary capacity to make a Will (testamentary capacity), it is still possible for a Will to be made for that person. Such a legal document is known as a Statutory Will. Statutory Wills are made by an application to the Court of Protection.

A Statutory Will allows for the wishes of a person who does not have a capacity to make a Will to be carried out after his/her death. A Statutory Will can also be used as part of inheritance tax planning and to avoid the Intestacy Rules.

Even though someone may lack the capacity to manage their financial affairs they are, nevertheless, still able to make a new Will or Codicil to an existing Will. The test for testamentary capacity is different and easier. For a person to be able to make a Will they must be able to understand what they are doing, the general value of the assets their Will is to deal with and the people they ought to be thinking of providing for under their Will. If a client's financial affairs are under the control of the Court of Protection then a medical opinion has to be obtained as to whether or not the client has testamentary capacity. The doctor or consultant will charge a fee for this.

If the medical opinion is that the person has no testamentary capacity, then an application can be made to the Court of Protection for the Deputy to be authorised to execute a Will on behalf of the person.

The Court's approach is what is in the patient's best interests. It requires the decision-maker to consider the patient's present wishes and feelings and the Act expressly requires the decision-maker to take a number of steps before reaching a decision which include:-

- Encouraging the patient to participate in the decision.
- Considering the patient's past and present wishes, beliefs and values.
- Taking into account the views of third parties as to the patient's best interests.

The procedure to be followed to apply for a Statutory Will is quite complex and it is advisable to seek professional help in this. Amongst other things the Court will require you to provide

- A copy of the proposed draft Will or Codicil.
- A copy of any existing Will or Codicil.
- Any consents to act by proposed Executors.
- The family tree of the patient.
- A statement explaining why the patient might be expected to provide for the proposed beneficiaries.
- A schedule showing details of the current assets.
- A schedule showing estimated income and outgoings.
- Details of any inheritance tax payable in the event of the patient's death.
- A copy of any registered Enduring Power of Attorney or Lasting Power of Attorney.
- Confirmation of residence or domicile.
- Medical evidence as to testamentary capacity.

Any beneficiary under an existing Will or Codicil likely to be materially or adversely affected by the Statutory Will must be named as a respondent to the proceedings. The Court will then decide whether or not the patient should be joined as a party and if they are, then the Court will usually invite the Official Solicitor to act as a litigation friend for the person.

Conclusion

It is vital that the appropriate procedures are followed in relation to Statutory Will applications and that the correct test of mental capacity is applied.

In some cases it may be helpful or advisable to obtain a professional legal help and medical opinion. We have experience in dealing with Statutory Wills applications to the Court of Protection and would be very happy to advise you on whether an application is necessary and to handle this for you if it is.