

My child will soon be turning 18:

Do they need a deputy?

Mental capacity and decision making

When your child reaches 18 they will become a legal adult. Amongst other matters, this means that they will be deemed able to make their own decisions about all aspects of their life, unless it is established that they lack the mental capacity to do so. A parent does not automatically have the right to make decisions for their child once they have turned 18. This can sometimes feel concerning for parents who have been their child's advocate throughout their life and have a detailed understanding of their child's needs.

The Mental Capacity Act 2005 ("MCA 2005") provides the legal framework for decision-making for people who lack mental capacity to make certain decisions. Much of the MCA 2005 applies to those aged 16 and above. However, parents can still provide consent to certain care and treatment matters until their child reaches 18 if their child does not have capacity to provide or refuse consent themselves.

A capacity assessment can be arranged by your child's social worker or other professional involved in your child's care (such as a GP or psychologist/psychiatrist). Sometimes the input of other professionals (such as a speech and language therapist) can ensure the person being assessed has the best opportunity to understand the assessment and to communicate their answers.

Mental capacity is "decision-specific", which means that your child could have capacity to make certain decisions, but not others. If your child is assessed to lack the mental capacity to make a particular decision, decisions must be made in his or her best interests.

In some circumstances it may be appropriate for a deputy to be appointed. A deputy is a person (or persons) who is (are) given authority by the Court of Protection to make certain decisions for a person who lacks capacity to make those decisions.

Decisions about money and property

A property and affairs deputy may be required where your child lacks mental capacity to make decisions about their finances, but has funds or assets that need to be managed. A deputy may not be required if your child only receives welfare benefits; often an "appointeeship"¹ is sufficient to manage welfare benefits alone.

A property and affairs deputy has authority to make decisions about the management of a person's financial affairs. You may be able to apply to act as your child's deputy (as a "lay" (non-professional) deputy). Alternatively, it may be beneficial for a professional deputy to be appointed. Sometimes there can be a combination of the two.

If your child has been awarded significant damages as part of a successful personal injury or medical negligence claim, the options in respect of the management of your child's funds should be discussed with you by your child's personal injury solicitor.

¹ To become an appointee, or to find out more about this, you should contact the organisation responsible for paying your child's benefits

Decisions about health and welfare issues

If your child lacks mental capacity to make decisions about specific issues affecting their health and welfare, a collaborative approach should be taken to decision-making by the professionals involved in your child's care or treatment, taking into account your views and the views of your child. In most cases decisions can be made without there being any need for a personal welfare deputy being appointed.

If there is a substantial disagreement between two or more parties (for example, between the local authority and you) as to what is in your child's best interests, steps should be taken to try to resolve the disagreement and, if these are unsuccessful, an application can be made to the Court of Protection to ask the court to decide what is in your child's best interests. The Court of Protection effectively "steps into the shoes" of the person who lacks mental capacity, and can only decide between possible options that are actually available.

In some circumstances it may be possible for a personal welfare deputy to be appointed. Personal welfare deputies are appointed much less commonly than property and affairs deputies. The decision to appoint a deputy will always focus on the best interests of the person who lacks mental capacity.

When considering whether to appoint a personal welfare deputy, often the court will expect to see evidence of why the collaborative decision-making process is not working or is unlikely to work in future. For example, it may be that there are likely to be a series of linked welfare decisions that will need to be made over time, where it would be not be practical or possible for an application to be made to court each time in the event of a dispute.

Making a deputyship application

How do I apply to be appointed deputy?

You need to complete certain application forms and send these to the Court of Protection. A list of the forms that need to be completed can be found on the government website: www.gov.uk/become-deputy. You should also complete a witness statement to explain to the court why you believe a deputyship order is in the best interests of the person who lacks mental capacity (often anonymously referred to as "P" in the Court of Protection). You will need to provide evidence that P lacks mental capacity to make the decisions you are seeking authority to make on their behalf, by asking an appropriate professional to complete a "COP3" form (accessible via the above link).

After your application has been sent to the court, the court will "issue" (register) the application and send a sealed copy of the application forms to you to serve on any interested parties and to discuss with P. Once everyone notified has had an opportunity to send any comments to the court, the court will consider your application on the papers and decide whether to make the order requested. The court can decide to list a hearing before making its final decision.

Do I need to instruct a solicitor to bring a health and welfare deputyship?

No - you can apply for both a property and affairs deputyship and a health and welfare deputyship yourself, without instructing a solicitor.

However, due to the fairly rare circumstances in which a health and welfare deputyship order is made, many people find it beneficial to seek legal advice and assistance with completing the paperwork for this type of application. A solicitor can also assist you to prepare a property and affairs deputyship application if preferred.

What are the costs to apply for a deputyship?

There is an application fee that must be paid to the court at the time of filing your application. At the time of writing this article, the fee is £365. If the court decides to list a hearing, you may be asked to pay a hearing fee. At the time of writing, a hearing fee is £485. Court fees are subject to change, and you should ensure that you are paying the correct fee when you submit your application.

You may also be asked to pay a fee for completion of the COP3 capacity assessment if you instruct a private company or professional to complete this for you.

If you instruct a solicitor to complete the application for you, you can expect to pay legal fees to the solicitor, who should be able to give you an idea of the cost of completing the application when you approach them.

The Office of the Public Guardian ("OPG") supervises the deputy in his or her role once appointed. There is an initial one-off assessment fee payable to the OPG upon successful appointment (currently £100), followed by a yearly supervision fee (usually about £320). It is sometimes possible to apply for a fee exemption or remission. You may also have to pay to set up a "security bond" before you can be appointed property and affairs deputy.

What is the difference between a deputyship and a lasting power of attorney?

Both a deputyship and a lasting power of attorney ("LPA") confer a legal authority on the person appointed ("attorney" by a LPA and "deputy" by a deputyship order) to make decisions for a person who does not have mental capacity to make decisions themselves.

The key difference is the way in which the authority is given. A lasting power of attorney is made by an individual who *still has* mental capacity to appoint someone to make decisions on their behalf, in the event that they lose mental capacity in future.

A deputyship order is made by the court on behalf of a person who *already lacks* mental capacity to make certain decisions themselves.

In either event, it is always important to be mindful of any possibility of P developing or regaining mental capacity at a later date and to consider P's mental capacity each time a decision needs to be made on their behalf.

If you have any questions or require advice, please contact the Court of Protection team on 0800 124 4845 or email claimsadvice@bovesturner.com.

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