ACTING AS A COURT APPOINTED DEPUTY

A Deputy is someone appointed by the Court of Protection (the Court) to make decisions for someone who is mentally incapable of doing so on their own. A Deputy is responsible for making decisions for a mentally incapable person until either the death or recovery of that person.

There are two types of Deputy:

- A property and financial affairs Deputy; and
- A health and welfare Deputy.

It is not necessary to have both types of Deputy, but where both are appointed they can be the same person or separate people.

A Deputy cannot:

- Make a decision if the person can make the decision for themselves;
- Make a decision that is not authorised within the Court order;
- Make or change a Will for the person;
- Make large gifts out of the person's money;
- Hold any money or property in their own name on the person's behalf; or
- Charge for their time spent acting as a Deputy (unless a professional Deputy such as a solicitor), but can claim for reasonable expenses incurred whilst carrying out their duties. The OPG can ask for unreasonable expenses to be personally repaid by the Deputy.

A Deputy must comply with the Mental Capacity Act 2005 (the Act) and its Code of Practice (the Code) which can be found at:

www.legislation.gov.uk/ukpga/2005/9/contents

www.gov.uk/government/publications/mental-capacity-act-code-of-practice

The Act contains five key principles that must be taken into account for every decision made on behalf of a mentally incapable person:

- **A person must be assumed to have capacity unless it is established that he lacks capacity.** Whether a person lacks capacity must be judged for each decision that needs to be made. The person may have a gradually degenerating condition, or may have capacity on one day for a particular decision but not on another day for a different decision. You should only make a decision for the person when they are incapable of making it themselves.
- **A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.** A Deputy has a responsibility to try to obtain the person's input into decisions. This might involve presenting or explaining information in ways that would make it easier to understand (such as using pictures, photographs, sign language).
- **A person is not to be treated as unable to make a decision merely because he makes an unwise decision.**
- **An act done, or decision made, for or on behalf of a person who lacks capacity must be done, or made, in his best interests.** The Act does not define 'best interests', but instead lays down a set of steps to go through to help work out what would be in someone's best interests. You should therefore consider the mentally incapable person's past and recent wishes, beliefs and values; the views of family members, carers etc; and the possibility that the person could regain capacity.
- **Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.**

The role of the property and financial affairs Deputy is to manage and use the person's money in their best interests. You should therefore consider spending money on activities or items that will improve the person's quality of life, such as new clothes, items for where they live, or paying for extra support to allow them to visit others or go on holiday.

Sometimes you may have to make decisions where there is a conflict of interests between yourself and the mentally incapable person, and so in such situations you should record how you arrived at your decision in the best interests of the mentally incapable person in case the OPG queries the decision. If the decision is very important or could cause potential conflict then it may be best to seek legal advice.

As a Deputy, you can employ professionals such as a solicitor, an accountant and an Independent Financial Adviser (IFA) to help manage the person's affairs if it is reasonable to do so.

The Security Bond

The Court requires that a Deputy appointed to manage a mentally incapable person's property and financial affairs arrange a Security Bond with an insurer. This is a standard requirement and is not intended to reflect on the Deputy's personal integrity.

A Security Bond is an insurance policy to protect the mentally incapable person from any financial loss that may occur due to mis-handling of their finances. The annual premium depends on the level of security set by the Court, which in turn is determined by the amount of funds that the Deputy will have control of, including any non-cash assets such as property.

You may pay the annual premium from money you hold for the mentally incapable person. If you are not happy with the level of bond you should apply to the Court stating your reasons. If the person's assets significantly change at any point you must make an application to the Court to change the level of security.

If the Security Bond has to pay out at any point, to cover loss due to mis-handling of the mentally incapable person's finances, then the Security Bond company may ask you to pay them any money they have had to pay.

Letting people know

You will need to let organisations with whom the mentally incapable person has or may have an interest know that you are the Deputy. This is known as 'registering' the Deputyship. Examples of who to register the Deputyship with are:

- Department for Work and Pensions (DWP)
- Financial institutions such as banks, building societies, life assurance companies
- Advisers such as any stockbroker, IFA, accountant or solicitor
- Payer of any private pension
- Care Home
- Utility companies and house insurance provider where the mentally incapable person owns property
- Local Authority
- The Court Funds Office (CFO) if the mentally incapable person has funds deposited with them

For a health and welfare Deputy, the following organisations should be shown a copy of the order:

- Care Home
- Hospital
- GP
- Local Authority

When registering the order with various organisations, you must show an original sealed copy of the order, and not a photocopy. Whilst you should ask for the order to be returned, should you ever need extra copies then these can be obtained from the Court subject to payment of a fee.

If your order is not accepted then you should ask to speak to the management or legal advisers of the organisation to have the problem resolved, and if necessary make a formal complaint.

Setting up a Deputyship Account

You should begin keeping a record of decisions and expenditure as soon as the order is used. To assist with this, it is sensible to keep the mentally incapable person's money in a designated account (a Deputyship Account) into which all income is paid and from which all payments are made, although there may be occasions where you keep a joint account, for example if you are the person's spouse and have had the joint account for many years.

Can a Deputy make gifts on behalf of the mentally incapable person?

A property and financial affairs order may give you the authority to make gifts on behalf of the mentally incapable person. You may be asked to explain the gifts you have made, and so before making a gift you should consider:

- Does the order grant you the authority to make gifts? If it does, are any limitations imposed?
- Is the gift reasonable in terms of the proposed amount and intended recipient? For example, is it similar to the value of gifts the person had previously made?
- Is the gift proportionate to the size of the person's estate?
- Is the gift something that the person is likely to have wanted to do if they still had capacity?

If you want to make larger gifts of money or property then you must apply to the Court for permission or you will have to pay back the amount of the gift from your own funds.

Does the Deputyship order conclude all dealings with the Court?

Once the Deputyship order has been made, the Deputy will receive ongoing supervision from the Office of the Public Guardian (OPG) (see below). Aside from this regular supervision, a Deputy may need to apply to the Court for a specific order where a decision needs to be made, or an act done, which the Deputy does not have the authority to do.

Examples include:

- Making large gifts of money or property belonging to the mentally incapable person;
- Making or amending a Will for the mentally incapable person (known as a "Statutory Will" on which expert advice is available on request);
- Acting in place of the mentally incapable person where they are a trustee, which includes acting in the sale of a property that the mentally incapable person owns jointly with another (which is classed as 'trust property').

A separate application must therefore be made to the Court, with a separate application fee payable, for a decision in relation to such matters.

What if a matter is or becomes urgent?

You can apply to the Court using the emergency procedure for a decision within 24 hours if there is a clear risk that someone may suffer serious loss or harm. Examples include:

- Applications about urgent medical treatment;
- Applications to prevent the mentally incapable person being removed from where they live;
- Applications to execute a Statutory Will where the mentally incapable person's life expectancy is very short

Being supervised as a Deputy

While the Court is ultimately responsible for the supervision of Deputies, day to day supervision is delegated to the OPG. There are a number of ways in which the OPG supervise a Deputy to ensure that they are:

- Complying with the terms of the Court order;
- Making decisions in accordance with the Act and the Code; and
- Acting in the best interests of the mentally incapable person.

For general supervision, the OPG charge an Annual Supervision fee which can be paid from the funds of the mentally incapable person. If the mentally incapable person receives certain means-tested benefits, they may qualify to pay no fee (an exemption). If a mentally incapable person's gross annual income is below £12,000 they may qualify to pay half the fee (a remission). If the mentally incapable person does not qualify for an exemption or remission but payment of fees would cause undue hardship, an application can be made to have the fees waived by the OPG.

Methods of supervision include:

- Annual Report
- Accounts
- Court Visitor
- Investigation

Annual Report

As a Deputy, you will need to send a report to the OPG every year (unless you are subject to minimal supervision when a report may be requested periodically).

The OPG automatically sends out the form a few weeks before the end of the accounting period. This can either be a full report form or a standard form. When the Deputy's appointment is terminated, the OPG may require a final report to be submitted. The form requires the Deputy to:

- Give details of any major decisions made on the mentally incapable person's behalf
- Provide the contact details of the significant people that the Deputy has been in contact with while managing the mentally incapable person's affairs
- List the mentally incapable person's assets
- Provide details of income and expenditure
- Give further detail about any major property or other financial expenditure

For a property and financial affairs Deputy, the report is a way for the OPG to check that the mentally incapable person's funds are not being misused and monitor the way in which you involve them in decisions. To help complete the report, throughout the year you should keep a record of all financial dealings and decisions you make. You should therefore keep all bank statements, receipts, invoices and correspondence.

For a health and welfare Deputy, the report should record the decisions you have made on behalf of the mentally incapable person. To help complete the report, throughout the year you should keep a record of the decisions you make. You should record how you reached the decisions in the best interests of the mentally incapable person, and who you consulted.

Accounts

A Deputy appointed to manage a mentally incapable person's property and affairs must keep proper accounts of all dealings and transactions made on their behalf. Some of the detail from these accounts is used to complete the annual report for the OPG, but the OPG may also request that the Deputy submit accounts from time to time.

As part of their proper accounting, Deputies should keep supporting evidence such as copies of bank statements, receipts and other financial correspondence.

Court Visitor

The Court and OPG have a team of Visitors they can call upon to see Deputies in person to provide assistance or gather information. The OPG may request a visit for a number of reasons, including because:

- You are new to the role and the Visitor will talk you through your responsibilities;
- You are having difficulties with aspects of your role;
- The Court or OPG wants assurance that your duties are being carried out in accordance with the order and that the mentally incapable person's best interests and needs are being met;
- The Court or OPG is conducting a formal investigation.

Visitors can arrange to see or speak to anyone they need in order to obtain information for their report. They will usually see both you and the mentally incapable person separately. Sometimes they will also contact third parties such as care homes, local authorities, solicitors, accountants, relatives and friends.

You should give the Visitor access to any information they ask to see that relates to the mentally incapable person, and so it is always useful to have relevant paperwork to hand such as a copy of the order, recent correspondence, bank statements, benefit information, financial portfolios, care management plans.

Following the meeting the Visitor will write a report for the Court or OPG who will then address any action points.

Investigation

The OPG has a duty to investigate any complaints about a Deputy. In high risk situations, immediate action will be taken to involve other agencies, including the police, or to apply to the Court; in lower risk situations, the Investigation Team will conduct a formal investigation before any action is taken.

The Investigation Team can collect evidence from all relevant organisations, and may ask a Visitor to visit the Deputy or mentally incapable person. Investigations generally last between three and six months, though this can vary according to the circumstances. The OPG will not usually release the identity of who has made the complaint.

The investigation will focus on what are the best interests of the mentally incapable person. Whether the Deputy is acting in the mentally incapable person's best interests will determine whether or not any action will be taken as a result of the complaint. Whilst a Deputy may not like being investigated, if they are acting in the best interests of the mentally incapable person and complying with the order, the Act and the Code then there is nothing to fear.

The conclusion of an Annual Report, visit by a Court Visitor or Investigation may be that the Deputy is acting in the best interests of the mentally incapable person and complying with the Act and the Code. On the other hand, the OPG can:

- Refer the matter to the police;
- Ask the Court to appoint a different Deputy; and/or
- Enforce the Security Bond to compensate the mentally incapable person for any financial loss, in which case the insurer may take legal action against the Deputy to recover any sum it has paid out.