



The Mental Capacity Act (MCA) replaced the old style 'receiver' with a deputy, appointed to 'step into the shoes' of someone lacking mental capacity and take decisions on their behalf.

A deputy is appointed by the Court of Protection to manage the affairs of an individual who due to lack of mental capacity, is unable to manage their own. They can be appointed for 'Property and Affairs', giving them responsibility for someone's money and assets, or for 'Health and Welfare', where they are responsible for welfare and care decisions. This article focuses on the role of the 'Property and Affairs' Deputy, which is the most common appointment.

Family member or professional?

A deputy is usually appointed where a person has lost mental capacity and has no plans in place to cover this eventuality, such as a Lasting Power of Attorney or one of the old Enduring Powers of Attorney. The majority of individuals that the Court of Protection is responsible for are elderly, and a family member is often chosen to act as deputy. However, in a case involving a substantial damages award, Senior Judge Lush (Senior Judge of the Court of Protection) indicated that the Court of Protection prefers professional deputies rather than family members to be appointed in all but exceptional cases - at least for the first few years after settlement (BABICM newsletter, Autumn 2011). There may also be a practical problem with a family member not being able to get the appropriate level of security bond required by the Court if it has been set at a high level - usually in a case with a large damages award.

Any deputy, whether professional or lay (non-professional), has a duty to comply with the MCA and its principles. The key principle that must guide any deputy's actions is that of acting in the best interests of the incapacitated person. This can mean setting aside personal views and preferences (and prejudices) in order to step into the shoes of the person for whom you are making the decision. This can prove difficult where a family member is acting as deputy, particularly if there is a potential conflict of interest.

Caring consultation

So how does a deputy act in the best interests of an incapacitated person? One requirement of the MCA is to consult. Even though the individual has been deemed to have lost mental capacity, they may be able to express opinions on certain matters and these must be taken into account as far as possible. Capacity can fluctuate, which means the deputy may be able to speak to them at different times. Consultation should also happen with those who are closest to the individual - usually family - but friends, care staff or other professionals can also provide useful insight into their wishes or views. A deputy should also give consideration to a person's beliefs and decisions prior to the loss of capacity, which indicates what they view as important and the likely course of action they would have taken were they able to now decide.

The role of a deputy varies from client to client. A lot of work is required for example, where a person has lost capacity due to an acquired brain injury and a claim is being pursued. In such complex cases, the support of a professional deputy can be hugely beneficial both for the individual affected and their family. Caring for someone with life-changing injuries is inevitably very challenging for the

family, and managing a substantial damages award is an unwelcome distraction from supporting their loved one.

A deputy may be called upon to deal with:

- making applications to the Court of Protection
- preparing and submitting tax returns, preparing annual report and accounts for the Office of the Public Guardian
- dealing with the employment of care teams including payroll, contracts, pension auto-enrolment and employment disputes
- setting and monitoring budgets with clients, family and other professionals and ensuring availability of funds to meet a person's day-to-day needs
- arranging the investment of a damages award through a specialist independent financial adviser
- payment of bills and liaising with family over the best way for these to be dealt with
- liaising with case managers and other professionals in respect of care teams, therapists and other needs
- supporting families and clients in the process of buying new, appropriate properties including the conveyancing process and the paperwork it generates
- working with architects and others to adapt properties as required
- consideration of statutory funding availability and dealing with benefits applications

This list provides only an indication of what being a deputy involves. The reality is that finance touches most areas of our lives, so the work of a deputy can be extensive and wide-ranging.

Where an injury claim is ongoing, it is possible to recover the costs of a professional deputy, and these costs should be included within the schedule of loss.

Summary

In summary, the role of the deputy is to step into the shoes of the person who has lost mental capacity and to take decisions on their behalf, which will cover many areas of their life. It is key to remember that when making a decision for an incapacitated person it should always be in their best interests. This can depend on many factors, but wherever possible a deputy should consult with others.

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Ashtons Legal is a member of the Brain Injury Group.

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