

Planning for the Future Series 7

COURT OF PROTECTION

APPOINTMENT OF A DEPUTY FOR HEALTH AND WELFARE

What does this mean?

Capacity is the ability to make a decision in relation to a specific issue at the time that the decision needs to be taken. This area of law is governed by the Mental Capacity Act 2007. This is a law which empowers individuals to make their own decisions as far as possible.

Capacity can be clear but there are many shades of understanding so the question can be difficult to assess.

EXAMPLE

Jean is 70. She is living with Alzheimer's Disease and at the moment she is living on her own and carers visit twice a day and a neighbour does her shopping. Jean's son Tim and daughter Tara both live away and they are not able to look after their mum, Jean's granddaughter Mary is at the university and calls in on her nan every Sunday afternoon. Mary is worried that Jean is getting increasingly forgetful as she has gone out and forgotten how to get home on a couple of occasions and on other occasions has gone to bed with the front door wide open.

Jean wants to stay at home but Mary and her family are worried that Jean is vulnerable and in danger.

There is a question about whether or not Jean has the mental capacity to make the decision about where she lives. Jean must be able to understand the issues which are relevant to the question in hand, for example that she is wandering and by leaving her front door open, there is a risk that she will be burgled and her safety may be at risk.

Jean is allowed to make what are called "unwise decisions" and she must be given all the help and support practicable to make her own decision.

What happens next?

If a person does not have capacity to make the decision in question, in Jean's case about where she lives, the decision is taken in her best interests by the multi-disciplinary

team, made up of medical and social care professionals who will consult with the persons interested in Jean. In Jean's case this would be Tim, Tara and Mary as well as Jean herself.

What if there is a disagreement about what is in Jean's best interests?

The Court of Protection has an overriding jurisdiction to decide what is in a person's best interests.

In Jean's case, the professionals think that Jean should go into residential care for a time to see how she progresses and in due course, she may be able to return home. When this is suggested to Jean she is devastated and inconsolable. Jean's family think carefully about these matters and decide that Mary could live with Jean to look after her at night and at some time during the day. Mary is keen to do this. There is a long standing neighbour would also be happy to call in and check on Jean. Jean would still have carers twice a day. Jean would be happy to wear a GPS device so she can be located and says she would be fine with staying in the house and not to go out unaccompanied.

Under the Mental Capacity Act, one of the core principles is to act in the least restrictive way possible but at the same time to safeguard the person's best interests.

These issues are complex and in the absence of agreement, the Court will make the decision.

How does the Deputyship fit in?

The Court can make an order that a person is appointed as a person's Deputy to make all the decisions about their personal health and welfare.

(**Note** that if a person makes a Lasting Power of Attorney for Health and Welfare, the attorneys have legal authority to make these decisions. It must be made when the person understands the nature and effect of the document).

In practice the Court is very reluctant to make the Deputyship Orders for health and welfare matters because the Act envisages that the decisions are made by agreement and it is important that there is co-operation between the different caring bodies.

If a Deputyship Order is in place, it means that the jurisdiction of the Court as an overseeing body is restricted and its ability to protect people without mental capacity is eroded. This is not the underlying principle of the Mental Capacity Act which promotes collaborative decision making to promote the best interests of the person lacking capacity.

There are certain circumstances when it is more likely that a Deputyship Order will be made, including the following:-

- A person needs to make a series of linked decisions over a period of time and it would not be either appropriate or beneficial for the Court to make those decisions
- It is the most appropriate way to safeguard a person's best interests and the Deputy will consult the relevant people regarding decisions
- There is a history of family disputes which could have a detrimental effect on the person's future care
- The person lacking capacity is felt to be at risk in the care of family members and in these extremely rare cases, an independent person such as an officer of the Local Authority may be best placed to make decisions. There may even be a need to apply for an order prohibiting contact with certain family members.

NEXT STEPS

This is a basic guide, so contact us to talk about your wishes to enable us to advise you about your options and how we can help you.



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Naomi Pinder qualified as a solicitor in 1988 and for over 20 years she has specialised in helping clients in planning for the future through Wills, Trusts and Lasting Powers of Attorney; Probate and the administration of estates and trusts; capacity and Court of Protection; later life care planning and related elder client issues.

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