

Deputyship the on-going struggle Rescare Form by Zoom

Wednesday 14th July 2021 10.00-11.30am

The Mental Capacity Act 2005 and Code of Practice form the legal framework

The Mental Capacity Act 2005 came into force in 2007. It is designed to protect and restore power to those vulnerable people who may lack capacity to make certain decisions, due to the way their mind is affected by illness or disability, or the effects of drugs or alcohol. The Act also supports those who have capacity and choose to plan for their future. As a deputy, you'll be authorised by the Court of Protection to make decisions on their behalf.

Types of deputy

There are 2 types of deputy.

Property and financial affairs deputy

You'll do things like pay the person's bills or organise their pension.

Personal welfare deputy

You'll make decisions about medical treatment and how someone is looked after.

From <https://www.scie.org.uk/mca/introduction>

How it works

(from the slide presentation by Alex Rook)

1 The Mental Capacity Act 2005 (the "MCA") is the main piece of legislation regarding mental capacity.

"P" means the person who lacks mental capacity.

The Court of Protection ("COP") has jurisdiction over matters relating to adults who lack mental capacity.

Under section 16, the COP has two options.

Section 16(2): The court may—

“(a) by making an order, make the decision or decisions on P's behalf in relation to the matter or matters, or

(b) appoint a person (a “deputy”) to make decisions on P's behalf in relation to the matter or matters.”

2 The court will have regard to the following principles under s 16(4):

“(a) a decision by the court is to be preferred to the appointment of a deputy to make a decision, and

(b) the powers conferred on a deputy should be as limited in scope and duration as possible.”

- The court will only appoint a deputy if it is in P's best interests to do so (section 1(5))
- When determining P's best interests, the best interests checklist will be considered (section 4)

3 The Mental Capacity Act Code of Practice

- The Code provides guidance on how the MCA should be applied in practice.
- The Code as currently drafted makes it clear that welfare deputyship orders will not be routinely made. It says:

Paragraph 8.3:

“In most cases, the core principles of the Act and the processes set out will be enough to –

- help people take action or make decisions in the best interests of someone who lacks capacity to make decisions about their own care or treatment, or
- find ways of settling disagreements about such actions or decisions.”

However, three situations are given as examples of when a welfare deputyship may be necessary: these are:

- particularly difficult decisions
- disagreements that cannot be resolved in any other way, or

Notes from the forum)

- situations where ongoing decisions may need to be made about the personal welfare of a person who lacks capacity to make decisions for themselves.

“Deputies for personal welfare decisions will only be required in the most difficult cases where:

- important and necessary actions cannot be carried out without the court’s authority, or
- there is no other way of settling the matter in the best interests of the person who lacks capacity to make particular welfare decisions.”

(paragraph 8.31)

The Code sets out some examples:

- “Someone needs to make a series of linked welfare decisions over time and it would not be beneficial or appropriate to require all of those decisions to be made by the court. For example, someone (such as a family carer) who is close to a person with profound and multiple learning disabilities might apply to be appointed as a deputy with authority to make such decisions...
- ...the most appropriate way to act in the person’s best interests is to have a deputy, who will consult relevant people but have the final authority to make decisions
- there is a history of serious family disputes that could have a detrimental effect on the person’s future care unless a deputy is appointed to make necessary decisions.”

4 Property and Financial Affairs Deputyship

Note that the MCA as set out above applies regarding finance deputyships, but not the guidance regarding the “most difficult cases.”

This means that obtaining a financial deputyship order is much more straightforward

Note however: Does P have any income or savings other than their benefits?

If not, an application to become the appointee of their benefits should suffice, and deputyship may be rejected for this reason

You do not need to be a deputy if you’re just looking after someone’s benefits. You can apply to become an appointee instead.

5 Our facilitator's advice to members considering these processes:

- Most of the information you will need, including copies of the forms to complete, information on fees etc, can be downloaded from here:
<https://www.gov.uk/become-deputy/apply-deputy>
- In our experience, families are often able to apply for finance deputyship without the assistance of a solicitor
- Applications for welfare deputyship are more complex, and a solicitor may help in particular with the drafting of a witness statement

The session facilitator:



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Alex's work has always focused on achieving social justice. He acts for individuals, charities and companies in the full range of judicial review cases, with particular specialisms in the law on consultation, in health and social care, mental capacity and human rights law.