

Court of Protection A-Z

The Court of Protection plays a key role in both protecting and empowering individuals who have been assessed to lack mental capacity to make certain decisions for themselves.

However, becoming involved in Court of Protection proceedings for the first time can be very daunting. Rosie Banks, health and welfare Court of Protection specialist, explains the meaning and significance of some of the most used terms that you may hear during the course of the proceedings.

1. Best interests

Where a person has been assessed to lack mental capacity, each and every decision that is made for them must be made in their best interests. This is the case regardless of whether the decision is being made by the court, a deputy, or any other person or group of people.

The Mental Capacity Act 2005 (see below) contains rules about the factors that must and must not be considered by the person making a decision.

Factors that must be considered include:

- Whether the person who lacks mental capacity will regain capacity to make the decision, and when that will be;
- The past and present wishes and feelings of the person who lacks capacity;
- The beliefs and values of the person who lacks capacity
- The views of anyone named by the person who lacks capacity; anyone caring for or interested in the person's welfare; any donee of a lasting power of attorney or deputy

The person who lacks mental capacity to make the decision should be permitted and encouraged to participate in the process as much as possible.

2. Deputyship

A deputy is a person or other legal entity (such as a trust corporation) who has legal authority to make decisions for a person who lacks mental capacity to make those decisions. "Deputyship" refers to the deputy arrangement. It is the Court of Protection that decides whether a deputy should be appointed and confers the legal authority.

A deputy can make decisions about a person's property and finances, or about aspects of their health and welfare (such as where to live and what care and support arrangements are most appropriate), or in some cases both. The court will often restrict the scope of a deputy's authority.

A person can have more than one deputy. Two or more deputies can be appointed jointly (the deputies must make all decisions together) or jointly and severally (one deputy can make a decision independently of any other deputy).

3. “DOLS” and deprivation of liberty

If a person’s care arrangements mean that they are continually supervised and they are not free to leave their home of their own accord, and they do not have mental capacity to consent to this arrangement, they are likely to be deprived of their liberty. A person can be deprived of their liberty whether they live in a residential care home, in a supported living placement, or even in their own home.

In many cases it is necessary for a person to be subject to care arrangements that amount to a deprivation of liberty to ensure that their needs are met and to keep them safe from harm. Any deprivation of liberty must be appropriately authorised to ensure that the arrangements are in the person’s best interests and the least restrictive way of meeting their needs. Sometimes the authorisation process is referred to as “DOLS”, which stands for deprivation of liberty safeguards.

If a person is deprived of their liberty in a residential care home or hospital setting, their deprivation of liberty can be authorised by their local authority (council). This type of authorisation is called a “**standard authorisation**” or, in some cases, an “**urgent authorisation**”. If a person lives in any other setting, their deprivation of liberty must be authorised by the court.

The “DOLS” system is due to change from April 2022 and will be known as the “Liberty Protection Safeguards”.

4. Hearing

A court hearing is an official, formal meeting with a judge of the Court of Protection. Depending on the issue at hand, the judge will hear from each of the parties and/or their legal representatives. Sometimes the judge will hear from other people, such as medical experts.

The judge may make “directions” (specific steps to be taken by the parties to help progress the case), or they may make a final decision. In some cases, the judge may give a full “judgment”, with detailed reasoning for their decision. Hearings can take place remotely (by telephone or video call) or in person.

5. Lasting Power of Attorney

A lasting power of attorney gives legal authority to a person or persons (the “donee/s”) to make decisions on behalf of another person (“the donor”).

The difference between a lasting power of attorney and a deputyship is that a lasting power of attorney is made by an individual who has mental capacity to decide who they would like to make decisions for them in the event that they lose mental capacity. In comparison, a deputy can only be appointed by the court where a person already lacks mental capacity to decide who they would like to make decisions for them.

6. Litigation friend

If a person lacks mental capacity to conduct court proceedings (whether by instructing a solicitor to represent them, or by representing themselves as a “litigant in person”), but it is nevertheless important that they are able to participate in the proceedings, then they will require a litigation friend to “step into their shoes” and to act in their best interests. Sometimes the litigation friend will instruct a solicitor on behalf of the person who lacks mental capacity.

A litigation friend could be a family member, friend, advocate or another person. A litigation friend **must** be able to act in the best interests of the person who lacks mental capacity at all times. Therefore, if a family member or friend has particularly strong views of their own about what decision should be made, it may not be appropriate for them to act as a litigation friend. In that situation, the family member or friend can ask the court if they can be a separate party to the proceedings to ensure that their views are heard.

7. Mental capacity

Having mental capacity means that you are able to make and communicate your own decisions. A person must always be assumed to *have* mental capacity unless it is established that they do not. Mental capacity always relates to a specific decision: a person does not “lack mental capacity” in general terms. A lack of capacity cannot be established solely because of a person’s age, appearance, condition or specific diagnosis, unless the points above apply.

A person lacks mental capacity to make a decision if they are unable to make a particular decision and this is because of an impairment of, or a disturbance in the functioning of their mind or brain.

A person is unable to make a particular decision if they cannot do one or more of the following:

- a) Understand the information that is relevant to the decision;
- b) Recall the information that is relevant to the decision;
- c) Use and weigh the information that is relevant to the decision; and/or
- d) Communicate their decision (this does not need to happen verbally)

8. Mental Capacity Act 2005

This is the key piece of legislation that governs how decisions are made for people who lack mental capacity to make them. It is the Mental Capacity Act that gives the Court of Protection the powers that it has. Sometimes you might see the Mental Capacity Act abbreviated as “MCA” or “MCA 2005”.

9. Official Solicitor

Where there is no one else suitable to act as litigation friend for a person who lacks mental capacity to conduct court proceedings, the Official Solicitor can take on this role. The Official Solicitor is a lawyer and civil servant, who is appointed by the government, but is independent.

The Official Solicitor has a number of lawyers and case workers who assist her in her role. You may hear the Official Solicitor referred to by legal professionals as “the OS”.

10. Order

An order is a formal document issued by the court, which confirms the court’s decision or records the directions that have been made by the judge. It is very important that a court order is complied with.

11. P

The term “P” is often used to refer to the person who lacks mental capacity to make decisions and who is therefore at the centre of the Court of Protection proceedings. This term is used to provide anonymity and protection to the vulnerable person during the course of the proceedings, which are usually heard in public.

12. Parties

The parties to court proceedings are the key participants, who have a right to speak to the judge, and to see all documents relating to the proceedings, unless the court decides there is good reason not to.

The court will often give “directions”, telling the parties what steps they need to take (see “Order”). All parties have a right to seek their own legal representation.

13. “Section 21A”

You may hear or read the term “Section 21A application” if an application has been made, or will be made, to the Court of Protection on behalf of a family member or contact who lives in a care home or hospital setting. The application is made under section 21A of the Mental Capacity Act 2005.

This type of application is made to challenge a deprivation of liberty authorisation (see above). A section 21A application can be made for a number of different reasons. Often this type of application is made where a person, who is deemed to be deprived of their liberty, is unhappy with their care arrangements.

At Boyes Turner we have experience in all types of proceedings in the Court of Protection. For further information, please contact the Court of Protection team on 0800 124 4845 or email claimsadvice@boyesturner.com

Please note that we are unable to provide advice under the legal aid scheme.