

Good practice guidance on accessing the Court of Protection



The Social Care Institute for Excellence (SCIE) was established by Government in 2001 to improve social care services for adults and children in the United Kingdom.

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SCIE works to:

- disseminate knowledge-based good practice guidance
- involve people who use services, carers, practitioners, providers and policy makers in advancing and promoting good practice in social care
- enhance the skills and professionalism of social care workers through our tailored, targeted and user-friendly resources.

First published in Great Britain in June 2011
by the Social Care Institute for Excellence

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Endorsement by the Association of Directors of Adult Social Services

The Association of Directors of Adult Social Services (ADASS) is the national organisation in England and Northern Ireland representing directors of social care in local social services authorities. (Directors of local social services authorities in Wales and Scotland have separate arrangements.) ADASS members are responsible for providing or commissioning, through the activities of their departments, the wellbeing, protection and care of hundreds of thousands of people, as well as for the promotion of their wellbeing and protection wherever it is needed. Close formal and informal links are maintained with the National Health Service and with national government in helping to shape and implement policy and social care legislation.

Within ADASS the work on supporting the implementation of the Mental Capacity Act 2005, including the additional Deprivation of Liberty Safeguards, is located within our Mental Health Drugs and Alcohol Network. Greg Slay (West Sussex County Council) has been our lead officer in this work since 2005, recently and ably assisted by Lindsay Smith (Halton Council) and Richard Smith (Telford and Wrekin Council).

ADASS members continue to work in partnership with the Social Care Institute for Excellence (SCIE), the Department of Health, the Office of the Public Guardian, the Care Quality Commission and many other organisations in improving practitioner awareness of the Mental Capacity Act 2005.

The Mental Capacity Act provides an important legal underpinning for the work undertaken by local social services authorities in England in supporting adults who are in need of community care services. This new guidance, the final one in a series published by SCIE, is very welcome. It complements earlier practice guidance documents on both the commissioning and operation of statutory independent mental capacity advocacy services, and specific guidance on statutory advocacy in the context of the Deprivation of Liberty Safeguards.

This clearly written explanatory guidance on accessing the Court of Protection deserves a wide readership, and we wholeheartedly endorse and recommend it to you.

Richard Webb (Sheffield Council) and Jonathan Phillips (Calderdale Council)
Co-chairs, ADASS Mental Health Drugs and Alcohol Network

April 2011

Introduction

The Association of Directors of Adult Social Services (ADASS) and the Social Care Institute for Excellence (SCIE) have produced this guide to support access to the Court of Protection for people who may need this safeguard. It may be useful for:

- health and social care staff
- local authorities and NHS trusts
- Independent Mental Capacity Advocates (IMCAs)
- the relatives and friends of people who may lack capacity to make key decisions.

This guide contains information about:

- when people may or must be supported to access the safeguard of the Court of Protection
- how cases can be taken to the Court of Protection
- what happens at each stage of the process
- other legal options (for example, judicial review).

This guide was supported by SCIE's Mental Capacity Act (MCA) advisory group.

Membership of the advisory group included representatives of the Department of Health (DH), ADASS, Action for Advocacy (A4A), the Care Quality Commission (CQC) and the Office of the Public Guardian (OPG).

For more information about this guide or SCIE's work on the MCA, please visit the [SCIE MCA webpages](#) or contact SCIE on 020 7089 6840.

When to apply to the Court of Protection

Introduction

The Court of Protection is a specialist court, set up as part of the Mental Capacity Act (MCA), to deal with decision-making for adults who may lack capacity to make specific decisions. Generally, the court has a range of powers, including decisions about:

- whether a person has capacity to make a particular decision
- whether an action is in a person's best interests
- whether a person is being deprived of their liberty
- the validity of lasting and enduring powers of attorney
- the appointment of deputies.

Decisions about whether an application should be made to the Court of Protection must be informed by the MCA Code of Practice and case law. Those people who have a legal duty to follow the MCA Code of Practice should ensure that cases are taken to the court when they meet the conditions set out in the Code. This includes the employees of local authorities, National Health Service (NHS) trusts and care providers, general practitioners and Independent Mental Capacity Advocates (IMCAs).

When the Court of Protection must be accessed

The Code of Practice confirms some of the situations when decisions **must** be taken to the Court of Protection (Section 8.18). These are:

- the proposed withholding or withdrawal of artificial nutrition and hydration (ANH) from a patient in a permanent vegetative state (PVS)
- cases where it is proposed that a person who lacks capacity to consent should donate an organ or bone marrow to another person
- the proposed non-therapeutic sterilisation of a person who lacks capacity to consent (for example, for contraceptive purposes)
- cases where there is a dispute about whether a particular treatment will be in a person's best interests.

Practice Direction 9E (PDF) of the Court of Protection provides further information about which serious medical treatment cases should be heard by the court.

Case law has set out when a case involving a termination of pregnancy must be taken to the Court of Protection. This includes situations where:

- there is a dispute about capacity
- the patient may regain capacity during or shortly after pregnancy
- the decision of the medical team is not unanimous
- the patient, the potential father or the patient's close family disagree with the decision
- the procedures under section 1 of the Abortion Act have not been followed or

- there are other exceptional circumstances, for example the pregnancy is the patient's last chance to conceive (see *D v An NHS Trust (Medical Treatment: Consent: Termination)* (2004) FLR 1110).

When the Court of Protection should normally be accessed

The Code of Practice also provides details of situations when the Court of Protection **should** be accessed. This includes cases where:

- There is doubt about whether withholding or withdrawing life-sustaining treatment is in the patient's best interests (5.33).
- There is a major disagreement regarding a serious decision, which cannot be settled in any other way; this includes where a person should live (6.12 and 8.28).
- It is unclear whether proposed serious and/or invasive medical treatment is likely to be in the best interests of the person who lacks capacity to consent (8.24).
- There is genuine doubt or disagreement about the existence, validity or applicability of an advance decision to refuse treatment (8.28).
- A family carer or a solicitor asks for personal information about someone who lacks capacity to consent to that information being revealed (8.28).
- Stopping or limiting contact with a named individual because of a risk of harm or abuse to a person lacking capacity to decide on the contact (8.28); the **DH (2010) has said that Deprivation of Liberty Safeguards should not be used in non-contact cases other than as a short-term measure.**

Example

Fred has advanced throat cancer. He had capacity to make the decision about starting chemotherapy to treat his cancer but his condition has now progressed and he has been assessed as lacking capacity to make a decision about whether to continue with this treatment. The medical staff believe that further chemotherapy is not in Fred's best interests, particularly because the prognosis is not good, and in order to receive the treatment he has to be restrained, causing him a great deal of distress. His son and daughter disagree and state that their father would want the medical staff to do everything they could to treat his cancer. The primary care trust responsible for Fred's treatment applies to the court for a decision.

Example

Anna has dementia and lacks capacity to decide where to move following the closure of her current care home. There is dispute between the IMCA and local authority about which option is in Anna's best interests. The IMCA who was instructed for the accommodation decision is concerned that the option proposed by the local authority will severely limit the opportunity for contact with the few people she does know and she counts as friends. Anna enjoys going out but the home proposed has poor access to public transport, shops and other facilities. They have visited the new home with Anna, who displayed clear signs of not wanting to move there. The local authority will not reconsider its decision. The IMCA draws its attention to the Code of Practice and the local authority makes an application to the Court of Protection for a decision.

Example

A safeguarding adult alert has been raised about Faye, who has autism. There are concerns that she is being neglected and financially abused in the family home. Faye has been assessed as lacking capacity to make decisions on these matters. The local authority is proposing to move her to a care home against the wishes of her family. It wants to put some restrictions on Faye's contact with her family after a move. The local authority makes an application to the Court of Protection regarding Faye's residence and contact with her family.

The Court of Protection can be used to authorise deprivation of liberty outside a care home or hospital (where the Deprivation of Liberty Safeguards can not apply). See, for example, [\[2009\] EW Misc 10 \(EWCOP\) – The PCT v P, AH & The Local Authority](#).

In **Re A (Adult) and Re C (Child); A Local Authority v A** (2010) EWHC 978 (Fam), Mr Justice Munby (now Lord Justice Munby), gave further guidance when a court should or must be accessed. He stated at paragraph 68:

'Section 47 apart, if a local authority seeks to control an incapacitated or vulnerable adult it must enlist the assistance of either the Court of Protection or the High Court.'

And in the following paragraph (69), he stated:

'The local authority, it is to be noted, may provide advice and assistance, but there is nothing to suggest that it can intervene to regulate or control matters without judicial assistance.'

In paragraph 96, he stated:

'What emerges from this is that, whatever the extent of a local authority's positive obligations under Article 5, its duties, and more important its powers, are limited. In essence, its duties are threefold: a duty in appropriate circumstances to investigate; a duty in appropriate circumstances to provide supporting services; and a duty in appropriate circumstances to refer the matter to the court. But, and this is a key message, whatever the positive obligations of a local authority under Article 5 may be, they do not clothe it with any power to regulate, control, compel, restrain, confine or coerce. A local authority which seeks to do so must either point to specific statutory authority for what it is doing – and, as I have pointed out, such statutory powers are, by and large, lacking in cases such as this – or obtain the appropriate sanction of the court. Of course if there is immediate threat to life or limb a local authority will be justified in taking protective (including compulsory) steps: *R (G) v Nottingham City Council* [2008] EWHC 152 (Admin), [2008] 1 FLR 1660, at para [21]. But it must follow up any such intervention with an immediate application to the court.'

As seen above, the Court of Protection should not only be accessed when there is a dispute. The motivation to access the court could be to ensure that the person can access the *additional safeguard* that the courts have to offer for decision-making – particularly where the outcomes of the decision could have serious consequences for the person. This means that someone trying to get a decision addressed by the court

need not be in dispute about the decision or have a view about what decision should be made.

Example

An IMCA is appointed for Seema, a woman with learning disabilities and mental health needs. After a case of financial abuse where she lost several thousand pounds, a mental capacity assessment was completed. The assessor concluded that she lacked capacity to make decisions for large amounts of money and recommended that there should be an application for a deputy to be appointed. Seema was unhappy with this outcome. In response, a further assessment was arranged with a different assessor, which found that she did have capacity. The IMCA believes that the Court of Protection should make a decision on her capacity to manage her finances, particularly because she has a lot of money and this was not the first time she had been financially abused. The local authority makes an application to the Court of Protection to make a decision about Seema's capacity to make financial decisions, and to appoint a deputy if required.

Does there have to be a dispute?

Often there will be a dispute when the option to access the Court of Protection is being explored. For example, a family member, advocate or the person themselves may have a strong view about what is in the person's best interests, which may differ considerably from that of the local authority or health trust. Where there is a dispute it is important to consider alternatives to legal action. These include:

- Informal resolution processes, such as best interests meetings and mediation.
- Following a complaints or disputes resolution procedure.
- Referring concerns to the relevant ombudsman.

When judicial review may be an option

The Court of Protection can only make decisions that could be made by the person who lacks capacity themselves, for example whether they have capacity or what is in their best interests.

If a person disagrees with a decision made by a local authority or primary care trust, an option for challenging such a decision is to apply for judicial review. Judicial review is a form of court proceeding where a judge reviews the lawfulness of a decision or action made by a public body. In general terms, judicial review may be appropriate where the challenge is based on an allegation that the public body has taken an unlawful decision or action, and there is no adequate alternative remedy. Applying for judicial review will usually only be considered if the disagreement cannot be resolved following a formal complaints procedure. Judicial review involves the court in deciding not whether the public body has made the 'right' or 'correct' decision, but whether the correct legal basis has been used in reaching it.

For example, a recent judicial review found that a local authority had failed to consult adequately when making the decision to move a man with autism ([\[2011\] EWHC 696 \(Admin\)](#)).

Example

Mavis had lived in a specialist nursing unit for people with dementia for three years. She was assessed as lacking capacity to make decisions about where she lived. A continuing NHS healthcare review was undertaken and found that she no longer qualified for NHS funding. The local authority was unwilling to fund the cost of her current service, which meant that she would need to move.

Mavis' carers were very concerned of the potential impact on Mavis of a move. The following options were available to them:

- making an application for a judicial review of the health trust's decision that Mavis no longer qualified for continuing care
- making an application for a judicial review of the local authority's decision not to continue to fund her in her current service
- making an application to the Court of Protection to ask for a legal judgment about where it is in Mavis' best interests to live.

As is seen in the case study above, at times there may be a choice of challenging decisions through either judicial review or application to the Court of Protection.

Further information about judicial review can be found on the [HMCS website](#).

Who should apply to the Court of Protection

Application by the local authority or NHS trust

In cases where an application should be made to the Court of Protection, the Code of Practice puts the responsibility to do this with the decision-making body. In most cases this will be a local authority or NHS trust (see Code of Practice, Section 8.8).

Therefore, if anyone considers that an application to the Court of Protection should be made by a local authority or NHS trust, the first step is to remind them of their responsibility under the MCA. This is how many cases involving IMCAs have been brought to the court to date.

Where a local authority or NHS trust fails in its responsibility to make an application to the Court of Protection, an application may need to be made by another party. The options are set out below.

Application by the person

The person may want to be supported to make an application to the Court of Protection themselves.

In accordance with the first principle of the MCA, it should not be assumed that the person is unable to make an application to the court themselves. If the person has capacity to do this, or to instruct a solicitor to do this, they should make the application. In many cases they will need support to do this, and this could be a role that an IMCA or family member fulfils.

Application by the Official Solicitor

The Official Solicitor (OS) acts as litigation friend of last resort for people who lack capacity to instruct a solicitor for themselves. The OS acts as litigation friend in many different types of court proceedings. In welfare disputes where an application has already been made to the Court of Protection, the Court will usually invite the Official Solicitor to act for the subject of the proceedings.

If anyone believes that a person who lacks capacity should have legal support to make an application to the Court of Protection, an option is to contact the Official Solicitor's office to see whether they are able to agree that the OS can act as the person's litigation friend for the purpose of making the initial application.

The MCA Code of Practice provides the following guidance for IMCAs:

'The first step in making a formal challenge is to approach the Official Solicitor with the facts of the case. The Official Solicitor can decide to apply to the court as a litigation friend (acting on behalf of the person the IMCA is representing). If the OS decides not to apply himself, the IMCA can ask for permission to apply to the Court of Protection (10.38).'

As the OS acts as litigation friend of last resort, they may feel that there is someone else available to take on this role for the purpose of bringing proceedings, for example, the person contacting them, including if this is an IMCA.

The OS may not agree to act as litigation friend for the person in order to make the application to the Court, especially where there are other parties who could more properly make the application. However, this does not mean that the OS will not be involved with the case at a later date as they may be invited to act by the Court once an application has been made.

The Official Solicitor may consent to act in order to bring an application if all the circumstances indicate an application is appropriate and no-one else is prepared to bring the application or act as litigation friend. The Official Solicitor's office is prepared to discuss cases to see whether he will consent to act for the purposes of making an application.

If the OS does agree to act as litigation friend, he will instruct private solicitors to represent the person who lacks capacity and the person will still be liable to pay legal fees, unless he or she is eligible for legal aid.

You can find contact details for the OS in Appendix 1.

Application by the Public Guardian

The role of the Public Guardian is to protect people who lack capacity from abuse. The Public Guardian does not make applications to the court about decisions regarding a person's treatment or welfare, but they can make an application to the court where concerns are raised about the way in which attorneys and deputies are carrying out their role.

Application by a third party, including family members and IMCAs

Anyone can seek permission to apply to the Court of Protection on behalf of someone who lacks capacity to make the application themselves. This includes:

- family members and friends
- professionals and paid carers
- advocates, including IMCAs and volunteers.

The MCA Code of Practice provides the following guidance to IMCAs:

‘IMCAs may use complaints procedures as necessary to try to settle a disagreement – and they can pursue a complaint as far as the relevant ombudsman if needed. In particularly serious or urgent cases, an IMCA may seek permission to refer a case to the Court of Protection for a decision (10.37).’

The application can be submitted either in the name of the person submitting the application or in the name of the person to whom the decisions relate. If the latter applies, they will be making the application as a litigation friend.

What is a litigation friend?

A solicitor can only act on the instructions of their client. This is called ‘instructing’ a solicitor. Where a person does not have capacity to instruct a solicitor, a litigation friend should be appointed. A litigation friend directs the case on the person's behalf, including instructing any solicitor appointed. The role does not require specialist training or legal expertise and is usually undertaken by someone who has a close relationship with the person, for example a family member.

What are the rules about who can be a litigation friend?

Rule 140 in the Court of Protection rules states:

140 ‘(1) A person may act as a litigation friend on behalf of a person if he:

1. can fairly and competently conduct proceedings on behalf of that person; and
2. has no interests adverse to those of that person.’

In many cases, family members would be able to act as litigation friends, as long as there is no conflict of interest, for example in relation to assets or money. In many

cases, IMCAs would also satisfy these requirements and a number of applications to the Court of Protection have been made by IMCAs using this route.

Why apply as a litigation friend?

One advantage for third parties in making an application as a litigation friend is access to financial support. The person may qualify for a reduction in the application fee and legal aid to cover other legal costs including engaging a solicitor.

Where the application is in the name of another individual, such as a family member or IMCA, they or their organisation will be liable to pay any the legal costs. However, it is important to remember that the individual themselves may qualify for legal aid and could therefore make the application in their own name.

The funding given to local authorities to cover the costs of implementing the MCA factored in the likelihood that local authorities, or occasionally IMCAs, would need to make applications to the Court of Protection. This is covered further in the ADASS/SCIE IMCA **commissioning guidance**.

It is good practice to inform the OS when making an application to the Court of Protection as a litigation friend.

Instructing a solicitor

A person acting as a litigation friend can instruct a solicitor on the person's behalf. However, legal representation is not required to submit an application to the Court of Protection. The intention has always been for the court to be accessible without legal representation. If an application is made without legal support, it may be appropriate or necessary at a later stage of the case. The OS can be contacted for advice.

Solicitors' firms that deal with Court of Protection work can be found on the Law Society's website, details of which can be found in Appendix 1.

Legal aid

Where there is possible eligibility for legal aid, contact should be made with a solicitor firm that deals with legal aid cases in addition to dealing with Court of Protection work. The easiest way to do this is to call Community Legal Advice direct or to search for a firm on their website. Contact details can be found in Appendix 1. It may also be worth contacting local advocacy organisations, which may have developed links with local solicitors firms that deal with Court of Protection work.

At the first meeting with the solicitor, all relevant documents should be brought to the meeting, including:

- information about the person's income (for example benefit statements)
- copies of any court documents relating to the case.

To qualify for legal aid, it will need to be shown that:

- the person receives particular benefits, or earns less than £16,500 and does not have savings or financial assets over this amount

- the potential benefit of the legal action justifies the cost
- the person is not eligible for alternative funding.

If the person has capital just over the legal aid limit of £16,500, it may be possible to arrange for them to be liable for fees only until their capital falls below the limit.

If a person has a litigation friend, it is likely that they lack capacity to make a decision about whether they wish to use their own money to take legal action if they exceed the capital limit. If the person has a property and financial affairs attorney or deputy, or an appointee, agreement from them that it is in their best interests to use their money in this way will need to be given to access these funds.

Any application for legal aid funding will normally need to go to the Legal Services Commission for consideration and, if successful, the legal fees will be funded by legal aid, and any help with the case from solicitors will be charged to the Legal Services Commission. This can include help with writing letters, preparing a witness statement and advice about who can represent the person at any hearing.

The Deprivation of Liberty Safeguards and legal costs

Free legal support is always available to people who at the time of application are deprived of their liberty under a standard authorisation, if they wish to challenge the authorisation in the court. The same right to make an application to challenge the standard authorisation without costs also applies to their relevant person's representative (whether they are paid or not) and 39C section IMCAs covering this role.

How to apply to the Court of Protection

Permission to apply

In some cases, to make an application to the Court of Protection, permission to do so from the court is needed. Permission is required for the following groups:

- local authorities
- NHS trusts
- family members or friends
- professionals
- advocates, including IMCAs (with the exception of the section 39C IMCA role).

The following have right of access to the court and do not need permission to apply:

- the person concerned
- the person's litigation friend
- attorneys appointed under a Lasting Power of Attorney to which the decision relates
- deputies appointed by the court for matters in relation to decisions the deputies have to make
- relevant person's representatives and 39C IMCAs
- the Public Guardian
- the OS

- the subject of an existing order of the court that names them as a person who can apply if the application relates to the matters raised in the existing order.

If there is uncertainty about whether permission is needed in a particular case, the Court of Protection can be contacted for advice. Contact details can be found in Appendix 1.

The application process

All of the forms referred to below can be located on the [HMCS website](#).

To make an application to the court, the following forms need to be completed:

- [COP1 \(PDF\)](#) - Application form
- [COP1B \(PDF\)](#) - Supporting information for personal welfare applications (this can be done once permission is granted, but submitting it now will save later delay)
- [COP2 \(PDF\)](#) - Permission form (if needed)
- [COP3 \(PDF\)](#) - Assessment of capacity form

If making an application as a person's litigation friend, the forms should be filled out in the person's name and signed by the litigation friend. The litigation friend will then take on the role of applicant.

The cost of the application

Applying to the court costs £400, which must be paid at the time of making the application. Cheques are payable to the 'Court of Protection'.

The applicant may be exempt from the paying the fee if they are in receipt of certain benefits. They may, alternatively, qualify to pay a reduced amount if they are on a low income or have assets of less than £16,500. Further guidance on this can be found in the Court of Protection guidelines on the [direct.gov website](#). If these provisions apply, the applicant should complete a [COP44 \(PDF\)](#) form along with the application forms listed above.

Legal aid is available to cover the cost of applications by people who are deprived of their liberty under a standard authorisation, their relevant person's representative or 39C IMCAs.

What happens next?

Once filled in, the relevant forms, with payment if applicable, should be sent to:

Court of Protection
Archway Tower
2 Junction Road
London
N19 5SZ

Urgent and 'fast track' applications

There will be circumstances where an immediate decision needs to be made. In this situation, a person should contact the court and ask to speak to the 'urgent business officer' to discuss the case.

They can arrange for the application to be seen by a Judge. This service is available on weekdays during office hours. Outside of these times, a person should telephone the Royal Courts of Justice and ask to speak to security, who will put them in contact with the relevant clerk. Contact details can be found in Appendix 1.

Examples of urgent decisions include:

- Whether to treat a person who lacks capacity to consent with chemotherapy for their cancer and there is dispute about what is in their best interests
- Whether to perform major surgery (such as open heart surgery or neurosurgery) on a person who lacks capacity to consent and there is dispute about what is in their best interests
- An application for an urgent Deprivation of Liberty Safeguards authorisation where it is thought that a person who lacks capacity is being unlawfully deprived of their liberty.

It is important to highlight that this process is only to be used when an immediate decision needs to be made. [Practice direction 10B \(PDF\)](#) states:

4 'In some cases, urgent applications arise because applications to the court have not been pursued sufficiently promptly. This is undesirable, and should be avoided. A judge who has concerns that the facility for urgent applications may have been abused may require the applicant or the applicant's representative to attend at a subsequent hearing to provide an explanation for the delay.'

In *Re A (Adult) and Re C (Child); A Local Authority v A* [2010] EWHC 978 (Fam), Lord Justice Munby cautions further about the use of urgent application in all but the most serious of cases:

"Too often, in my experience, local authorities seeking the assistance of the court in removing an incapacitated or vulnerable adult from their home against their wishes or against the wishes of the relatives or friends caring for them, apply *ex parte* (without notice) and, I have to say, too often such orders have been made by the court without any prior warning to those affected and in circumstances where such seeming heavy-handedness is not easy to justify and can too often turn out to be completely counter-productive... it seems to me that, generally speaking, a local authority will only be justified in seeking a without notice order for the removal of an incapacitated or vulnerable adult in the kind of circumstances which in the case of a child would justify a without notice application for an emergency protection order".

There may be circumstances where a decision needs to be made quickly but not urgently, for example if a person thinks that the timing of a decision is going against the person's best interests. In this situation, the court may agree to 'fast track' the case.

Similarly to the process for urgent applications, the person should contact the court and ask to speak to the 'fast-track business officer' to discuss the case. This process is used in regards to financial decisions where a person is at risk of losing money in the interim period.

The Court's response to applications

Introduction

If permission to apply has been sought, the court will first consider whether it will grant permission to apply. In doing this, it will have regard to:

- the reasons the application is being made
- the benefits to the person of the application
- whether the benefits can be achieved any other way.

Within 14 days, the applicant will be notified by the court that:

- permission has been granted
- permission has been refused or
- a date has been fixed for a hearing of the application for permission.

If permission is granted and the application has been completed correctly, proceedings will begin. The applicant will receive a copy of the application form stamped by the court and a series of blank forms:

- **COP5 (PDF)** - Acknowledgement of notification of an application to the court
- **COP14 (PDF)** - Proceedings about the applicant in the court (if the applicant is not the person)
- **COP15 (PDF)** - Notification for others that an application has been made (and guidance notes for completing this)
- **COP20A (PDF)** - Certificate of service for form COP14
- **COP20B (PDF)** - Certificate of service for all other forms.

As soon as the applicant has these forms, they must use them to notify the relevant parties that proceedings have begun, as explained below. This must be done within 21 days of the date on the form.

Notifying others

There are people that the applicant must notify that court proceedings have begun. If the applicant is the person themselves, does not have a litigation friend and has not instructed a solicitor, it is likely that they will need support with this process. This could be provided by family, friends, carers or an IMCA.

The person to whom the application relates (if not making the application themselves) should be given:

- a copy of the application and any supporting documents
- a completed COP14 form

- a blank copy of the COP5 form.

Anyone named as an opposing party (a respondent) should be given:

- a copy of the application and any supporting documents
- a blank copy of the COP5 form.

Relatives, IMCAs and anyone else named as likely to have an interest in section 4.2 of the application form should be given:

- a completed and signed COP15 form. Some of the questions are the same as those on the application form, and here the answers should be copied from the original form
- a blank copy of the COP5 form.

How to notify others

This process is referred to as 'serving' documents. A document is 'served' by:

- delivering it to the person personally
- delivering it to their home address
- sending it to that address, by first-class post or by an alternative method of service that provides for delivery on the next working day.

Once a document has been served, the applicant must complete a COP20 certificate of service form, and return this to the court within seven days. This provides evidence to the court that people have been notified. A separate form must be completed for each person.

What if the applicant cannot notify someone?

If for any reason the applicant is unable to serve a document, for example they do not know a person's address and are unable to contact them within the 21-day time limit, they must complete the COP20 form to explain the circumstances. This must be sent to the court within seven days of the latest date on which the documents should have been served.

What should a person do once they are notified?

A person served with a copy of the application form, COP5 and COP15 forms, must then decide whether they want to participate in the case. If so, they will need to apply to be joined as a 'party'. They will then have the opportunity to put forward their views about the case. This is done by completing the COP5 form and returning it to the court. This must be done within 21 days.

If an individual is not a party to the proceedings they do not have the right to participate in the case. An advocate, for example, may wish to become a party in the proceedings if they are concerned that the person's views and wishes will not be well represented without their involvement.

A party in the proceedings should consider whether they are happy to attend the Court of Protection with or without legal support.

What if a person has not been notified, but thinks they should be involved?

If a person has not been notified but wishes to participate in the case, they must make an application to the court to be joined as a party to the proceedings using a [COP10 \(PDF\)](#) form. This is referred to as an 'application notice' and should include:

- their name and address
- their interest in the proceedings
- whether they agree or disagree with what is being proposed, or propose an alternative
- if they disagree, the reasons why.

The signed and dated application notice should be sent to the court along with:

- a witness statement using a [COP24 form \(PDF\)](#) containing evidence of their interest in the proceedings and, if proposing an alternative to what is set out in the application, evidence that they will be relying on should the case progress to a hearing
- enough copies of the application notice for the court to serve on other parties to the proceedings.

The court will consider the application and if it decides to join the person as a party to the case, it will make an order to that effect.

IMCAs, for example, may wish to be a party to proceedings in cases where they have encouraged a local authority or health trust to make an application to the court because of a serious dispute about a person's best interests.

A person who is joined as a party can make an application to the court to remove themselves as a party to proceedings at any time.

What will the court do with this information?

Once the period of time allocated to notification and serving documents is over, the court will consider all of the information it has received in the COP5 forms from those who were served notice. The court will decide the next steps depending on what has been asked for in the application, and whether those notified have agreed, expressed objection, or suggested doing something different.

The court will then:

- **Make a decision based on the application without a hearing.**

If the matter is straightforward, and if nobody has objected to what has been asked for, or suggested doing something different, the court may make a decision based on the application alone. An example is where an application is made to appoint a deputy to manage a person's property and financial affairs and there is no objection to this. For

further information on what happens next in this situation, please refer to Part 6 – What happens when the court makes a decision.

- **Give directions about the application and next steps to be taken.**

The court may not be able to make a decision on the information that it has at this stage. It may give directions on what needs to be done in order that it can make a decision. Examples of directions are:

- provide additional evidence
- obtain the opinion of an outside agency, for example social services or a Court of Protection visitor
- decide whether anyone else needs to be involved in the case.

In this circumstance, all parties must follow the instructions given and provide any information that they are asked for. The court will then use this information to either make a decision or set a date for a hearing.

- **Or fix a date for the application to be heard by the court.**

The court may decide to set a date for a hearing. If this is the case, all parties will receive a letter from the court or a COP28 form. This is a 'notice of hearing' and will give details of when and where the hearing will take place.

Do I have to pay anything else, and if so, how much does it cost?

The hearing fee is £500, which is payable once the court has held a hearing to decide the application and has made the final order, declaration or decision. This is payable by the person who submitted the application. Some individuals are eligible for either a fee exemption or remission.

Preparing for and attending a hearing

Introduction

If they have not done so already, the person or their litigation friend may decide to instruct a solicitor at this point. The case management process will not be the same for every case that is heard at the Court of Protection. If a solicitor has been instructed they will advise the person/litigation friend on each part of the case as it progresses. The following section is intended to provide a guide to the key stages of preparing and attending a hearing.

Evidence

The court decides what will constitute the evidence for the case. They will send directions to the applicant, their representative and anyone else identified as a party, setting out:

- the issues of the case that will require evidence

- what evidence is needed to decide those issues
- which parties will provide this and in which format.

Disclosure

Disclosure means stating that certain documents exist. The court may, either on its own initiative or on the application of another party to the case, make an order for 'general' or 'specific' disclosure.

General disclosure is an order from the court that a party must:

- disclose any documents that could be used to support the person's case
- disclose any documents that could be used to oppose the person's case.

Specific disclosure is an order from the court that a party must:

- disclose a particular document or a type of document, for example bank statements
- look for a particular document in accordance with the directions of the court order, and disclose any document located as a result of that search.

If a request for disclosure is received, parties must draw up a list of the documents they have that fit into that particular category. This list must be sent to all other parties, and a copy sent to the court within seven days of service. If new documents come to light as the case continues, these must be added to the list and the updated version sent to all other parties and the court.

Parties have a right to see any document in the list. If a party wants to look at a document they must write to the relevant party who disclosed it and request a copy. They have a 14-day time limit to make it available.

If a party thinks they have a right or duty to stop another party looking at a particular document, they must write to them explaining why, for example this could be for reasons of data protection. If the party who is requesting it disagrees with these reasons, they should apply to the court for a decision about whether it can be withheld or not.

Example

The court may make an order for general disclosure. As a party to the case, an IMCA put their IMCA report, email correspondence, case notes and supervision record on the list. These could then be requested by another party. The IMCA must send copies to the party within 14 days.

Reports under section 49 of the MCA

The court may request that the following agencies submit a report on a particular issue relating to the person:

- the Public Guardian
- a Court of Protection visitor

- a local authority or NHS body officer or employee
- any other person that the local authority or NHS body considers appropriate (this could include an IMCA, even if they are not joined as a party).

The court will give directions explaining the subject matter they wish to be covered in the report. Further information about content of section 49 reports can be found in [Practice Direction 14E \(PDF\)](#).

The report will be sent to all of the parties involved. If a party wishes to question the person who has written the report, they can send the questions they want to ask to the court on a COP9 form. If the court decides that the questions are appropriate, it will put them to the report writer and ask for a response, which will be sent to all of the parties.

Example

John lives alone and has mental health needs. His flat is constantly filthy and he neglects his personal care. Serious concern has been raised about his welfare and the local authority does not believe he has the capacity to refuse the support it has offered him. John disputes this and his sister Fran has made an application to the court to dispute the decision that John lacks capacity to make decisions about his welfare.

The court requests that the local authority submit a section 49 report. The local authority nominates John's social worker Peter, to produce this. The court provides Peter with guidance on how to complete this report and Peter writes and submits the report accordingly. A copy of the report is sent to all parties.

Witnesses

If there is an issue that needs to be decided by witness evidence, this can be provided orally at a final hearing or in writing if there is no hearing. An IMCA may be called as a witness.

All witnesses must produce a witness statement. A witness statement is a written account of events and opinions. It provides the evidence that a person would be allowed to give if directed to do so at a hearing. If a party intends to rely on a witness statement, the court will give directions about how this should be served on other parties. A witness statement is written by filling out a COP24 form.

If a witness is called to give evidence at a final hearing, their witness statement is the main evidence that will be relied on and that they can be questioned about. The court may allow a witness to expand on the information submitted in their witness statement, particularly if something has changed since the witness statement was made. The court may allow a witness to give evidence through a video link or by other communication technology.

Summoning witnesses

If a party wants a person to attend the court hearing and give oral evidence, they must apply to the court to ask it to issue a witness summons to the person. This should be done on a COP9 form and must give the details of the person, and explain the reasons for wanting the proposed witness to appear.

The court will make a decision based on the application. If the court issues a summons, it is the responsibility of the party who has made the application to serve this on the witness and the other parties to the case. As long as this is done seven days before the date on which the witness is required to attend before the court, the summons is binding on that witness, and the witness must attend.

The witness should be offered reasonable expenses at the time at which they receive the summons.

Sometimes the court will decide that a person should give evidence before the hearing takes place and this evidence is used at the hearing. This is called a deposition. The court will send further information about when and where this will take place.

Example

James has severe learning disabilities and is suffering from bowel cancer. He does not have capacity to make decisions about his treatment. Lucy is appointed as James' IMCA. The doctor treating James believes he should be treated with chemotherapy and radiotherapy, but other hospital staff disagree that this is in his best interests. The hospital trust makes an urgent application to the Court of Protection and a hearing is scheduled to make a decision about whether James should have medical treatment. Lucy is called as a witness.

Getting ready for the hearing

Whether attending the hearing as an applicant, witness or party to proceedings, it is very important to ensure that you:

- know the date and time of the hearing, where the court is and how to get there
- have done everything the court directed to prepare the case
- have sent the documents requested to the court
- have all the documents you want to use at the hearing ready.

Attending the hearing

It is important to arrive in good time for the hearing. The hearing will not start before the time stated on the notice of the hearing, but may start later than expected, so you should be prepared to wait.

On arrival, you should report to the receptionist or the court usher. A note will be made that you have arrived and you will be told where to wait. The court usher will call out the name of the case when the case is ready to begin.

Hearings can either be 'in public' or 'in private'. Generally, Court of Protection hearings are heard in private, which means that, unless the court rules otherwise, the only people allowed to attend are the parties, the person who is the subject of the proceedings (whether or not a party), litigation friends, legal representatives and court staff. The hearing may take place in either a court room or the judge's room. All court proceedings are recorded.

The judge will normally want to hear first from the applicant, and then the respondent. Seeing someone give evidence helps the judge to decide whether or not that person is telling the truth.

Witnesses will normally be asked to swear (take an oath) that what is said or used as evidence to decide the case is true. An oath is taken on the appropriate holy book. If a witness objects to being sworn, they can give a promise to tell the truth (called 'affirming'). If they intend to do this, or take an oath on a particular holy book, good practice is to inform the usher before the hearing begins.

Each party, or their solicitor, will be given an opportunity to speak and ask the other person (and any witnesses) questions. This is called cross-examination. The judge may also ask you some questions.

A party to the case may have instructed a barrister, a specialist advocate. In this case, they will be asking questions rather than their solicitor.

Example

Elizabeth is a 63-year-old woman with arthritis and mental health needs. She is often in pain and lacks mobility. She lives at home with her daughter, Lola. Over the last 18 months, Elizabeth has become uncooperative, making it very difficult for the local authority to provide the services she needs for the right amount of time each day.

The local authority has taken the view that Elizabeth is capable of deciding whether to cooperate and accept the care services offered to her. Lola disagrees and believes that her mother lacks the capacity to decide whether to accept their services. The local authority makes an application to the court for a decision about Elizabeth's capacity.

Lola is called as a witness. She has completed a witness statement prior to the hearing and this provides the main evidence of her view about her mother's capacity. She attends the hearing and is asked questions by both the local authority solicitor and the judge. These questions are based on the evidence she has provided in her witness statement.

What happens when the court makes a decision

Introduction

Once the court has made a decision, every other party will receive a copy of this. The court's decision is referred to as an 'order'.

What if a party does not agree with the court's decision?

If the decision was made without a hearing, or without notice to any person affected by the order

In this situation, you or any person affected by the decision may apply to the court for the decision to be reconsidered. You have 21 days to do this from the date you receive the decision and the application should be made using a [COP9 \(PDF\)](#) form.

If the decision was made at a hearing

In this situation, you or any other party, or any person affected by the decision, may ask for permission to appeal against the decision. You have 21 days to do this from the date you receive the decision and the application should be made using a [COP35 \(PDF\)](#) form.

Cost orders following a decision

When it comes to costs in court proceedings that concern personal welfare decisions, there is usually no order made, that is, if an application is unsuccessful, the applicant will not be liable to pay anything except their own costs. Therefore, an IMCA or family member will usually not be liable for the costs of the other parties unless they have acted wholly unreasonably in their conduct in bringing or acting in the case. This is explained further in paragraph 159 of the Court of Protection rules:

‘Departing from the general rule

159.—(1) The court may depart from rules 156 to 158 if the circumstances so justify, and in deciding whether departure is justified the court will have regard to all the circumstances, including:

- (a) the conduct of the parties;
- (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
- (c) the role of any public body involved in the proceedings.

(2) The conduct of the parties includes:

- (a) conduct before, as well as during, the proceedings;
- (b) whether it was reasonable for a party to raise, pursue or contest a particular issue;
- (c) the manner in which a party has made or responded to an application or a particular issue; and
- (d) whether a party who has succeeded in his application or response to an application, in whole or in part, exaggerated any matter contained in his application or response.

(3) Without prejudice to rules 156 to 158 and the foregoing provisions of this rule, the court may permit a party to recover their fixed costs in accordance with the relevant practice direction.’

Key contacts

Community Legal Advice

Provides a list of solicitors firms that deal with legally aided Court of Protection work.
Various locations.

Telephone: 0845 345 4 345

Website: www.communitylegaladvice.org.uk/

Court of Protection

Archway Tower
2 Junction Road
London
N19 5SZ

Telephone: 030 0456 4600

Website: www.direct.gov.uk

For urgent applications outside of office hours: 0207 947 6000.

Office of the Public Guardian

PO Box 15118
Birmingham
B16 6GX

Telephone: 030 0456 0300

Email: customerservices@publicguardian.gsi.gov.uk

Website: www.direct.gov.uk

Official Solicitor

81 Chancery Lane
London
WC2A 1DD

Telephone: 020 7911 7127

Email: enquiries@offsol.gsi.gov.uk

Website: www.courtfunds.gov.uk/os/offsol.htm

Social Care Institute for Excellence

Golding's House
2 Hay's Lane
London
SE1 2HB

ADULTS' SERVICES

Telephone: 020 7089 6840

Email: imca@scie.org.uk

Website: www.scie.org.uk/mca

The Law Society

Provides a list of solicitors firms that deal with Court of Protection work.

The Law Society's Hall

113 Chancery Lane

London

WC2A 1PL

Telephone: 020 7242 1222

Website: www.lawsociety.org.uk/home.law

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