

A basic guide to the Court of Protection

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Who is this guide for?

This guide gives you a basic explanation about the Court of Protection in England and Wales. It is not an official document, but it is for people who are involved in proceedings in the Court of Protection, or who want to find out if the Court of Protection can help them or someone they know. Most of the guide is about **welfare cases**. These are cases about where people should live, what care they should receive, and who they should be able to spend time with. Some of the guide is also relevant to **property and financial affairs cases**.

In all courts there are words used that are familiar to those that work in the court, but may not be familiar to others. If you do not understand some of the words in this guide, please look at the [glossary](#), which gives explanations about what the words in **bold text** mean.

If you are going to attend a welfare hearing, you may also want to read the guide by Jakki Cowley, an **advocate**, as to what you might expect. You can find the guide on this page [here](#).

Who wrote this guide?

This guide is based upon a guide first written by Victoria Butler-Cole QC, a **barrister**. It has been written by Victoria, Alex Ruck Keene (another barrister), Sarah Castle (**the Official Solicitor**), and Jakki Cowley (an **advocate**).

What is the Court of Protection?

The Court of Protection is a court in England and Wales that can make decisions on behalf of people who cannot make their own decisions because of something in their mind or brain, for example dementia, autism, or a brain injury.

The person who lacks **capacity** is known as “P” in the proceedings. In part, this is for simplicity so that everyone knows who is being discussed.

The Court is not just in one place – a Court of Protection hearing could be in the Royal Courts of Justice in London, in First Avenue House in London, or in a county court outside London. There are lots of different judges who are part of the Court of Protection.

What can the Court of Protection do?

The Court of Protection can:

- Decide whether or not a person is able to make their own decision or decisions about a particular thing or things
*This is called deciding whether someone has **capacity** to make their own decision. A person who cannot make their own decision ‘lacks **capacity**’ to make it.*
- Make a decision for someone who cannot make that decision for themselves.
*This is called making a **best interests** decision for someone who lacks **capacity**.*

The Court of Protection **CANNOT** make a decision on behalf of someone who has **capacity** to make that decision for

themselves.

The Court of Protection **CANNOT** choose something for a person which is not available. For instance, the Court of Protection cannot tell a doctor to provide medical treatment which the doctor does not think will work. Nor can it tell a local authority to provide a service which the local authority does not think is required to meet the person's needs.

What is the law that applies to the Court of Protection?

The Court of Protection was set up by the **Mental Capacity Act 2005**. The court applies the rules that are in that Act. The court is also required to make decisions that respect people's human rights under the **Human Rights Act 1998**, including the right to a fair hearing, and the right to respect for private and family life.

These are other rules and guidance that apply to the court:

- The Mental Capacity Act Code of Practice
- The Mental Capacity Act Deprivation of Liberty Safeguards Code of Practice
- The Court of Protection Rules
- Court of Protection Practice Directions

All of these can be found online, the easiest place being via this link here: <https://courtofprotectionhandbook.com/legislation-codes-of-practice-forms-and-guidance/>

Do all decisions for people who lack capacity have to be made by the Court?

No. Usually, if someone lacks **capacity** to make their own decisions, their family and carers will be able to make decisions for that person, by deciding together what is in that person's **best interests**. It means, in particular, trying to see matters from the person's own point of view.

If everyone agrees about the person's **best interests**, then, in very many cases, there will be no need to go to the Court. There may still be some situations where it is necessary for the Court to be involved: for instance, to appoint a **deputy** to manage the person's money.

Sometimes, family members or carers may disagree with each other, or with social workers, nurses or other professionals.

Sometimes, families, carers and professionals will all agree what should happen, but the person themselves may disagree – for example, an elderly person who does not want to move into a care home, even though everyone else thinks this would be the best way to keep them safe. If people cannot agree with each other, the Court should be asked to decide.

The Court can make decisions about:

- **welfare** – for example where someone should live, what care they should receive, and whether they should be allowed to see their friends and relations.

- **medical treatment** – in particular treatment which might have serious consequences for the person if it is given (or not given)
- **property and financial affairs** – for example, whether someone is a suitable person to hold a **Lasting Power of Attorney**, whether a **deputy** should be appointed to manage the person's money, or whether a **statutory will** should be written for P.

Before any case goes to Court those involved must think about whether there is another way in which to resolve the situation, for instance by way of **mediation**.

What does the Court have to do with deprivation of liberty?

The **Deprivation of Liberty Safeguards** ('DoLS') are part of the Mental Capacity Act. A person can be deprived of their liberty in a hospital or care home under an **urgent** or a **standard DOLS authorisation**. There are special protections in place for the person, including support by a **Relevant Person's Representative**. More details about the DoLS can be found in the **DoLS Code of Practice**.

If they are, it is possible to apply to the Court under section 21A of the Mental Capacity Act 2005 to ask it to look at the situation. Section 21A cases are similar to other Court of Protection cases, but are often more urgent. Different rules apply about legal aid in these cases.

If a person is deprived of their liberty outside a hospital or care home, or they are under 18, the DoLS cannot be used. A public body – usually the local authority – can apply to the Court to authorise the deprivation of liberty. There is a special process for this where no one disagrees that the deprivation of liberty is in P's **best interests**, which means that it is possible for the Court to make the order without a hearing. This is sometimes called 'community DoL' or 'Re X' (after the case where the Court set down the special process).

How does the Court decide what to do?

The Court decides what to do by getting all the evidence it needs, and by speaking to the people who are involved. This means that documents about P will need to be shared, for example social services records, or P's bank statements.

People who want the court to listen to their view will need to write witness statements which say what they think should happen, and explain their views.

Sometimes, the judge will decide that they need to get more information directly, rather than being provided it by one of the parties. Sometimes they might ask for a **s49** report from a **Visitor**, who could be a **General Visitor** (who may have a social work, advocacy, nursing or finance background) or a **Special Visitor** (a psychiatrist) who will visit P and give a report to the court. Sometimes they might require a local authority or an NHS body to provide particular information to the court. Sometimes they might ask an independent expert to give extra advice. This

could be advice about whether P lacks **capacity** to make their own decisions, or advice about what the effect would be on P of the different choices that are available.

How will my case be dealt with?

Exactly how the court will deal with the case will depend upon the type of application. Many cases are decided without a Court hearing, especially those relating to the person's property and affairs. Where the Court makes a decision without a hearing, it is called making a decision '**on the papers.**'

The Court has 'pathways' for different types of case. The first step in most welfare cases is for a judge to read the application, and give the person who has made the application permission to proceed. They will also have to think about P will take part (see below).

In a **welfare** case, the Court will arrange a **Case Management Conference** to decide what steps to be taken to allow it to answer the questions before it. It will also have to work out how to make sure it has before it the evidence that it needs, for instance, medical records or social services records. How many further hearings will be required before the Court will finally be able to decide the case will depend upon how complicated the case is.

In some cases, the judge may decide to have a **fact-finding hearing**, if there are major disagreement about important things that happened in the past which are still relevant to what is best for P now.

If the parties cannot reach agreement and allow the Court to

make a consent order, the case will continue towards a final hearing. This means that there is likely to be what is called an **Advocates Meeting**, at which the solicitors and barristers involved will try to make sure that the judge at the final hearing is only asked to answer those questions which really have to be answered. If you do not have a solicitor or a barrister, you should be invited to the Advocates Meeting.

There will then be a **Final Management Hearing**, at which the judge will make sure that everything is ready for the final hearing. At the final hearing, the court will hear all the evidence that it needs to be able to reach a decision.

In cases about a person's **property and affairs**, how the case will be decided will depend upon whether there is a dispute about any aspect. If there is no dispute, then the case is very likely to be dealt with without a hearing. If there is disagreement, then the Court will ordinarily arrange a **Dispute Resolution Hearing**. This is a chance to see whether the case can be resolved without the need for it to go any further. It is held entirely in private, and before a different judge who would then hear the case if the dispute cannot be resolved. In almost all circumstances, nothing said at the hearing can then be relied upon if the case has to continue. If the case has to continue, then a judge will decide what further steps are required to allow the Court to be able to answer the questions before it.

How will P take part?

The Court must always think about how P is to take part in the case.

In a welfare case, P will usually be a party. In a case about property and affairs (except for cases about **statutory wills** and making gifts) P will usually not be a party.

If P is to be a party, the judge will have to decide whether P has the **capacity** to make decisions about what to do in the case (sometimes called **litigation capacity**).

If they do not have this **capacity**, they will need to have a **litigation friend** or an **Accredited Legal Representative** to make decisions about what to do and to represent them. A **litigation friend** will often ask a lawyer to represent the person (often called ‘instructing a lawyer.’ An **Accredited Legal Representative** is a lawyer.

If P is not a party, the judge will still think about ways in which they can participate. In particular, if the judge will think about ways to find out what their wishes and feelings, beliefs and values are to help them make the right decision in their **best interests**. This might in some cases involve the judge going to see P.

Who is the Official Solicitor?

In some cases, P is represented by the Official Solicitor. She is a civil servant and a lawyer who is appointed by the government, but is independent of them. If there is no one suitable to act as **litigation friend** (and if arrangements can be made to meet her legal costs) then she can be the **litigation friend** for the person. She has staff who work on different cases in the Court of Protection.

If the person does not have **capacity** to make the decision for themselves, then the Official Solicitor has to decide what she will ask the court to say is in their **best interests**. The Official Solicitor has to act herself in the person's **best interests**. There may be some situations in which even though it is clear what the person would want to do, the Official Solicitor thinks that this is not in their **best interests**. This means that she has to make an argument to the court which may sound like the opposite of what the person wants. In every case, however, the Official Solicitor always has to make sure that the person's wishes and feelings are investigated and made clear to the judge.

Do I need to be a party?

You may not have a choice about being a party if you are named as a **respondent** by the **applicant**. In some situations you might be aware that there is a court case about someone you know and there might be things that you would like to say to the Court. Or, the court might make an order which tells you to decide whether you want to be a party.

The main difference between being a party and not being a party is that if you are a party, you are allowed to speak to the judge and say what you think should happen. But sometimes the judge will let you come to court hearings and say what you think even if you are not a party. The lawyers in the case can help you decide whether to be a party by explaining the options.

If you decide you do want to be a party, you will need to fill in the COP5 form which you can find at the website on page 21 and send it to the court. The rest of this document assumes that you

are a party to the proceedings.

What will I have to do?

You will need to read all the documents that are produced, so that you know what the evidence is.

You should write a **witness statement** which explains your views and tells the judge everything you think they need to know to help her make a decision.

Who will hear my case?

Most cases in the Court of Protection need a hearing are heard by **District Judges**. More serious cases are heard by **Circuit Judges**. The most serious cases are heard by **High Court Judges**.

Certain types of very straightforward decisions about P's property and affairs can be made by **Authorised Court Officers**, who are civil servants, supervised by judges.

What will happen at the hearing?

Exactly what will happen at the hearing will depend upon whether it is a hearing where the judge is deciding what information they need, or whether it is a hearing where they are going to make the final decisions.

At the moment, because of the effect of the Coronavirus outbreak, most hearings are being held by video or telephone. A useful guide to these 'remote hearings' written for non-

lawyers has been written by the Transparency Project: <http://www.transparencyproject.org.uk/remote-court-hearings-guidance-note/>. Although the guide is about hearings involving children, the same practical matters will apply about, for instance, technology.

If it is a hearing where final decisions are going to be made, it is important to remember that it is ultimately the judge who has to decide whether the person lacks **capacity** to make the decision and, if they do, what is in their **best interests**. Each party, including you, will need to be able to explain to the judge why they should make the relevant decisions.

The precise order that the hearing will take will vary. However, in general, it is usually the case that the applicant will explain first what they want to happen. Very often in welfare cases, the applicant will be a public body, such as a local authority or NHS Trust, will be legally represented. They almost always have sent to the court, and to you, a document called a position statement or skeleton argument, which sets out what they think the court should do. They are likely to have witnesses who can explain to the judge whether or not the person has **capacity**, and what they think is in their **best interests**. You will get the chance to ask questions of those witnesses (cross-examine). The judge can help you ask appropriate questions. The judge will also be able to ask questions of the witnesses.

It is always helpful to try to write down the most important questions that you want to ask before you go into the hearing, so that you don't forget anything.

You can take a friend with you into a hearing, who can help you by writing down things that other people say, and reminding

you about the questions you wanted to ask. They may be able to speak to the judge too, if the judge agrees. This person is known as a **McKenzie friend**, and they must promise to obey any orders that the judge makes about what information can be shared outside court.

You do not necessarily have to speak to the court (which is called giving evidence), but the judge is likely to want to hear from you why you think (for instance) it is in P's **best interests** to return home. If you give evidence, the other parties – and the judge – will be able to ask you questions.

It is important to remember that this is not a test, so there are no right or wrong answers. Especially in cases concerning a person's **best interests**, the judge will want to get as much information as they can from you about the person. If you are talking about the person's values and what was or is important to them it is very helpful if you are able to offer examples: for instance, if you can tell the judge about particular experiences or conversations. You will probably have written down many of these things in your witness statement, but the court process is designed to make sure – if possible – all the relevant facts and information come out.

In some cases, you may need to talk about very personal or sensitive matters. This may feel particularly difficult if you are describing these to people you may not have met. Although the judge should be keeping an eye on this, it is always alright to say that you are finding things difficult or need a break.

Equally, if you have been asked a question and you do not understand it, it is always alright to ask the person asking it to repeat it or make it clearer.

At the end of the process of giving evidence, the judge will usually ask for closing submissions. This means that each party gets a final chance to explain to the judge what decision they should make.

If the judge is able to give a judgment on the spot, they will do so. Sometimes they will need a short break in which to gather their thoughts. Sometimes, they will not give judgment orally, but will ‘reserve’ the judgment – in other words, they provide it in writing after the hearing.

What should I call the judge?

You should be told what level of judge is hearing your case in the **order** that you are sent by the Court.

A District Judge is called Sir or Madam.

A Circuit Judge is called Your Honour.

A High Court Judge is called My Lord, or My Lady.

Can I attend a hearing if I am not a party to the case?

Most hearings at the moment are taking place remotely so ‘attendance’ here means attending either by video or telephone as opposed to being in the court room in person.

It depends:

- If you are involved in the case – for instance you are a witness – then you can, and you should have been given details of how to attend.

- If you have some other connection, because you are a family member, then it depends upon whether the hearing is being held in public. If it is being held in public, then you can attend and you will not need to ask anyone's permission. It is likely that the judge will ask you to sign a Transparency Order which will set out what you can and cannot say about the case, in particular about P. If the hearing is held in private, then you will need to ask the judge whether you can attend. If you do attend, the judge will explain what you can and cannot say about the case.
- If you are a member of the public, you can attend without doing anything if the hearing is in public. It is likely that the judge will ask you to sign a Transparency Order which will set out what you can and cannot say about the case, in particular about P. If the hearing is in private, you can ask the judge in advance whether you can attend. The judge will explain what you can and cannot say about the case. The Open Justice Court of Protection Project <https://openjusticecourtofprotection.org/> has more details as to how members of the public can attend remote hearings.

See also the section on confidentiality below under “what are the most important rules I need to know about?”.

What happens if I do not understand what is happening in the hearing?

The law has its own language. When referring to the past law or existing guidelines, acronyms may be used, or the name of a

judgment stated in a particular way. This has the advantage that it is a way of communicating that all the representatives understand. It is about putting the core facts or issues in a language that all legal representatives speak.

However, it is important to recognise there may be times it feels like a different language is being spoken (because it is) or a specific point is being made that is not clear to you. Whilst it may not always be necessary for you to follow every detail, the judge should make sure that you understand the most important points when they become relevant.

If you have not understood something, however, you should ask.

What are the most important rules that I need to know about?

- **Costs**

In welfare cases, usually everyone pays their own costs of taking part, including the costs of their lawyers. But, if you behave unreasonably, for example by ignoring court orders, or wasting the court's time, you may be told that you have to pay other people's costs. These can be very large amounts of money – tens of thousands of pounds. If you are worried about this, you should ask the judge what you need to do to avoid having to pay anyone else's costs.

In cases about a person's property and affairs, usually the costs are paid out of the person's own money. However, again, if you behave unreasonably, you might have to pay your own costs or those of others.

• Confidentiality

At the moment, because of the effects of the Coronavirus pandemic, almost all hearings are being held remotely. If the hearing is before a **High Court judge**, the hearing will be held remotely by way of video conferencing platform. The hearing will be in public. This means that it is possible to talk openly about the case, although it is very likely that the court will make an order (a Transparency Order) that means that you cannot tell people the name of P (unless they already know it) or details which might allow them to be identified. This only applies to talking about the court proceedings – you can still talk about P to other people as long as you don't mention the court case.

If the hearing is before a **District Judge** or a **Circuit Judge**, it will be held remotely, either by telephone or by video. It should, again, be possible for the public to have access.

There are some hearings which are held in private. This means that there are very strict limits on what you can tell people about the case and what documents you can show them. If you want to talk about the proceedings to other people, or show documents to anyone else, you must ask the judge first. Even if the hearing is in private, other people (including members of the public) can ask the judge whether they can attend. If they do attend, they cannot tell anyone else the name of the person who is the subject of the proceedings, or tell them details which might allow the person to be identified.

What can I do if I disagree with the

Court's decision?

If the decision was made without a hearing (sometimes called 'on the papers') you can ask the judge to reconsider the decision. You have to ask by using a COP9 application form, and need to do so within 21 days unless the order containing the decision gives a different period. If you did not receive the order until later, you should explain in the COP9 form why you did not receive it. Please see page 21 for the website address to download a COP9 form.

If you think that the Court has made the wrong decision, you can ask the judge who made the decision for permission to appeal against their decision. If they say no, you can fill in an application form, within 21 days, to ask another judge for permission to appeal. Please see page 21 for the website address to download the appeal forms.

What do I need to know about court forms and documents?

All the court documents are available on the internet. The documents about deputies and attorneys are on the Office of the Public Guardian website. Website links to these forms and the Court of Protection forms are at the end of this booklet.

If you want to ask the Court to decide something, you will probably need to fill in these forms: COP1 and COP3. You will also need to fill in COP1a if your case is about money or property. If your case is about welfare, you need to fill in a COP1b form.

You should also fill in a COP24 form which contains your witness statement.

If you want to use the section 21A procedure for challenging an urgent or standard authorisation under the deprivation of liberty safeguards, there are special forms, called COPDLA, COPDLB and COPDLC.

The form for making an application for ‘community deprivation of liberty’ is the COPDOL11 form. It is likely that this form will be being filled out mostly by a local authority or NHS body, but there are specific parts that you might be asked to look at. The lawyers for the public body should help you with what you need to do.

There are other special forms for applications to be made a Deputy (COP4) and applications that are about powers of attorney.

There are guidance notes on the internet to go with each form which tell you which forms you need to fill in, and what you should put in them. Make sure you read these guidance notes before you fill in the forms.

What happens if P dies?

The Court can only make decisions for P that P could have made himself. If P dies during the proceedings, the Court cannot make any decisions on behalf of P. The proceedings will finish. The only things the Court can still make decisions about are who should pay for the costs of the proceedings and also about whether any order made protecting P’s privacy should be continued.

When P dies, usually the parties will agree a **consent order** which can be sent to the judge, which will say that the proceedings have come to an end because P has died, and will explain how the costs of the proceedings are going to be paid for.

How can I get a lawyer to represent me in the Court of Protection?

You may be entitled to free legal representation in some cases, in particular if there is an **urgent or standard authorisation** in place, or if you receive a qualifying benefit. You should speak to a lawyer to find out whether you are entitled to legal aid to help you pay for a solicitor or barrister.

If you cannot get legal aid, but you cannot afford to pay for your own lawyers, you could ask the charity **Advocate** whether they can help you by finding a barrister who would work for free.

If you have some funds but cannot afford a solicitor and a barrister for all of the proceedings, you could look for a barrister who can be directly instructed (called Direct Access or Public Access) to represent you in a hearing. The **Bar Council** can tell you which barristers might be able to do this work for you.

Where can I get more help and

information?

Here are some organisations that may be able to help you:

- The Citizens Advice Bureau www.citizensadvice.org.uk
- Local or regional advocacy services, including Independent Mental Capacity Advocates or IMCAs
Ask your local authority or Council for details
- The Free Representation Unit www.thefru.org.uk
- Advocate (which used to be called the Bar Pro Bono Unit)
<https://weareadvocate.org.uk/>
- The Law Society www.lawsociety.org.uk
- The Bar Council Direct Access Portal
<https://www.directaccessportal.co.uk/access/>
- Support Through Court (for help during hearings)
<https://www.supportthroughcourt.org/>

Here are some websites that may be of use:

- The Mental Capacity Act Codes of Practice and booklets about the Act
 - www.gov.uk/government/collections/mental-capacity-act-making-decisions
- The Court of Protection forms and Practice Directions
 - <https://courtofprotectionhandbook.com/legislation-codes-of-practice-forms-and-guidance/>
- The Office of the Public Guardian forms
 - www.gov.uk/government/collections/lasting-power-of-attorney-forms
- Court of Protection caselaw

- www.bailii.org
- www.mentalhealthlaw.co.uk
- www.copcasesonline.co.uk

- Resources about **capacity** and **best interests**
 - www.3gessex.com/resources-and-training/mental-capacity-law/
 - www.scie.org.uk/mca-directory/