What is dementia?

Dementia is a group of associated symptoms connected to ongoing cognitive decline. It is a common condition here in the UK with approximately 800,000 people affected. Dementia manifests itself in everyone differently depending on the type of dementia such as Alzheimer’s disease, vascular dementia, dementia with Lewy bodies and frontotemporal dementia for example. The condition is generally progressive meaning that over time these signs will become more apparent or more severe. The rate of deterioration is an individual matter and lots of people live independently for years.

What are the signs?

Some signs of dementia are memory losses, difficulty planning or thinking things through logically, problems with communication, being confused, visual difficulties and mood changes.

What causes people to get dementia?

A common misconception about dementia is that it is just a part of getting old. Dementia is not a natural part of ageing. It happens when the brain is affected physically by a disease. The brain physically changes and over time, damage occurs to the brain cells and eventually the brain cells die. Damage to different parts of the brain has different effects on the individual.

The chance of developing dementia does increase with age. A recent statistic shows that 1 in every 14 people over the age of 65 has dementia. It is also shown to be more common in women than in men. This is not to say that younger people cannot get dementia. Over 17,000 younger people who are under the age of 65 have dementia in the UK, which is called young onset dementia.
Diagnosis

If you are experiencing any of these symptoms, our advice would be to visit your GP at first instance. The GP would be able to assess your condition and come to a conclusion about whether or not you are suffering from dementia. If you are diagnosed, then they would be able to give you valuable information to help you deal with the condition at your own pace. You would be able to gain information about what type, stage and severity of dementia that you are suffering from. Although this can be a frightening experience, knowledge is king and the information will arm you with the tools you need to look to the future.

Issue of mental capacity

More importantly, you will be able to discuss the issue of capacity, something which is closely associated with dementia. Together with your GP, you would be able to assess and discuss whether or not you have the capacity to make certain decisions. You might find that you would benefit from a little bit of help from a close relative or friend in making some or all decisions.

Mild cognitive impairment

Alternatively, some people are diagnosed with mild cognitive impairment which still symptomizes loss of memory, problems with thinking, language and issues with interpretation. These symptoms are not severe enough to be categorised as dementia and so are diagnosed with mild cognitive impairment. This guide may also be of assistance to anybody who has recently received this diagnosis.

Mental Capacity Act principles

When dealing with dementia, we must have regard to the Mental Capacity Act 2005 and its main principles. The Act is designed to protect people who may not be able to make certain decisions for themselves. The main principles are explained in section 1 of the Mental Capacity Act 2005:

1. A person must be assumed to have capacity unless it is established that he lacks capacity.
2. A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
3. A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
4. An act done or decision made, under this act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
5. Before the act is done, or the decision made, regard must be had to whether this can be achieved in a less restrictive way.
You may have already made an Enduring Power of Attorney which has been around for a number of years. A new Enduring Power of Attorney can no longer be made. However, if an Enduring Power of Attorney was created before October 2007, then this can still be used and registered. After October 2007, Lasting Powers of Attorney took the place of Enduring Powers of Attorneys. An Enduring Power of Attorney works similarly to a Lasting Power of Attorney but it is more general.

An Enduring Power of Attorney becomes valid from the moment the person giving the power, known as the donor, and the attorney(s), who are the individual(s) who have been given the power, sign the document. This is a key difference between a Lasting Power of Attorney and an Enduring Power of Attorney. With the Lasting Power of Attorney it needs to be registered with the Office of the Public Guardian before it can be used.

An Enduring Power of Attorney should be registered by the attorney at the point when they feel that the donor has become mentally incapable of handling their own affairs or is becoming this way. By registering the Enduring Power of Attorney, the attorney steps into the donor’s shoes to deal fully with the donor’s property and affairs. If the donor still feels that they are able to do some tasks then it is for the attorney and the donor to reach a conclusion about how they will do this. Under an Enduring Power of Attorney, the attorneys can act jointly or individually in their role. If the attorneys have been appointed jointly then all the attorneys must decide to register the document. If one disagrees, then the power cannot be registered.

Before Registering the Enduring Power of Attorney

The donor needs to receive notification that the Enduring Power of Attorney is to be registered. In addition, at least 3 of their relatives must be notified with the intention to register the document. The following categories are relatives who must be notified, in order of priority;

- Donor’s spouse or civil partner,
- Donor’s children (which includes adopted children but not step children),
- Donor’s parents,
- Donor’s brothers and sisters (including half siblings),
- Widow or widower or surviving civil partner of the donor’s child,
- Donor’s grandchildren,
- Donor’s nieces and nephews (only children of full siblings),
- Donor’s nieces and nephews (children of half siblings),
- Donor’s aunts and uncles (who are full siblings of a parent of the donor) and,
- Donor’s first cousins (children of the donor’s aunts and uncles who are full siblings of a parent of the donor).

In relation to the above categories, if one person is notified from a category then all members of that category must also be notified, not just 3. By way of an example if a donor is divorced with 8 children then all 8 children must be notified, not just 3 of them.

All reasonable attempts must be made to locate relatives. However, if they are untraceable, then the next relevant relative must be notified. If the donor has fewer than 3 relatives alive then this must be explained on the application form to the Office of the Public Guardian.

The process of notifying family members and the donor can be upsetting for the donor. If this is the case then an application should be made to the Court of Protection for notice to the donor to be dispensed with. The Court of Protection will need evidence to support the application for notice not to be given.

Objections

When a relative receives the form notifying them of the attorney’s intention to register the Enduring Power of Attorney, the relative is entitled to object to the registration. All objections must be dealt with...
before the Enduring Power of Attorney can be registered. Within the form there is a timeframe for the objection to be brought by and there are also grounds that the relative must satisfy to be able to object. Such grounds are:

• The Enduring Power of Attorney is not valid. This could be due to it not being properly executed or the donor could have lacked capacity when it was made;
• The Enduring Power of Attorney was cancelled previously;
• The application to register the Enduring Power of Attorney is premature because the donor is still mentally capable;
• Fraud or undue influence was used to induce the donor to create the document; or
• Under the circumstances the attorney is unsuitable to act on behalf of the donor.

When a valid objection is raised, the Court of Protection will decide whether to uphold or dismiss the objection. Notice of the objection will be sent to the attorney and the application will be frozen until the Court of Protection has come to a decision.

During the registration process, the attorney should act with caution when managing the donor’s affairs and only continue acting to prevent loss to their estate.

Registering the Enduring Power of Attorney

The application form must be accurately and honestly completed. It is an offence under the Mental Capacity Act 2005 to make false statements on an application which could lead to conviction. A specific form should then be submitted to the Office of the Public Guardian together with the original Enduring Power of Attorney and a court fee of £110.

Timescales of Enduring Power of Attorney

Registration usually takes 8 – 10 weeks after the application form has been sent and the family members have been told. The registered Enduring Power or Attorney will be returned to the attorney within 5 days of registration. If there are any objections, queries, indiscrepancies or mistakes, these must be resolved before registration can take place and therefore the registration process will take longer.

Attorney’s costs

Unless you are a professional attorney, who is somebody that acts as an attorney as part of their paid job, you will not usually be paid to be someone’s attorney. However you can sometimes claim expenses that you have incurred whilst carrying out your duties as an attorney such as travel costs, stationery, postage and making telephone calls. Receipts will need to be retained for these expenses.

After registration

After the Enduring Power of Attorney is registered, the attorney is now in an important role and so must answer to the Office of the Public Guardian or the Court of Protection if they have any questions regarding their actions. The attorney cannot retire from this position unless they give notice to the Office of the Public Guardian and obtain confirmation from the Court of Protection.

Under an Enduring Power of Attorney the attorney cannot make a Will on behalf of the donor. The donor may still be able to make a Will or codicil in the same way that they would have been able to prior to the Enduring Power of Attorney being made. However it should be noted that the Will or codicil is more likely to be challenged after the donor’s death on the basis that the donor lacked capacity. It is therefore advisable to seek legal and medical advice if the donor would like to create or amend a Will after the Enduring Power of Attorney has been registered.

Deed of Revocation

If you have read this guide through and have already made an Enduring Power of Attorney which has not been registered and think that you would like to make a Lasting Power of Attorney instead, then this can be done. To cancel an Enduring Power of Attorney whilst you still have mental capacity, you can make a ‘deed of revocation’ which is a statement cancelling the document. This needs to be kept with the Enduring Power of Attorney and not sent to Office of the Public Guardian. The document states that the Enduring Power of Attorney and any authority in the same is cancelled. You must inform the attorneys.

Cancelling a registered Enduring Power of Attorney

If you have already registered your Enduring Power of Attorney and still want to cancel this, then you must apply to the Court of Protection with evidence that you have the capacity to cancel the Enduring Power of Attorney. The correct form to do this is the COP1 form which is the general application form together with the COP24 which is the witness statement form. It costs £400 to apply to revoke an Enduring Power of Attorney.
Lasting Powers of Attorney

A Lasting Power of Attorney is a beneficial consideration for anyone but even more so for someone who has been diagnosed with dementia. It allows you to plan in advance who you would like to make decisions for you when the time comes and also what you would like them to be able to deal with. This is clearly a significant decision and we would advise you to choose someone that you trust and know well.

From October 2007, you can only make Lasting Powers of Attorney - one relating to your property and affairs and one relating to your personal welfare. You, as the person which is granting the power (the donor) must have mental capacity and be over the age of 18. The advantage of a Lasting Power of Attorney is that it allows you to have more control as to what happens to you if you were to lose mental capacity in the future. Dementia is a progressive condition; however it is difficult to predict how quickly or slowly the symptoms will worsen. This is why it is advisable to consider your future now.

Lasting Power of Attorney - Health & Welfare

This authorises someone to make decisions regarding the donor’s personal health and welfare when they lack mental capacity.

An example of the duties and responsibilities of the attorney would be making decisions regarding:

Where the donor should live;
- The quality of medical treatments that the donor receives;
- The withholding of medical treatment;
- Ordinary day to day decisions about the donor’s personal care such as meals, clothing and the activities the donor engages in.

An example of duties and responsibilities that the attorney cannot make are:
- Deal or manage any of the donor’s affairs or finances;
- Sell or manage property for the donor;
- Make any small, large, regular or irregularly gifts using the donor’s money.

Once an attorney has been chosen and the correct form completed, the power needs to be registered with the Office of the Public Guardian. This can take up to 10 weeks. When the donor loses mental capacity the power is then ready to be used.
Lasting Power of Attorney - Property & Affairs

This authorises someone to look after your finances and deal with your property if necessary. As an example, it might be suitable to appoint someone you trust to pay your bills or collect your benefits for you. This would lend a helping hand if dealing with money is just becoming too stressful and this is the support that you require to live well with dementia. Alternatively, it might be increasingly more difficult for you to travel to the bank in order for you to get access to your money and so a Lasting Power of Attorney is suitable here.

An example of the duties and responsibilities of the attorney would be helping to:

- Manage money and bills;
- Deal with bank and building society accounts;
- Deal/ sell property or investments;
- Manage pensions and benefits;
- Always act in the best interests of the donor;
- Always act within restrictions and guidance listed from the donor.

An example of tasks that attorneys cannot do is:

- Make decisions regarding medical treatment;
- Make decisions about where the donor lives;
- Make a Will on behalf of the donor;
- Make gifts to connected people on the donor’s behalf outside of usual occasions such as birthday or Christmas without the permission of the Court of Protection.

If you still feel comfortable with managing these types of tasks at present, then as the donor of this power you might include a restriction that the Lasting Power of Attorney can only be used when you lack capacity in the future. With this option, at present you have not given the power to make decisions to anyone else but at the right time, somebody who you previously have appointed will step into your shoes and take the stress away of making certain decisions. However on the downside of such a restriction, if you are not mentally incapacitated but are physically unable to do certain tasks due to, for example an accident, then the Lasting Power of Attorney cannot be used because the restriction only allows the attorney to gain power upon loss of mental capacity.

Gifts

An attorney can make gifts on a donor’s behalf providing that there are no restrictions contained in the Lasting Power of Attorney that stop them from doing so. However this is limited to relatives of the donor or people connected to the donor and only on such occasions as birthdays, wedding anniversary or Christmas. The value of the gifts should be reasonable and proportionate compared to the donor’s estate. Larger gift of money or property, possibly for tax planning purposes can only be made with the permission of the Court of Protection. Additionally, if the donor regularly gave to charity then this can be continued on their behalf. For more information regarding making gifts, please see our chapter on ‘Securing your children’s future’.
Complete legal guide to dealing with dementia

Choosing your Attorney(s)

As the donor, you can choose one or more people to become your attorneys when the time is right. If you do appoint more than one attorney, then you should consider whether you would like them to act jointly or separately when making decisions. As briefly touched on above, an attorney can be anybody over the age of 18 who has mental capacity themselves. This person might be a relative, a friend, a trusted professional such as a solicitor or your spouse.

You should consider:
• How well you know that person;
• Whether you trust them to make your decisions for you;
• Whether they will want to make your decisions for you or not;
• How well do they look after their own finances or make good decisions.

The Code of Practice and duties of an attorney

Another consideration when deciding on your choice of attorney should include whether someone will abide by the duties and responsibilities set out under Chapter 7 of the Code of Practice. The legal framework of the Mental Capacity Act 2005 is supported by this Code of Practice which provides information and explanation on how the Act works in practice. The Code of Practice has statutory force, meaning that certain categories of people have legal duties including an attorney and a deputy. Some duties and obligations set out in the Code of Practice are:

• A duty of care when making decisions on behalf of the donor;
• To carry out instructions as required by the Lasting Power of Attorney;
• A duty not to delegate the powers given to you under the Lasting Power of Attorney unless you have been authorised to do so;
• Not to personally benefit – this links to conflict of interest and the attorney should not put themselves in a position of conflict, particularly not to profit or acquire personal benefit;
• A duty of good faith, meaning to always act honestly and in good faith;
• A duty of confidentiality; to keep all affairs private and confidential unless the donor has consented to otherwise;
• To comply with the directions of the Court of Protection;
• Not to give up the role without notifying the Court of Protection and the donor.

Below are specifically in relation to Property and Affair Lasting Power of Attorneys:

• To keep the donor’s money and property separate; and
• To keep accurate accounts on all dealings as attorney.

The above duties and obligations should certainly be discussed with the potential attorney or at least considered by the donor before appointing them. The attorney should want to read about the duties in the Code of Practice because if they do not perform their duties properly, they may have to compensate the donor for any losses. Additionally any ill-treatment or neglect of the donor could result in a criminal offence. The penalty for this offence is a fine or imprisonment for a maximum of 5 years.

An influential factor may be looking at the responsibilities as an attorney. There are 2 different types of Lasting Powers of Attorney that can be made whilst someone still has capacity. Both need to be registered with the Office of the Public Guardian before they can be used – although the Lasting Power of Attorney for personal welfare can only be used after the donor has lost capacity.
How to make a Lasting Power of Attorney

A Lasting Power of Attorney is a safe way of maintaining control over the decisions that will be made for you when the time comes. The reasons why it is safe is because it has to be registered with the Office of the Public Guardian before it can be used. If another person tried to register a Lasting Power of Attorney without your permission, you would be able to make an objection to the Court of Protection to stop this. You may also choose someone to provide you with a ‘Certificate’ which demonstrates that they understand how important the role is. As another safeguard, you can also plan for certain people to be told about your Lasting Power of Attorney when the time comes for it to be registered. Again, these people should be trusted so that if they do not feel that registering the Lasting Power of Attorney now is appropriate they can raise their concerns with the Office of the Public Guardian.

Finally and most importantly, your attorneys must follow the Code of Practice in the Mental Capacity Act 2005. If the attorney does not act in your best interests then the Office of the Public Guardian can step in and assess the decisions. The attorney can be held accountable for their actions. We will come on to safeguarding further on in this guide.

To make a Lasting Power of Attorney, the correct forms need to be completed by hand or online and sent off. The forms need to contain lots of details about the attorney that you have chosen, need to be signed and also witnessed.

When to register your Lasting Power of Attorney

There is no set timescale in which your Lasting Power of Attorney needs to be registered. However, the sooner that it is registered, the sooner it can be used by your choice of attorney when necessary. It must be stressed that the Attorney cannot use the Lasting Power of Attorney until it is registered. The attorney’s contact details will need to be kept up to date and so if those details change before the power is registered, these details will need to be amended.

To register the Lasting Power of Attorney the person making the application must inform any person mentioned in the document of their intention to register the Lasting Power of Attorney. This is done through a specific form and gives the person 3 weeks to raise any concerns that they might have about registration. The next task would be to complete the additional form to accompany your complete Lasting Power of Attorney form. This form includes the instruction to register the Lasting Power of Attorney enclosed with it. The original or certified copy of these forms needs to be posted to the Office of the Public Guardian.

Costs & timescales

There is no fee for completing a Lasting Power of Attorney if no legal advice is sought. However, it is always advisable to seek legal advice when making such a significant decision. There is a fee of £110 payable when the document is registered although there are certain exemptions of payment. If the donor receives certain means tested benefits, then the exemption will apply and the £110 fee will not be payable. A 50% reduction may also be available based on the donor’s financial circumstances. We suggest that you contact the Office of the Public Guardian for further information on fee exemptions.
No Lasting Power of Attorney or Enduring Power of Attorney and the donor lacks capacity

If you have not previously made an Enduring Power of Attorney and no longer have the capacity to make a Lasting Power of Attorney, then there is still assistance from the Court of Protection. Someone such as a family member, or friend or even a carer can make an application to the Court of Protection for the appointment of a Deputy in relation to finances. A Deputy works in a similar way as an Attorney other than the Court has appointed them to manage affairs.

What is the Court of Protection?

The Court of Protection was created under the Mental Capacity Act 2005 and specialises in all issues relating to people who lack capacity to make decisions. The Court of Protection exists to ensure that all decisions made on behalf of a donor are done in their best interests. The Court of Protection and the Office of the Public Guardian work closely together and deal with the same issues. The Court of Protection makes the decision whilst the Office of the Public Guardian deals with the ongoing administration or investigation of the case.

What is a Deputy?

A deputy is similar to an attorney but the Court of Protection has appointed them instead of the donor. In most cases a close relative or spouse usually would apply to become a deputy. They would need to be over the age of 18 and have mental capacity. If there is not a suitable or willing relative or close associate, then a professional deputy will be appointed by the Court of Protection.

A property and affairs deputy manages and looks after the donor’s financial affairs. Similarly to attorneys, their duties include:

- Manage money and bills;
- Deal with bank and building society accounts;
- Deal with property or investments;
- Manage pensions and benefits;
- Always act in the best interests of the donor; and
- Always act within restrictions and guidance listed from the donor.

A deputy should not:

- Make personal welfare decisions if they are a deputy for financial affairs;
- Refuse medication prescribed by a responsible clinician if the donor is under the Mental Health Act 1983 or on leave from hospital;
- Make decisions regarding serious healthcare and treatment decisions.

A difference between an attorney and a deputy is that a deputy must account to the Court of Protection at all times. A Deputy must at all times respect the Code of Practice and will be held accountable if they do not.

An advantage of having a deputy is that someone will be able to help you manage your affairs if no Power of Attorney was previously in place. A disadvantage is that there is no certainty over who will be your deputy. The process can take a long time to finalise.
and for this period of time, your affairs are left unmanaged and vulnerable. Our advice would be to make a Lasting Power of Attorney to prevent any uncertainty regarding your future, if you are still able to do so.

Security bond

In order to help protect the donor’s assets, the Court of Protection would ask the deputy to provide a bond to the Court. The bond is not required if a power of attorney is in place. The size of the bond could be based on the size of the donor’s estate and the extent to which the deputy will have access. If the estate suffers through wrongdoing or misappropriation of the deputy then the Court of Protection may make a claim against the bond. The insurers then reimburse the estate within 7 working days. The insurers will be able to claim the same from the deputy in addition to any fees or costs. Once the bond is in place it remains in place until the Court of Protection discharges it. The deputy does not get any protection from the bond because its main purpose is to protect the donor.

Additional duties

Alongside the duties mentioned in the Code of Practice section, under Chapter 4 of this guide, deputies must carry out their duties carefully and responsibly including:

- To always act with due care and skill (duty of care);
- Not take advantage of their position of authority on the donor’s life (fiduciary duty);
- Indemnify the donor against liability to any third party caused by the deputy’s negligence; and
- Not to delegate duties to anybody else unless the Court authorises this.

How to apply, timescales, forms and costs

If you would like to become a deputy then you must submit a form to the Court of Protection. They will then assess your request in detail, looking at your suitability from the information provided in the application form.

The person who lacks capacity must visit their GP or medical practitioner to be assessed for mental capacity. The GP or medical practitioner will complete a Medical Certificate to be submitted alongside the application to the Court of Protection. The GP or medical practitioner may charge for completing the medical evidence and this can range from £50 - £300.

The application itself involves supplying a lot of detailed information about the vulnerable person’s financial circumstances and history, including the Medical Assessment form and a legal Undertaking from the deputy to the Court of Protection. The application fee is £400 which is payable to the Court of Protection and needs to be sent with your application. If the Court of Protection decides that your case requires a hearing then there may be a £500 fee payable and they will let you know when this is payable by.

If you are successful and are appointed as a deputy, you must pay an annual supervision fee depending on what level of supervision you require. This fee becomes payable on 31 March each year for the previous year:

- £320 if you are a type 1, 2 or 2A deputy,
- £35 if you are a type 3 deputy.

If you are a new deputy, you will also need to pay a £100 assessment fee. You may be able to claim back reasonable expenses in certain circumstances. For more information, please contact the Court of Protection.

The bond mentioned above will differ in accordance with the size of the donor’s estate and the responsibility of the deputy. However it is unlikely that the Court of Protection will request anything below £200. This is due annually in addition to the fees mentioned above.

Once an application has been sent to the Court of Protection it commonly takes 2-3 months for someone to be appointed as a deputy. However there can be delays or back logs for the Court of Protection to deal with such as medical evidence being held up.
Securing your children’s future

Making a Will

It is likely that your main concern lies with your children or loved ones and ensuring that their future is secure. A way to ensure this is to make a Will including what you would like to leave to them. This can include money, property and shares. Another benefit of making a Will is that it can save payment of Inheritance tax in some circumstances which would burden your loved ones. If you have not made a Will, then the intestacy rules would apply. The intestacy rules provide that certain categories of relatives should benefit from your estate in a certain order of priority. Therefore, if you had not made a Will but wanted to leave everything to your spouse, then the rules of intestacy would dictate that only a set amount or percentage of your estate would go to your spouse, and not everything as you may have intended. With the intestacy rules, other relatives may be entitled to a portion and inheritance tax may need to be paid on that portion. For more information on the intestacy rules, please see heading below.

Our advice would be to seek legal and financial advice regarding making a Will sooner rather than later to ensure that your plans are executed as per your wish when the time comes. The reason for this is because once you have lost capacity, you cannot make a Will and neither can your deputy or Attorney on your behalf.

Lack of capacity to make a Will

When someone has lost mental capacity before they had the opportunity to make a Will, there are two options:

- To do nothing. If you do not have a valid Will in place, then the rules of intestacy will apply; or
- Apply to Court of Protection to make a Statutory Will.

Intestacy Rules

The rules in relation to Intestacy can be complex and our advice would depend on your family set up. If you have a spouse, children, grandchildren and an estate that you estimate would be over £250,000, then usually the position would be that your partner would keep all the assets (including property) up to the value of £250,000, as well as all your personal possessions. The remainder of the estate would be shared in this way:

- Your spouse will have an absolute interest in half of the remainder of our Estate; and
- The other half will be shared equally between your surviving children. If any child has already passed away, then their share will be equally split amongst their children.

As you can see from this brief example, you do not have an input as to who receives what in your estate which can be upsetting and also cause argument in the remaining family. Another aspect to be aware of is that grandchildren are not automatically provided for under the rules of intestacy and only receive their parents’ share if the parents have passed away.

Our recommendation would be not to leave your estate to be shared out under these rules because there is a chance that they may not provide for all the family members that you intended to look after.

Making a Statutory Will

Before making a Court of Protection application for a statutory Will, it must be established whether the vulnerable person has testamentary capacity to specifically make a Will. The test for testamentary capacity was established in the case of Banks v Goodfellow (1870). This states that the person considering making a Will must consider and understand:

- The nature and effect of making a Will;
- The extent of his or her estate;
- The claims of those who might expect to benefit from the testator’s estate; and
- The testator must not have a mental illness that influences the testator to make certain legacies in his Will that he would not have otherwise included.

Another consideration, to be taken into account section 3 of the Mental Capacity Act 2005 which explains that a person is unable to make a decision for himself if he is unable to understand information relevant to the decision, retain that information in order to make a decision and effectively communicate the decision.

If you have reached a stage where you do not have testamentary capacity, then an application for a statutory Will needs to be submitted to the Court of Protection. This can be done by your attorney, a relative etc., (please see below). The Court of
Protection is most likely to allow a statutory Will to be made if a vulnerable person has never made a Will before or if there is a significant change in their circumstances.

A statutory Will can also be made if:

- the estate value has decreased or increased;
- tax planning purposes;
- a beneficiary under the current will has passed away;
- a beneficiary under the current will has received substantial gifts which call for an adjustment to the current Will.

The Court’s permission is usually required to make a statutory will. However, there are certain categories of people who do not need permission:

- the vulnerable person;
- the donor or donee of a Lasting Power of Attorney;
- an attorney under a registered Enduring Power of Attorney;
- a deputy appointed by the Court of Protection;
- persons who may become entitled to the vulnerable person’s estate under the rules of intestacy or under a current Will; and
- a person for whom the vulnerable person might be expected to provide for if they had capacity.

A concerned friend or other relative would need to apply to the Court of Protection for permission.

When the Court is making their decision as to whether to allow the statutory will to be made, they will consider if it in the vulnerable person’s best interests. Under section 4(6) of the Mental Capacity Act 2005, the court must consider:

- the vulnerable person’s past and present wishes and feelings;
- any written note from when the person had capacity;
- the beliefs and values that would be likely to influence the persons decision if they had capacity;
- the other factors that the person would be likely to consider if they were able to do so.

The Court of Protection will also try to take into account, where possible:

- Anyone named by the person as someone to consult when required;
- Anyone involved in caring for the person’s welfare; and
- Any deputy appointed for the person by the Court of Protection.

Making Substantial gifts

An attorney has limited power to make gifts on behalf of the vulnerable person. They may make gifts:

- On customary occasions to persons (including themselves) who are related to or connected with the vulnerable person; or
- To any charity to whom the vulnerable person made or might have been expected to make gifts provided that the value of each such gift is not unreasonable having regard to all the circumstances and, in particular, the size of the vulnerable person’s estate.

A Court of Protection Deputyship Order will usually contain a similar expressed authority to make gifts. Any other gifts will require the permission of the court.

Where a vulnerable person has a substantial estate which will bear inheritance tax at the time of their death, the attorney or deputy may consider making an application to the Court of Protection for permission to gift assets away during the vulnerable person’s lifetime. This will reduce the value of the vulnerable person’s estate for inheritance tax purposes. The vulnerable person must survive a period of 7 years following the date of the gift in order for the value of it to fall outside of their estate.

Generally, the Court of Protection will make an order where it can be demonstrated that the vulnerable person has adequate capital and income to maintain their standard of living for the rest of their lifetime after the gift has been made. Usually the recipient of the gift will be someone named in the vulnerable person’s Will (or in the absence of a will, someone who will benefit under the intestacy rules). The Court of Protection will require notice of the application to be given to the vulnerable person’s close relatives and anyone likely to be affected by the outcome of the application.

Costs

The general rule on costs, persuant to rule 156 of the Court of Protection Rules 2007, is that where the proceedings concern a vulnerable person’s property and affairs, the costs of the proceedings shall be paid by the vulnerable person or charged to their estate.
Safeguarding

The Office of the Public Guardian

The Office of the Public Guardian is an executive agency sponsored by the Ministry of Justice. The role of the Office of the Public Guardian is to protect people in England and Wales who may not have the mental capacity to make certain decisions for themselves. They also assist people in planning for their future should they lack mental capacity. They essentially carry out the functions of the Mental Capacity Act 2005.

The need for the Office of the Public Guardian derives from the risk of abuse of power under Lasting Power of Attorneys or Enduring Power of Attorneys. Their main responsibilities include:

• Investigating any concerns that are voiced about an attorney or deputy;
• Registering Lasting Power of Attorneys or Enduring Power of Attorneys;
• Maintaining the public register of deputies and people that have given Lasting Power of Attorneys or Enduring Power of Attorneys; and
• Supervising deputies and ensuring that they carry out their work in accordance with the Mental Capacity Act 2005.

To safeguard against abuse of position by a deputy or an attorney, the Office of the Public Guardian will supervise them. The Office of the Public Guardian will contact or visit the deputy or an attorney to ensure that they are working in line with their duties and Code of Practice.

How does the supervision work?

When the Court of Protection appoints a deputy, the Office of the Public Guardian will assess the deputy to decide on what level of supervision or support they will require. There are different levels of support:

• Type 1: the most constant supervision including regular telephone calls and meetings with Office of the Public Guardian together with visits from a Court of Protection member.
• Type 2A: predominantly for property and affairs deputies who are new to their position (became a deputy within the past year). This is for a deputy who needs extra support.
• Type 2: Light supervision.
• Type 3: This is type of supervision is for property and affairs deputies who are managing less than £21,000 and requires very occasional contact.

The supervision visits are to check that the attorneys understand what is expected of them and what their duties are or whether they are being investigated because of a complaint.

After members of the Office of the Public Guardian have visited the deputy and assessed the supervision type, they will let the attorney or deputy know whether they will need to send an annual report.

What is an annual report?

If their supervision type is either 1, 2A or 2 from the above list, then the attorney or deputy will need to write a yearly report explaining the decisions they have made in their role as deputy. It is unlikely that they will have to do this if they are assessed as type 3 supervision. However this is not certain. The attorney or deputy will be notified when you will be required to send the report to the Office of the Public Guardian.

The report must contain:

• The decisions and reasons for those decisions. This must be reinforced by an explanation of why the decision was in the donors best interest;
• Details of any advice that you took at the time as to what was in the donors best interests such as friends, family or professional advice; and
• If there were any differences of opinion in the above, then how the differences were resolved.

As a property and affairs deputy, you are required to provide a detailed account of how you have managed the donor’s finances. This includes bank accounts, any incoming or outgoings, benefits or property. You must include or retain copies of bank statements, contracts, receipts and any letters or e-mails about your activities as a deputy. In addition to this, the attorney or deputy must at all times keep their finances and assets completely separate from the donor’s.

If an attorney or a deputy does not send the reports to the Office of the Public Guardian when requested, they can increase your level of supervision or even request for the Court of Protection to replace the attorney or deputy.
If you have any concerns regarding financial or other abuse of a vulnerable person, you should contact the Office of the Public Guardian using the details below:

PO Box 16185, Birmingham, B2 2WH;
customerservices@publicguardian.gsi.gov.uk;
0300 456 0300

The office is open Monday, Tuesday, Thursday and Friday 9am to 5pm and Wednesday 10am to 5pm.

**Want to know more?**

The purpose of this guide is to share information with anyone who has recently been diagnosed with dementia or those who support that person. It is hoped that the guide will assist you with processing how to live well with dementia. Our aim is to ensure that you are prepared and can build a secure future, not only for yourself but also for your family.

If you would like more information about anything contained in this guide, please contact a member of our expert team:

**Meet the team**

**Mitra Mann**
Associate
Court of Protection & Powers of Attorney
mitra.mann@wrighthassall.co.uk
01926 880722

**Kelly Schofield**
Paralegal
Court of Protection & Powers of Attorney
kelly.schofield@wrighthassall.co.uk
01926 883012

**John Rouse**
Partner
Wills and tax planning
john.rouse@wrighthassall.co.uk
01926 880743

**Caroline Bates**
Partner
Wills and tax planning
caroline.bates@wrighthassall.co.uk
01926 884688

**Helen Strong**
Solicitor
Wills and tax planning
helen.strong@wrighthassall.co.uk
01926 884678

**Clare Burke**
Solicitor
Wills and tax planning
clare.burke@wrighthassall.co.uk
01926 884620
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