
**A Practitioner's Guide to
Court of Protection Property Procedures**

This guide outlines the legal and other requirements in dealing with the sale and purchase of land for a person who lacks capacity in light of the implementation of the Mental Capacity Act 2005 from 1st October 2007

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Introduction

On 1st October 2007 the Mental Capacity Act 2005 was implemented in England and Wales. This guidance outlines the Court of Protection's requirements and the recommended practice for practitioners dealing with the sale and purchase of land owned by a person who lacks capacity.

This guide does not apply to a sale of property held on trust where the person who lacks capacity is a co-owner (see Practice Direction G to Part 9 of the Court of Protection Rules 2007)

References to the 'Court' mean the Court of Protection.

References to a 'solicitor' apply equally to a licensed conveyancer or legal executive instructed to act on behalf of a person who lacks capacity.

It is assumed that all sales and purchases of residential property will be:

- by a Court appointed Deputy with ongoing legal authority as prescribed by the Court to make decisions on behalf of the person who lacks capacity; or
- by an Attorney appointed by a Lasting Power of Attorney to deal with property and financial affairs where the donor of the power no longer has capacity; or
- by an Attorney appointed by an Enduring Power of Attorney to deal with property and financial affairs where the donor of the power no longer has capacity and the Enduring Power of Attorney has been registered at Court; **and in all cases**
- adopting the current edition of the Standard Conditions of Sale.

Sale of Property

1. Is the consent of the Court required to sell the property?

The Court's consent is not required if:

- the Order or Direction appointing the Deputy authorises the Deputy to make decisions about 'property and affairs'; or
- the Lasting Power of Attorney or Enduring Power of the Attorney appointing the Attorney authorises the Attorney to deal with the property and affairs of the person who lacks capacity; **and**
- the sale is in the best interests of the person who lacks capacity

If the Deputy or Attorney are in any doubt as to whether the sale serves the best interests of the person who lacks capacity, an application should be made to the Court in form COP1/COP9 (within proceedings).

2. Does the Court need to approve the sale price?

The Court does not need to approve the sale price. The Deputy or Attorney must act in the best interests of the person who lacks capacity in agreeing the sale price. The Deputy or Attorney's decision will be assessed on the basis of due diligence.

The following best practice is recommended:

(a) Advertising the property for sale

The sale should not be advertised as being made by Order of the Court of Protection. No reference should be made to the seller's capacity (or lack of capacity). The address of the seller (if required) should be care of the address of the Deputy or Attorney. This reduces the risk of inadvertent discrimination.

(b) Valuation

(i) Sale by private treaty

The property should be valued by a valuer who has confirmed they have no personal or professional interest in the sale and who has:

- the professional qualifications FRICS, MRICS, FSVA, ASVA; or
- at least five years' experience with a firm or firms practicing in the locality of the property.

The valuer should be asked to advise on and provide written confirmation of the lowest price to be accepted for the property.

Two independent valuations are recommended. The cost of any valuation should be negotiated and may be included in the marketing package of the chosen estate agent.

An affidavit of value is recommended where:

- the sale is of a business property; or
- the person buying the property is known to or associated with the Deputy or Attorney or is a member of the family of the person who lacks capacity; or
- the Deputy or Attorney considers the circumstances to be exceptional or for any reason they feel it may be diligent to do so e.g. if there is a history of family conflict.

(ii) Sale by public auction

The procedure referred to above is recommended for choosing a valuer.

The valuer should be asked to advise on, and provide written confirmation of, the full and fair market value of the property and also to confirm the recommended reserve price on a sale by public auction.

An affidavit of value is recommended in the same circumstances as above.

(c) Agent's charges

The Court does not need to approve the charges of estate agents. A competitive rate of commission for estate agents operating in the locality of the property should be negotiated.

Before 1 October 2007 the Court's approval was required to any proposal to charge more than 2% of the sale price. This is no longer required but the previous practice should be considered by the Deputy or Attorney when acting in the best interests of the person who lacks capacity in agreeing the level of commission.

3. The Contract

The contract should name the person who lacks capacity as the seller acting by the Deputy or Attorney pursuant to the relevant Order, Direction, Lasting Power or Attorney or Enduring Power of Attorney that authorises the Deputy or Attorney to make decisions about property and affairs.

The following wording is recommended:

"[name of person who lacks capacity] acting by [name of Deputy or Attorney] of [address of Deputy or Attorney] pursuant to [an Order/a Direction of the Court of Protection dated the.....day of2...] [a Lasting Power of Attorney/an Enduring Power of Attorney dated the ...day of2...]".

The contract should not contain any reference to the seller's capacity (or lack of capacity). The address of the seller (if inserted) should be care of the address of the Deputy or Attorney.

The contract should contain the following special condition:

"The seller is selling with full/limited title guarantee by his/her [Deputy /Attorney] pursuant to[an Order/a Direction of the Court of Protection dated the.....day of2...] [a Lasting Power of Attorney/an Enduring Power of Attorney dated the ...day of2...]. A certified copy of the [Order/Direction/Lasting Power of Attorney/Enduring Power of Attorney] authorising the [Deputy /Attorney] to sell has been supplied to the buyer's solicitor and shall be deemed to be conclusive evidence of the Deputy 's/Attorney's authority to sell. The buyer and the buyer's solicitor shall not be entitled to raise any requisition or objection relating thereto".

The title guarantee will be the level of guarantee that the person who lacks capacity is able to provide.

4. The Transfer Deed

The solicitor acting must ensure that the transfer deed is correct in all aspects.

The following clauses provide guidance for transfer deeds in form TR1:

Box 4: (transferor/seller) enter the name of the person who lacks capacity acting by the Deputy or Attorney pursuant to the relevant Order:

"[*name of person who lacks capacity*] acting by [*name of Deputy or Attorney*] of [*address of Deputy or Attorney*] pursuant to [an Order/a Direction of the Court of Protection dated the...day of2...] [a Lasting Power of Attorney/an Enduring power of Attorney dated the ...day of2...]".

Box 9: (title guarantee) enter the title guarantee that the person with the lack of capacity is able to provide.

Box 12: (execution):

"Signed by [*name of the person who lacks capacity*] by the said [*name of Deputy or Attorney*] acting as aforesaid in the presence of... ".

As with the contract, the transfer deed should not contain any reference to the seller's capacity (or lack of capacity).

5. Entry to property between exchange of contracts and completion

The solicitor must take all necessary steps to safeguard the interests of the person who lacks capacity. Wherever possible, access by the buyer between exchange of contracts should be avoided.

Where justified, the buyer may be allowed access to carry out repairs or decorations. The contract should contain a suitable access provision or the buyer should enter into a separate written undertaking so as to:

- fully indemnify the seller against all losses claims, demands and damages arising from the access; and
- acknowledge that the buyer has no claim against the seller for the work undertaken in the event that the contract is not completed whether due to the default of the seller or the buyer.

Occupation by the buyer between exchange of contracts and completion should only be permitted in exceptional circumstances and subject to the current edition of the Standard Conditions of Sale.

6. Dealing with the proceeds of sale

There is no longer a strict obligation to lodge the proceeds of sale into Court. A Deputy or Attorney must however act in the best interests of the person who lacks capacity in placing or investing the proceeds. It is recommended that trustee investment procedures are followed to achieve this.

The terms of the Order/Direction appointing a Deputy, or those of the Lasting Power of Attorney or Enduring Power of Attorney appointing an Attorney, should be carefully considered.

The following practice is recommended:

- repayment of any charges on the property on the day of completion (including a Local Authority charge)
- payment of the estate agent's fees on the day of completion (as approved by the Deputy or Attorney)
- payment of the disbursements reasonably and properly incurred by the acting solicitor (e.g. Land Registry documents, bank transfer fees)
- payment of fixed costs for the conveyancing (see below for Solicitors' Charges).

Pending receipt of instructions from the Deputy or Attorney, solicitors should place the net proceeds of sale with an authorised deposit taker, namely a bank or building society. The funds should be held by way of a deposit held in the firm's name and recording the name of the person who lacks capacity. The account should allow instant access and attract the highest rate of interest available under the circumstances.

The solicitor acting should consider the tax implications of the disposal prior to exchange of contracts. It may be appropriate for the Deputy or Attorney to obtain specialist capital gains tax advice.

7. Solicitors' Charges

The Court removed the category for fixed costs for conveyancing from 1st May 2009. Under the new regime a Deputy or an Attorney is empowered as a decision maker. Where a solicitor is instructed by a Deputy or an Attorney to deal with a sale and the transaction does not require the prior consent of the Court, the Court expects the fees to be agreed between the Deputy/Attorney and the solicitor.

If the fees cannot be agreed the conveyancing file may need to be assessed by a cost draftsman (with the Deputy's/Attorney's prior consent and approval to the cost draftsman's fees). In cases of dispute, an application to the Court for an Order for costs to be approved may still be required. The application would attract a Court fee as would the subsequent application to the Supreme Court Costs Office.

8. Land Registry requirements

A certified copy of the Order/Direction/Lasting Power of Attorney/Enduring Power of Attorney authorising the sale should be supplied to the buyer's solicitor on completion.

The buyer's solicitor will be responsible for lodging the document with the Land Registry.

Sale of property where the person who lacks capacity is a co-owner

Co-owners hold the legal estate in land on trust as trustees.

Where a Lasting Power of Attorney or a registered Enduring Power of Attorney appoints the only other co-owner/co-trustee to exercise trust functions as attorney, a second independent attorney will need to be appointed (to give a good receipt for capital monies).

Enduring Powers of Attorney - where the donor lacks capacity

- Where an EPA created after 1 March 2000 delegates to the only co-owner/co-trustee, the co-owner/co-trustee can use S.8 Trustee Delegation Act 1999 (TDA 1999) to appoint another trustee where the power has been registered with the Court (see sections 7 and 8 TDA 1999)

(Solicitors should check the EPA to make sure the instrument does not restrict the power to appoint new trustees)

- Where an EPA created before 1 March 2000 delegates to the only co-owner/co-trustee and the power was not registered before 1 March 2001, the co-owner/co-trustee cannot use S.8 TDA 1999. An application will need to be made to the Court under S.36(1) Trustee Act 1925 to appoint a new trustee.

In the majority of cases the person who lacks capacity will need to be removed from the legal title (i.e. removed from their position as trustee) and replaced by a new trustee before the property can be sold. This is usually the case even when there are two other continuing trustees.

An application should be made to the Court under S.36(1) Trustee Act 1925 to appoint a new trustee to deal with the sale. Please refer to Practice Direction G to Part 9 of the Court of Protection Rules 2007.

Purchase of Property

1. Is the consent of the Court required to purchase a property?

The solicitor should carefully consider the terms of the Order or Direction appointing a Deputy .

From 1 October 2007 Orders appointing a Deputy to deal with property and affairs may confer a 'General Authority' on a Deputy to purchase a property without obtaining further authority from the Court.

The Order may refer to a Deputy's "General Authority ...to take possession or control of the property and affairs of [*the person who lacks capacity*] and to exercise the same powers of management and investment as [*the person who lacks capacity*] has as beneficial owner, subject to the terms and conditions set out in [*the*] Order".

The solicitor acting must ensure that the terms of the Order do not place a restriction on the Deputy's authority. The Order may specifically limit the Deputy's 'General Authority'.

In cases of doubt, an application in form COP1 (COP9 within proceedings) should be submitted to the Court.

An Attorney appointed to deal with property and financial affairs by either a Lasting Power of Attorney or an Enduring Power of Attorney may have authority to purchase a property. The terms of the instrument appointing the Attorney should be carefully considered. An Attorney must always act in the best interests of the person who lacks capacity.

2. Does the Court need to approve the purchase price?

From 1 October 2007 where an Order appointing a Deputy to deal with property and affairs confers a 'General Authority' on a Deputy to purchase a property (see above) the Deputy will not need to apply to Court for the purchase price to be approved.

The terms of the Order must be carefully considered.

A Deputy is under a legal obligation to act in the best interests of the person who lacks capacity in agreeing the purchase price. A Deputy would be accountable to the Court if an appropriate price is not achieved.

A Deputy or Attorney should consider:

- the level of purchase price
- the suitability of the property in terms of size, style and location

- the medium to long term prospects of the person who lacks capacity
- the future costs of maintaining the property
- the needs of any relevant carer, co-owner or other occupier (e.g. parents brothers and sisters).

In every case:

- a building survey should be undertaken by a chartered surveyor, the surveyor's report should include a valuation of the property
- all efforts should be made to negotiate the purchase price to reflect market conditions and the advice given in the surveyor's report
- if the purchase is to be funded from an award of damages, the existence of the fund should remain confidential
- the need for a specialist adaptations report should be considered if the property is to be adapted or altered to accommodate the needs of the person who lacks capacity
- the solicitor should consider whether a conditional exchange of contracts is appropriate i.e. subject to the grant of planning consents and building regulations approval for alterations
- buildings insurance should be considered at an early stage and effected on exchange of contracts.

Where the terms of the Order appointing a Deputy do not confer authority to purchase a property, an application will need to be made to the Court before exchange of contracts takes place. The application (in form COP9) should ask the Court to approve the purchase.

The Court will require a copy of the surveyor's report as evidence of value. In exceptional circumstances the Court may call for evidence of value in the form of a certificate or affidavit (see Appendix I).

The application can include a request for the purchase monies where funds are held in Court and the Order appointing the Deputy does not give authority to access funds in Court directly. The Court may include a provision for obtaining the purchase money in the Order or Direction for the purchase, or separately.

3. The Contract

The Court does not need to approve the terms of the contract.

The solicitor acting must ensure that the contract is correct in all aspects.

(a) Where the person who lacks capacity is an adult

The contract should name the person who lacks capacity as the buyer.

(i) Where the adult is an executing party the contract should refer to:

"[name of person who lacks capacity] care of [address of Deputy or Attorney]".

(ii) Where the adult is not an executing party the contract should refer to:

"[name of person who lacks capacity] acting by [name of Deputy or Attorney] of [address of Deputy or Attorney]".

In every case:

- the address of the buyer (if inserted) should be care of the address of the Deputy or Attorney
- the acting solicitor does not need to provide evidence of the Deputy's or Attorney's authority to the seller's solicitor
- no reference should be made to:
 - the buyer's capacity (or lack of capacity)
 - the purchase proceeding pursuant to an Order of the Court of Protection
 - the buyer acting by a Deputy .

4. Transfer Deed

The court does not need to approve the terms of the transfer deed. The transfer deed is not sealed by the Court.

The solicitor acting must ensure that the transfer deed is correct in all aspects.

(a) Where the person who lacks capacity is an adult

The transfer deed should name the person who lacks capacity as the transferee/buyer.

(i) **Where the adult is an executing party**

Box 5: enter the name the person who lacks capacity as the transferee/buyer.

Box 12: a buyer's execution clause will only be required if covenants are given by the buyer:

"Signed as a deed by [*name of person who lacks capacity*] in the presence of...".

(ii) **Where the adult is not an executing party**

Box 5: enter the name of the person who lacks capacity acting by the Deputy or Attorney:

"[*name of person who lacks capacity*] acting by [*name of Deputy or Attorney*].

Box 12: a buyer's execution clause will only be required if covenants are given by the buyer:

"[*name of person who lacks capacity*] acting by [*name of Deputy or Attorney*]".

In every case:

Box 6: the address for service should refer to "[*name of person who lacks capacity*] care of [*address of Attorney or Deputy*]".

Box 11: the covenants will be by the adult who lacks capacity and who has been named as the transferee/buyer in Box 6:

"the transferee hereby covenants ...".

- the acting solicitor does not need to provide evidence of the Deputy 's or Attorney's authority to the seller's solicitor
- no reference should be made to:
 - the buyer's capacity (or lack of capacity)
 - the purchase proceeding pursuant to an Order or Direction of the Court of Protection
 - the buyer acting by a Deputy.

(b) Where the person who lacks capacity is a minor or the property is to be purchased by the person who lacks capacity jointly with one or more persons (whether as joint tenants or as tenants in common)

The property will be held by at least two trustees. The trustees will need to enter into a declaration of trust.

The Deputy or Attorney should ensure that there is a satisfactory declaration of trust in place before exchange of contracts takes place. The declaration of trust does not need to be submitted to the Court for approval unless the Court has specifically directed or called for the document.

The solicitor acting must ensure that the declaration of trust is correct in all aspects and accurately records the beneficiary's interest in the property.

The contract and transfer deed should name the two (or more) people acting as trustees as the buyer/transferee:

"[name of first trustee] of [address of first trustee] and [name of second trustee] of [address of second trustee] as trustees for [name of person who lacks capacity]".

Box 10 of the transfer deed should note:

"The transferees are to hold the Property on the trusts of a [trust deed/declaration of trust] dated [*date of completion*].

- Details of the trust do **not** need to be set out in the contract or the transfer deed
- The acting solicitor does not need to provide a copy of the declaration of trust to the seller's solicitor
- No reference should be made to:
 - the buyer's/beneficiary's capacity (or lack of capacity)
 - the purchase proceeding pursuant to an Order or Direction of the Court of Protection.

Solicitors will need to consider the implications of the property being held by trustees on trust, especially where a mortgage is involved.

If the person who lacks capacity is included as one of the trustees, the consent of the Court will be required to appoint a new trustee to deal with a subsequent sale (Practice Direction G to Part 9 of the Court of Protection Rules 2007).

6. Solicitors' Charges

The Court removed the category for fixed costs for conveyancing from 1st May 2009. Where a solicitor is instructed by a Deputy or an Attorney to deal with a purchase and the transaction does not require the prior consent of the Court, the Court expects the fees to be agreed between the Deputy/Attorney and the solicitor.

If the fees cannot be agreed the conveyancing file may need to be assessed by a cost draftsman (with the Deputy's/Attorney's prior consent and approval to the cost draftsman's fees). In cases of dispute, an application to the Court for an Order for costs to be approved may still be required. The application would attract a Court fee as would the subsequent application to the Supreme Court Costs Office.

7. Stamp Duty Land Tax - Land Transaction Return (SDLT1)

The solicitor acting must take all reasonable steps to ensure that an appropriate return is submitted to the Inland Revenue within 30 days of completion.

(a) Where the person who lacks capacity is an adult and sole buyer

Whether or not the adult is an executing party, form SDLT1 should detail the adult as the 'purchaser'. The adult's National Insurance number will need to be added.

To ensure that any notices are dealt with promptly, the purchaser's address should refer to the address of the Deputy or Attorney.

The certificate should be sent to the 'Agent'. Full contact details of the solicitors acting should be provided as 'Agent'.

Execution:

- where the adult is an executing party the adult will sign as 'purchaser 1'.
- where the adult is not an executing party the Deputy or Attorney will sign as 'purchaser 1'.

Provided a form SDLT1 has been signed as above, the solicitor acting may choose to submit a duplicate form SDLT1 signed as Agent, or deal with an electronic return.

(b) Where the person who lacks capacity is a minor or the property is to be purchased by the person who lacks capacity jointly with one or more persons

The trustees who have entered into a declaration of trust (see above section 4(b) Purchase of Property) will be detailed as the 'purchasers' on form SDLT1.

Where one of the trustees is a Deputy or Attorney, the Deputy or Attorney should be named as 'purchaser 1'.

The certificate should be sent to the 'Agent'. Full contact details of the solicitors acting should be provided as 'Agent'.

Execution: the trustees will sign as 'purchaser 1' and 'purchaser 2'.

Provided the SDLT1 has been signed as above, the solicitor acting may choose to submit a duplicate form SDLT1 signed as Agent, or deal with an electronic return.

8. Land Registry requirements

(a) Where the person who lacks capacity is an adult

(i) Where the adult is an executing party

The Land Registry application will name the person who lacks capacity as the applicant. The Land Registry will be guided by the information in the transfer deed.

The proprietorship register should name the person who lacks capacity as the proprietor 'care of' the address of the Deputy or Attorney.

In exceptional circumstances the Deputy or Attorney may consider it diligent to apply for a restriction to be registered at the Land Registry. This will usually only be necessary where there is a significant risk of financial abuse or undue influence, by a third party.

In this situation:

- The registration of the restriction must be in the best interests of the adult who lacks capacity (and for no other reason)
- The Land Registry may call for evidence to support the need to register the restriction
- Form RX1 can accompany the application to the Land Registry.

The following provides guidance for a Form N restriction:

"No disposition of the registered estate by the proprietor of the registered estate is to be registered without a written consent signed on behalf of [*name of person who lacks capacity*] by [*name of Deputy or Attorney*] of [*address of Deputy or Attorney*]".

(ii) Where the adult is not an executing party

The Land Registry application should name the person who lacks capacity as the applicant acting by the Deputy or Attorney.

A certified copy of the Order/Direction/Registered Lasting Power of Attorney/Registered Enduring Power of Attorney authorising the purchase, should be lodged with the Land Registry.

The proprietorship register should name the person who lacks capacity as the proprietor acting by the Deputy or Attorney. The address of the Deputy or Attorney should be referred to.

From 1 October 2007, where the person who lacks capacity is an adult and sole buyer, the Court no longer requires a restriction to be registered in favour of the Court. The terms of the relevant Order or Direction should be considered in every case.

A diligent Deputy or Attorney may consider it appropriate to apply for a restriction to ensure that any future disposition is made in accordance with the Order/Direction/Registered Lasting Power of Attorney/Registered Enduring Power of Attorney.

In every case a Form LL restriction should be considered.

(b) Where the person who lacks capacity is a minor or the property is to be purchased by the person who lacks capacity jointly with one or more persons

The Land Registry application should refer to the trustees named in the declaration of trust as the applicants "as trustees for [*name of person who lacks capacity*]".

The Land Registry will automatically register a Form A restriction.

An application for a restriction (using form RX1) should accompany the application to the Land Registry. The solicitor acting should consider a suitable form or restriction to reflect the terms of the declaration of trust.

The following provides guidance for a Form B restriction:

"No disposition by the proprietors of the registered estate is to be registered unless they make a statutory declaration, or their conveyancer gives a certificate, that the disposition is in accordance with a [trust deed/declaration of trust] dated [*date of completion*] or some variation thereof referred to in the declaration or certificate".

Generally speaking, a restriction 'in favour of the Court of Protection' will only be required where the Court has directed that such a restriction is appropriate e.g. where the Court has specifically required a Deputy to submit a declaration of trust to the Court for approval and the Court has added a provision to this effect (see above section 5(b) Purchase of Property). In cases of doubt, an application should be made to the Court.

Death of the person who lacks capacity during the sale or purchase of property

The Court's jurisdiction ceases on the death of the person who lacks capacity, as does the authority of a Deputy or Attorney.

The completion of any sale or purchase will be a matter for personal representatives.

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The law is believed to be correct as at 1st December 2009

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Appendix I

Draft certificate of value

COURT OF PROTECTION

No.

In the matter of (*name of person who lacks capacity*)

I, of
.....

HEREBY CERTIFY as follows

1. I have the following professional qualifications *

or

I have at least five years' experience as a valuer with my present firm or another firm practicing in the locality

and I believe myself to be well qualified to judge the value of the premises hereinafter mentioned and of the property in the vicinity thereof and have no undisclosed personal or professional interest in the property.

2. I have carefully inspected the freehold/leasehold (*delete as appropriate*) property known as in order to form an opinion as to the value thereof and the appropriate price of the said property in light of the current market conditions.
3. The negotiated price of £..... for the said property is in my judgement a fair market value of the said premises.

Dated the day of 2.....

Signed

*The recommended best practice is to accept qualifications FRICS, MRICS, FSVA, ASVA. This practice reflects the Court's requirements prior to 1 October 2007.