



Court of Protection Awareness Campaign (#COPAC)

Mental Capacity, Financial
Safeguarding &
the Court of Protection

Introduction

- **Tom Evans – Solicitor & Professional Court of Protection Deputy**
Qualia Law CIC - **non-profit** social enterprise.

We provide:

1. **Free Legal Advice** for neurodiverse people (and families, carers or professionals) about the options available to safeguard and manage the affairs where there are mental capacity issues.
2. Assist family members with **applications** to the Court of Protection, or
3. Act as Deputy where it is in P's best interests to have an independent **professional deputy**.

The only **non-profit** in the UK to provide Court of Protection Deputyship and Attorney services by qualified and regulated Solicitors.

We are members of AdviceUK and funded by the Charities Aid Foundation, UnLtd and the National Lottery.

Objectives

- Understand what the Court of Protection (COP) is and its function
- Understand capacity in the context of COP and **Property/Finances**
- Understand the difference between an LPA and a Deputy
- Recognise when a Deputy may be needed
- Know when and how to refer

Acronyms & Jargon

- COP or 'the Court' = Court of Protection
- OPG = Office of the Public Guardian - (the government body which supervises Attorneys and Deputies)
- LPA = Lasting Power of Attorney - (the document which gives power to an Attorney)
- P = 'Patient' the 'Protected Party' - (the incapacitated person in COP cases)

What is the **Court of Protection**?

The Court of Protection ('COP') makes decisions on behalf of somebody who lacks mental capacity

Either the Court will make one-off decisions

- o Where should someone live?
- o Should someone receive a certain treatment?
- o Should a gift of money or property be made to family to avoid inheritance tax?

Or the Court can appoint a Deputy to make ongoing decisions



The two spheres

Health & Welfare



- Should P receive a certain type of medical treatment?
- Should P move into a care home?

Usually a **one-off** decision made by agreement or by COP

Legal Aid



Property & Finances

- Should a property be sold / purchased?
- Managing benefits and investments
- Paying care fees and negotiating funding

Usually a **Deputy** appointed

No Legal Aid

The Overlap

A case example:

- o P needs to go into a care home (a **health and welfare** decision).
- o The most important thing in his life is his dog Ollie (is a dog property or family?)
- o A care home is found for them both – but only if the Ollie gets the snip.
- o A Deputy has an obligation to ‘work with carers to achieve best quality of life for P’.
- o = Best interests decision for property and finances Deputy.

Ollie the dog.



Ollie



CAPACITY - The 1st Question for the Court of Protection

- Common Statement: 'This person does not have capacity'
- My (pedantic) Response: 'To do what?'

*To say that someone does not have capacity is to make half a statement. You must specify **what it is** that the person does not have capacity to do.*

*Mental Capacity Act 2005, Section 2(1): a person lacks capacity in relation to a matter if at the material **time** he is **unable to make a decision for himself in relation to the matter** because of an impairment of, or a disturbance in the functioning of, the mind or brain*

Decision specific: someone can lack capacity to manage their money but still have capacity to make all sorts of other decisions.

Time Specific: someone can lack capacity to make an LPA one day and regain capacity the following day

Lacking Capacity means ‘Unable to Make a Decision’ – but what does that mean?

- A person is ‘**unable to make a decision**’ for themselves if they are unable to—
 - (a) **understand** the information relevant to the decision,
 - (b) **retain** that information,
 - (c) **use or weigh** that information as part of the process of making the decision, or
 - (d) **communicate** their decision (whether by talking, using sign language or any other means).

Who decides?

Ultimately the decision will be made by the Court.
But, the Court relies on a capacity assessment:

Completed by a:

- Medical Practitioner - (e.g. a GP)
- Psychiatrist
- Approved mental health professional
- Social worker
- Psychologist
- Nurse
- Occupational Therapist

Who has examined and assessed the capacity of P and decides:

- 1. **Is there an impairment** of, or disturbance in the functioning of, the person's mind or brain?
- 2. If so, is the impairment or disturbance **sufficient** that the person **lacks the capacity to make a decision** in relation to the matter in question?

“A person is not to be treated as being unable to make a decision merely because they have made an **unwise** decision.”



A Case Example:

The Doctor Who Lacked Capacity



What happened:

1. Dr assessed Joan's capacity in relation to whether Joan could make a Lasting Power of Attorney (LPA).
2. The question to be asked: Does Joan have capacity to make an LPA appointing her 'new friend' as attorney?
3. Dr discusses Joan's wishes. Joan says that she wants to make a new LPA for her friend 'because she has 5 kids and she needs the money.'
4. Dr concludes that Joan **DOES** have capacity to make the LPA appointing her new friend.
5. The Dr states that she clearly: **understood, retained, weighed** the information and made her decision on 'humanitarian grounds.'

Analysis:

1. Did Joan actually **understand**?

The OPG sets out what someone needs to understand in order to have capacity to make an LPA:

- o **The test:** Donor (Joan) must understand what an LPA is and what powers are being given to the attorney.
- o **What are the powers?** - An attorney is appointed to manage Joan's money in **Joan's best interests**.

But maybe she would have capacity if it was explained to her?

Comment:

The Dr also fails this test. The Dr does not understand what powers an attorney has. Has he confused it with a Will?
My opinion = at that time - P did not have capacity to make an LPA.
The Doctor did not have capacity to make an LPA.
Dr does NOT need to give legal advice – but **assessors need to understand the DECISION** themselves in order to recognise whether P understands the decision.

LASTING POWER OF ATTORNEY VS COURT OF PROTECTION DEPUTY



- Person making the LPA is called the 'donor'
- The Donor **does** have mental capacity to make an LPA.
- Family members/friends **can't** make LPA's on behalf of their relatives/friends.
- A professional can act as Attorney.
- The Court of Protection is typically not involved.
- The Office of the Public Guardian(OPG) provides **minimal** (to no) supervision.
- The Attorney must comply with the mental capacity code of practice.
- The Attorney must act in the best interests of the Donor.
- An Attorney has very broad powers
- The Attorney must apply to COP for certain decisions.

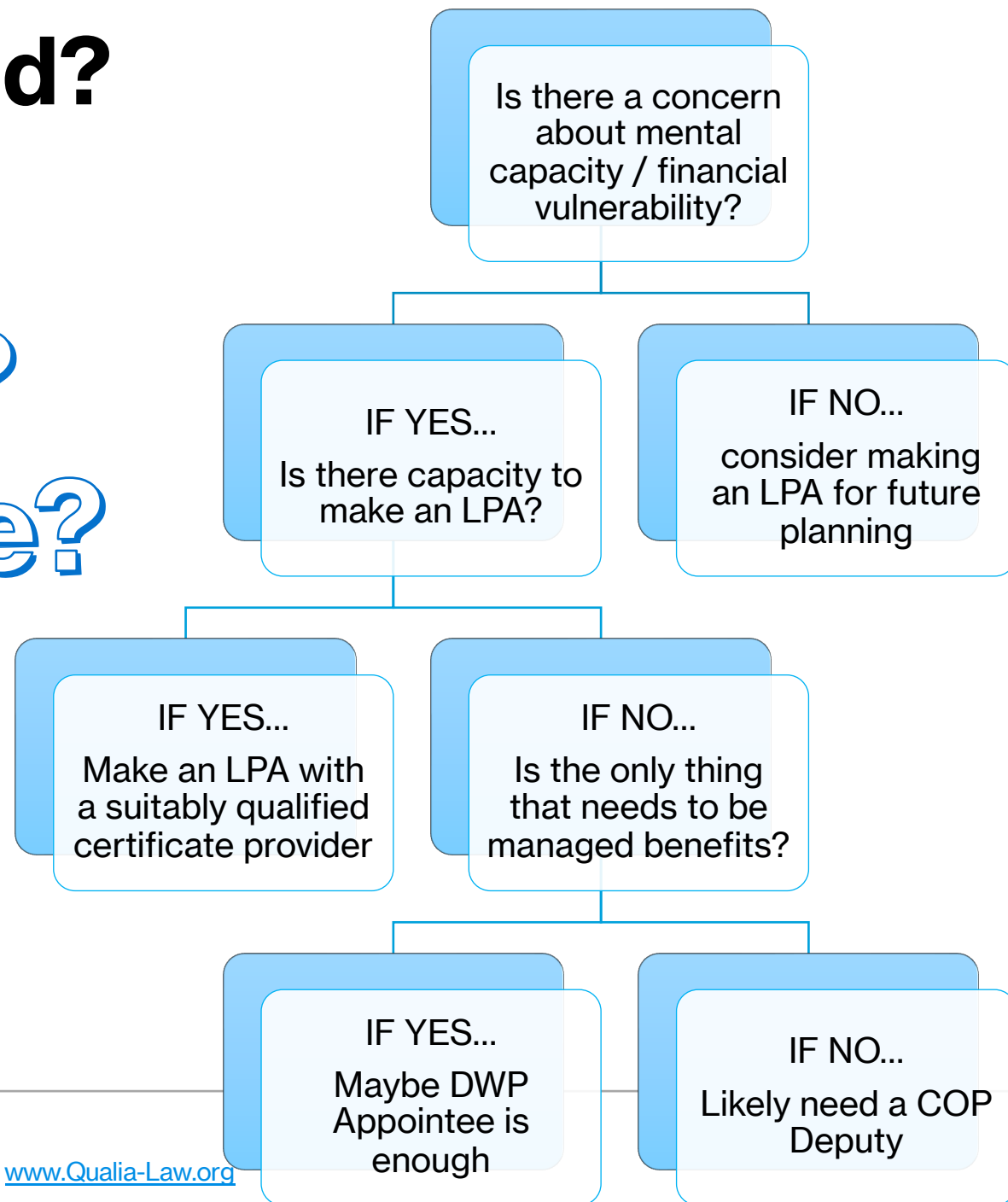
- Person who lacks capacity is referred to as 'P'
- P **does not** have mental capacity to make an LPA.
- Family members/friends **can** make a COP application on behalf of their relatives/friends.
- A Professional can act as Deputy.
- The Court of Protection decides if Deputy is appointed.
- The OPG provides supervision–the Deputy must provide annual reports.
- The Deputy must comply with the mental capacity code of practice.
- The Deputy must act in the best interests of the Donor.
- The Deputy's powers are limited by the COP
- The Deputy must apply to COP for certain decisions.

What's needed?

LPA?

Deputy?

Appointee?



Who can be Deputy?

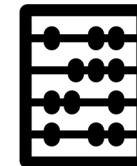
The COP can appoint **family member**, trusted **friend** or a professional, such as a **solicitor** to act as a 'Deputy' to manage a person's property and financial affairs

A deputy **must**:

- Get to know the Person (the incapacitated person is known as 'P' in Court of Protection matters);
- Pay the 'bond' (is like an insurance premium for Deputies);
- Keep P's money separate;
- Maximise benefits entitlements and minimise liabilities;
- Keep accurate records and report all income and expenditure to the Office of the Public Guardian (annual reports);
- Ensure that all decisions are made in P's best interests (and record all decisions);
- Register authority with all relevant bodies (Banks, Councils, Care Homes, DWP);
- Pay OPG Fees (£100 assessment fee and £320 annual fee);
- Take IFA advice (when appropriate);

A deputy **must NOT**:

- make decisions which P can make themselves;
- make any gifts (except in limited circumstances);
- make decisions outside of their authority (e.g selling a property if that specific authority is not granted);
- be paid for carrying out their duties (except Professional Deputies);



Just because someone is willing to be Deputy does not mean they should

When should a Lay vs Professional Deputy act?

Lay Deputies

- When there is a relative/friend who is:
 1. Trustworthy,
 2. Willing to act
 3. Capable of complying with obligations and responsibilities.
 4. Likely to be able to continue in the role
- Where matters are administrative - not complex
- Where there is unlikely to be any conflict between family
- Where the estate is very low value

Professional Deputies

- When there are no relatives/friends who are willing and able to act.
- When matters are complex: (e.g Statutory Wills, Sale/Purchase of property, Large asset management, care fees issues).
- Where there is family conflict or potential conflict (either between family internally – or between family and care providers)
- When an existing Attorney or Deputy is not acting in P's best interests.
- Where the estate is high value



Professional Deputy Costs

- **MYTHBUSTER:** A Professional Deputy isn't given a blank cheque and doesn't choose how much they charge.

Means Tested: If P has over **£16,000...**

- A Professional Deputy is either paid
 - **a fixed fee** (as set by the Court – which is currently £1,320 per year for solicitors).
 - Or '**assessed**' costs, which means the Court assesses what the Deputy does each year, and then tells the Deputy what charges are **reasonable** and **proportionate**.
 - This avoids a potential conflict of interest

Costs are **paid from the protected party's funds** (i.e. the person who has lost capacity). This means a family member or a professional should **NOT** have to pay the cost of a Court application or the costs of a Deputy.



How does a **Professional Deputy** become involved?

A Professional Deputy can become involved at any stage, even before a person loses capacity (in which case they would act as a Professional Attorney instead).

Example 1:

- P goes into a care home.
- He has no family or family are not actively involved.
- P loses capacity (re finances).
- CH fees start accruing
- P's property is uninsured
- P is vulnerable to financial abuse
- Once CH fees rack up and his house is broken into, social services are notified.
- Social services eventually become involved
- A referral is made to COP.

Example 2:

- P goes into a care home.
- He has no family or family are not actively involved.
- P loses capacity (re finances).
- Neighbours notify Professional Deputy
- Deputy does application and is appointed.
- CH fees paid
- P's property is insured (and sold if needed)
- P is NOT vulnerable to financial abuse
- Social services DON'T become involved

Example 3:

- P goes into a care home.
- He has no family or family are not actively involved.
- P loses capacity (re finances).
- Care Staff notify Professional Deputy
- Deputy does application and is appointed.
- CH fees paid
- P's property is insured (and sold if needed)
- P is NOT vulnerable to financial abuse
- Social services DON'T become involved

Jane's journey

- **Living with dementia. Recently moved into Care Home.**
- Only daughter lives in USA
- Lacks capacity to access banks, pay bills, insure property
- Qualia Law (QL) asked to apply for Deputyship
- Once appointed: Funds secured, property insured, bills paid, attendance allowance claimed, council tax stopped

- QL worked with social worker to help Jane move back home
- QL adapted property (removed old cooker, added handrails, life-line, automated lights)
- Jane moved home with 4x calls per day
- Jane gradually improved independence, re-uses her own bank account
- Re-establishes friendships in community
- Care calls reduced and eventually removed.
- **Jane now living independently in her own home with no professional care support.**

Marco's Mission

- **Acquired brain injury following motorbike accident.**
- £2million compensation and professional Deputy appointed.
- Marco has always been fiercely independent. Not a fan of authority.
- Relationship between M and Deputy strained – leads to more costs from the Deputy and more restrictions – leads to more animosity.
- Moved from one private sector Deputy to another – same cycle continues and costs spiral out of control and erode M's compensation.
- Qualia Law CIC invited to take case on – given status as non-profit with much reduced costs.
- QL works with Marco to get to know him, his challenges, and the extend of his capacity.
- QL gradually gives Marco more independence and responsibility.
- Marco pays all his own bills, does not have to provide receipts for dog food (he used to!)
- Marco went back to work for first time since his injury. Self employed at first.
- Marco stopped receiving Universal Credit because he began working full time
- **Marco has now set up his own company and, after re-assessment of his capacity, QL has applied to end the Deputyship.**

Common scenarios **Qualia Law CIC** can assist with

A child with **learning disability** turns 18 and parents are concerned about how decisions will be made

An **elderly person** is struggling to make decisions and does not have a suitable family member to appoint

Financial abuse or mismanagement has occurred where there is a lay attorney or deputy – or where the subject of the abuse lacks **capacity**

A person with **capacity issues** is told they can't make an LPA

A person with mental health issues is **sectioned** and has fluctuating capacity

Families are in **conflict** about how their **incapacitated** parents funds are to be managed

A person with a **brain injury** is unable to deal with their compensation

A person living with **dementia** can no longer manage their property or finances

An existing LPA or Deputyship is being **challenged**

Recognising Financial Abuse

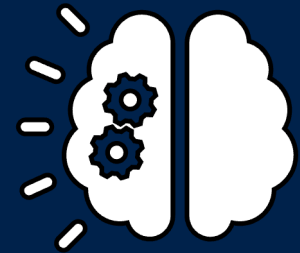
Having money or other property stolen or being defrauded or put under pressure in relation to money or property.

Physical Indicators:

- Pension or benefits cashed but P has no money
- Unexplained withdrawals from accounts
- Unpaid bills, rent or care home fees
- Creation or changes to an LPA or Will.
- Entry into care opposed by relatives concerned about inheritance
- Disappearance of financial documents
- Lax financial recording/monitoring in a care setting
- Unexplained Online transactions

Behavioural Indicators:

- Confusion, distress or fear when financial anomalies discussed
- P expresses worries about theft, threats or coercion.
- Unusual concern by abuser that too much money is being spent on care.
- Deliberate isolation by abuser from friends or family
- Unreasonable use of social benefits (e.g. motability car)
- Overly trusting of strangers



If a **trustworthy** Attorney (LPA) or **Deputy** is in place, a vulnerable person is much less likely to be financially abused. However, **financial abuse** is also carried out by Attorneys and Deputies.

The importance of support networks and COP-Awareness

The incapacitated person will be unlikely to independently seek out the help and advice they need; they are often reliant upon care professionals, friends or family to do so for them.

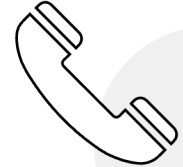
‘COP-Awareness’ = the ability to recognise capacity issues and take the initial steps to ensure the person is supported.

SAFEGUARDING IS EVERYONE’S BUSINESS

Many vulnerable people do not have family or friends on whom to rely for a referral to a Professional Deputy. In such cases, a Professional Deputy can be notified directly by care professionals or the local authority (via Social Workers).

What Steps Can You Take?

- Call 999 if you suspect that a crime is in progress or if someone is in immediate danger.
- You can contact social services directly via your Local Authority (but remember, you DON’T need to wait for Social Services before contacting a Deputy).
- If you have concerns about an attorney under an LPA or a Court appointed Deputy, please contact the Office of the Public Guardian on 0115 934 2777.
- For general queries and advice, call **Qualia Law CIC**. A hotline to be used by professionals in the care sector to advise them on a case-by-case basis about what steps to take based on the circumstances.



How to refer to **Qualia Law CIC** or seek advice

For **free**, independent advice about everything in the previous slides, we offer a **direct access service** open to individuals, families, cares and professionals in the social care, advice and third sectors.



0333 305 3057



Email for advice or to make a referral: info@qualia-law.org



Advice request form and referral forms can be found at: www.Qualia-Law.org

Thank You



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