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Looking After Your Child's Future

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If you are looking after a child with a serious brain injury and have received a compensation payment, considering the future and making financial plans can be a daunting prospect.

## Deputyship or Personal Injury Trust?

Deciding between a Deputyship and a Personal Injury Trust is not a simple matter of choice. In most cases, you may not be free to decide between one or the other due to the issue of the future mental capacity of your child.

For example, if your child is under the jurisdiction of the Court of Protection (CoP), a Deputyship will be the most appropriate. If the CoP is not involved, a Deputyship will not be an option and setting up a Personal Injury Trust will be the only route to take.

## How is the Court of Protection's jurisdiction established?

Most children, by the simple fact they are a child, do not possess the mental capacity required to manage their property and financial affairs. However, the jurisdiction of the CoP is established if the person under 16 is likely to continue to lack capacity when they reach adulthood (the age of 18). In simple terms, if your child has a significant injury that will impair their capacity into adulthood, the CoP will be able to make decisions on their behalf, even though they are under the age of 16.

## How does the Court of Protection determine capacity?

With all CoP applications, medical evidence is vital. It enables the Court to be satisfied they have jurisdiction to act. The medical evidence sought for a child will address whether they will continue to lack capacity beyond the age of 18. Simply stating that a 10 year old child does not have the capacity to manage their finances is not enough. A medical practitioner will assess whether your child's condition makes it likely they will not be able to deal with their own finances when they reach 18. This makes it all the more important to properly instruct your medical practitioner, to ensure you receive the proper conclusion in the assessment. If your assessment demonstrates a likely lack of capacity beyond 18, a CoP application for a Deputyship is the appropriate route.

## What are the benefits of coming under the Court of Protection?

The Court of Protection is of great importance as it exists to safeguard vulnerable people who lack the mental capacity to make their own decisions. There are many benefits of coming under the Court of Protection's jurisdiction,

including being overseen by the Office of the Public Guardian, the executive body sponsored by the Ministry of Justice to protect people who lack mental capacity, as well as the benefit of getting a security bond.

### **It's clear my child won't have capacity at 18, why can't we set up a Personal Injury Trust?**

If your child lacks the capacity to make property and financial decisions for themselves, they will be unable to sign important documents, such as a Trust deed. The CoP will need to authorise someone else to do this on their behalf. It's extremely unlikely the CoP will authorise the execution of a Personal Injury Trust because the deputyship regime will effectively deal with such a situation.

### **It's likely my child will have capacity at 18, what's next?**

If your child is likely to have capacity at the age of 18, a Personal Injury Trust should be used to hold the funds. In most cases, if your child is in this category, they probably haven't sustained a major brain injury; although a Trust may be suitable for some children with mild cerebral palsy. The High Court will need to approve the terms of a Trust for your child and this needs to be considered in the claim process. If your child will receive a large compensation award, it is essential to have a professional Trustee and the cost must be considered by the claimant solicitor.

### **What if the medical expert's view is inconclusive?**

Every so often, there are cases where the medical expert's view is inconclusive or borderline. There may be elements of your child's diagnosis which make the forecast to 18 particularly difficult; especially if your child is very young at the time the assessment is completed. Sometimes it's just not known whether your child will make a sufficient recovery in the years ahead to finally be able to manage their own affairs once they reach adulthood. In these cases, the best course of action is to make an application for a Deputyship. It's likely the evidence presented to the Court will be enough to establish jurisdiction and capacity can always be revisited at a later date. This offers your child optimal protection and is sufficiently flexible to allow for changes as they grow up.