

# Trustee orders – what you need to know

The Court of Protection may need to make a trustee order to appoint someone to replace an incapacitated trustee in certain circumstances. This most commonly occurs in situations where a property is owned by two or more people. You need a Trustee order before you can deal with the property as a deputy.

## What is a trust?

A trust is a legal arrangement whereby assets are placed under the control of the trustees, who look after the assets for the benefit of the beneficiaries. This arrangement commonly arises where property is co-owned by two or more individuals.

The trustees must have capacity to understand the powers, duties, and responsibilities of their role.

If a trustee loses capacity to perform their role, they will not be automatically discharged from their role. Due to their lack of capacity, as they are unable to retire, the steps will need to be taken to remove the incapacitated trustee.

Acting as a trustee is a separate legal role, which may not be automatically assumed by the trustee's attorney or deputy.

## How to remove an incapacitated trustee

The exact process for removing an incapacitated trustee depends on the circumstances of the case.

In some instances, the trust document itself may contain express terms on how to remove and replace a trustee.

There is otherwise legislation which provides for trustees to be removed in certain circumstances, for example if they are dead, remain out of the country for over a year, refuse to act, are unfit to act, incapable of acting or where they are minors. The legislation that applies and the process to follow will depend on whether the individual has a beneficial interest in the trust and whether there is a surviving co-trustee with mental capacity.

In some limited circumstances, an existing attorney may be able to act for the incapacitated trustee without further court application, although this is not always the case.

In contrast, a deputy may not automatically assume a trustee role and will require authority from the Court of Protection to replace the incapacitated person.

An example of when this situation might arise is when we have a husband and wife who own their property jointly and the wife loses capacity. The husband and wife have prepared powers of attorney appointing each other as their attorneys. If the property is sold, the husband will be unable to sign to sale documents in both his role as trustee (of the property) and attorney (for his wife). We would therefore need to apply to the Court of Protection for permission to retire the wife as a trustee and replace her with someone else.

## Making an application to the Court of Protection

We have the knowledge and experience to advise and assist you with your application the Court of Protection. After submitting the application to the Court of Protection, it may take five to nine months before a final order is made.

## Meet our team



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