Removing a Trustee who no longer has capacity
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1. **QUICK GUIDE**

1.1 The incapable trustee has no beneficial interest

(i) there are other competent trustees – see section 7 on page 7

(ii) there are no other competent trustees; and

(a) all the beneficiaries are of age and competent – see section 14 or section 10 on page 11

(b) not all the beneficiaries are of age and competent – see sections 8-11 on page 10 or 11

1.2 The incapable Trustee has a beneficial interest and

(i) there is land and s/he executed an EPA or LPA - see section 5.7 on page 5

(ii) there is no land but a competent trustee – section 8 on page 9

(iii) There is no land and no competent Trustee – see sections 10 or 11 on page

2. **OVERVIEW**

2.1 Where there is a Trustee lacking capacity, this can be highly problematic. Often the solutions can seem complex, but a structured approach can help to clear up the muddied waters, presenting the way forward.

2.2 The aim of this booklet is to help indicate which routes to follow in the event a trustee lacking capacity needs to be removed.

2.3 Below at section 3 on page 4 is a flowchart to help in the understanding of the main procedures to follow in the removal of a Trustee. Please ensure that the fuller explanations for each section corresponding to parts of the flow chart are read in full before deciding to act.
3. THE BASIC ROUTE FORWARD

Does P have capacity to act as a Trustee?

Yes

Will they willingly retire? And if they retire will there still be at least two Trustees?

No

Is there an express power in the Trust instrument to remove them?

Yes

Read the powers carefully and if sufficient then remove the Trustee accordingly.

No

Consider options and if needs be seek legal advice.

Yes

Ensure a deed of retirement is created and executed properly.

No

if no express powers or the powers are insufficient, consider using Section 36 of the Trustee Act 1925. Are any of the following conditions met?

- Trustee has died?
- Trustee has been out of the UK for more than 12 months (12 months must be unbroken)
- Trustee refuses to act?
- Trustee is unfit to act? (Bankrupt, absconds, untraceable or convicted of a crime of dishonesty)
- Trustee is incapable of acting? (Lacks personal capacity for the purposes of the Mental Capacity Act 2005).

Yes

If a Vesting Order is required, or there is no co-trustee with capacity, use s54 Trustee Act 1954, if P has a deputy or a deputyship appointment is pending.

No

Consider using Section 31 of the Trustee Act 1925. This will require an application to court for the court to remove and replace the Trustee lacking capacity. If there is no clear evidence the Trustee lacks capacity, this route should be used. 2 conditions need to be met:

1. It is expedient to appoint a new trustee(s)
2. It is inexpedient, difficult or impractical to do so without the help of the court.

The court has wide discretion here. However, if any of the following apply, Section 41 is unsuitable:

- Removal is sought due to a case of emergency, there are disputed of fact, the Trustee is likely to resist removal.

A co-trustee (or anyone expressly nominated within the Trust instrument) may replace P with a new Trustee. It is wise to exercise this option by Deed.

If a dispute about the facts arises, purchasers of land from the Trust will be protected provided a statement in the deed of appointment that replaced the trustee states one of the latter four bullet points above to be the case.

This is not the case for other Trust assets and an appointment of the court should be sought.

If any of the unsuitable criteria are met, then an application should be made to the court based on its inherent jurisdiction.
A breakdown of the relevant requirements of each section above is set out below, where more detail is required.

It is worth remembering this general principle:

Unless there is a Deputy, or P has a beneficial interest in the trust, the High Court should normally be used where an application for the Court to appoint a Trustee/Trustees is required.

4. MENTAL CAPACITY

4.1 A Trustee is presumed to have mental capacity unless it is established they lack capacity (s.1(2) MCA 2005).

4.2 A Trustee should not be treated as unable to act as a continuing trustee and make any particular decision including making the decision to retire/appoint another Trustee unless all practical steps to help him have been taken and failed (s.1(3) MCA 2005).

4.3 Always remember that assumptions cannot be made about the capacity of a Trustee, regardless of their age, appearance, condition and behaviour (s.2(3) MCA).

4.4 Information about a decision to be made by the Trustee must be presented in a way they will understand and all the relevant information must be provided.

4.5 A Trustee’s capacity will need to be based on a function specific test, so at the time of making the decision, they need to understand:

(a) the nature,
(b) the purpose,
(c) and the effect

of a decision. Any information presented to them needs to be:

(d) retained
(e) and weighed
(f) and the Trustee should then make their decision.

The Trustee then needs to be able to communicate their decision.

If they are unable to do the above, they may lack capacity as a Trustee, or at the very least lack the ability and capacity to perform specific tasks required of them as a Trustee.

4.6 In the event of any uncertainty or possible subsequent problems it will be sensible to apply to the Court for the appropriate order as a determinative view. Such an application will include a requirement to obtain medical evidence on the issue of P’s capacity in the matter.
5. **DOES P HAVE AN ATTORNEY**

5.1 A valid General Power of Attorney and a valid Trustee Power of Attorney can only be used if P still has capacity in relation to the matter in question.

5.2 A valid Property and Finance Lasting Power of Attorney (LPA) will only be relevant if first registered with the Office of the Public Guardian (OPG).

5.3 A valid Enduring Power of Attorney (EPA) can be used whether registered with the OPG or not although if P is incapable of managing their property and finances it should now be registered.

5.4 An EPA and an LPA must *not* contain a restriction preventing its use in the circumstances (e.g. a restriction preventing the Attorneys from selling P’s house). If it does a prior application to the Court of Protection will be necessary.

5.5 If P has an attorney, be it by an EPA or an LPA, there may be limited scope for the Attorney to act for P in their role as a Trustee.

5.6 HM Land Registry practice guide 9 provides useful guidance and tips on the position as regards registered land.

5.7 **P HAS AN INTEREST IN LAND:**

5.7.1 An attorney can step into P’s shoes to act as Trustee, if the Trustee role *relates to land, or capital proceeds / income from the land, in which P has a beneficial interest*. (s.1(1) Trustee Delegation Act 1999).

5.7.2 Should this power be used, the attorney must provide any purchaser of the land with a statement to confirm that P had a beneficial interest. This can be done in the transfer document (TR1 form or in the lease/charge itself) in several ways:

(a) If in a TR1 (in the additional provisions box) or in the body of a lease, the following wording:

“[Attorney’s name ] confirms that [ P ] has a beneficial interest in the property at the date of this [Transfer, lease, charge, etc].”

(b) Alternatively the Deed can be signed in one of two ways:

The wording for the deed statement:

(i) “Signed as a deed by [ P ], who has a beneficial interest in the property at the date of this [Transfer, lease, charge, etc.], acting by [his/her] attorney [ Attorney’s name] in the presence of:”

Or when signing for P, enhance the signature to read as follows;
(ii) “[P] by his attorney [Attorney’s name], who confirms that the donor has a beneficial interest in the property at the date hereof”

5.7.3 If the attorney is acting for P in their position as Trustee, in the circumstances under 5.7.1 above, there are still conditions relating to a requirement for two Trustees:

(a) Capital money needs to be paid to at least two Trustees
(b) A valid receipt must be given by at least two Trustees
(c) A conveyance or deed must be made by at least two trustees for the purposes of overreaching.

This means there must always be at least two different signatures on the relevant document: the Attorney cannot:

- Sign for themselves AND P; or
- Sign as Attorney for BOTH P1 AND P2 (if there are two legal owners and both have appointed the same person as Attorney)

In light of this, s.8 Trustee Delegation Act 1999 enables an attorney to appoint another trustee (if the EPA or LPA was made after 1 March 2000 and is registered). To do this, the attorney must be EITHER

the other joint trustee of the land. If there is more than one incapable Trustee the individual must be Attorney for each of the incapable Trustees.

OR

If he is not a trustee, he must be attorney for each of the other trustees

(The Trustee Delegation Act is silent on whether the other trustees must also lack capacity but presumably it is not a requirement)

e.g.

1. a married couple own a property as joint tenants; they both lose capacity; the nephew was the sole attorney of both of them; the house needs to be sold so they can move to a care home and pay the care home fees. The nephew can appoint another trustee so the property can be sold.

2. John and Margaret have a property as joint tenants and John has appointed Margaret as his attorney before losing capacity. Margaret can appoint another trustee.

However, if the Attorney wishes to replace the incapable trustee it would appear an application has to be made to the Court of Protection under s36(9) Trustee Act 1925.

S.8 Trustee Delegation Act 1999 does not apply to attorneys appointed by an EPA if the EPA was created prior to 1 March 2000 which then was not registered by 1 March 2001.
5.7.4 GENERAL COMMENTS ABOUT THE TRUSTEE DELEGATION ACT

5.7.4.1 The interest in land can be as a life tenant (but not as a beneficiary under a class of potential beneficiaries under a Discretionary Trust).

5.7.4.2 If P holds as a tenant in common and gives away (e.g. by assignment) their equitable share then the Trustee Delegation Act no longer assists P.

5.8 P HAS NO INTEREST IN THE LAND

The Trustee Delegation Act will not assist P (see sections 7 and 11 below for the relevant process).

5.9 THERE IS NO LAND IN THE TRUST

The Trustee Delegation Act will not assist P (see sections 8 and 10 below for the relevant process).

6. WHAT IF P HAS A DEPUTY?

If P has a Deputy, the Deputy is bound and limited by the Deputyship Order put in place by the Court of Protection. If the Deputy wishes to act in place of P as a Trustee, an application would need to be made to the Court of Protection under one of the relevant sections below. The Deputyship Order by itself will not enable the Deputy to take on P’s trustee functions and responsibilities.

7. P (ALSO A TRUSTEE) HAS NO BENEFICIAL INTEREST AND THERE IS ANOTHER COMPETENT TRUSTEE IN PLACE – SECTION 36(1) TRUSTEE ACT 1925

7.1 This section is particularly useful where P (also a Trustee) has no beneficial interest and there is another competent Trustee in place.

(a) If there is a competent Trustee in place, they can appoint another Trustee in the place of P as a result of Section 36(1), if P is unfit to act or is incapable of acting.

(b) If the Trust Instrument nominates a specific person or persons to appoint new trustees, these people should do this. Ideally this appointment should be made by deed and state that the reason for the appointment is due to P being unfit or incapable when performing their duties as a Trustee.

(c) If no such person(s) are outlined in the Trust instrument then the continuing Trustee, or potentially the personal representatives of the last surviving or continuing Trustee may appoint other persons as Trustees.

7.2 S.36(1) enables the appointment of one or more Trustees. So for example if one Trustee is lacking capacity and the Trust Instrument is silent, the continuing Trustee may decide to appoint a further two Trustees to ensure
there are two Trustees in the eventuality of them wishing to retire in the near future.

7.3 The appointment must be in writing and is generally best done by deed. This is because under s.40(1) of the Trustee Act 1925, a deed allows automatic vesting of the trust assets (with a few important exceptions). See section 9 below for more on automatic vesting.

7.4 S.36(1) does not require an application to court if it is not contested.

7.5 If there could be any dispute at a later date about P’s capacity and therefore the validity of the appointment it will be preferable to make the application under S.40 Trustee Act 1925.

8. P (A TRUSTEE LACKING CAPACITY) DOES HAVE A BENEFICIAL INTEREST AND THERE IS ANOTHER COMPETENT TRUSTEE IN PLACE – SECTION 36(9) TRUSTEE ACT 1925

8.1 If P is a trustee and
(a) EITHER has a beneficial interest under the Trust;
(b) OR has a share in land under the Trust but no valid EPA or LPA to cover the situation

then any remaining Trustee(s) with capacity should apply to Court for permission to appoint a new Trustee in place of P (s.36(9) Trustee Act 1925).

8.2 The Court here is the Court of Protection.

8.3 The criteria to fulfil here are:
(a) The Trustee to be replaced lacks capacity to exercise the trustee power (if appropriate, it is recommended that a COP 3 form is completed by a GP in relation to P as evidence of their (in)capacity).
(b) The Trustee/P has a beneficial interest of some sort in the trust property
(c) There is a continuing trustee who is not under a disability and has capacity.
(d) The High Court is not involved in the proceedings or with the Trust.

8.4 The procedure is set out at section 18 – form templates for Court of Protection Application

8.5 A separate application to the Court of Protection will need to be made to manage P’s own assets. The same COP3 medical certificate should be able to be used for both applications if it contains the relevant information.
9. WHAT IF A VESTING ORDER IS REQUIRED – S.40(4) TRUSTEE ACT 1925

9.1 As mentioned in section 7, sometimes trust property does not automatically vest in a Trustee, even if a deed is used. These situations include:
   (a) Land subject to a mortgage
   (b) A lease which requires P’s consent to assign or dispose
   (c) Stocks and shares or property with restrictive transfer provisions (normally those which are transferable in books kept by a company or other body or where they are subject to transfer in a manner set out in an Act of Parliament).
   (d) Insurance based investments

9.2 In instances such as these, a Vesting Order is required to transfer the legal title of that asset to the Trustee. S.36 of the Trustee Act 1925 cannot be used here.

9.3 Land Registry practice guide 24: private trusts of land (section 7) confirms that a Deed of Appointment that complies with S.36 Trustee Act will meet their requirements and satisfy S.40 Trustee Act 1925 without the need for a separate TR1.

9.4 A bank may also require additional paperwork to be completed not covered by the automatic vesting.

9.5 In these situations an application under s54 Trustee Act 1925 will need to be made.

10. FOR VESTING ORDERS AND WHERE THERE IS NO CONTINUING TRUSTEE – S.54 TRUSTEE ACT 1925

10.1 Where there is no Trustee with capacity (for instance if all the Trustees lack capacity or P is the only (surviving) Trustee) then the Court of Protection can make an order to appoint Trustees and retire those lacking capacity.

10.2 Equally if a vesting order is required and P lacks capacity, the Court of Protection (subject to the comments in 10.4 below) is able to appoint and retire Trustees accordingly.

10.3 P, the Trustee lacking capacity must have a deputy appointed for them, or an appointment of a deputy must be pending, for the Court of Protection to be able to deal with the matter.

10.4 An application to the Court of Protection for either of the above requires:
   (a) P to lack capacity in fulfilling their functions as a Trustee
   (b) P to have a beneficial interest in the property
(c) A Deputy to have been appointed or such an appointment be pending; and

(d) No High Court involvement.

10.5 Otherwise the application must be made to the High Court (i.e. because P has no beneficial interest of there is no Deputy in place or application underway for the appointment of a Deputy).

11. Where P has no beneficial interest in the Trust Property and there is no continuing Trustee – Section 41 Trustee Act 1925

11.1 If a s.36(1) or s.36(9) application cannot be made (e.g. because P is the only Trustee), then an application can be made to the Chancery Division of the High Court to appoint a new trustee or trustees.

11.2 There are two conditions to be met:

   (a) It must be expedient to appoint a new trustee/new trustees; and

   (b) It must be inexpedient, difficult or impractical to do so without the help of the Court.

11.3 N.B. The issues about vesting of assets in the new trustee(s) will still apply so that a S.54 Trustee Act 1925 may well be more appropriate.

12. P has power to appoint and/or retire trustees under the Trust Deed or their consent is required – S.18 Mental Capacity Act 2005

If P has the power under a trust deed to appoint and/or retire trustees or their consent is required to the exercise of a power an application can be made to the Court of Protection for an order under s18(1)(j) Mental Capacity Act 2005. Under Mental Capacity Act 2005 Schedule 2 Para 5(2) the Court of Protection can make such consequential vesting or other orders as the case may require.

13. Settled Land

13.1 The Court of Protection can appoint a new trustee if a Settled Land Act Settlement exists and P as a Trustee does not have capacity (s.18(1)(j) Mental Capacity Act 2005).

13.2 Settled Land is any land deemed to be subject to a settlement.

13.3 A Settlement for the purposes of the Settled Land Act 1925 is any deed or other instrument which limits land so that it is limited in trust for any persons through succession (e.g. to a first born son) or subject to the other criteria of s. 1 of the above Act.
13.4 Should P be the statutory owner of the land, if there is a deputy appointed, the court can authorise the deputy to transfer the land to the new statutory owner.

13.5 Settled Land trusts cannot be created since 1st January 1996.

14. **P IS A TRUSTEE OF LAND BUT HAS NO BENEFICIAL INTEREST IN IT – SECTION 20 TRUSTS OF LAND AND APPOINTMENT OF TRUSTEES ACT 1996**

14.1 If P has no beneficial interest in the Trust and there is nobody able, entitled or willing to appoint a Trustee in place of P under s.36(1) Trustees Act 1925, then it may be possible to make an application under s.20 of the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA).

14.2 This enables the beneficiaries to provide a written direction to appoint a Trustee in place of P who lacks capacity.

14.3 To do this all the beneficiaries must:
   (a) Be 18 or over
   (b) have full capacity
   (c) between them own all the beneficial interests in the trust fund
   (d) Agree to the written direction

14.4 The written direction to appoint should be given to:
   (a) The Deputy appointed for P, the trustee; or
   (b) An attorney acting under an EPA or LPA for P; or
   (c) A person authorised by the Court of Protection for the purpose of the written direction. (Note only this one will require an application to Court.)

14.5 S.20 does not
   (a) Specify the form of deed – presumably it should refer to the appointment being made under S.20 TOLATA 1996.
   (b) Confirm how the vesting of the trust assets is to happen (does s.40 Trustee Act 1925 apply for automatic vesting?)
   (c) Specifically require the person receiving the notice to act on it!

   It may therefore be preferable to make an application under s.41 Trustee Act 1925 (see section 11 above) or s.54 Trustee Act 1925 (see section 10 above).

15. **OTHER SITUATIONS – REMOVAL OF CLASS F LAND CHARGES ENTRY WHERE P HAS NO EQUITABLE INTEREST IN THE PROPERTY**

15.1 Does P have a valid EPA or valid registered LPA for Property and Affairs with no restriction?
It should be possible to act if the removal is in P’s best interests – which should be minuted.

15.2 *Does P have a Deputy appointed?*

If so and the powers conferred are sufficient under the Order it should be possible to act if the removal is in P’s best interests – which should be minuted.

15.3 *Neither of the above applies*

An application will have to be made for the appointment of a Deputy with power to agree to the removal of the charge. The background will need to be set out in the application and evidence as to why removal is in P’s best interests.

15.4 *P is not in occupation*

On production of evidence to that effect and that P will not be able to return it may be possible to secure the lifting of the charge without further application.
16. APPLICATIONS TO THE COURT OF PROTECTION

The Application to the Court of Protection

Who should be the applicant?

- If being made under s.36 Trustee Act 1925, the cotrustee should apply.
- If there is no co-trustee, and P has a beneficial interest, consider other persons to make the application. If P has a deputy or attorney, if P does not yet have a deputy, the proposed deputy could make the application. This can be for s.54 or s.41 Trustee Act 1925.
- If P has no beneficial interest, and s.36 cannot be followed due to there being no co-trustee, consider if the beneficiaries can apply under s.20 TOLATA.

Is permission of the Court required? If it is, file a COP 2 form.

Permission is required if the application is not:
- Made by a deputy or continuing Trustee under s.54(2) Trustee Act 1925.
- Made by a co-trustee or other person with the power to appoint a new trustee (e.g. the donor if the trust instrument allows this) under s.55(9).
- If someone other than a beneficiary under the trust applies under s.20 TOLATA.

File a COP1 form, stating what is being applied for, including the relevant section the court is to consider and why the application is being made. COP1A form and COP3 capacity assessment along with the required witness statements.

The witness statements can either be made using form COP 24, or correctly drafted as a normal witness statement. One witness statement should state:
- The applicant’s fitness to be appointed and act as a Trustee, the fitness to act of the relevant proposed Trustee. (This should be a statement made by an independent person (not the applicant, solicitor acting in the matter, the proposed trustee or relative of the proposed trustee).

A further COP 24 witness statement by the applicant will need to outline/include:
- A copy of the Trust document.
- Where relevant, any transfers or other trust documents (e.g. conveyance, lease, will, trust etc).
- Names and addresses of present trustees.
- The beneficial interests held by present trustees.
- How the trustees were made trustees, with copies of the deeds of appointment and retirement.
- Name, address, date of birth of the person(s) to replace P and their relationship to P.
- Confirmation the trust is not under any order for administration in the Chancery Division.
- If there is a continuing Trustee, the co-trustee and the proposed new trustee have not made EFA’s or LPA’s appointing one another.
- Copies of any EFA’s or LPA’s for the co-trustee should be included, and whether it is registered or not.
- Confirmation the co-trustee remains able to carry out their duties as trustee.
- Names and addresses of any one with an interest in the trust property, including any beneficiary of a will (and if they are a minor or lack capacity).
- Details of the trust assets: annex a copy mortgage deed, stocks, shares etc where a vesting order is sought.
- Confirmation of the relevant consents to the appointment of the proposed trustee(s) - e.g. from the beneficiaries and personal representatives.
- Where relevant: Copies of any notices of severance (and evidence of service), any copy of a grant of probate and will, of the deceased.
16.1 Note: In addition to the above, if the trust relates to land being held on trust, the following needs to be set out in the Applicant’s witness statement:

(a) The address of the property
(b) Whether it is freehold or leasehold
(c) The title number of the property and a copy of the Land Registry Entry. If the property is unregistered, the court needs to be informed of this.
(d) If leasehold, the court should be informed as to whether the applicant has a licence or consent to assignment and provide copies (if relevant).
(e) Whilst not strictly required, a valuation of the property should be included if the land is to be sold.

16.2 If the application relates to s.20 TOLATA:

(a) Include in the witness statement the details of all the beneficiaries, whether they are in possession or remainder, provide their names and addresses, their ages/ dates of birth and confirm their capacity.
(b) Where P has a deputy or attorney, an explanation as to why the written direction has not been given to them
(c) If there remains a person entitled to appoint a trustee under s.36(1) Trustee Act 1925, provide evidence that they are unwilling to or unable to appoint a replacement trustee for P (e.g. if there is a letter stating their unwillingness, this can be appended to the witness statement).
(d) Include the name and address of the person who is to receive the written direction
(e) Confirm that the beneficiaries will meet the costs of the application (again if a written statement has been signed and dated, this can be appended).

16.3 Notification of the application must be provided to:

(a) Any person who has the power to appoint a new Trustee by a COP 15 form
(b) P should be notified using the COP14 form.
(c) If the deputy of P is not the applicant, they must also be notified by a COP15 form.
17. APPLICATIONS TO THE CHANCERY DIVISION OF THE HIGH COURT

The Application to the Chancery Division of the High Court

Who should be the applicant?

If there is doubt over P’s capacity but a medical report cannot be obtained, and s.25 is not possible, the co-trustee should make the application. Alternatively a personal representative in relation to a deceased person’s estate may bring the claim if it affects, for instance, a Will Trust.

Is permission of the Court required? If it is, file a COP 2 form.

Permission is not required if a Trustee brings the claim. If anyone other than a Trustee brings a claim, permission must be sought under rule 8.2A. This means notice for permission must be filed prior to the claim form.

- It does not have to be served on any other person, and

It must be accompanied by a copy of the claim form that the applicant proposes to issue.

The court will then decide if permission is granted, outlining the next steps, i.e. submitting the claim.

File a Claim Form (CPR Part 8 Form) along with the relevant evidence and witness statement.

Where there is a Trustee lacking capacity:

- Medical evidence is required to show the Trustee’s incapacity at the date the claim form is submitted, such evidence also showing the incapacity is continuing at the date of the witness statement as well.

- P must also be added to the claim form as the Defendant (although they need only be served if they are a sole trustee or have a beneficial interest.

As with the Court of Protection, it will likely assist the court if the witness statement by the applicant outlines/ includes:

- A copy of the Trust Deed

- Where relevant, any transfers or other trust documents (e.g. conveyance, lease, will, trust etc.)

- Names and addresses of present trustees

- The beneficial interests held by present trustees

- How the trustees were made trustees, with copies of the deeds of appointment and retirement

- Name, address, date of birth of the person(s) to replace P and their relationship to P

- Confirm the Trust is not under an order for administration in the Chancery Division

- If there is a continuing Trustee, the co-trustee and the proposed new trustee have not made EPA’s or LPA’s appointing one another

- Copies of any EPA’s or LPA’s for the co-trustee should be included, and whether it is registered or not

- Confirmation the co-trustee remains able to carry out their duties as trustee

- Names and addresses of anyone with an interest in the trust property, including as beneficiary of a will (and if they are a minor or lack capacity)

- Details of the trust assets/ annex a copy mortgage deed, stocks, shares etc where an interim order is sought

- Confirmation of the relevant consents to the appointment of the proposed trustee(s) - e.g. from the beneficiaries and personal representatives

- Where relevant: copies of any notices of severance (and evidence of service), any copy of a grant of probate and will of the deceased

- Where land is involved: the address of the property, if it is freehold or leasehold, the title number (or if unregistered informing the court of this), if leasehold whether the applicant had a licence or consent to assignment provide the court with copies and if the property needs to be sold - valuation of the land.
18. PRECEDENTS/EXAMPLES FOR HIGH COURT APPLICATIONS

Note – these are purely example forms and precedents that follow, they are not complete forms and will not be suitable for all circumstances and situations but are meant as a guide only. Whilst every effort has been made to use completely up to date forms at the date of writing, the courts may update their forms from time to time. At the date of writing up to date forms can be obtained from:

http://hmctsformfinder.justice.gov.uk/HMCTS/FormFinder.do

Precedents/ examples:

A. Application notice for permission from the Chancery Division, High Court

B. Part 8 Claim Form

C. Witness Statement

D. Deed of appointment and retirement

E. Index to a bundle for a hearing

F. Draft Order
**Application notice**

For help in completing this form please read the notes for guidance form N244 Notes.

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<td>[trustee lacking capacity]</td>
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<table>
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<tr>
<th>Date</th>
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<tbody>
<tr>
<td>[insert date]</td>
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</table>

1. **What is your name or, if you are a solicitor, the name of your firm?**
   
   XYZ LLP

2. **Are you a Representative**
   
   - [ ] Claimant
   - [ ] Defendant
   - [x] Legal

   - [ ] Other  *(please specify)*

   If you are a solicitor whom do you represent?

3. **What order are you asking the court to make and why?**

   1. Pursuant to [insert relevant legislation, including section number/ the inherent jurisdiction of the court] that [the new proposed trustee] or some other fit and proper person may be appointed a trustee of [XYZ Trust] in place of the Defendant, [trustee lacking capacity], now a person lacking capacity to exercise his/her functions as a Trustee.
   2. That [new proposed trustee] will act jointly and together with the claimant, the continuing trustee of [XYZ Trust].
   3. That all necessary vesting and other orders in respect of the trust estate as listed in the Schedule annexed to the Order may be made.

4. **Have you attached a draft of the order you are applying for?**
   
   - [x] Yes
   - [ ] No
5. How do you want to have this application dealt with? at a hearing □ without a hearing □
at a telephone hearing □

6. How long do you think the hearing will last? Hours □ Minutes 15 □
Is this time estimate agreed by all parties? Yes □ No N/A □

7. Give details of any fixed trial date or period N/A □

8. What level of Judge does your hearing need? Master □

9. Who should be served with this application? No-one unless court directs □

10. What information will you be relying on, in support of your application? 
   □ the attached witness statement
   □ the statement of case
   □ the evidence set out in the box below

If necessary, please continue on a separate sheet.

Statement of Truth
(I believe) (The applicant believes) that the facts stated in this section (and any continuation sheets) are true.

Signed ___________________________ Dated ___________________________

Applicant’s Legal Representative)’s litigation friend

Full name ___________________________

Name of applicant’s legal representative’s firm ___________________________

Position or office held ___________________________

(if signing on behalf of firm or company)

11. Signature and address details

Signed ___________________________

Dated ___________________________

Applicant’s Legal Representative)’s litigation friend

Position or office held ___________________________

(if signing on behalf of firm or company)

Applicant’s address to which documents about this application should be sent

<table>
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<tr>
<th>If applicable</th>
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<tbody>
<tr>
<td>Phone no.</td>
</tr>
<tr>
<td>Fax no.</td>
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<tr>
<td>DX no.</td>
</tr>
<tr>
<td>Ref no.</td>
</tr>
</tbody>
</table>

Postcode ________

E-mail address
Claim Form

(CPR Part 8)

In the

Claim No.

Fee Account no.

Claimant

[Name of the applicant (likely the continuing trustee)] [as a trustee of the XYZ Trust]
[Address]

Defendant(s)

[Name of trustee lacking capacity] [as a trustee of the XYZ Trust]
[Address]

Does your claim include any issues under the Human Rights Act 1998?        Yes                   No

Details of claim (see also overleaf)

1. Pursuant to [insert relevant legislation, including section number/ the inherent jurisdiction of the court] that [the new proposed trustee] or some other fit and proper person may be appointed a trustee of [XYZ Trust] in place of the Defendant, [trustee lacking capacity], now a person lacking capacity to exercise his/her functions as a Trustee.
2. That [new proposed trustee] will act jointly and together with the claimant, the continuing trustee of [XYZ Trust].
3. That all necessary vesting and other orders in respect of the trust estate as listed in the Schedule annexed to the Order may be made.

Defendant’s name and address

[Name of trustee lacking capacity]

[Address]

£

Court fee

Legal representative’s costs

Issue date

SEAL
Details of claim (*continued*)

Please see the attached witness statement and exhibits.
IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

[BIRMINGHAM] DISTRICT REGISTRY

BETWEEN:

[AAA]

Claimant

and

[Trustee lacking capacity]

Defendant

Witness Statement of AAA

I, [AAA] of [address] Trustee of [XYZ Trust] wish to rely on the following evidence in support of the application:

1. I am the above named Claimant and the matters stated herein are within my own knowledge.

2. I am [insert age] born on [insert date of birth] and I am [insert relationship to the Trustee lacking capacity].
3. A Settlement (“the Settlement”) was created by [insert name of the settlor] on [date the trust/ settlement was created]. I refer to the Settlement at exhibit “AAA-1”.

4. The original Trustees were [set out details].

5. The current trustees of the Settlement are [set out details]. I refer to [set out details of supplementary docs, e.g. deeds of appointment and retirement] at exhibit “AAA-2”.

6. I am [the absolute beneficiary/ partial beneficiary of the trust]. [The other beneficiaries are] [set out details of other beneficiaries].

7. [Trustee lacking capacity] was at the date of the Claim Form and still is incapable of managing the affairs of the Trust owing to [insert reason here, e.g. severe form of dementia, Alzheimer’s, traumatic brain injury etc]. S/He is no longer capable of executing any of his/ her duties as a trustee. These facts are borne out by the Report of Dr BBB at exhibit “AAA-3”.

8. The Settlement assets are [set out in detail the assets]. I refer to [correspondence / documents] from [stockbroker / investment company/ land registry etc] at exhibit “AAA-4”.

9. In the above circumstances it is not possible to appoint a new trustee or trustees without the assistance of the Court and accordingly the Claimant asks the honourable Court to afford the relief sought in the application.

10. I refer to the draft Deed of Appointment and Retirement marked “AAA-5” whereby it is proposed that [Trustee lacking capacity] retire from his position as Trustee and that [proposed new trustee] be appointed as Trustee. I refer to exhibit “AAA-6” where [proposed new trustee] has agreed to act in this capacity.

STATEMENT OF TRUTH

I believe the facts stated in this Witness Statement are true.

Signed…………………………

Date………………………….
Dated ___________________________________________ 20

IN [NAME OF TRUST]

DEED OF APPOINTMENT AND RETIREMENT

BETWEEN

[Continuing Trustee] (1)
AND
[New Trustee] (2)
DEED OF APPOINTMENT AND RETIREMENT

DATE:

PARTIES:
(1) [Continuing Trustee] (the ‘Continuing Trustee’);
(2) [New Trustee] (the ‘New Trustee’).

RECITALS

(A) This Deed is supplemental to the settlement (the ‘Settlement’) and to the other documents and events specified in the First Schedule.

(B) The statutory power of appointment applies to the Settlement and is exercisable by the Continuing Trustee and [Trustee lacking capacity] (the ‘Retiring Trustee’).

(C) The Continuing Trustee and the Retiring Trustee are the present trustees of the Settlement.

(D) The Retiring Trustee has lost capacity to execute this Deed and the Continuing Trustee has made an application to the Court for approval of a Vesting Order which will vest the property set out in the Second Schedule in the names of the Continuing Trustee and the New Trustee provided that this Deed will only be enforceable when exhibited with a Court approved Vesting Order.

(E) The Continuing Trustee wishes to appoint the New Trustee to act as a trustee of the Settlement in place of the Retiring Trustee.

(F) It is intended that the property now in the Settlement, details of which are set out in the Second Schedule, shall be transferred to, or under the control of, the Continuing Trustee and the New Trustee by virtue of a Court approved Vesting Order dated [date] granted by [District Judge XX/ His or Her Honour Judge XX] sitting at [Birmingham Civil Justice Centre/ relevant district registry] (order sealed on date).

OPERATIVE PROVISIONS

1. Appointment of New Trustee in place of Retiring Trustee

In exercise of the power of appointment conferred by the Trustee Act 1925 and of all other powers (if any), the Continuing Trustee hereby appoints the New Trustee as a trustee of the Settlement to act jointly with the Continuing Trustee in place of the Retiring Trustee who hereby retires and is discharged from the trusts of the Settlement.

2. Declaration as to residence

It is hereby declared that, at the date hereof, there is no proposal that the trustees of the Settlement might become either non-resident or not ordinarily resident in the United Kingdom.
FIRST SCHEDULE

<table>
<thead>
<tr>
<th>Date</th>
<th>Name of Trust</th>
<th>Settlor (1)</th>
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<tbody>
<tr>
<td></td>
<td></td>
<td>Initial Trustees (2)</td>
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</table>

Supplemental documents

SECOND SCHEDULE

Assets in the trust

Signed as a deed and delivered by **CONTINUING TRUSTEE**
in the presence of:
Witness
Signature:
Name:
Address:

Occupation:

Signed as a deed and delivered by **NEW TRUSTEE**
in the presence of:
Witness
Signature:
Name:
Address:

Occupation:
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
[BIRMINGHAM] DISTRICT REGISTRY

BETWEEN:

[AAA]  
Claimant

and

[Trustee lacking capacity]  
Defendant

Index to Bundle for hearing [date]
Before [District Judge X / His / Her Honour Judge X]

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<th>SECTION A – Preliminary documents</th>
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</thead>
<tbody>
<tr>
<td>1. Skeleton Argument</td>
</tr>
<tr>
<td>a. s.36 Trustee Act 1925</td>
</tr>
<tr>
<td>b. s.41 Trustee Act 1925</td>
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<tr>
<td>c. s.54 Trustee Act 1925</td>
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</table>

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<thead>
<tr>
<th>SECTION B – Applications and Orders</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. N208 Claim Form issued date</td>
</tr>
<tr>
<td>2. Notice of Issue dated date</td>
</tr>
<tr>
<td>3. Notice of Part 8 Directions dated date</td>
</tr>
<tr>
<td>4. Statement of Confirmation of Service on Incapable Trustee</td>
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<tr>
<th>SECTION C – Claimants Evidence</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Witness Statement of AAA dated date</td>
</tr>
<tr>
<td>a. AAA-1 Copy [Settlement/ Trust] deed</td>
</tr>
<tr>
<td>b. AAA-2 Copy supplemental documents</td>
</tr>
<tr>
<td>c. AAA-3 Capacity report of Dr [doctor’s name]</td>
</tr>
<tr>
<td>d. AAA-4 The [Settlement/Trust ] [investments/ assets]</td>
</tr>
<tr>
<td>e. AAA5 Draft Deed of Appointment and Retirement of Trustee</td>
</tr>
<tr>
<td>f. AAA-6 Copy Consent of [new trustee] to act as Trustee</td>
</tr>
</tbody>
</table>
SECTION D – Draft Documentation for Court Approval

1. Draft Deed of Appointment and Retirement of Trustee   D1
2. Draft Approval and Vesting Order   D5
IN THE HIGH COURT OF JUSTICE  
CHANCERY DIVISION  
[BIRMINGHAM] DISTRICT REGISTRY

Before………………………………………………………………………………

Dated………………………………………………………………………………

BETWEEN:

[AAA]

and

[Trustee lacking capacity]

Order for discharge of Trustee

The Claimant made an application by Part 8 Claim Form dated [date of application] (issued on [date issued by court]).

AND UPON the court having read the written submissions and evidence

AND UPON the oral representations of the [Claimant/ Claimant’s Solicitor/ Counsel for the Claimant]

AND it appearing to the satisfaction of the Court that the Defendant [Trustee lacking capacity] one of the trustees of [name of the trust / settlement], lacks capacity to exercise his/her functions as a trustee and that the assets in the Schedule are subject to the trusts of [name of trust/ settlement].

IT IS ORDERED THAT [proposed new trustee] be appointed trustee in place of [trustee lacking capacity] to act together with the continuing Trustee [AAA/ continuing Trustee].

AND IT IS ORDERED THAT the right to transfer the assets specified in the Schedule standing in the names of the Defendant [trustee lacking capacity] and the Claimant [AAA/ Continuing trustee] [and to receive any dividends now due to accrue], shall vest in [AAA/ Continuing Trustee] and [proposed new trustee].

Schedule

[List Trust Assets]
19. **FORM TEMPLATES FOR COURT OF PROTECTION APPLICATIONS**

Note – these are purely example forms and precedents that follow, they are not complete forms and will not be suitable for all circumstances and situations but are meant as a guide only. Whilst every effort has been made to use completely up to date forms at the date of writing, the courts may update their forms from time to time. At the date of writing up to date forms can be obtained from:

http://hmctsformfinder.justice.gov.uk/HMCTS/FormFinder.do

Precedents/ examples for a s54 and s36(9) application:

A. COP 1 form (application itself) – for both a s54 and s36(9) application

B. COP1D form (supporting information for applications to appoint or discharge a trustee)

C. COP 3 form (capacity assessment form)

D. COP5 form (acknowledgement of service/notification)

E. COP 12 form (Special Undertaking by Trustees)

F. COP 14 form (Notice to P, if required)

G. COP 15 form (Notice to other parties, if required)

H. COP20A&B (Certificate of Service/non-service)

I. COP 24 form (witness statement by the applicant)

J. COP 24 form (witness statement regarding the proposed new trustee’s fitness to act)