



2024 Annual Conference 'Working Together'

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THE PROFESSIONAL
DEPUTIES FORUM





**Deputyships:
Gifts, loans & statutory wills**

Aintree University Hospitals Trust v James [2013] UKSC 67

At paragraph 36, Baroness Hale observed that:

‘The courts have been most reluctant to lay down general principles which might guide the decision. Every patient, and every case, is different and must be decided on its own facts.’

The certainties

- Deputy must follow s1 MCA Principles
- Deputy must make decisions in the P's best interests (s4 MCA)
- Deputy is a fiduciary and must act in good faith, not benefit from their position without authority, not put themselves in a position of conflict, and use care and skill when carrying out their functions as they would in the management of their own affairs
- Deputy may make limited gifts & provide for others under a standard order

Preliminary considerations

- What does or what would P want?
- What does P's current will say?
- What is driving the need for a decision/ application?
- How will this impact P financially?
- Are there other consequences for P?
- Are there other options which might achieve the same outcome?

Preliminary considerations

- Does it need a court order or fall within deputyship order?
- Who is/is not in agreement and why?
- Who would need to be served/notified?
- OS Practice Note and acceptance criteria:
 - Capacity evidence of decision and capacity to litigate
 - Sufficient for OS costs be paid
 - Value of application is proportionate to P's estate

<https://www.gov.uk/government/publications/appointment-of-the-official-solicitor-in-property-and-affairs-proceedings-practice-note>

Preliminary considerations

- Would the potential beneficiary pay the OS costs?
- If OS will not act as litigation friend is there someone else who would be willing to act who:
 - is able to conduct proceedings competently and fairly;
 - has no adverse interest to P ?

**Gifts & meeting needs
without a court order**

Allowable Gifts

Standard deputyship order:

‘The deputy may (without obtaining any further authority from the court) dispose of [P’s full name]’s money or property by way of gift to any charity to which [he/she] made, or might have been expected to make, such gifts, and, on customary occasions, to persons who are related to or connected with [him/her], provided that the value of each such gift is not unreasonable having regard to all the circumstances and, in particular, the size of [his/her] estate.’

Allowable Gifts

- Aligned to s12 MCA (gifts by financial attorneys)
- To (an expectant) charity (NB: political parties are not charities)
- To people related or connected to P on 'customary occasions'
- 'Customary occasion' in s12 (3) MCA means –
 - (a) the occasion or anniversary of a birth, a marriage or the formation of a civil partnership, or
 - (b) any other occasion on which presents are customarily given within families or among friends or associates.
- Within P's family or within families generally?

Allowable Gifts: what is reasonable?

In simple terms- it should be surplus to P's requirements and not conflict with P's wishes

It broadly depends on the following:

- P's age and life expectancy
- P's current and future financial needs & requirements
- Whether P would be opposed to the making of the gifts
- Whether it would interfere with P's testamentary wishes/plans
- The tax consequence of the gift
- Overall is it in P's best interests?

De minimus exception

Re GM: MJ and JM v The Public Guardian [2013] EWCOP 2966
deputy permitted to make £3,000 annual exemption & £250 small gifts up to maximum of 10 if:

- P has a life expectancy of less than five years;
- P's estate will be chargeable to inheritance tax;
- the gifts are affordable having regard to P's care costs and will not adversely affect P's standard of care and quality of life; and
- there is no evidence that P would be opposed to gifts of this magnitude being made on their behalf.

De Minimus considerations

- P's will should be checked as any gifts should not frustrate the terms of their will or consideration of who would benefit under P's intestacy
- Check P's life expectancy (consider parent's age on death)
- With NRB, TNRB and RNRB, P may not have an IHT estate
- Cost of care is commonly greater than inflation rate
- Be realistic about care need increasing and be cautious

Providing for needs of others

Standard deputyship order:

‘The deputy may make provision for the needs of anyone who is related to or connected with [P’s full name] if [he/she] provided for, or might be expected to provide for, that person’s needs by doing whatever [he/she] did, or might reasonably be expected to do, to meet those needs.’

Providing for needs of others

Wording broadly aligned to MCA, Schedule 4, para 3(2)

.....an attorney under an enduring power,may (without obtaining any consent) act under the power so as to benefit himself or other persons than the donor to the following extent but no further—

(a)he may so act in relation to himself or in relation to any other person if the donor might be expected to provide for his or that person's needs respectively, and

(b)he may do whatever the donor might be expected to do to meet those needs.

Providing for needs of others

The Various LPAs [2019] EWCOP 40, para 49:

‘there is no basis to limit the parameters of 'best interest' considerations so that an attorney can only use a donor's funds to benefit someone else if in doing so the benefit is meeting 'needs' (of a type which the donor might be expected to provide for, or otherwise.)

Providing for other's needs

- Questions to ask:
 1. Is the person related to or connected P?
 2. Is the suggested provision a need?
 3. Would P be expected to meet these needs?
 4. What would P have been expected to do to meet that need?
- Does Schedule 4, para 23(2) MCA assist? Although applies to EPAs, any question as to what P might be expected to do is determined by assuming they had full mental capacity at the time but otherwise by reference to the circumstances at the time.

Providing for other's needs

- No definition of 'needs': always turns on facts of case
- In **Re Cameron (deceased)** [1999] 2 All ER 924: for the purposes of the EPA Act, the private education of a grandchild was a 'need', and one which the donor might have been expected to provide, and of a kind which she might have been expected to make.

Providing for other's needs

David Ross v A [2015] EWCOP 46:

- the payment of P's brother's school fees from P's PI award was authorised
- where the professional deputy had carefully gone through the checklist of matters to be taken into account in making a best interests' decision, the court should be reluctant to interfere unless the decision was plainly wrong

Providing for other's needs

Re X, Y and Z [2014] EWCOP 87

- P had an acquired brain injury and could no longer care for her three children, X, Y and Z.
- She had a PI award, which was insufficient to meet her own needs and would be exhausted in 10 years
- Professional deputy obtained court order authorising him to make payments from P's funds to the children's nanny to facilitate their care.

When to obtain Court authority

- When there is uncertainty as to what is in P's best interests
- Gifts which fall outside of the deputyship order, including
 - to an individual not 'related to or connected with P'
 - Not on a customary occasion
 - To a political party
- Gifts to save IHT
- Interest free loans to others
- Sale of P's property at an undervalue
- Deeds of variation (**Re LMS** [2020] EWCOP 52: **F v R** [2022] EWCOP 49)
- Statutory will

What order are you asking the court to make?

- Section 18(1)(b) for ‘the sale, exchange, charging, gift or other disposition of P's property.’ includes gift/loans
- Section 18 (1)(h) for ‘settlement of any of P’s property, whether for P’s benefit or for the benefit of others’: covers gifts into trust
- Section 18(1)(j) for ‘the execution for P of a will’: authority to execute a will

Ascertaining P's wishes etc

Re Joan Treadwell deceased [2013] COPLR 587',
Senior Judge Lush commented at paragraph 88:

‘ In the context of someone’s property and financial affairs, I can think of no written statement that is more relevant or more important than a will.’

Ascertaining P's wishes etc

In the matter of JKS and ADS v DSM [2017] EWCOP 8: consider and take steps to try to ensure that so far as practicable:

- (1) P is seen in circumstances that will reduce family influences (such as a neutral venue and at least not in the presence of family members);
 - (2) the history taken and given are balanced, applied with care and in a way, that recognises the difference between fact and assertion; and
 - (3) the explanations, questions and prompts given to P are appropriately framed (e.g. as to why P is expressing their current view and what they remember about relevant parts of P's family history).
- See MCA Code para 5.40 & 5.67 about influences of others

Weight attributed to P's wishes etc

In the matter of JKS and ADS v DSM [2017] EWCOP 8:

The weight to be given to expressions of P's wishes and feelings must take account P's capacity when those expressions were made and should include consideration of:

- (1) P's ability at the relevant times to take account of relevant past and present circumstances;
- (2) the factual accuracy of reasons expressed by P at the relevant times;
- (3) any influences to which P may be subject at the relevant times; and
- (4) the way in which P's wishes and feelings had been obtained.

Weight attributed to P's wishes etc

Re M [2009] EWHC 2525 held:

- (1) P's wishes and feelings will always be a significant factor, which the court must pay close regard;
- (2) The weight will always be case and fact specific;
- (3) The MCA does not lay down any hierarchy as between the various factors, which should be borne in mind;
- (4) In some cases, there will one or more features or factors of 'magnetic importance', which influence or determine the outcome;

Weight attributed to P's wishes etc

Re M [2009] EWHC 2525 held

(5) Regard to all the circumstances will include but are not limited to –

- (i) The degree of incapacity; the nearer to the borderline of capacity, the more weight should be attached to the person's wishes and feelings;
- (ii) The strength and consistency of the person's expressed views;
- (iii) The possible impact on the person's knowledge that their wishes and feelings are not being given effect to;
- (iv) The extent to which the person's wishes and feelings are/are not rational, sensible, responsible and pragmatically capable of sensible implementation in the circumstances; and

Weight attributed to P's wishes etc

Re M [2009] EWHC 2525 held

(i) The extent to which the person's wishes and feelings, if given effect to can be properly accommodated within the court's overall assessment of what is in their best interests.

(6) In considering the best interests factors, material, which falls outside what is listed as to be considered, may still be relevant, which the decision maker should take into account. This may include an oral statement, particularly if it relates to the person's wishes and feelings; and someone who was engaged in caring but is no longer doing so.

Weight attributed to P's wishes etc

- Article 8 European Convention on Human Rights
- The United Nations Convention on the Rights of Persons with Disabilities, Article 12(4):

‘States Parties shall ensure that all measures that relate to the exercise of legal capacityshall ensure that measures relating to the exercise of legal capacity **respect the rights, will and preferences of the person....’**

Evidence in support

- Follow s4(1)- (7) MCA as evidence of best interest
- PD9E para 6 sets out the evidence in support
- Forms COP1 & COP1C & witness statement
- COP3/evidence of testamentary capacity (but also need evidence of P's capacity to litigate)
- Medical condition report including P's life expectancy, likelihood of required increased expenditure in the foreseeable future may also be relevant for a statutory will application

Evidence in support

- Evidence of before and after analysis of tax ramifications may also be relevant for a statutory will application
- PD does not ask for P's wishes, feelings, values & beliefs. Although this will be provided by the OS if acting as LF, it is important to include a character sketch to help demonstrate what P would be likely to want if they had capacity to make the decision
- Gift applications must demonstrate surplus funds (see **Re JDS** [2012] COPLR 383 at para 39), if not a loan may be more appropriate (see **Re AK (Gift Application)** [2014] COPLR 180)

Court considerations

- Benefit can be indirect benefit for P (***SS for the Home Department v Sergei Skripal*** [2018] EWCOP 6)
- ***In the Matter of G (TJ)*** [2010] EWCOP 3005) Mr Justice Morgan observed at paragraph 35 that
 "... the word 'interest' in the best interests is not confined to matters of self-interest, or, putting it another way, a court could conclude in an appropriate case that it is in the best interests of P for P to act altruistically."
- Court can take a holistic approach and take into account financial, social and emotional considerations (***Re A*** [2015] EWCOP 46)

Tax planning applications

- There are no assumptions or presumptions that tax planning will be in P's best interests (*PBC v JMA & Others* [2018] EWCOP 19; *The matter of MJL* [2019] EWCOP 31)
- **Affordability:** Where the Court is considering the authorisation of gifts, affordability is a "necessary but not sufficient" consideration

Court may also consider

- P would have wanted to put their house in order and make a Will. They would want to do the right thing and not to leave family members with unintended consequences and problems (**Re Peter Jones** [2014] EWCOP 59).
- P being remembered for having done ‘the right thing’ (**Re P** [2009] EWHC 163)
- whether P is currently being funded by the State (see **K v LM** [2015] EWCOP 91: **In matter of MJL** [2019] EWCOP 31)

Service of application

Paragraph 9 of PD 9E provides that the applicant must name as a respondent –

- (a) any beneficiary under an existing will or codicil who is likely to be materially or adversely affected by the application;
- (b) any beneficiary under a proposed will or codicil who is likely to be materially or adversely affected by the application; and
- (c) any prospective beneficiary under P's intestacy where P has no existing will

Dispensing with service

- It is a procedural decision not a best interest decision for the court (need to give effect to rules of natural justice; Art 6 ECHR and overriding objectives in r1 COPR 2017)
- **Re AB** [2014] COPLR 381: P's father had the right to be heard there, was no urgency, and insufficient efforts had been made to locate him.
- **I v D** [2016] EWCOP 35: comprehensive judicial guidance provided

Dispensing with service

- **M and H v P** [2019] EWCOP 42: son had alcohol and drug addiction, and had a history of violence and abuse towards P and others- it was not necessary for him to be served or notified
- **BH v JH** [2024] EWCOP 1: carers who were potential beneficiaries under a discretionary trust did not need to be served as it might impact on P's care, but the Attorney General should be notified for non -specified charities

Further guidance

- OPG Practice Note on Gifts PN7

<https://www.gov.uk/government/publications/public-guardian-practice-note-gifts>

- OPG2: Giving gifts for someone else: a guide for deputies and attorneys

<https://www.gov.uk/government/publications/giving-gifts-a-guide-for-deputies-and-attorneys>

- MCA Code, paras 7.40-7.42

Further guidance

- Court of Protection Practice Direction 9E

<https://www.judiciary.uk/guidance-and-resources/court-of-protection-practice-directions/>

- Dealing with a protected person's property: wills, gifts, settlements (COP GN8)

<https://www.gov.uk/government/publications/dealing-with-a-protected-persons-property-wills-gifts-settlements-cop-gn8>

Thankyou!

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