

# DECISIONS, DECISIONS

Kiran Vasudeva considers some of the challenges that a property and financial affairs deputy may face

## ➡ KEY POINTS

### WHAT IS THE ISSUE?

The role of a property and financial affairs deputy.

### WHAT DOES IT MEAN FOR ME?

The Court of Protection can appoint a lay person, local authority, professional or trust corporation as someone's deputy, to make property and financial affairs decisions on that person's behalf if they lack mental capacity.

### WHAT CAN I TAKE AWAY?

An understanding of some practical matters that a property and financial affairs deputy may face in their day-to-day role, and action that the deputy can take.

In England and Wales, the *Mental Capacity Act 2005* (MCA) provides the Court of Protection (COP) with jurisdiction to appoint a deputy to make decisions on behalf of another person (P) who lacks mental capacity to manage their property and affairs. A person may lack mental capacity because they have sustained a brain injury, or through illness, dementia or because they have severe learning disabilities.

The test for mental capacity is set out in s3 MCA and is function-specific – i.e. capacity should be assessed in relation to the particular decision in question at the time the decision is to be made. Therefore, if P has times when their condition is better than others, the decision should be postponed or reviewed.

The COP can appoint a deputy with a 'deputyship order' to deal with a single decision or multiple decisions for P, indefinitely or for a fixed period.

The deputy must always act within the scope of the powers set out in the

deputyship order and apply to the COP if further or varied powers are required. For example, the deputyship order can include restrictions on purchasing and selling property and, particularly for lay deputies, there can be limits on the withdrawal of funds.

A deputy will usually need to open a deputyship bank account, pay invoices, implement budgets, arrange insurance and, if the deputyship order allows, buy and sell property, and invest P's funds.

## RULES TO KEEP IN MIND

As well as complying with the deputyship order, there are a number of rules for the deputy to comply with, including the statutory principles set out in s1 MCA:

- **P must be assumed to have capacity unless it is established otherwise;**
- **all practicable steps must be taken to support P in making a decision;**
- **P must be allowed the right to make unwise decisions;**
- **before an act is done or decision made, consideration must be given to whether the object can be as effectively achieved in a way that is less restrictive of P's rights and freedoms;**
- **actions and decisions must be made in P's best interests, which includes:<sup>1</sup>**
  - o **not making any unjustified assumptions on the basis of P's age, condition, appearance or behaviour;**
  - o **consulting with P and other people, such as carers, friends and family;**
  - o **taking into account P's past and present wishes and feelings, and P's beliefs and values, such as any religious, cultural, moral or political values.**

Unless a decision is required urgently, a full and objective best-interests assessment should be carried out. For significant decisions, it is

important to keep a record of how the criteria were applied:

- **having regard to the guidance provided in the MCA Code of Practice as required under s42(4) MCA; and**
- **complying with the common-law duties, such as the duty of care, fiduciary duties, maintaining confidentiality and keeping accounts.**

Section 19(6) MCA states that 'a deputy is to be treated as P's agent in relation to anything done or decided by him within the scope of his appointment...' and, as such, the rules of principal and agency apply to the relationship.

Each deputyship appointment is distinct. As a deputy, you are stepping into the shoes of P. After all, P is a unique person with individual circumstances and needs. From time to time, the deputy may have to deal with significant, life-changing events or periods of crisis in P's life. The deputy's appointment can be sometimes onerous and time-consuming – for example, P may attempt to take out loans and be successful, have a beneficial interest in an estate or be entitled to be appointed as the personal representative of someone's estate.

## WHEN P TRIES TO TAKE OUT LOANS

The P who applies for loans and overdrafts without any means of repaying the credit, and who provides false information about their circumstances, can be difficult for the deputy to manage. It is important to look at the s1 MCA statutory principles and question if P has the requisite capacity to take out credit.

When applying the test for capacity,<sup>2</sup> if it is determined that P does lack the requisite capacity, then what can be done to stop P in the least restrictive way possible? The MCA Code of Practice provides that the best-interest principle prevails over the least-restrictive-option principle.

The deputy could write to the bank and ask it to remove any overdraft facilities and/or apply to the credit referencing agencies, such as Experian and Equifax, with a copy of the deputyship order, to enter a notice on P's credit file, with details of the deputyship order and a contact name and address.

The deputy should try to find out why P is applying for loans. Are the budgets in place for P's personal expenditure sufficient? Should they be reviewed? Does P know what the budgets are for and that the deputy can be approached for further funds? Is anyone putting any undue influence on P for funds? The deputy, particularly a professional one, cannot be with P for 24 hours a day. If there are concerns that P is not using their budgets as intended, it may be necessary for the deputy to consider alternative means of ensuring P's needs are met. This may involve fuel

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administration (with will annexed) for P's use and benefit. Rule 35(2) of the *Non-Contentious Probate Rules 1987* provides that 'the person authorised by the Court of Protection to apply for a grant' has priority over any other applicant.<sup>7</sup>

If the deceased died intestate, the deputy will only have authority to apply for the grant on P's behalf if there is no other person entitled in the same degree who is able or willing to apply. Again, the short procedure under *Practice Direction 9D* may be available.

The probate registry will require a sealed copy of the court order, which is usually exhibited with the applicant's oath. The oath should include the limitation 'for the use and benefit of P until further representation is granted'.

What if P lost capacity after being appointed as an executor? The original grant is not revoked. The deputy may apply for a new grant for the unadministered estate for the use and benefit of the person who now lacks capacity.

## CONCLUSION

The examples here are just a few of the challenges a deputy may face. The deputy may also be required to manage the P who owns a business, the P who is a trustee, the P who is divorcing and the P who has a compensation claim.

A deputy's role is complex, as they owe a number of duties at different levels, which may not always be consistent. Whatever the circumstances, it is key for the deputy to understand the powers granted under the deputyship order and the limitations on their power, and to be familiar with the myriad obligations imposed on them.

The MCA *Code of Practice* provides useful guidance to assist the deputy in performing their role,<sup>8</sup> and the Office of the Public Guardian has recently issued a note on standards for professional deputies (see page 43),<sup>9</sup> which is an invaluable tool for professional and public authority deputies.

1 Section 4 MCA

2 Section 3 MCA

3 Concrete thinking is literal thinking that is focused on the physical world. It is the opposite of abstract thinking

4 Section 18(1)(g) MCA

5 *Re Winkle* [1894] 2 Ch 519

6 [bit.ly/1PjMfJ2](http://bit.ly/1PjMfJ2)

7 [bit.ly/1npagCn](http://bit.ly/1npagCn)

8 [bit.ly/1KzmlE4](http://bit.ly/1KzmlE4)

9 [bit.ly/1UIMvVY](http://bit.ly/1UIMvVY)



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cards, grocery accounts or providing budgets to family members or support workers to assist with P's expenditure.

It may be that P's condition causes concrete thinking,<sup>3</sup> or a distorted perception of reality. The deputy should consider whether intervention from an occupational therapist, to assist with budgeting, or a neuropsychologist is appropriate.

It is not uncommon for the deputy to find there is a conflict with P's wishes, particularly in this scenario. Of course, P is allowed to make an unwise decision; the deputy should work with, advise and assist P, rather than impose decisions on them. However, if it is more than an unwise decision and P does lack capacity, the deputy is entitled to act solely in P's best interests, even if that will contradict P's wishes.

## WHEN P IS SUCCESSFUL IN TAKING OUT A LOAN

The COP may confer authority on the deputy to deal with 'the discharge of P's debts and any of P's obligations, whether legally enforceable or not'.<sup>4</sup> There is no other assistance in the MCA to protect P's assets against claims from creditors.

A creditor is in a similar position to any other person dealing with the property and financial affairs of P. If a claim is to be issued against P, it should be issued against P acting by the deputy as their agent or litigation friend. Under common-law principles, where a person's property is under the jurisdiction of the COP, it may be assumed that it cannot be seized in satisfaction of a judgment debt. Case law

suggests creditors cannot obtain any payment unless the COP makes an order in their favour.<sup>5</sup>

## WHEN P HAS A BENEFICIAL INTEREST IN AN ESTATE

Where P is named as a beneficiary in a will, there are practical points to consider. P will be dealing with bereavement and additional therapies may need to be considered around this time.

The deputy will generally have sufficient authority to act as P's agent in dealing with the personal representatives of the estate under the deputyship order. However, it may be necessary to apply to the COP for authority to give a valid receipt for any monies due to P.

If the requisite authority has not been provided in the deputyship order, the deputy can use the short application procedure set out in *Practice Direction 9D*,<sup>6</sup> which accompanies the *Court of Protection Rules 2007*. The COP may also review the security bond at the same time, as P's inheritance may have significantly increased the value of P's estate, and it may consider varying the deputy's powers to allow the deputy to administer the funds.

## WHEN P IS APPOINTED AS AN EXECUTOR

If P is one of several executors named in the will, the probate registry can reserve power to P and issue a grant to the other executors.

But, if P is to take the appointment, the COP has the power to authorise the deputy to apply for a grant of letters of