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Court of Protection

Annual Update

16th October 2018

at

**Prince Philip House
3 Carlton Terrace
London SW1 5DG**

www.5sblaw.com

2.5 hours

- 8.30 am **Registration and breakfast**
- 9.00 am **Introduction – David Rees QC**
- 9.05 am **Recent deputyship cases – (Re Appointment of Trust Corporations as Deputies; Re AR)**
Alexander Drapkin and Mathew Roper
- 9.30 am **Problems with Lasting Powers of Attorney – Re The Public Guardian’s Severance Applications**
Thomas Entwistle
- 9.50 am **Dispute Resolution in and out of the Court of Protection**
Barbara Rich
- 10.15 am Coffee
- 10.45 am **Personal Welfare for the Property and Affairs Practitioner**
David Rees QC
- 11.15 am **Statutory wills and working with the Official Solicitor**
Jordan Holland
- 11.35 am **Removing defaulting deputies and attorneys**
William East and Eliza Eagling
- 12.00 pm **Plenary Session**
- 12.30 pm **Close**

David Rees QC is well known for his experience in wills, trusts, estates and Court of Protection matters. He is ranked for Traditional Chancery and Court of Protection in Chambers UK Bar Guide 2018 where he is described as “experienced, knowledgeable and an expert in his field”. He is regularly instructed by the Official Solicitor and appears before all levels of judge in the Court of Protection. He has appeared in many leading cases under the Mental Capacity Act 2005. His recent cases include:

The Public Guardian v DA & Others [2018] EWCOP 26 (Test case on the severance of provisions relating to the termination of life in lasting powers of attorney).

PBC v JMA & Others [2018] EWCOP 19 (Authorisation of statutory gifts in excess of £6M).

Re Various Incapacitated Persons [2018] EWCOP 3. (Test case to determine basis upon which Court of Protection should appoint trust corporations to act as property and affairs deputies).

David is the General Editor of Heywood & Massey’s Court of Protection Practice and is a member of the Court of Protection Rules Committee. He was appointed as a Recorder in 2012 and as a Deputy High Court Judge in 2018.

Alexander Drapkin has a broad traditional chancery practice incorporating both litigation and advisory work. His practice is predominantly split between all manner of trust and inheritance disputes, the work of the Court of Protection and non-contentious trust, estate and taxation advice.

Alexander’s contentious trust work includes all actions for breach of trust and the removal of trustees, establishing resulting and common intention constructive trusts, construction and rectification of trust documents, and applications for directions. In relation to estates, Alexander deals with probate and estate administration claims of all kinds, as well as claims for the construction and rectification of wills. In the Court of Protection Alexander predominantly accepts instructions in property and affairs cases but also acts in those with a welfare element.

Mathew Roper has a busy traditional Chancery practice with a particular emphasis on trusts, estates, related professional negligence and the property and affairs jurisdiction of the Court of Protection. His Court of Protection practice focuses on contested deputyship, statutory will and estate planning applications. He also receives regular instructions to act in proceedings concerning the validity, registration and revocation of Enduring and Lasting Powers of Attorney. He recently acted for the Public Guardian in proceedings concerning the remuneration of professional deputies (*Re AR* [2018] EWCOP 8).

Thomas Entwistle has a Chancery practice mainly involving probate, wills and estates including family provision, trusts, related taxation and professional negligence, and Court of Protection work. His practice includes both litigation and advisory work.

Barbara Rich specialises in contentious succession and trusts litigation, and in the property and affairs jurisdiction of the Court of Protection under the Mental Capacity Act 2005, often of substantial value and/or legal complexity and importance. She is recommended as a leading junior for traditional Chancery work in both Chambers UK and the Legal 500

directories guide. In Chambers UK 2017 she was listed as a starred individual in the Court of Protection practice area, where “being against her in court is a challenge for any opponent because judges really trust her. She is compelling and has the ear of the court in a way which is totally deserved”. Barbara is also an enthusiastic and effective mediator with substantial mediation experiences. She is the consultant editor of Jordan’s Elder Law Journal and assistant editor of Heywood & Massey: Court of Protection Practice. She is regularly in demand for speaking engagements within her field of expertise.

Jordan Holland has a wide chancery practice with an emphasis on offshore and domestic trust disputes, contentious probate, family provision and Court of Protection matters. He has significant experience of working in larger teams as well as cases where he is sole instructed counsel and has appeared in a number of major offshore trust disputes in recent years, including the *Trilogy* litigation and the *Crociani* litigation. Recent onshore cases include *Re Earl Bathurst (Deceased)* [2018] EWHC 21 (Ch) (rights of life tenants) and *Tish v Olley* [2018] EWHC 1069 (Ch) (annuities in wills). He is also noted for his art and cultural property practice and regularly appears in the Court of Protection, often for the Official Solicitor. Chambers UK Bar Guide 2018 (Traditional Chancery) describes him as “*an absolute go-to junior barrister who is destined for big things*”.

William East has a general chancery practice in all areas of work undertaken at 5 Stone Buildings. For nine months after completing pupillage he was a judicial assistant in the Supreme Court to Lords Walker and Dyson. He makes regular appearances in the High Court, County Court and the Court of Protection and is listed for the latter as a leading junior in Chambers UK 2017.

Eliza Eagling Eliza has a chancery practice with a particular emphasis on the Court of Protection, wills and estates, family provision, trusts and personal taxation. She advises on contentious and non-contentious matters and regularly appears in the High Court and the Court of Protection. In 2017 Eliza undertook a secondment in the contentious trusts and probate team of Withers LLP.

Recent Court of Protection litigation includes an application to transfer P’s assets from a deputyship to a personal injury trust in New York; authorisation to defend trust litigation in the Chancery Division in circumstances where P killed his father; authorisation to purchase a property for P’s children; statutory will proceedings; whether P had capacity to marry his attorney; and the removal of attorneys and deputies.

These notes are intended as an aid to stimulate debate: delegates must take expert advice before taking or refraining from any action on the basis of these notes and the speaker can accept no responsibility or liability for any action or omission taken by delegates based on the information in these notes or the lectures.

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RECENT DEPUTYSHIP CASES

**(Re Appointment of Trust
Corporations as Deputies; Re AR)**

Alexander Drapkin and Mathew Roper

REMUNERATION OF DEPUTIES

Introduction

1. The purpose of this short presentation is to consider the remuneration of professional deputies following the recent decisions in *Re AR* [2018] EWCOP 8 and *LBE v Matrix Deputies Ltd* [2018] EWCOP 22.

Background

2. Section 16(2) of the Mental Capacity Act 2005 ("MCA 2005") provides the Court of Protection ("the Court") with power to appoint a deputy to make decisions on behalf of an incapacitated person ("P").
3. MCA 2005, section 16(5) provides that the Court may confer on a deputy such powers or impose on him such duties as it thinks necessary and in P's best interests.
4. One power the Court generally confers on professional deputies is the right to receive remuneration out of P's property for discharging his functions. The Court's power to make such an order is expressly stated in MCA 2005, section 19(7). Section 19(7) is supplemented by rule 19.13(1) of the Court of Protection Rules 2017 ("COPR 2017") (previously rule 167 of the Court of Protection Rules 2007 ("COPR 2007")), which provides as follows:

- (1) *Where the court orders that a deputy, donee or attorney is entitled to remuneration out of P's estate for discharging functions as such, the court may make such order as it thinks fit including an order that –*
- (a) *the deputy, donee or attorney be paid a fixed amount;*
 - (b) *the deputy, donee or attorney be paid at a specified rate; or*
 - (c) *the amount of the remuneration shall be determined in accordance with the schedule of fees set out in the relevant practice direction.*

5. Accordingly, where the Court determines to authorise remuneration, it has a wide discretion as to the terms of that remuneration. The Court may order such remuneration as it considers to be in P's best interests. Three options are expressly provided but these are non-exhaustive and are not prescriptive. Nevertheless, it has become common practice to authorise remuneration pursuant to the schedule of fees set out in Practice Direction 19B ("PD 19B"). Indeed, members of the legal profession and judiciary have often assumed there is a presumption that remuneration will be ordered pursuant to PD 19B.

Re AR

6. This assumption as to the status of PD 19B was exposed as being erroneous in *Re AR*. In this case, a solicitor ("NSC") had been appointed the property and affairs deputy for over one hundred persons, the majority of whom were in receipt of means tested benefits. NSC applied to be appointed AR's deputy for property and affairs. AR was in receipt of means tested benefits and NSC sought an order for remuneration pursuant to the last of a number of successive bulk orders made in respect of his remuneration as deputy.

7. The bulk remuneration order in question was made by an authorised court officer on 24th November 2014 and provided inter alia as follows:

1. *[NSC] is authorised to charge the persons in receipt of means assessed benefits for whom NSC has been appointed deputy remuneration for work incurred in respect of acting as deputy in accordance with the following terms:*

Category 1: Work up to and including the date upon which the court makes an order appointing a deputy for property and affairs £850 plus VAT.

Category 2: Annual management fee for acting as deputy payable on the anniversary of the order appointing a deputy £650 plus VAT.

Category 3: Where applicable, an annual fee for managing the person's tenancy and accommodation of £65 plus VAT.

Category 4: Where applicable an annual fee for managing any direct payments received by NSC from the local authority of £110 plus VAT.

8. Accordingly, NSC had been receiving, and sought to receive in AR's case, remuneration in excess of the cap imposed by PD 19B. On this basis, and given his decision in *The Friendly Trusts Bulk Application* [2016] EWCOP 40, DJ Eldergill raised concerns about the 24th November 2014 order and the terms of NSC's remuneration more generally. More particularly, when inviting the Public Guardian to participate in the proceedings, the District Judge raised inter alia the following issues:

- (1) The fact the 24th November 2014 order permitted charging in excess of PD 19B;
 - (2) The fact the 24th November 2014 order authorised remuneration for categories of work not permitted by PD 19B; and
 - (3) The fact the 24th November 2014 order authorised a detailed assessment in all cases whereas a specific order is required under PD 19B if P's assets are below £16,000.
9. The Public Guardian agreed to participate in the proceedings and the matter was transferred to HHJ Hilder, the Senior Judge of the Court of Protection. HHJ Hilder identified a number of procedural irregularities in the 24th November 2014 order and the earlier bulk remuneration orders on which NSC had relied, including:
- (1) The lack of a formal application leading to the 24th November 2014 order or its predecessors;
 - (2) The fact the orders were of a “bulk” nature without apparent consideration of the particular circumstances of each individual P; and
 - (3) A probable failure to comply with the notification provisions of COPR 2007.

10. The case was transferred to Charles J, then the Vice President of the Court of Protection. Charles J agreed with the position advanced by NSC and the Public Guardian, namely that there is no presumption of, or a starting point or bias in favour of, remuneration being authorised pursuant to PD 19B (as to the incompatibility of presumptions and “best interests” decisions see *Watt v ABC* [2016] EWCOP 2532 at [75]). Accordingly, DJ Eldergill had fallen into error so far as he held that there was a presumption in *The Friendly Trusts Bulk Application* case.
11. Charles J held that the Court is required to make a best interests decision specific to each P concerned. Otherwise, the Court’s discretion is unfettered and PD 19B merely provides a scheme of remuneration which can be incorporated into a deputyship order by reference should the court determine to direct remuneration in accordance with its terms. Moreover, Charles J confirmed that there is nothing in MCA 2005 or COPR, rule 19.13 to prevent an order authorising a deputy to receive a fixed sum for a particular item of work not included within PD 19B or preventing the sum authorised for a particular item of work from exceeding the sum which would be permitted if remuneration was authorised pursuant to PD 19B. The unfettered nature of the Court’s discretion also meant that there was no prohibition on an order for detailed assessment in cases where P had assets below £16,000.
12. Notwithstanding this decision as to the width of the Court’s discretion when ordering remuneration, Charles J determined that the 24th November 2014 order and its predecessors could no longer be relied on owing to what Charles

J described as “surprising, unfortunate and serious flaws in the substantive approach that was taken”, and in particular the Court’s failure to separately consider the best interests of each P concerned.

20 *...The informality of the procedure adopted may have been founded on some pragmatic considerations and the historic approach of the old Court of Protection before the MCA. However, in my view the flaws are not confined to issues that can properly be described as procedural flaws that could or should not found the revisiting or setting aside of the ACO orders [the 24th November 2014 order and its predecessors].*

21 *To my mind, it is remarkable that the COP made the ACO orders in the manner that it did and in particular that it did so:*

- i) without either a schedule identifying the persons to which they applied or evidence relating to each P in receipt of means assessed benefits (including whether the remuneration was cost neutral for that P) to whom they applied, and so in a generic form, and*
- ii) in respect of future appointments of Mr. Cawthorn [NSC] as a property and affairs deputy.*

The same can be said of the addition of a number of Ps to the order dated 15 March 2013 if, as appears to be the case, no evidence was put before the COP relating to each of those Ps.

....

25 *In my judgment, the generic and purported future effect of the ACO orders shows that in making those orders the COP failed to properly address and so have proper regard to the best interests of each P and so contravened a fundamental principle:*

- i) of the MCA, and indeed any approach that is founded on the best interests of an individual, and*

ii) *more generally, of the fair administration of justice.*

These fundamental flaws cannot be excused by pragmatic considerations and cannot properly be described as procedural. Rather, they are surprising, unfortunate and serious flaws in the substantive approach that was taken.

26 *Now that these flaws have been discovered I have concluded that the ACO orders should no longer be relied on.*

13. In the circumstances, Charles J duly ordered a review of NSC's remuneration in every case where NSC acted as a deputy. This exercise was to be undertaken without the need to pay a fee because, in Charles J's judgment, the Court carried considerable responsibility for the issues to be addressed. Indeed, Charles J had indicated an intention to join the Crown for the purpose of making a non-party costs order to reflect this responsibility. (This possibility had however fallen away because neither NSC nor the Public Guardian sought to recover their costs of the proceedings.)

6 *...there is no doubt that the COP acting through its then Senior Judge (Judge Lush) and an authorised court officer (Mr. Batey) with the concurrence of Judge Lush must carry considerable responsibility for the problems now facing the COP, Mr. Cawthorn and most importantly the Ps for whom he acts as a property and affairs deputy. However, the Crown has not been joined to these proceedings because the Public Guardian does not seek any order for his costs and both he and Mr. Cawthorn have decided that they do not seek an order for costs to be paid by the court (and so the Crown).*

14. So far as AR's case was concerned, Charles J authorised NSC to receive the remuneration he sought for discharging his functions as deputy. Charles J considered the possibility of appointing the relevant local authority to be

remunerated pursuant to PD 19B, but determined that the more personal service offered by NSC justified the additional expense to AR. In this regard, Charles J emphasised inter alia the views of AR's foster mother and the fact that AR would be unlikely to amass significant savings even if she paid the lower deputyship fees of the local authority. As a footnote, it is worth emphasising that Charles J also took the unusual step of ordering NSC's remuneration to rise in line with the Consumer Prices Index. Charles J held that this was appropriate so as to avoid the unnecessary time and expense of NSC making repeated applications for increases in his level of remuneration.

15. It is to be emphasised that the decision in AR's case is fact specific (as are the other cases in which NSC acted as deputy). Nevertheless, it highlights the potential in appropriate cases for professionals to seek appointments as deputy on bespoke terms which are more generous than those provided by PD 19B. It may be that the number of cases where such an appointment can be justified, as opposed merely to a provision permitting detailed assessment, will be limited. The potential to obtain an order for the remuneration authorised to rise in line with the Consumer Prices Index may be more likely to find favour with the Court, but the comments of HHJ Hilder in *LBE v Matrix Deputies* (discussed below) may suggest otherwise:

56 *Clearly the court is not obliged to provide for authorisation of a deputy by reference to the fixed fees of the Practice Direction. Rule 19.13 expressly sets out alternative options of remuneration at a "fixed amount" or a "specified rate." However, each of these alternatives may be perceived as having some practical disadvantages. Authorisation of remuneration of a "fixed amount" means it is more likely that there will need to be future*

applications to court (with attendant cost to P) because in a particular year the vicissitudes of life present more demands on the deputyship than usual, or simply to update the amount to reflect rising costs over time. To some extent these difficulties can be addressed by index-linking (as in Re AR) but the orders, and the steps necessary to quantify authorised fee, necessarily become more complex. Authorisation of a "specified rate" on the other hand does not inherently carry any limit on how much of that specified rate would be reasonable. These disadvantages are mitigated if remuneration is by reference to the Practice Direction fixed rates, which are updated periodically.

LBE v Matrix Deputies Ltd

16. The London Borough of Enfield ("LBE") outsourced a large number of deputyships to Matrix Deputies Ltd ("Matrix").¹

17. The Public Guardian applied to discharge Matrix as deputy in all cases, raising the following concerns: (1) the charging of excessive fees; (2) inappropriate or inadequate arrangements for holding/recording client funds and transactions; (3) conflicts of interest arising from inappropriate relationships with other bodies; and (4) a failure to provide information and comply with orders for disclosure. Matrix conceded that its deputyships should be terminated. However, save that it admitted some accounting discrepancies and receiving commission from an estate agent on the sale of properties owned by the Ps, Matrix made no admissions as to the concerns

¹ Matrix was, erroneously, appointed deputy in some cases. In others the appointed deputy was an employee of Matrix. For ease of expression and to avoid confusion, Matrix is referred to as the "deputy" in all cases.

raised by the Public Guardian. See *Public Guardian v Matrix Deputies Ltd* [2017] EWCOP 14.

18. Following the termination of its deputyships, LBE, as the successor deputy in the majority of cases, sought orders to call in the security bonds maintained as a condition of Matrix's appointment as deputy. The losses LBE identified for the purpose of calling in the security bonds were limited to fees charged in excess of the fixed costs stipulated by PD 19B for public authorities.
19. The parties differed greatly in their respective positions on Matrix's entitlement to remuneration, but principally LBE and the Public Guardian contended that Matrix was limited to the public authority rates, while Matrix contended it was entitled to charge fees at the solicitor rate. The Court was also required to consider further questions about the effect of the deputyship orders in these cases as a consequence both of the parties' respective positions and fact the deputyship orders in the cases before the court were not identical. In particular, some orders provided for merely "fixed costs", while others provided for "fixed costs" in addition to authorising the deputy to seek a detailed assessment of his costs.
20. In the circumstances, the Court identified the following issues for determination:
 - (1) If an order merely authorises "fixed costs" without specifying at what rate, does that necessarily imply fixed costs at the lower, public authority rate?

(2) If an order authorises "fixed costs" without specifying at what rate but also authorises the deputy to obtain assessment from the SCCO, what is the

effect of the second limb of the order? Is it 'simply otiose'? Does it necessarily imply fixed costs at the higher, solicitors' rates?

(3) Where a single deputy holds various appointments, some of which include authorisation to charge fees at the higher fixed rate, and some of which authorise merely "fixed costs" without specifying the rate, can that deputy infer that all his appointments are made on the same basis such that where the rate is not specified, the higher rate can be implied?

(4) If an order did not include authorisation to obtain SCCO assessment, but such assessment was obtained anyway, is the deputy entitled to charge the assessed fees?

(5) Where an order does include authority to obtain SCCO assessment, can the deputy rely on that authority once the estate has fallen below £16000, or is the deputy required to seek specific further authority for assessment?

21. In HHJ Hilder's judgment the answers were as follows:

- (1) Yes, if an order authorises "fixed costs" without specifying at what rate, that necessarily implies the lower, public authority rate [where the deputy is not a solicitor].

41 *...To my mind, it is impossible to read the discretion provision as saying that any non-solicitor professionals acting as deputy (including accountants and case managers as well as not-for-profit organisations) are 'entitled' to fixed costs at the solicitor rate or are to be treated as if they were solicitors. Providing for such entitlement is in the discretion of the court ('may').*

42 *By the very nature of discretion, how it is exercised cannot be assumed. The wording of the discretion provision clearly envisages that, if the higher rate is to apply to 'other professionals' a court direction will be made – "the court may direct that". Logically therefore, where an order appointing a non-solicitor does not specify the solicitor's rate, an authorisation to receive 'fixed costs' must necessarily imply the lower, public authority rate. In my judgment, the answer to the first question is 'YES'.*

43 *Such an approach is consistent with the general approach taken to interpreting costs clauses in court orders, and with the approach taken in The Friendly Trust (paragraph 97).*

44 *Moreover, in the particular circumstances of the appointments with which the court is presently concerned, there is nothing which would justify any other assumption. Any reference in forms COP1 or COP4 to DW's qualification as an accountant cannot, as DW would have it, be determinative because the court is not obliged to direct that an accountant be entitled to remuneration at the higher rate. Although DW asserts that he did not regard himself as 'standing in' for the Local Authority the context of the appointments under consideration was (as set out in paragraph 7 of the earlier judgment)*

the Applicant's 'outsourcing' of deputyship functions. As envisaged at paragraph 93(b) of The Friendly Trust judgment and latterly spelled out in paragraph 19 of the current version of PD19B, the starting point in those circumstances will be the public authority rate.

- (2) No, if an order authorises "fixed costs" without specifying at what rate but also authorises the deputy to seek assessment from the SCCO, that does not imply the higher, solicitors' rate. It is open to the court to provide for fixed costs at the lower rate and also the option of assessment in a particular case if it sees fit.

48 *The discretion provision provides for the court to apply "its provisions" (that is, the provisions of the Practice Direction) to "other professionals." It does not specify that any particular provisions may be applied; and it does not provide that the court may only apply the provisions of one pillar of the Practice Direction or the other in their entirety. It leaves the decision as to which provisions are to be applied completely in the discretion of the court.*

49 *At paragraph 5 of the Practice Direction it is provided that " The court order or direction will state whether fixed costs or remuneration applies, or whether there is to be a detailed assessment by a costs officer ." "Or" usually suggests mutual exclusivity. However, and as noted in paragraph 33 above, it would not be consistent with the Rules to read this 'or' as meaning that an order may not provide for both fixed costs and assessment. Rather, in my judgment, it should be construed as denoting that an order to apply fixed costs and an order to permit detailed assessment are the products of distinct decisions.*

50 *In the absence of any reference to assessment in the context of public authority rates, I have considered whether the wording of paragraph 15 (" the following fixed rates of*

remuneration will (emphasis added) apply where the court appoints a holder of an office in a public authority to act as deputy ") should be considered to exclude any possibility of assessment if the public authority rate is applied. I have concluded that it should not. Exactly the same wording is used in respect of solicitors at paragraph 9, apparently without causing any difficulty to the subsequent provision (at paragraph 11) for application for assessment if the deputy prefers.

51 *It follows from these conclusions that there is nothing in the Practice Direction which requires the court only to provide for assessment if it applies the solicitors' rate of fixed costs. It is open to the court to apply the lower, public authority rate and also provide for assessment if the deputy prefers.*

...

59 *It follows that an order which authorises "fixed costs" without specifying at what rate but also authorises the deputy to obtain assessment from the SCCO, does not necessarily imply fixed costs at the higher, solicitors' rates. In my judgment, the answer to the second question is NO.*

(3) No, a deputy may not 'read across' from the terms of one appointment into the terms of another. Each order stands on its own as a 'best interests' decision on the facts of a particular case.

65 *This question can be dealt with shortly. Each order represents a 'best interests' decision on the facts of the particular case. It must be read in its own terms. It is not open to a deputy to 'read across' from the terms of one appointment any inference for another appointment. Therefore, even if a deputy holds appointment A with authority to charge*

fees at the higher rate, he cannot imply that rate into appointment B where the order did not specify the rate.

- (4) No, an assessment obtained from the SCCO without authority is not sufficient to establish entitlement to claim the assessed fee. At best, the deputy may seek to rely on such assessment in support of an application for release of liability in respect of any fee charged at the assessed rate. Any lack of challenge from the OPG to a report submitted to it by the deputy does not constitute authorisation to charge the reported fee.

69 *...The authority to charge the fee comes from the court order alone. If by whatever means an SCCO assessment has been obtained, the assessment itself cannot give authority to charge the fee. The answer to the fourth question is NO.*

...

71 *Where a deputy has already taken a fee in the amount assessed, in the absence of authorisation for that assessment the deputy will need to make an application for relief of any liability which attaches to the taking of the unauthorised fee. In that application, the deputy may seek to rely on the SCCO assessment as demonstrating some independent, reasonably contemporaneous acceptance of the reasonableness of the fee, but it will be a matter for the court to decide whether or not it is appropriate to grant the application and effectively authorise the fee retrospectively...*

...

73 *In a similar vein to their (now rejected) contention that they may rely on an unauthorised SCCO assessment, Matrix contends that, where a report has been submitted to the Public Guardian setting out a claim for fees at the higher rate, and that report has not been challenged by the Public Guardian, they should be treated as entitled to claim the higher rate fee, irrespective of whether or not the deputyship order included specific authority to claim the higher rate. The Public Guardian does not accept that, and neither do I. The absence of a challenge to an account filed for supervisory purposes is not the same as a court authorisation to charge the fee. At best, the deputy may point to the absence of prompt challenge in support of a claim for relief from liability.*

(5) Yes, once an estate falls below £16,000, specific authorisation is required to obtain assessment of costs. The deputy may not continue to rely on an authorisation of assessment which was granted when the net value of the estate was greater than £16 000.

75 *Practice Direction 19B refers expressly to estates of net value less than £16 000 in the provisions relating to fixed remuneration at the higher, solicitors' rate (which, I note, is the basis to which the Respondents have claimed to be entitled.) In that context, it is in my judgment plain from paragraph 11 of the Practice Direction that if "detailed assessment in relation to an estate with net assets of a value of less than £16000" is to be an available option, there must be "a specific order" for such. The "However" indicates that the threshold of £16 000 net worth marks a threshold at which a different approach is expected. Either the deputy accepts fixed costs at the specified rate, or the deputy must specifically obtain court authorisation for assessment.*

76 *There is an obvious logic to this approach in the protection for P of a basic level of funds. When funds are reduced to £16 000, in the ordinary run of events the demands of deputyship, and therefore the reasonableness of seeking costs higher than the stipulated #*

percentage rate, are likely to be few. It is a sensible protective measure to require that any deputy who does seek assessment in those circumstances, with the attendant costs of the procedure and the aim of higher charges, should be obliged to explain to the court why.

77 *I have determined that the court may permit assessment where it authorises fixed remuneration at the lower, public authority rate. I acknowledge that the provisions of the Practice Direction relating to the lower, public authority rate do not include an equivalent provision to paragraph 11. In my judgment, that absence of provision should be seen in the wider context of the binary conception of the Practice Direction i.e. in the context of public authorities a different approach to assessment at all, rather than a different approach to estates of less than £16 000. Once the court has determined that, for a non-solicitor non-public authority it is appropriate in a particular case to include the option for assessment, it must follow on grounds of consistency that the same approach as provided in paragraph 11 is to be applied.*

78 *The answer to question 5 is that NO, the deputy cannot continue to rely on an earlier authority to seek assessment once the estate falls below £16 000; and YES, the deputy must at that point either accept the stipulated percentage or seek further, specific authority.*

22. HHJ Hilder's decision in this case is not particularly surprising. Nevertheless, it provides useful guidance on the effect of remuneration orders which authorise a non-solicitor deputy to receive fixed costs pursuant to PD 19B. It also serves as a reminder that professional deputies should review their authority to receive remuneration if and when a P's assets fall below £16,000.

Mathew Roper

5 Stone Buildings

Lincoln's Inn



8th October 2018



5 Stone Buildings



**Problems with lasting
powers of attorney**

***The Public Guardian's Severance
Applications [2018] EWCOP 26***

Thomas Entwistle

<div data-bbox="165 575 298 622">  </div> <div data-bbox="710 586 812 636"> 11 October, 2018 Court of Protection Update 2018 </div> <h2 data-bbox="177 680 595 719">Problematic provisions of LPAs</h2> <ul data-bbox="177 741 809 1010" style="list-style-type: none"> • Provisions authorising/directing euthanasia <ul style="list-style-type: none"> – Contemplates attorney breaking the law • Multiple attorneys <ul style="list-style-type: none"> – Appointment must be joint/joint & several/joint for some decisions and joint & several for others • Gifts/maintenance of others <ul style="list-style-type: none"> – Are provisions authorising/directing gifts consistent with the general prohibition on gifts by attorneys? <div data-bbox="169 1064 272 1081">www.5sblaw.co.uk</div> <div data-bbox="823 1064 836 1081">2</div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<div data-bbox="165 1182 298 1229">  </div> <div data-bbox="710 1193 812 1243"> 11 October, 2018 Court of Protection Update 2018 </div> <h2 data-bbox="177 1288 451 1326">Registration of LPAs</h2> <ul data-bbox="177 1348 826 1617" style="list-style-type: none"> • Mental Capacity Act 2005 Sch 1 Part 2 • Applications must be made to the Public Guardian • PG must refer any LPA to the court which contains a provision that appears to the PG to be <ul style="list-style-type: none"> – Ineffective as part of an LPA – Prevents the instrument from operating as a valid LPA (Sch 1 para 11) • If the court agrees it must either <ul style="list-style-type: none"> – Sever the provision and notify the PG or – direct the PG not to register the instrument <div data-bbox="169 1671 272 1688">www.5sblaw.co.uk</div> <div data-bbox="823 1671 836 1688">3</div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

<div data-bbox="165 557 298 604">  </div> <div data-bbox="708 568 812 618"> 11 October, 2018 Court of Protection Update 2018 </div> <div data-bbox="175 660 804 732"> <h2>Miles & Beattie v. The Public Guardian [2015] EWHC 2960</h2> </div> <div data-bbox="175 766 826 967"> <p>“...it does seem to me to be right that the Mental Capacity Act 2005 should be construed in a way which gives as much flexibility to donors to set out how they wish their affairs to be dealt with as possible, the Act being intended to give autonomy to those who are in a position where they can foresee that they may in the future lack capacity to specify who it is that they wish to act for their affairs.”</p> </div> <div data-bbox="167 1043 272 1064"> www.5sblaw.co.uk </div> <div data-bbox="821 1046 836 1066"> 4 </div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<div data-bbox="165 1167 298 1214">  </div> <div data-bbox="708 1178 812 1227"> 11 October, 2018 Court of Protection Update 2018 </div> <div data-bbox="175 1272 456 1312"> <h2>LPA prescribed form</h2> </div> <div data-bbox="175 1337 829 1568"> <ul style="list-style-type: none"> • Use of the prescribed form is mandatory: Sch 1 para 1 • “Preferences” distinguished from “instructions” • Preferences: “Your attorneys don’t have to follow your preferences but they should keep them in mind” • Instructions: “Your attorneys will have to follow your instructions exactly” • c.f. MCA s. 9(4)(b): “The authority conferred by a lasting power of attorney is subject to...any conditions or restrictions specified in the instrument” • Previous prescribed forms referred to “restrictions and conditions” and “guidance” </div> <div data-bbox="167 1655 272 1675"> www.5sblaw.co.uk </div> <div data-bbox="821 1655 836 1675"> 5 </div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>



<div data-bbox="124 544 296 638">  <p>5 Stone Buildings</p> </div> <div data-bbox="708 602 810 651"> <p>11 October, 2018 Court of Protection Update 2018</p> </div> <h2 data-bbox="177 696 569 732">Preferences and instructions</h2> <ul data-bbox="177 757 823 1032" style="list-style-type: none"> • <i>PG's Severance Applications</i> [2017] EWCOP 10 <ul style="list-style-type: none"> – DJ Eldergill: use of preferences and instructions "potentially misleading" • <i>PG's Severance Applications</i> [2018] EWCOP 26 <ul style="list-style-type: none"> – LJ Baker: agreed with DJ Eldergill – Invited reconsideration of the prescribed forms – Whether a provision is an instruction or preference is a matter of construction and does not depend simply on which box it appears in • How do instructions and best interests fit together? <ul style="list-style-type: none"> – Eg "my attorney must not sell my house in any circumstances" - this is a restriction on the attorney's authority – Eg "my attorney must sell my house within a year of my 80th birthday" - this is (arguably) merely an expression of wishes to be given due weight in assessing best interests but is not conclusive <div data-bbox="169 1079 271 1097">www.5sblaw.co.uk</div> <div data-bbox="821 1079 836 1097">6</div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<div data-bbox="124 1160 296 1254">  <p>5 Stone Buildings</p> </div> <div data-bbox="708 1216 810 1265"> <p>11 October, 2018 Court of Protection Update 2018</p> </div> <h2 data-bbox="217 1310 553 1346">Euthanasia - background</h2> <ul data-bbox="177 1370 786 1637" style="list-style-type: none"> • Suicide Act 1961 s. 2 <ul style="list-style-type: none"> – "(1) A person ("D") commits an offence if— <ul style="list-style-type: none"> (a) D does an act capable of encouraging or assisting the suicide or attempted suicide of another person, and (b) D's act was intended to encourage or assist suicide or an attempt at suicide." • Would an attorney who followed a direction to end the donor's life commit this offence, or murder? • MCA s. 62 - nothing in the Act affects law of murder, manslaughter or assisting suicide <div data-bbox="169 1691 271 1709">www.5sblaw.co.uk</div> <div data-bbox="821 1691 836 1709">7</div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>



Types of euthanasia provisions

- NB provisions concerning life-sustaining treatment are not affected - MCA ss. 24-26 provides that an attorney can be empowered to refuse such treatment
- Does it matter whether the provision is a preference or an instruction?
- Is a provision which recognises that euthanasia is presently illegal but contemplates a future change in the law effective?

Euthanasia - instructions

- DA: "Should a vegetative existence arise (i.e. no prospect of a reasonable quality of life is possible) then life is to be terminated."
- Held: this is a straightforward instruction to the attorneys to carry out an unlawful act and is therefore ineffective

<div data-bbox="165 528 298 577">  </div> <div data-bbox="708 539 812 589"> 11 October, 2018 Court of Protection Update 2018 </div> <div data-bbox="175 631 523 672"> <h2>Euthanasia - preferences</h2> </div> <div data-bbox="175 687 829 963"> <ul style="list-style-type: none"> • LB: "If my life is impaired in such a way that my quality of life would be severely restricted, I would wish my attorneys to make the necessary arrangements which would lead to my demise." • GT: "In the event of my having a long-term diagnosis for a painful or incapacitating or undignified, but not necessarily terminal, condition, I wish my attorney to do all possible to arrange my transit to Dignitas (in Switzerland) or similar." • Held: these are preferences but nevertheless encourage the attorneys to act unlawfully and so are ineffective </div> <div data-bbox="167 1014 272 1034"> www.5sblaw.co.uk </div> <div data-bbox="813 1014 841 1034"> 10 </div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<div data-bbox="165 1135 298 1184">  </div> <div data-bbox="708 1149 812 1198"> 11 October, 2018 Court of Protection Update 2018 </div> <div data-bbox="175 1243 601 1283"> <h2>Euthanasia - change in the law</h2> </div> <div data-bbox="175 1308 817 1581"> <ul style="list-style-type: none"> • AG & CG: "If the option is available at the time and my pain and suffering is unbearable and there is no prospect for an improvement in my condition, my preference is for active euthanasia to end my life with dignity and in peace." • MW: "My attorneys should consider, if possible, aiding the end of my life should I become incapacitated to the extent that I have no ability to affect or comprehend my situation or environment." • Held: although these are preferences and (arguably) contemplate a change in the law, they are ineffective. The nature and details of any such change are impossible to predict and therefore "such provisions would be likely to cause uncertainty and confusion" </div> <div data-bbox="167 1628 272 1646"> www.5sblaw.co.uk </div> <div data-bbox="813 1628 841 1646"> 11 </div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

<div data-bbox="167 533 298 577">  </div> <div data-bbox="710 542 812 591"> 11 October, 2018 Court of Protection Update 2018 </div> <div data-bbox="175 633 422 672"> <h2>Euthanasia - misc</h2> </div> <div data-bbox="175 696 821 958"> <ul style="list-style-type: none"> • PC1: "At the time of writing these instructions, assisted dying is not permitted under UK law but my attorney must be aware that it is my wish that, when the time comes, I can choose to end my life on my own terms, whether or not this means travelling outside of the UK to a country where assisted dying is legal." • This provision clearly contemplates a change in the law • Held: this is neither an instruction nor a preference, but merely a statement of the donor's intention to make his own decision, and is therefore ineffective. </div> <div data-bbox="167 1016 272 1037"> www.5sblaw.co.uk </div> <div data-bbox="813 1016 841 1037"> 12 </div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<div data-bbox="167 1142 298 1187">  </div> <div data-bbox="710 1151 812 1200"> 11 October, 2018 Court of Protection Update 2018 </div> <div data-bbox="213 1245 472 1285"> <h2>Multiple attorneys</h2> </div> <div data-bbox="175 1310 831 1572"> <ul style="list-style-type: none"> • MCA s. 10(4) - LPA may appoint attorneys to act <ul style="list-style-type: none"> – Jointly – Jointly and severally – Jointly in respect of some matters and jointly and severally in respect of others • These 3 options are exhaustive • Prescribed form requires donor to tick one of 3 boxes where more than one attorney appointed </div> <div data-bbox="167 1628 272 1648"> www.5sblaw.co.uk </div> <div data-bbox="813 1628 841 1648"> 13 </div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

Multiple attorneys - 2 types of case

- The 2017 applications included a case (MC) where:
 - Donor ticked the “joint and several” box on the prescribed form
 - Instruction that “Any financial decisions up to the value of £150 can be made independently by my attorneys. However any financial decisions over this amount must be agreed upon by both my attorneys.”
- DJ Eldergill held
 - The donor’s intention was clearly to appoint attorneys jointly for some decisions and jointly and severally for others - the joint and several box had been ticked in error
 - Therefore the instruction should not be severed
- This type of issue is one of construction: if the donor intended to appoint attorneys to act in one of the 3 permitted ways that should be given effect

Multiple attorneys - the 2018 applications

- These cases raised a different issue - what if the donor intended to appoint attorneys to act in some other, bespoke, manner?
- BP & MP: “If my spouse is capable of acting, my attorneys other than my spouse shall not act in any matter unless my spouse is unable to act on their own in that matter.”
- JR: “The Primary Power of Attorney is Mrs R should she survive her husband and be of sound mind and will be the decision maker. Mrs X and Mrs Y are secondary PAs should Mrs R not be of sound mind or deceased.”

Multiple attorneys - the 2018 applications

- Held: these instructions are inconsistent with joint and several appointment and require severance as invalid provisions of an LPA
- NB these donors could have achieved what they apparently intended by appointing the spouse as sole attorney and the others as replacements
- NB the provisions would have been unobjectionable as preferences rather than instructions

Multiple attorneys - the 2018 applications

- CW created an LPA for property and affairs containing this instruction:
- "In the event I no longer have mental capacity and cannot take any decisions I direct my principal attorney to obtain the consent of both of my children (mentioned above) before doing the following:
 1. Sale, mortgage or other major disposition of my family home.
 2. In the choice of a nursing home for me if that becomes necessary for my welfare.
 3. Spending more than £10,000 per annum of my money."
- (In fact the "principal attorney" was the only one appointed)
- The second category of decision related to health and welfare
- Otherwise this is a valid restriction on the attorney's authority and does not require severance - see also XZ [2015] EWCOP 35

Gifts/maintenance

- MCA s. 12 - LPA cannot authorise attorneys to make gifts except in limited circumstances
- Is an instruction to an attorney to provide for the needs of someone other than the donor therefore severable?
- In a series of decisions of SJ Lush he held that
 - If the person to be maintained is the donor's spouse, the instruction is valid because there is a common law duty to maintain a spouse
 - Otherwise such an instruction is invalid

Gifts/maintenance

- In one of the 2017 applications (PG) the donor provided that:
 - "My attorneys must ensure that [the donor's daughter] who is unable to make decisions for herself because of her disabilities that her needs are met"
- Held
 - There is a distinction between gifts and payments to meet needs and the latter are not subject to the provisions of MCA s. 12
 - Therefore this provision did not require severance
- A preference that an attorney make gifts is also valid as an expression of wishes to be taken into account by the attorney in deciding whether to apply to court for authorisation under s. 12

5 Stone Buildings

Dispute Resolution in and out of the Court of Protection

**Please see link to the article on Best
Interests mentioned by Barbara in the
plenary session**

<https://medium.com/@abarbararich/sergei-and-yulia-skripal-and-the-court-of-protection-47220fcd902b>

Barbara Rich

5 Stone
Buildings

5 Stone Buildings

**Personal Welfare for the
Property and Affairs Practitioner**

David Rees QC

PERSONAL WELFARE FOR THE PROPERTY AND AFFAIRS PRACTITIONER

DAVID REES QC

5 STONE BUILDINGS, COURT OF PROTECTION CONFERENCE

TUESDAY 16 OCTOBER 2018

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Introduction

For many COP practitioners, property and affairs and personal welfare are two different continents divided by a deep and wide ocean; foreign lands populated by two very different tribes, speaking mutually unintelligible languages. Yet this is not how the Mental Capacity Act 2005 is intended to operate. The test of capacity, the “best interests” test, and the powers of the Court of Protection are (give or take a few minor differences) the same whether the court is dealing with a property and affairs or personal welfare matter. Although there are procedural differences in the way that most P&A and PW cases are handled (see PD 3B - case pathways), the essential questions before the COP are always the same:

- Does this person have capacity to take a decision for him or herself?
- If not, what is in that person's best interests?

There is much that practitioners from both sides of the divide can learn from each other - a case in point is the inadequacy of COP3 assessments of capacity in many property and affairs cases. For a discussion of the difference in approach between personal welfare and property and affairs practitioners see *Property and Affairs Lawyers are from Mars, Health and Welfare Lawyers from Venus* - David Rees and Alex Ruck Keene (2014) 4(3) Elder Law Journal 285.

Some common personal welfare abbreviations

DoLS - Deprivation of Liberty Safeguards (Sch A1 MCA 2005) - sometimes used to refer to any deprivation of liberty

IMCA - Independent Mental Capacity Act Advocate (s35 MCA 2005)

ISW - Independent Social Worker

OT - Occupational therapist

RPR - Relevant person's representative (Part 10 of Sch A1 MCA 2005)

S49 Report – A formal report prepared by the Public Guardian, a local authority or an NHS Body under s49 MCA 2005.

The Fundamentals

(1) Capacity

Capacity under the MCA is time and decision specific. A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation

to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain (ss 2 and 3 MCA 2005).

(2) Best Interests

Any act done or decision made for a person who lacks capacity must be done or made in his best interests (s 1(5) MCA 2005). There is no statutory definition of “best interests”, but s4 MCA 2005 makes clear that “all relevant circumstances” must be considered. So far as reasonably practicable, P should be permitted and encouraged to participate as fully as possible in any act done for him and any decision affecting him. The following specific matters should also be taken into account:

- whether it is likely that P will at some time have capacity in relation to the matter in question, (and if it appears likely that he will, when that is likely to be).
- P’s past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity);
- the beliefs and values that would be likely to influence P’s decision if he had capacity, and
- the other factors that P would be likely to consider if he were able to do so.
- to the extent that it is practicable and appropriate to consult them, the views of:
 - anyone named by P as someone to be consulted on the matter in question or on matters of that kind;
 - anyone engaged in caring for P or interested in his welfare;
 - any donee of a lasting power of attorney granted by P; and
 - any deputy appointed for P by the court,

as to what would be in the person's best interests.

Thus the views of an attorney under a P&A LPA or of a P&A deputy may be relevant to the personal welfare decisions to be made on P's behalf.

There is considerable cross-fertilisation in the case law between property and affairs and personal welfare cases as to the application of the best interests test. See for example:

- *Secretary of State for the Home Department v Skripal* [2018] EWCOP 6.
- *PBC v JMA & Others* [2018] EWCOP 19.

Decision Making

(1) Collaborative Decision Making - MCA 2005 section 5:

Possible the biggest difference between property and affairs and health and welfare cases is the existence of section 5 MCA 2005. This provides as follows:

- “(1) If a person (“D”) does an act in connection with the care or treatment of another person (“P”), the act is one to which this section applies if—
- (a) before doing the act, D takes reasonable steps to establish whether P lacks capacity in relation to the matter in question, and
 - (b) when doing the act, D reasonably believes—
 - (i) that P lacks capacity in relation to the matter, and
 - (ii) that it will be in P's best interests for the act to be done.
- (2) D does not incur any liability in relation to the act that he would not have incurred if P—
- (a) had had capacity to consent in relation to the matter, and

- (b) had consented to D's doing the act.
- (3) Nothing in this section excludes a person's civil liability for loss or damage, or his criminal liability, resulting from his negligence in doing the act..."

This means that most health and welfare decisions can be taken collaboratively by those involved in P's care and treatment, without the need to go to court or for a deputy to be appointed. Note:

- (1) The section only applies where the person carrying out the act reasonably believes P to lack capacity (after having carried reasonable steps to establish this). If P has capacity to take the decision for himself, then s 5 does not apply.
- (2) The section does not confer a positive power on anyone to take the decision on P's behalf (unlike an attorney under an LPA or a deputy appointed under section 16); rather it is phrased so that an act carried out on or to P will be lawful if the person carrying it out reasonably believes the act to be in P's best interests. This may require consultation with others interested in P's welfare. If everyone concerned is agreed that a particular step is in P's best interests, then the act may be lawfully done. However, where there is a dispute or a doubt as to P's best interests, then it will usually be appropriate to apply to the Court of Protection.
- (3) Section 5 is in broad terms. It can apply to small decisions (what P should wear or have for breakfast), but can also apply to life or death decisions such as the withdrawal of life sustaining treatment - *An NHS Trust v Y* [2018] UKSC 46.

(2) Excluded Decisions

If P lacks capacity to make certain decisions, neither the Court of Protection, nor a deputy, nor an attorney, nor anyone else has power to make that decision on P's behalf. The excluded decisions are set in section 27 MCA 2005:

- Consenting to a marriage or civil partnership;
- Consenting to have sexual relations;
- Consenting to a decree of divorce being granted on the basis of two years' separation;
- Consenting to a dissolution order being made in relation to a civil partnership on the basis of two years' separation;
- Consenting to a child being placed for adoption by an adoption order;
- Consenting to the making of an adoption order;
- Discharging parental responsibilities in matters not relating to a child's property;
- Giving a consent under the Human Fertilisation and Embryology Acts 1990 and 2008 (but cf *Y v A Healthcare NHS Trust* [2018] EWCOP 18).

In addition, the Mental Health Act 1983 effectively takes priority over aspects of the MCA 2005, so that if at any time a person is being treated under Part 4 of the Mental Health Act 1983, the MCA 2005 cannot be used:

- to give that person medical treatment for mental disorder;
- to consent to that person being given medical treatment for mental disorder (s28 MCA 2005).

Furthermore, in most cases where a person falls within the provisions of the MHA 1983, the MCA 2005 cannot be used to authorise a deprivation of his liberty (s16A and Sch 1A MCA 2005).

The interaction between the MCA 2005 and the MHA 1983 can be complex and problematic. In *NHS Authority v Dr A* [2013] EWHC 2442 (COP), a gap was identified between the provisions of the MCA 2005 and the MHA 1983, which was ultimately resolved by recourse to the High Court's inherent jurisdiction. Baker J judge authorised the deprivation of liberty and force feeding of an individual, who lacked capacity to consent to such treatment, under the inherent jurisdiction. In that case, the jurisdiction of the Court of Protection could not be invoked as the individual had been detained under the Mental Health Act 1983 and the Court of Protection therefore lacked jurisdiction to make an order which would deprive him of his liberty; nor could the feeding be authorised as treatment under the Mental Health Act 1983.

Deputies and Attorneys

(1) Deputies

The Court's power to appoint a deputy (whether property and affairs or personal welfare) is conferred by section 16(2)(b) MCA 2005. In each case it is simply a best interests decision. There are some differences in who may act as an attorney (a trust corporation cannot be appointed as a welfare deputy; a bankrupt cannot act as a property and affairs deputy).

The court is also required by MCA 2005 s.16(4) to have regard to the principles that:

- a decision by the court is to be preferred to the appointment of a deputy to make a decision; and
- the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances.

Usually it will be the case that decisions about complex and serious issues are taken by a court rather than any individual. In certain cases, it will be more appropriate to appoint a deputy or deputies to make these decisions. But because it is important that such decisions should wherever possible be taken collaboratively and informally, the appointments must be as limited in scope and duration as is reasonably practicable in the circumstances.

Nevertheless, the Court will usually take a practical approach in deciding whether a deputy is needed. It will sometimes be impracticable to insist on decisions being taken by the court. In *G v E* [2010] EWCOP 2512 Baker J. identified cases which involve a series of decisions (for example, about medical procedures) and cases where the assets of an incapacitated adult are of a magnitude that requires regular management as being likely to justify the appointment of a deputy. He commented that the second of these examples is likely to arise more frequently than the first, and that the appointment of deputies is likely to be more common, and of a longer duration, in property and affairs cases than in a personal welfare matter. In the majority of cases connected with P's personal welfare, many decisions can be made under the principles set out in s.5 of the MCA 2005 without the need for the

intervention of a deputy. Particularly important decisions should be reserved by the court to itself in accordance with the principles set out at MCA 2005 s.16(4).

Although the MCA Code of Practice refers to welfare deputies being appointed only in the “most difficult” category of cases, the Court, when deciding whether to

appoint a deputy, is not constrained by this guidance. It should have regard to the unvarnished words of the MCA 2005 and decide whether it is in the best interests of P for a deputy (whether welfare or property and affairs) to be appointed for him, rather than for the decision in question to be taken by the Court or in some other way (*SBC v PBA* [2011] EWHC 2580 (Fam)). The Code of Practice is ultimately only guidance, although any departure from it should require careful explanation.

Ultimately the issue is whether it is in P’s best interests for a deputy to be appointed. There is no presumption or starting point that the Court should not appoint a welfare deputy - see *Watt v ABC* [2016] EWCOP 2532.

For an example of where the Court declined to appoint a welfare deputy see *Re TZ; A Local Authority v TZ (No.2)* [2014] EWCOP 973.

A deputy (whether a property and affairs or personal welfare deputy) may not make a decision for P if he knows or has reasonable grounds for believing that P has capacity in relation to the matter.

(2) Attorneys

It was not possible to appoint a welfare attorney under an EPA. Since October 1 2007 it has been possible to appoint a welfare deputy under an LPA. The following points should be noted:

- (1) An attorney under a welfare LPA must be an individual; a trust corporation may not be appointed as a welfare attorney (s10(1) MCA 2005);
- (2) An attorney under a welfare LPA cannot take a decision on P's behalf unless P lacks (or the attorney reasonably believes that P lacks) capacity (s 11(7) MCA 2005). This is unlike a P&A LPA where (subject to any express restrictions) the attorneys may use the power as soon as it has been registered by the Public Guardian.
- (3) The authority of an attorney under a welfare LPA may be constrained by a valid and applicable advance decision made by P (ss 11(7) and 24-26 MCA 2005).
- (4) A personal welfare LPA only permits the attorney to authorise the giving or refusing of consent to the carrying out or continuation of life-sustaining treatment if the LPA expressly provides for this.

Procedural Issues

(1) Permission

Unlike property and affairs applications (where the former rules requiring permission to be obtained in some cases have been repealed) permission is still required for most personal welfare applications. The principal exception are applications under section 21A MCA 2005 relating to the terms of an authorisation made under the deprivation of liberty safeguards and applications for an order under section 16 MCA 2005 to authorise a deprivation of liberty (r8.1). Where permission is required it is sought in the COP1. In practice where there is a need

for a welfare order (for example where there is a dispute about P's best interests) permission will be granted. It is perhaps most likely to be refused where the application seeks the appointment of a welfare deputy, and no clear explanation as to why a deputy is needed has been provided.

(2) Case Pathways

The personal welfare pathway applies to virtually all personal welfare applications (other than those under s21A MCA or the streamlined *Re X* procedure). It is set out in Practice Direction 3B and is divided into six stages:

- the pre-issue stage;
- the point of issue of the application;
- case management on issue;
- the case management conference;

- the final management hearing; and
- the final hearing.

The personal welfare pathway places a much greater emphasis on pre-issue steps than the property and affairs pathway. Save in urgent cases, the personal welfare pathway requires the applicant to notify P, the potential respondents and other interested parties of the potential proceedings and engage with them to try to resolve the issues so far as possible. It also requires the applicant to file a significant amount of information and evidence with the application. Once the application has been issued, it will be case managed by a judge and allocated to

the personal welfare pathway and to the correct level of judge. The pathway envisages three hearings; a case management conference, final management hearing and final hearing. The pathway also envisages an “advocates meeting” before both the final management hearing and the final hearing. This is perhaps unfamiliar to P&A practitioners, but is essentially a without prejudice round table meeting to identify issues in advance of the hearing. Unlike the P&A pathway, there is no provision in the personal welfare pathway for a neutral evaluation by a judge at a dispute resolution hearing.

(3) Issuing Claims

The correct venue and procedure for the commencement of proceedings now depends upon both the nature of the application and where P lives. Property and affairs applications (including mixed property and affairs and welfare applications) must be filed at the court’s central registry at First Avenue House by

post, or in person at the public counter. Applications that seek orders under section 16 MCA 2005 relating solely to P's personal welfare (excluding serious medical treatment), or orders under section 21A MCA 2005 relating to the Deprivation of Liberty Safeguards should be filed by e-mail at appropriate court that is responsible for the area in which P lives. The relevant Regional Hubs and their respective e-mail addresses are as follows:

Court		Region	E-mail Address
London (First Avenue House)		London Region	COPUBOS@justice.gov.uk
Bristol		South West Region	courtofprotection@bristol.countycourt.gsi.gov.uk
Manchester		North West Region	COP.Manchester@hmcts.gsi.gov.uk
Birmingham		Midlands Region	courtofprotection.birmingham.countycourt@justice.gov.uk
Reading		South East Region	courtofprotection@reading.countycourt.gsi.gov.uk
Cardiff		Wales	Cardiffcop@hmcts.gsi.gov.uk
Leeds		North East Region (East)	cop.leeds.countycourt@justice.gov.uk
Newcastle		North East Region (North)	COPNewcastle@newcastle.countycourt.gsi.gov.uk

Where an applicant seeking an order under sections 16 or 21A MCA 2005 is unable to submit the application by e-mail, a paper application may be filed at the appropriate court.

Other applications, including applications relating to serious medical treatment should be filed at First Avenue House. The Court encourages the use of e-mail for the filing of welfare applications (including applications involving serious medical treatment). Such applications should be sent to the address set out above for the London Region.

(4) Orders

There is a tendency in personal welfare cases for orders to:

- (1) contain a large number of recitals; and
- (2) rely upon the court's declaratory powers under section 15 MCA 2005 rather than its power to take decisions on P's behalf under section 16 MCA 2005.

This is primarily a reflection of the general style of orders in the Family Division and the declaratory nature of the inherent jurisdiction which was used to deal with welfare matters prior to the enactment of the MCA 2005. The inclusion of recitals is purely a matter of style and can often provide a helpful summary of the issues before the Court. However, an over reliance on section 15 declarations rather than section 16 decisions is more dangerous. In the judgment of the Court of Appeal in *Re MN (An Adult)* [2015] EWCA Civ 411 (approved by the Supreme Court in its decision on the same case reported sub nom *N v A Clinical*

Commissioning Group [2017] UKSC 22) Sir James Munby P made three points about the use of declaratory orders in the Court of Protection.

- The “inveterate” use of such orders might be thought to be both anachronistic and inappropriate. The Court of Protection has, in addition to the declaratory jurisdiction referred to in MCA 2005 s.15, the more extensive powers conferred by s.16.
- MCA 2005 s.15 is very precise as to the powers of the court to grant declarations. The President stated:

“Given the very precise terms in which section 15 is drafted, it is not at all clear that the general powers conferred on the Court of Protection by section 47(1) of the 2005 Act extend to the granting of declarations in a form not provided for by section 15. Indeed, the better view is that probably they do not”.
- A declaration has no coercive effect and cannot be enforced by committal (see *MASM v MMAM* [2015] EWCOP 3).

The President concluded his examination of the court’s declaratory powers as follows:

“All in all, it might be thought that, unless the desired order clearly falls within the ambit of section 15, orders are better framed in terms of relief under section 16 and that, if non-compliance or interference with the arrangements put in place by the Court of Protection is thought to be a risk, that risk should be met by extracting appropriate undertakings or, if suitable undertakings are not forthcoming, granting an injunction.”

(5) Costs

The general rule in proceedings that relate to P's personal welfare is that there is no order for costs (r.19.3). A practice has developed in healthcare cases that 50 per cent of the costs incurred by the Official Solicitor in acting as litigation friend for P are usually ordered to be paid by the relevant hospital or health trust. *Re D* [2012] EWCOP 886.

Where the Official Solicitor is acting as litigation friend for P in welfare cases, he usually instructs external solicitors to act for him. He also frequently obtains orders permitting him to investigate P's assets and to obtain payment on account of a proportion of his costs. Where the Official Solicitor's costs are ordered to be paid out of P's estate, he may seek these on an indemnity basis to reflect the fact that these are solicitor / client rather than party / party costs.

Deprivations of Liberty

To many property and affairs practitioner, perhaps the least understood element of the COP's personal welfare jurisdiction relates to its powers to police and authorise deprivations of liberty:

(1) What is a deprivation of liberty?

Extract from The European Convention on Human Rights - Article 5

- (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

...

- (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Key features of a deprivation of liberty

- (1) The objective component of confinement in a particular restricted place for a not negligible length of time;
- (2) The subjective component of lack of valid consent; and
- (3) the attribution of responsibility to the state.

Recognising a deprivation of liberty

P (by his litigation friend the Official Solicitor) (Appellant) v Cheshire West and Chester Council and another (Respondents) [2014] UKSC 19

“[45] In my view, it is axiomatic that people with disabilities, both mental and physical, have the same human rights as the rest of the human race. It may be that those rights have sometimes to be limited or restricted because of

their disabilities, but the starting point should be the same as that for everyone else. This flows inexorably from the universal character of human rights, founded on the inherent dignity of all human beings, and is confirmed in the United Nations Convention on the Rights of Persons with Disabilities. Far from disability entitling the state to deny such people human rights: rather it places upon the state (and upon others) the duty to make reasonable accommodation to cater for the special needs of those with disabilities.

[46] Those rights include the right to physical liberty, which is guaranteed by article 5 of the European Convention. This is not a right to do or to go where one pleases. It is a more focused right, not to be deprived of that physical liberty. But, as it seems to me, what it means to be deprived of liberty must be the same for everyone, whether or not they have physical or mental disabilities. If it would be a deprivation of my liberty to be obliged to live in a particular place, subject to constant monitoring and control, only allowed out with close supervision, and unable to move away without permission even if such an opportunity became available, then it must also be a deprivation of the liberty of a disabled person. The fact that my living arrangements are comfortable, and indeed make my life as enjoyable as it could possibly be, should make no difference. A gilded cage is still a cage.”

Per Lady Hale DPSC

“[63] In agreement with Lady Hale, I consider that the Strasbourg court decisions do indicate that the twin features of continuous supervision and control and lack of freedom to leave are the essential ingredients of deprivation of liberty (in addition to the area and period of confinement).”

Per Lord Neuberger PSC

Some examples

***W City Council v L* [2015] EWCOP 20**

Mrs. L was 93 years old with dementia. She lived in an upper floor flat in a two storey building with a care package provided by the local authority’s specialist dementia carers visiting three times a day. She had unrestricted access to an enclosed garden, but was unable to get beyond it. There were also door sensors activated at night which would alert a daughter living nearby if she left the property. Bodey J held that on the facts whilst the case was finely balanced, Mrs. L was not being deprived of her liberty, the restrictions placed on her were not continuous and complete. Nor did he consider that it was to be imputed to the State:

“This is a shared arrangement set up by agreement with a caring and pro-active family: and the responsibility of the State is, it seems to me, diluted by the strong role which the family has played and continues to play. I do not consider in such circumstances that the mischief of State interference at which Article 5 was and is directed, sufficiently exists.”

***Secretary of State for Justice v Staffordshire County Council & Others* [2016] EWCA Civ 1317 (on appeal from *Staffordshire County Council v SRK & Others* [2016] EWCOP 27).**

P had been severely injured in a road accident in 2005 for which he had received substantial damages which were managed for him by a property and affairs deputy. P lacked capacity to make decisions in relation to his care regime. He lived in a property that had been bought and adapted for him; funded through his personal injury damages. He received a 24/7 care and support regime provided

for him by private sector providers. The care package was commissioned by his property and affairs deputy without any input from the local authority. The care and support regime, involved a constant monitoring of P such that it created, on an objective standard, a deprivation of liberty, although it was common ground that it was the least restrictive option available.

The Court of Appeal upheld the decision of Charles J, that P's deprivation of liberty was attributable to the State (and thus needed to be authorised by the COP). Although the State was not directly responsible in this case for the deprivation of liberty, it nevertheless knew or ought to know of the situation on the ground and as such had obligations under art.5 ECHR. The judge held that the knowledge existed in such cases because the High Court when awarding the damages, the Court of Protection when appointing a property and affairs deputy for P and the deputy (or the trustees or attorney or other person to whom the damages are paid) should take steps to ensure (a) that the relevant local authority with duties to safeguard adults knows of the regime of care, and (b) that if the least restrictive available care regime to best promote P's best interests creates a situation on the ground that satisfies the objective and subjective components of a deprivation of liberty, a welfare order based on that regime of care is made by the Court of Protection.

Ferreira v HM Senior Coroner for Inner South London [2017] EWCA Civ 31

P was taken admitted to hospital for treatment for pneumonia and heart problems. Two weeks later her condition worsened and she was admitted to the hospital's intensive care unit where she was sedated and intubated. Four days later she died. Throughout her stay in hospital P lacked capacity to make decisions on all aspects of her treatment and care. An issue arose at the inquest as to whether she had

died in “state detention” (so that the coroner needed to sit with a jury). The Court of Appeal held that, in general arrangements, in a hospital resulting from the administration of life-saving treatment will not amount to a deprivation of liberty for the purposes of art. 5 ECHR provided that treatment is essentially the same as that which would have been given to a person of sound mind in that condition.

(2) How are deprivations of liberty authorised?

(a) The Deprivation of Liberty Safeguards (“DoLS”)

- Administrative framework for authorising deprivations of liberty in hospitals and registered care homes
- Schedule A1 and 1A of Mental Capacity Act 2005

- Must satisfy a number of requirements
 - The age requirement (over 18)
 - The mental health requirement
 - The mental capacity requirement
 - The best interests requirement
 - The eligibility requirement
 - The “no refusals” requirement
- Two types of authorisation: “Standard” and “Urgent”. The relevant body usually responsible for providing the authorisation is the local authority.
- COP has role to review authorisations under section 21A MCA 2005.
- Procedure set out in PD 11A Part 1.
- Non-means tested legal aid available for challenge under s 21A (but see *Re Briggs* [2017] EWCA Civ 1169 for limits of availability)

(b) Orders under Section 16 MCA 2005

Outside the DoLS regime it is lawful for someone to deprive P of their liberty if, by doing so, they are giving effect to a decision made by an order of the Court of Protection under section 16(2)(a) of the MCA 2005 in relation to a matter concerning P’s personal welfare (MCA 2005 s4A). Usually a deprivation of liberty must be authorised before it begins. In certain urgent circumstances (see s4B MCA 2005) a deprivation of liberty made pending an application to the Court of Protection for authorisation can be lawful).

(i) The streamlined procedure (*Re X*)

Following the decision in *Cheshire West* Sir James Munby P held hearings in consolidated cases, reported as *Re X (Deprivation of Liberty)* [2014] EWCOP 25 and *Re X (Deprivation of Liberty) (No 2)*

[2014] EWCOP 37, and provided guidance as to how straightforward cases should be dealt with by the court by a streamlined paper procedure. Although aspects of the President's approach were subsequently criticised by the Court of Appeal in *RE X (Court of Protection Practice)* [2015] EWCA Civ 599, this remains the general foundation of the existing streamlined procedure. There is now a formal streamlined procedure set out in Part 2 of PD 11A. This sets out a process for such applications which do not on their face need to be dealt with at an oral hearing and which do not contemplate P being joined as a party to the proceedings. In *Re X*, the President indicated that the streamlined procedure may be inappropriate in the following cases:

- where there are disputed issues;
- where there has been a failure to notify P and all other relevant people in P's life and canvass their wishes, feelings and views;
- where concerns exist arising out of the information provided regarding the wishes, feelings and views of P and other relevant persons;
- where concerns exist regarding any information provided about the need for urgency in the case;
- where other factors brought to the Court's attention indicate the need for particular judicial scrutiny, or suggest that the

arrangements may not be in P's best interests or the least restrictive option or otherwise indicate that the order should not be made.

In order to comply with the requirements of arts 5 and 6 ECHR, if P is not formally joined as a party to the proceedings, it will usually be

necessary for a "rule 1.2 representative" to be appointed to represent P or provide the Court with specific information. This may be an "accredited legal representative" ("ALR") accredited under a formal Law Society scheme, or a lay person such as a suitable relative or friend. Lack of funding to pay for a litigation friend or ALR in cases where there is no suitable friend or relative has caused difficulties and has led to many cases being stayed (see *Re NRA* [2015] EWCOP 59; *Re JM* [2016] EWCOP 15; *Re VE* [2016] EWCOP 16. This logjam has recently been broken by the provision of additional funding to enable the Court to direct a general visitor to prepare a section 49 report on P. The appointment of a general visitor to prepare a report under s. 49 MCA 2005 will be sufficient to meet the procedural requirements of art. 5 ECHR without there being a need to appoint a rule 1.2 representative (see *Re KT & Others* [2018] EWCOP 1).

(ii) Other cases

In cases which do not fall within the scope of the streamlined procedure, it is necessary to make a formal application for an order under section 16 MCA 2005, using a COP 1 application form and following the personal welfare pathway.

(3) Deprivation of Liberty - Reform

There has been for sometime a consensus that the current arrangements for authorising a deprivation of liberty are problematic. The Government invited the Law Commission to look in detail at this area of the law, and the Commission published a final report *Mental Capacity and Deprivation of Liberty* in 13 March 2017. The Commission proposed a new scheme to be entitled the Liberty Protection

Safeguards (LPS), which was intended to cover deprivations of liberty in a wider range of settings than the existing DoLS, reducing the number of cases brought to the Court of Protection. There is currently a Government Bill before Parliament to introduce a scheme along the lines of that suggested by the Law Commission (the Mental Capacity (Amendment) Bill).

5 Stone Buildings



**Statutory Wills and working
with the Official Solicitor**



Jordan Holland



5 Stone Buildings

**Removing defaulting deputies
and attorneys**



William East and Eliza Eagling



<div data-bbox="167 441 298 488">  </div> <div data-bbox="718 461 829 492"> Removing Defaulting Deputies & Attorneys </div> <div data-bbox="175 544 644 582"> <h2>Some of the topics we will cover</h2> </div> <div data-bbox="175 611 694 835"> <ul style="list-style-type: none"> • Tests for removal • Initial steps / presenting evidence • Acting for the defaulting deputy / attorney - strategies • The importance of interim remedies / directions • The dispute resolution hearing • The final hearing </div> <div data-bbox="167 927 272 945"> www.5sblaw.co.uk </div> <div data-bbox="821 927 837 945"> 2 </div>	<div data-bbox="922 495 1516 904"> <hr/><hr/><hr/><hr/><hr/><hr/><hr/><hr/> </div>
<div data-bbox="167 1048 298 1095">  </div> <div data-bbox="718 1068 829 1099"> Removing Defaulting Deputies & Attorneys </div> <div data-bbox="175 1153 687 1191"> <h2>Legal tests for removal applications</h2> </div> <div data-bbox="175 1223 829 1489"> <ul style="list-style-type: none"> • Deputies - best interests test. However, s. 16 (8) MCA 2005 - court may in particular revoke appointment of deputy: <ul style="list-style-type: none"> – Due to past or current behaviour that contravenes the authority conferred on him or which is not in P's best interests – Where proposes to act in a way which would contravene that authority or not be in P's best interests • <i>Re B</i> (unreported, Senior Judge Lush): burden of proof on person seeking change in status quo </div> <div data-bbox="167 1538 272 1556"> www.5sblaw.co.uk </div> <div data-bbox="821 1538 837 1556"> 3 </div>	<div data-bbox="922 1102 1516 1512"> <hr/><hr/><hr/><hr/><hr/><hr/><hr/><hr/> </div>

<div data-bbox="165 439 298 488">  </div> <div data-bbox="718 459 829 490"> Removing Defaulting Deputies & Attorneys </div> <div data-bbox="175 542 793 582"> <h2>Legal tests for removal applications (cont.)</h2> </div> <div data-bbox="175 611 825 875"> <ul style="list-style-type: none"> Attorneys - need to show: <ul style="list-style-type: none"> that donee has behaved or is behaving in a way that contravenes his authority or is not in P's best interests, or that he proposes to do so (s. 22 (3) (b) MCA 2005) P lacks capacity to revoke the LPA (specific evidence required on this topic) (s. 22 (4) (b) MCA 2005) Behaviour which is not in P's best interests does not have to relate to things done under the LPA: <i>LB Redbridge v G</i> [2014] EWCOP 17 </div> <div data-bbox="167 925 272 945"> www.5sblaw.co.uk </div> <div data-bbox="821 925 841 945"> 4 </div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<div data-bbox="165 1043 298 1093">  </div> <div data-bbox="718 1064 829 1097"> Removing Defaulting Deputies & Attorneys </div> <div data-bbox="175 1151 485 1191"> <h2>Related applications?</h2> </div> <div data-bbox="175 1214 400 1243"> <h3>Concerns with the LPA?</h3> </div> <div data-bbox="175 1258 796 1426"> <ul style="list-style-type: none"> Was fraud or undue influence used to induce P to execute the LPA? S. 22(3)(a) MCA 2005 At the time P executed the LPA, did P have capacity to execute it? S. 9(2)(c) MCA 2005 </div> <div data-bbox="167 1536 272 1556"> www.5sblaw.co.uk </div> <div data-bbox="821 1536 841 1556"> 5 </div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

<div data-bbox="167 443 298 490">  </div> <div data-bbox="718 461 829 492"> Removing Defaulting Deputies & Attorneys </div> <div data-bbox="175 544 590 584"> <h2>Related applications? (cont.)</h2> </div> <div data-bbox="175 618 416 645"> <p>Issues relating to P's assets</p> </div> <div data-bbox="175 656 630 878"> <ul style="list-style-type: none"> • Authorisation to conduct proceedings on P's behalf Ss. 16 & 18(1)(k) MCA 2005 • Statutory will proceedings Ss. 16 & 18(1)(i) MCA 2005 • Ratification of gifts Ss. 16 & 18(1)(b) MCA 2005 </div> <div data-bbox="167 927 272 947"> www.5sblaw.co.uk </div> <div data-bbox="821 927 837 947"> 6 </div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<div data-bbox="167 1052 298 1099">  </div> <div data-bbox="718 1070 829 1102"> Removing Defaulting Deputies & Attorneys </div> <div data-bbox="175 1155 670 1193"> <h2>Initial Steps - Party other than A/D</h2> </div> <div data-bbox="175 1218 826 1498"> <ul style="list-style-type: none"> • Is an application by the party necessary? Any interested party, including P, may bring removal application but often the OPG is the applicant. Consider costs. • Are there additional steps that should be taken? <ul style="list-style-type: none"> – Safeguarding by local council – Police? • Consider whether to bring a related application? • Consider who should act as replacement Deputy? </div> <div data-bbox="167 1538 272 1559"> www.5sblaw.co.uk </div> <div data-bbox="821 1538 837 1559"> 7 </div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

<div data-bbox="167 441 298 488" data-label="Page-Header"> <p>5 Stone Buildings</p> </div> <div data-bbox="718 461 829 492" data-label="Page-Header"> <p>Removing Defaulting Deputies & Attorneys</p> </div> <div data-bbox="175 542 670 582" data-label="Section-Header"> <h2>Initial Steps - Party other than A/D</h2> </div> <div data-bbox="175 602 813 871" data-label="List-Group"> <ul style="list-style-type: none"> • Building a case - look to typical examples of behaviour which has previously prompted removal: <ul style="list-style-type: none"> – Misappropriation of assets (deliberately or in ignorance of law)/ breach of fiduciary duty / conflict of interest – History of improper influence and/or emotional and/or physical abuse – Failure to co-operate with investigations – Failure to keep proper accounts/ records – Failure to pay P's debts including care home fees – Acting beyond authority – Breakdown of joint decision making – Hostility? <i>Re F</i> [2004] 3 All ER 277/ <i>Re RM</i> [2016] EWCOP 25 • Capacity report - need order under s. 49 (9) MCA 2005? </div> <div data-bbox="167 925 272 945" data-label="Page-Footer"> <p>www.5sblaw.co.uk</p> </div> <div data-bbox="821 925 841 945" data-label="Page-Footer"> <p>8</p> </div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<div data-bbox="167 1048 298 1095" data-label="Page-Header"> <p>5 Stone Buildings</p> </div> <div data-bbox="718 1068 829 1099" data-label="Page-Header"> <p>Removing Defaulting Deputies & Attorneys</p> </div> <div data-bbox="175 1153 429 1193" data-label="Section-Header"> <h2>Initial Steps - A/D</h2> </div> <div data-bbox="175 1214 489 1245" data-label="Text"> <p>If you act for the Attorney/Deputy:</p> </div> <div data-bbox="175 1258 761 1290" data-label="Text"> <p><i>Re Buckley</i> [2013] EWHC 2965 (COP) per Judge Lush at para. 44:</p> </div> <div data-bbox="255 1305 478 1335" data-label="Text"> <p><i>"Ignorance is no excuse"</i></p> </div> <div data-bbox="175 1350 825 1426" data-label="Text"> <p>BUT in practice if "wrongdoing" was due to misunderstanding, Court may consider it to be in P's best interests for A/D to remain in place if A/D accepts mistake at an early opportunity and makes amends</p> </div> <div data-bbox="175 1442 758 1494" data-label="Text"> <p>Consider advising A/D to stand down at an early stage for tactical reasons/ to avoid adverse costs order.</p> </div> <div data-bbox="167 1536 272 1556" data-label="Page-Footer"> <p>www.5sblaw.co.uk</p> </div> <div data-bbox="821 1536 841 1556" data-label="Page-Footer"> <p>9</p> </div>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

<div data-bbox="165 439 298 488">  </div> <div data-bbox="718 459 829 490"> Removing Defaulting Deputies & Attorneys </div> <div data-bbox="175 521 703 564"> <h2>Interim / dispute resolution hearings</h2> </div> <div data-bbox="175 575 807 907"> <ul style="list-style-type: none"> • Interim hearings can give you substantive orders, not just case management directions. Can get: <ul style="list-style-type: none"> – Suspension of attorney/ deputy's authority (if not already ordered) – Appointment of interim deputy (can you get your own choice?) – Investigation of attorney/ deputy's conduct by interim appointee – Authorisation for interim appointee to act in other litigation where there are multiple proceedings – Search for and provision of key documents by interim appointee – Info / documents / account of dealings from attorney/ deputy – Potential for holding will where statutory will application also running – Involvement of P where able to express views (s. 49 report?) </div> <div data-bbox="167 925 272 945"> www.5sblaw.co.uk </div> <div data-bbox="813 925 841 947"> 10 </div>	<div data-bbox="922 495 1517 907"> <hr/><hr/><hr/><hr/><hr/><hr/><hr/><hr/> </div>
<div data-bbox="165 1043 298 1095">  </div> <div data-bbox="718 1064 829 1099"> Removing Defaulting Deputies & Attorneys </div> <div data-bbox="175 1151 568 1193"> <h2>Dispute Resolution Hearing</h2> </div> <div data-bbox="175 1220 817 1480"> <ul style="list-style-type: none"> • See PD 3B - Case Pathways • The court will give its view on the likely outcome of the proceedings • If the parties reach agreement to settle the case, the court will make a final order if it considers it in P's best interests • If the parties do not reach agreement, the court will give directions for the management of the case and for a Final Hearing </div> <div data-bbox="167 1536 272 1556"> www.5sblaw.co.uk </div> <div data-bbox="813 1536 841 1559"> 11 </div>	<div data-bbox="922 1099 1517 1512"> <hr/><hr/><hr/><hr/><hr/><hr/><hr/><hr/> </div>

<div data-bbox="167 441 298 488">  </div> <div data-bbox="718 461 829 492"> <small>Removing Defaulting Deputies & Attorneys</small> </div> <div data-bbox="175 542 671 582"> <h2>Dispute Resolution Hearing (cont.)</h2> </div> <div data-bbox="175 609 373 636"> <p>Tactical Considerations</p> </div> <div data-bbox="175 660 743 871"> <ul style="list-style-type: none"> • Do you want the court to express a view on the merits? • Agreement avoids the need for the court to make adverse findings at a final hearing • Court more likely to depart from general rule on costs at a final hearing? • If independent deputy a likely outcome, who do you want? • What directions do you want if no agreement? Costs warning? </div> <div data-bbox="167 927 272 945"> <small>www.5sblaw.co.uk</small> </div> <div data-bbox="813 927 841 947"> <small>12</small> </div>	<div data-bbox="922 495 1516 904"> <hr/><hr/><hr/><hr/><hr/><hr/><hr/><hr/> </div>
<div data-bbox="167 1050 298 1097">  </div> <div data-bbox="718 1070 829 1102"> <small>Removing Defaulting Deputies & Attorneys</small> </div> <div data-bbox="175 1153 624 1191"> <h2>DRH/Directions: Article 6 ECHR</h2> </div> <div data-bbox="175 1214 821 1308"> <p>A word of warning! At a hearing which was meant to be interlocutory, the DJ made final orders. The decision was appealed to His Honour Judge Horowitz QC - <i>KD & LD v LB Havering</i> [2010] WTLR 69. Whilst the Court of Protection may exercise its powers on its own initiative (now Rule 3.4 CopR 2017), it was held that there had been a breach of procedural fairness and of Article 6 of the Convention on those facts. The Court said:-</p> </div> <div data-bbox="175 1337 833 1489"> <p><i>such summary power is, in my judgement, to be exercised appropriately and with a modicum of restraint. The power to make an order of the court's own initiative without hearing the parties or giving them an opportunity to make representations does not extend as was done here to engagement in that procedure at the outset of a hearing in which the parties were in attendance all the more so in expectation of procedural and no other steps. It is plainly a power to be exercised as an alternative to a hearing and in the proper case such as an emergency or where there is little or no apparent contest anticipated to the exercise of the court's powers.</i></p> </div> <div data-bbox="167 1538 272 1556"> <small>www.5sblaw.co.uk</small> </div> <div data-bbox="813 1538 841 1559"> <small>13</small> </div>	<div data-bbox="922 1102 1516 1512"> <hr/><hr/><hr/><hr/><hr/><hr/><hr/><hr/> </div>

Final Hearing

- Variety of options available to court re removal/ replacement if satisfied:
 - More supervision - option mentioned in **BB v PP** [2015] EWCOP 93
 - Re-appointment alongside professional - **PG v Marvin** [2014] EWHC 47 (COP)
 - Appointment of new lay deputy - preferred - **C v D** [2016] EWCOP 3
 - Appointment of specific professional
 - Appointment of panel deputy? 'Last resort', but often happens! - see **Re YW** [2016] EWCOP 18
 - Retention of one of several attorneys/ different outcome depending on type of LPA - see **Re RM** [2016] EWCOP 25
- Call in security bond? **Re Meek** [2014] EWCOP 1

Final Hearing

- Consideration of ratification of excessive gifts/ repayment - see e.g. **BB v PP** [2015] EWCOP 93
- Provision of documents/ accounting information by person removed
- Authorisation to commence litigation
- Risk of punitive costs order - **PG v Matrix Deputies Ltd** [EWCOP] 14