

Gifts, Maintenance and Wills in relation to Protected Parties

November 2014

BACKGROUND & OVERVIEW

1. The Mental Capacity Act for England and Wales received Royal Assent on 7th April 2005, but came fully into effect on 1st October 2007.
2. The MCA affects all persons over 16.
3. The MCA provides a statutory framework for making decisions and acting on behalf of individuals who lack capacity.
4. The MCA also allows people with capacity to make a provision for a time in the future when they may lack capacity to make decisions by making a lasting power of attorney.
5. The MCA has 5 principles. (Section 1).
 - (i) A person must be assumed to have capacity unless it is established that he lacks capacity.
 - (ii) A person is not to be treated as unable to make a decision unless all practical steps to help him to do so have been taken without success.
 - (iii) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
 - (iv) An act done, or decision made must be done or made in his best interests.
 - (v) Before the act is done, or decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the persons rights or freedoms.
6. Section 2 of the MCA attempts to define persons who lacks capacity. Section 2 says:
"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 disturbance in the functioning of the mind or brain".
7. It does not matter whether the impairment is temporary or permanent. (Section 2(2) MCA).
8. Section 2(3) of the MCA states
"A lack of capacity cannot be established merely by reference to
 - a person's age or appearance, or
 - a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity"
9. The decision made by a court will be found on a balance of probabilities. (Section 2(4) MCA).
10. Section 3 provides
"For the purposes of section 2, a person is unable to make a decision for himself if he is unable -
 - (a) to understand the information relevant to the decision,
 - (b) to retain that information,
 - (c) to use or weigh that information as part of the process of making a decision, or
 - (d) to communicate his decision (whether by talking, using sign language or any other means).

- (2) A person is not to be regarded as unable to understand the information relevant to a decision if he is unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).
- (3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.
- (4) The information relevant to a decision includes information about the reasonably foreseeable consequences of
 - (a) deciding one way or another, or
 - (b) failing to make the decision."
11. One of the key principles of the MCA is that anything done or a decision made on behalf of a person who lacks capacity must be done in their best interests.
12. It is essential to use section 4 of the MCA as a checklist that the decision maker should make.
13. The manner in which a decision maker should approach the matter was provided in **Re P. (Statutory Will) 2009 EWHC 163 (Ch); [2010] 2W.L.R 253 Lewison J.**
14. Guidance as to best interests is also provided by section 4 MCA.
15. The Code of Practice supports the statute and provides guidance and information about how the MCA operates.
16. The code has statutory force, which means that a certain categories of persons have a legal duty to comply with the Code. If the Code is not followed by such persons, they will be expected to give reasons as to why they have departed from it.
17. The categories of persons who are legally required to have regard to the relevant guidance in the code are;
 - (i) attorneys appointed under a lasting power of attorney.
 - (ii) deputies appointed by the Court of Protection.
 - (iii) anyone acting as in independent mental capacity advocate.
 - (iv) anyone acting in a professional capacity for, or in relation to, a person who lacks capacity, and
 - (v) anyone being paid for acts for or in relation to a person who lacks capacity.
18. The public Guardian provides support for attorneys of Enduring and Lasting Powers of Attorney and for deputies appointed by the court.
19. The Court of Protection Rules 2007;
 - Set out practice and procedure to be followed in the court of Protection.
 - They adopt many of the provisions of the CPR.
 - They provide certain rules relating to family proceedings.
20. In the event that the rules do not expressly provide for a particular case, the default position is the CPR. (Section 9 CPR 2007).
21. Practice directions provide guidance and can be downloaded from the website;
<http://www.justice.gov.uk/courts/rcj>
22. In general, you will not need permission to apply to the court if the application relates to property and affairs.
23. The exception to the above is, a case involves the appointment and removal or trustees or applications relating to wills and gifts.
24. You will also need permission if the application relates to personal welfare.

THE COURT OF PROTECTION

25. The COP;

- is created by Section 45 of the MCA.
- Has the same rights, powers as the High Court.
- Deals with property, affairs, healthcare, personal welfare.
- Generally held in private.
- Restrictions on publications.
- Governed by the MCA 2005.

26. The COP powers comprise

- deciding whether a person has capacity to make a particular decision
- making declarations, decisions or orders on financial or welfare matters affecting people who lack capacity to make such decisions.
- appointing deputies to make decisions for people who lack capacity.
- deciding whether a lasting or enduring power of attorney is valid.
- removing deputies or attorneys who fail to carry out their duties.

27. Legal aid may be available for both advice and representation before the COP.

Are proceedings necessary?

28. The starting point under MCA is a person is assumed to be able to make their own decision.

29. Section 5 of MCA provides protection for carers, healthcare workers and social care staff to carry out certain functions without fear of liability viz, personal care and treatment.

30. Most matters regarding personal welfare the principles set out in the MCA and in the Code of Practice enables one to;

- take action
- make decisions
- in the best interests
- settle disagreements about actions or decisions

Infants

31. The COP has jurisdiction to deal with property and affairs of a minor.

32. The COP will administer damages on behalf of a minor.

SETTLEMENTS OR GIFTS OF P'S PROPERTY/STATUTORY WILLS

33. Under section 18(h) of the Mental Capacity Act 2007, the court may direct a settlement or gift to be made of any property of P with any consequential directions.

34. However, the basic principle is the courts will not generally interfere with a discretionary power if the trustees are unanimous as to its exercise.

35. An application for settlement, gift or statutory will are by formal application to the COP.
36. Part 9 of the Court of Protection Rules and the supplementary Practice Direction 09F provides guidance on such applications.
37. Attorneys and deputies can give gifts on behalf of the person who they have been appointed to help make decisions. They can only make gifts in some situations and only if it is in the person's best interests.
38. Guidance on making gifts is provided by the Public Guardian Practice Notes, which states
"There can be no generalised approach to gifts.
Each decision must be made considering its own context and timing. As with all decisions a deputy or attorney makes, the overriding test is whether this is in P's best interests.
Best interests must be determined on each occasion taking into account all the relevant circumstances PG Practice Note 02/12 Page 1 of 9 September 2012 and in particular taking into account the steps outlined in s. 4 of the Mental Capacity Act."
39. What is meant by a gift is defined in the Public Guardian Practice Notes. This states
"A deputy or an attorney makes a gift when they transfer money, property or possessions from P to themselves or to other people. It can include making an interest free loan, as the waived interest is in effect a gift.
A gift includes creating a trust of P's property and varying the will of a deceased person so as to divert P's interest in the estate to someone else by a deed of variation. Both of these require an application to the Court of Protection."
40. A deputy has no power to make gifts other than that contained in their Order of appointment.
41. Most Deputy Orders give quite limited powers to make gifts.
42. A deputy who wants to make gifts of money or property which exceed the terms of their order - whether or not they will benefit directly or indirectly - must apply to the Court of Protection for authority to make the gift.
43. The Mental Capacity Act says that an EPA attorney may:
- Make gifts of a seasonal nature, or on an anniversary of a birth, marriage or civil partnership;
 - These seasonal or anniversary gifts may be made to persons (including the Attorney) who are related to or connected to P;
 - Make gifts to any charity to whom P made or might have been expected to make gifts.
 - The value of each gift should not be unreasonable having regard to all the circumstances and in particular the size of P's estate.
 - An attorney is not obliged to make any gifts.
 - The attorney is obliged to follow any restrictions or conditions in the EPA about gifts.
 - The restrictions on gifts also apply to unregistered EPAs, provided P still has capacity to make decisions, and has agreed to the EPA being used by the attorney.
44. A Property & Financial Affairs LPA attorney's main duty is to provide for P's needs. Their main focus should be on maintaining and providing for P.
45. The Mental Capacity Act prescribes that an attorney has no authority to make gifts except in the following limited circumstances:
- A Property & Financial Affairs LPA attorney may only make gifts on customary occasions.
 - Customary occasions are the occasion or anniversary of a birth, a marriage or the formation of a civil partnership, or any other occasion on which presents are customarily given within families or among friends or associates.
 - These gifts may be made to persons (including the attorney) who are related to or connected with P.
 - Gifts may also be made to any charity to whom P made or might have been expected to make gifts.

- The value of each gift should not be unreasonable having regard to all the circumstances and, in particular, the size of P's estate.
 - An Attorney is not obliged to make any gifts.
 - The Attorney is obliged to follow any restrictions or conditions in the LPA about gifts.
46. Deputies and attorneys should apply to the Court of Protection where they want to make gifts which they do not have the authority to make under their deputy order or their EPA / LPA.
 47. The Public Guardian cannot approve a gift. Only the Court of Protection can do this.
 48. The Court of Protection cannot give informal advice on whether a deputy or attorney can make a gift. A formal application must always be made.
 49. Practice Direction F to Part 9 of the Court of Protection Rules 2007 explains the procedure relating to gift applications.
 50. The Mental Capacity Act does not define what is a "reasonable" or "unreasonable" gift. Deputies and attorneys are expected to decide how much is reasonable.
 51. The reasonableness of a gift depends very much on P's particular circumstances.
 52. Any gift or transfer of real property, (e.g. land or a house) either the whole property or a part share, is almost certainly outside the powers of the deputy or attorney (notwithstanding P's previously expressed wishes) and the deputy or attorney will need to apply to the Court of Protection for authority to make the gift or transfer.
 53. Deputies and attorneys may choose to gift personal possessions of modest or sentimental value to family members.
 54. Items of significant monetary value should not be gifted unless authorised by the Court.
 55. Of important consideration is whether the gift will impact on P's future needs?
 56. The deputy or attorney should consider P's financial circumstances, not simply in terms of their capital / savings but also their present and future needs.
 57. Most Deputy Orders enable the deputy to make provision for the "needs" of anyone who is related or connected to P.
 58. The deputy may only do this if P had provided for those needs in the past or if P might have been expected to provide for those needs.
 59. Most Deputy Orders do not define what is meant by "needs" but it is generally intended to cover situations such as maintaining spouses or dependent relatives and other circumstances where there is evidence that P has made financial provision for others for particular reasons in the past and that they would be likely to do so again in the future.
 60. The deputy should apply to the Court if there is any doubt as to whether they can rely on this provision in the Order.
 61. The deputy must comply with any restrictions in the Order.
 62. The Mental Capacity Act allows an EPA attorney to benefit themselves or other persons if P might be expected to provide for his or that person's needs.
 63. The Attorney may do whatever P might be expected to do to meet those needs. The Mental Capacity Act does not define what is meant by "needs" but it is generally intended to cover situations such as maintaining spouses or dependent relatives and other circumstances where there is evidence that P has made financial provision for others for particular reasons in the past and that they would be likely to do so again in the future.

64. The attorney should apply to the Court if there is any doubt as to whether they can rely on this provision in the EPA.
65. The attorney must comply with any restrictions in the EPA.
66. Lasting Powers of Attorney - the Mental Capacity Act does not expressly permit an LPA attorney to benefit themselves or other persons by providing for their needs. However, the Court of Protection has confirmed that an LPA attorney may provide for the needs of family members if P is legally obliged to maintain them, as in the case of P's spouse, civil partner or minor child. An application to Court will be necessary if an attorney wishes to maintain anyone else.
67. A deputy order or registered EPA / LPA does not necessarily prevent P from making or authorising gifts themselves. Deputies and attorneys are expected to use care and caution where P expresses a wish to make gifts.
68. Section 3 of the Mental Capacity Act requires P to be able to understand the information relevant to the decision, retain that information, use or weigh that information, and communicate his decision in order to have the capacity to make a decision.
69. The information relevant to a decision includes information about the reasonably foreseeable consequences of deciding one way or another and of failing to make the decision.
70. The Mental Capacity Code of Practice states;
71. Wherever possible deputies and attorneys should try to involve P in the decision making process when gifts are contemplated. Even if P lacks capacity to make the decision, they may have views on matters affecting the decision, and on what outcome would be preferred. Their involvement can help work out what would be in their best interests. The Mental Capacity Act Code of Practice includes guidance on how to approach this (5.21-5.24).
72. Sections 5.21 - 5.24 of the MCA Code of Practice says
73. If the deputy / attorney makes excessive gifts, the Public Guardian may:
- Apply to the Court of Protection for removal of the deputy or attorney (and, if appropriate, ask the court to arrange for a deputy or new deputy to be appointed)
 - Apply to the Court of Protection for the security bond of a deputy to be called in
 - Instruct the deputy/attorney to apply for retrospective approval from the Court of Protection in circumstances where such an application would have a reasonable prospect of success
 - Request the deputy/attorney to seek the return of the gifts and restitution of P's assets
 - Refer the matter to the police or other relevant regulatory or safeguarding bodies.
74. A new deputy may be authorised to take legal action to recover the money gifted. In some cases the Police may be asked to investigate.

MAINTENANCE GENERALLY

75. As a deputy, you're responsible for helping someone make decisions or making decisions on their behalf.
76. You must consider someone's level of mental capacity every time you make a decision for them - you can't assume it's the same at all times and for all kinds of things.
77. The Court of Protection will give you specific instructions about what you can and can't do.
78. There are also general rules and examples in the [**Mental Capacity Act 2005 Code of Practice.**](#)

79. The MCA code of practice provides

“When you’re making a decision, you must:

- make sure it’s in the other person’s best interests
- consider what they’ve done in the past
- apply a high standard of care - this might mean involving other people, eg getting advice from relatives and professionals like doctors
- do everything you can to help the other person understand the decision, eg explain what’s going to happen with the help of pictures or sign language”

CASE LAW UPDATE

80. The authorities prior to Re P 2009, assumed that P was having a brief lucid interval at the time of the making of a statutory will. During that lucid interval P was assumed to have full knowledge of the past, and a full realisation that as soon as the will is executed he will relapse into the mental state that previously existed. The court considers not a hypothetical P but the actual P, with all the antithapies and affections he had while of full capacity, and seeks to make a will which he, acting reasonably, would have made, P is to be envisaged during the hypothetical lucid interval as being advised by a competent solicitor and in normal cases, P is to be envisaged as taking a broad brush to the claims on his bounty. (Re D.J [1982] Ch 237.

81. The above principle has been changed by statute and the decision in Re P.

82. Under section 18(i) of the MCA 2005 the court has jurisdiction to provide for the making of a will, or codicil, for a person lacking capacity who does not possess testamentary capacity.

83. In the case of Re P [2009] EWHC 163 (Ch), the court gave guidance as to how it should exercise its power under the MCA 2005 to make a will on behalf of a person lacking mental capacity. The facts of the case were, the applicant B, a bank, applied for a will to be made on behalf of the respondent P under section 18(1)(i) of MCA 2005. The court held

- the guidance under MHA 1959, MHA 1983 was no longer applicable to a decision under MCA 2005.
- the goal of the enquiry was not what P might have done but what was in P’s best interests.
- Prior authorities were concerned with what P would have done were he not mentally disordered.
- the 2005 Act required the decision maker to consider P’s present wishes and feelings, even if they were wishes or feelings of a person who lacked mental capacity.
- The same structured decision making process applied to all decisions to be made on P’s behalf, whether great or small.
- Such decision making process was not only to be followed by the court but by all persons who made decisions on behalf of P.
- Having gone through those steps in the Act, he had to then form a value judgement of his own giving effect to the paramount statutory instruction that a decision had to be made in P’s best interests.
- The only imperative was that any decision must be made in P’s best interests.
- P’s wishes had to be considered and given weight but are only part of the balance.
- P’s wishes had to be given great weight but a decision maker but presumptions should not be made.
- has to consider the beliefs and values that would likely influence P’s decision if he had capacity and also other factors that P would likely to consider if he were able to do so.
- This did not require beliefs and values to be given effect.
- It was not proper for a decision maker to make an unwise decision just because P would have done so.
- A decision maker was entitled in making a decision to take account of how P would like to have been remembered after his death. For many people it was their best interests that they be remembered with affection by their family and as having done the right thing by their will.

84. Re P is also authority for authorisation of a statutory will for a person domiciled outside England and Wales in relation to land within the jurisdiction.
85. In the case of **ITW v (1) Z (2) M (By her Litigation Friend the Official Solicitor) (3) Various Charities [2009] EWHC 2525 (Fam)**, the applicant, a property and affairs deputy, (W), applied for an order authorising him to execute a statutory will for M. M was a childless widow who lacked testamentary capacity. At different times, she had made wills which she had left most of her property to charities or her neighbour. Later she was cared for Z and his family. During that period she transferred significant sums to Z and in 2004 made a will under which Z was the sole beneficiary and granted an enduring power of attorney in his favour. W was appointed to act for M. By court order, M was removed from Z's address. The court later directed that an interim will should be made on behalf of Z and reviewed once beneficiaries under previous wills had been notified. The interim will reinstated the terms of a will made before M had lived with Z and made provision for the charities and M's neighbour. It was held
- When considering the Mental Capacity Act 2005, old authorities such as **Re L [1966] Ch 135**, and **C (Spinster and Mental Patient) [1991] 3 All E.R. 866** and **G v Official Solicitor [2006] EWCA WTLR 1201**, were best consigned to history.
 - The starting point was the structured decision making process prescribed by the MCA.
 - This required encouraging the legator in participating in the decision considering his past and present wishes, beliefs and values.
 - considering third parties views as to what would be in the legator's best interests.
 - There was no place for reference to judicial decisions under the earlier statutory regimes.
 - The Act laid down no hierarchy as between factors which had to be borne in mind.
 - The overarching principle that was determinative was the Judicial evaluation of what was in the individual's best interests.
 - The weight to be attached to the factors would differ depending upon the individual circumstances of the particular case.
 - There may be one or more features that are of particular magnetic importance in influencing or determining the outcome.
 - The individuals wishes and feelings were a significant factor to which the court had to pay close regard.
 - The weight to be attached to those wishes and feelings were always case specific and fact specific and in considering their weight and importance, as required by section 4(2), the court had to have regard to all the relevant circumstances. That included the degree of the individual's incapacity, the strength and consistency of the views they expressed, the possible impact on the individual of knowledge of their wishes and feelings were not being given effect to, the extent to which their wishes and feelings were or were not rational, sensible, responsible, and pragmatically capable of sensible implementation, and the extent those wishes and feelings could be incorporated into the court's overall assessment of what was their best interests.
 - Material which fell outside of s4(6) and s4(7) did not, on that ground alone, fall out of account altogether, for it might, notwithstanding that it did not fit precisely within the language of those sections, still be a relevant circumstances within the meaning of s4(2).
86. In **Re: JC [2012] COPLR 540** Senior Judge Lush doubted the effectiveness of the balance sheet approach in statutory will applications. HE said that the balance sheet approach worked satisfactorily in certain cases, where a risk analysis was involved; but in the case he was considering, Senior Judge Lush said that he had struggled to identify any "factors of actual benefit" or "counter balancing dis benefits" of "risks of possibility of loss" or "possibilities of gain".
87. **Aintree University Hospitals NHS Trust v James [2013] UKSC 67**. Made clear that in the context of section 4 of the Mental Capacity Act, the wishes and feelings to be considered are those of the incapacitous person, and not those of what a reasonable person in that person's position might think.

88. In the case of **NT v FS (By his Litigation Friend the Official Solicitor & 8 Others [2013] EWHC 684 COP**, D applied as a deputy for authority to make a statutory will on behalf of F. 8 of the respondents included F's sons, two partners with whom he had a long term relationship, three siblings, an uncle and F's mother, (T). All were to be potential beneficiaries under the will. F had never married. F was 74 and had moderate to severe alzheimers. Significant disputes arose between the potential beneficiaries as to the beneficiaries of a statutory will. It was held -
- that the Mental Capacity Act 2005 marked a radical change in the treatment of persons lacking capacity.
 - the overarching principle was that any decision made on behalf of the person had to be in their best interests.
 - That was not the same as inquiring what the person would have decided if they had capacity.
 - It required the court to apply an objective test as to what was in the patient's best interests.
 - The court had to follow the structured decision making process laid down by the Act.
 - The court had to consider all relevant circumstances.
 - In particular, the court had to consider the matters set out in s4(6) and (7) of the MCA 2005.
 - The Act contained no hierarchy between the various factors to be borne in mind.
 - However, the weight to be attached to different factors would inevitably differ depending on the individual circumstances.
 - There could be one or more features in a particular case that which were of "magnetic importance" influencing or even determining the outcome.
 - the making of the terms of the will and/or gift were not being made by the person lacking capacity but by the court.
89. It was found that a document that was created by F in 1986, was a document that came within section 4(6) of the MCA insofar as it evidenced F's testamentary intentions. However, the court went onto to declare that such a document was a "magnetic feature" of the case, in that it had not been witnessed and there had been significant changes in the 26 years since it's making. The document was also not regarded as the starting point for determining F's best interests.

Judge Behrens in NT v FS [2013] EWHC 684 said

"The 2005 Act marks a radical change in the treatment of persons lacking capacity. The overarching principle is that any decision made on behalf of P must be in P's best interests. This is not the same as inquiring what P would have decided if he or she had had capacity. It is not a test of substituted judgement, but requires the court to apply an objective test of what would be in P's best interests".

"The court must follow the structured decision making process laid down by the 2005 Act. Thus, the court must consider all relevant circumstances, and, in particular, must consider, and take into account, the matters set out in sections 4(6) and 4(7)"

"The Court must then make a value judgement, giving effect to the paramount statutory instruction that the decision must be made in P's best interests".

"The Act contains no hierarchy between the various factors which have to be borne in mind. The weight to be attached to different factors will inevitably differ depending on the individual circumstances of the particular case. There may, however, in a particular case be one or more features which, in a particular case, are of "magnetic importance" in influencing, or even determining, the outcome."

"The decision maker must consider the beliefs and values that would be likely to have influenced P's decision if he had capacity, and also the other factors that P would be likely to have considered if he were able to do so. That did not, however, necessarily require those to be given effect. P's wishes and feelings will always be a significant factor to which the court must pay close regard, but weight to be attached to those wishes and feelings will always be case specific and fact specific."

"the right thing is to be judged... by reference to the standards of the incapacitous person himself, and not by what the reasonable incapacitous person might think".

90. In the case of **GLADYS MEEK sub nom HUGH ADRIAN SCOTT JONES v (1) JASON PARKIN (2) MARGARET LYNNE PARKIN (3) JANET MILLER (4) MARGARET PHYLLIS JOHNSON (5) GLADYS MEEK (BY HER LITIGATION FRIEND, THE OFFICIAL SOLICITOR) (2014) EWCOP 1** the applicant, a property and affairs deputy (H), applied for authority to execute a statutory will on behalf of the fifth respondent (G) and for an order calling in a security bond maintained by the third and fourth respondents (J), G's former property and affairs deputies.
91. G lacked testamentary capacity and there was no reasonable anticipation that she was likely to have such capacity in the foreseeable future. She was also unable to participate in any decision concerning the making of a statutory will, or to call in the security bond. The first and second respondents, G's niece and great nephew (L and X) stood to inherit her estate. J, who were G's relatives by marriage, had been removed as her property and affairs deputies by the court which had refused to ratify in total gifts they had made to themselves and families. The court appointed H as G's new deputy and indicated that a statutory will application was required. The issues were (i) the principles applicable to the making of a statutory will; (ii) whether the court should authorise a statutory will and if so, who should benefit; (iii) whether the security bond should be called in and if so, in what amount; (iv) whether the police should be alerted to J's conduct.
92. It was held;
- the overarching principle under the **Mental Capacity Act 2005** was that any decision that was made on behalf of a protected person had to be in that person's best interests.
 - that was not the same as enquiring what that person would have done had he had capacity.
 - it required the court to apply an objective test of what would be in his best interests.
 - in that context, the relevance of an individual having done "the right thing" by his will and being remembered for that after his death was to be judged from the perspective of the well-informed and disinterested objective bystander rather than an individual competing for a share of the testamentary bounty.
 - the "right thing" was to be judged by the standards of the incapacitous person himself and not by what the reasonable incapacitous person might be thought to think, **P (Statutory Will), Re [2009] EWHC 163 (Ch), [2010] Ch. 33** considered.
 - Additionally, the court endorsed a balance sheet approach to the question as to whether to make a statutory will (see paras 30, 33-34, 36 of judgment).
 - It was found that but for their dishonest misconduct, L and X would have been obvious people to benefit from G's estate. However, it was a serious case of breach of trust and neither should benefit above the level of gifts already ratified.
 - Balancing all of the factors, it would be inappropriate to include either L or X in any statutory will; it would not be in G's best interests to benefit them. The only people who had any real continuing claim on G's bounty were two of G's family friends. They were entitled to a quarter of the estate. The remainder would pass to charity (paras 57-59, 64, 71, 77, 79-81, 95).
 - There was no statutory guidance on the circumstances in which the court should call in a security bond. However, the best interests principle under **s.1(5)** of the 2005 Act applied to the decision where the bond had been provided by a defaulting deputy; such a decision was clearly made for or on behalf of the incapacitous person's estate. The appropriate course for the Court of Protection in cases of default by a deputy was to call in the security bond almost as a matter of course.
 - If the court did not call the bond in, the reality was that H would need to take proceedings, at G's expense, to recover the monies owed and that could not be in G's best interests when a straightforward alternative was available.
 - The whole purpose of requiring a deputy to provide security was to put in place a cheap, quick and simple mechanism to reimburse the incapacitous party's estate in the event of a deputy's default (paras 39, 41, 84-85, 92-93).

- It would not be in G's best interests for the matter to be reported to the police. If alerted, they would wish to contact H and further costs would be incurred which would have to be met out of G's estate. A police investigation might also result in approaches to G, which would not be in her best interests (para.96).

93. In the case of **1) DAVID (2) BARRY v PETER [2014] EWHC 31 (COP)CP (Senior Judge Denzil Lush)** the applicant sons (D and B) applied to be appointed jointly and severally as property and affairs deputies for their father (G).

94. G had Alzheimer's disease and resided in a care home. The respondent third son (P) objected to D and B's application and proposed that he be appointed as G's deputy instead. He claimed that, upon G's admission to hospital following an acute delirious episode, D and B had, without consulting him, arranged for G's wife (F) to be admitted to the care home. P had raised numerous complaints about the care home and blamed it for F's death. In May 2014, the local authority made a best interests decision to the effect that G should remain in the care home. It was common ground that the court should not appoint all three brothers jointly and severally because they did not see eye-to-eye and could not work together.

95. D and B submitted that they had been assisting G with his general care and finances for many years and that being appointed as his property and affairs deputies was a natural extension of that support. They argued that, due to where they lived, the reality was that they were in a position to assist with day-to-day care and decision-making whereas P was not.

96. It was held

- The hostility between D, B and P would not necessarily interfere with the day-to-day administration of G's property and financial affairs, and so it was not appropriate to appoint a completely independent deputy.
- The correct course was to apply a balance sheet approach to the competing applications by comparing the parties' respective strengths and weaknesses.
- There was nothing to choose between the parties under the following headings: (a) willingness to act; (b) ability to act; (c) qualifications; (d) the nature of their relationship with G; (e) G's past and present wishes and feelings and any relevant written statement made by him when he had capacity; (f) G's will; (g) remuneration; (h) security; (i) conflicts of interest. However, the factors of magnetic importance which tipped the balance in favour of appointing D and B were their geographical location and ability to interact with others. D and B each visited G several times a week, whereas P saw his father only three or four times a year as he lived much further away. The reality was that D and B were in a position to assist with day-to-day care and decision-making, but P was not. In addition, there was a marked difference between D and B's attitude and approach and P's towards G's carers and the care home management. Whereas D and B were able to interact successfully with the carers and statutory agencies with an interest in G's welfare, P's relationship with almost everyone was fraught. Whilst occasionally his complaints had resulted in a successful outcome for his parents, his victories had been pyrrhic and overall his approach had been counter-productive. He was a compulsive complainer who had unrealistic expectations and a tendency to become bogged down by minutiae. In the circumstances, it was in G's best interests to appoint D and B jointly and severally as his property and affairs deputies (see paras 24-31, 33-34 of judgment).

97. In the case of **Hugh Adrian Jones -v- Jason Parkin, Margaret Parkin, Janet Miller, Margaret Johnsons and Mrs Gladys Meek (By her Litigation Friend, The Official Solicitor) [2014] EWCOP 1**, HHJ Hodge QC found the 'balance sheet approach' to be the correct approach and did not share Senior Judge Lush's doubts.

HHJ Hodge said

"In my judgement, it may be helpful to prepare a table of arguments for, and against, both the making of a statutory will and, if it is decided that one is appropriate, the identification of the various beneficiaries, and the shares of the incapacitous person's estate which should pass to each of them. This exercise...is very much a value judgement, which inevitably involves weighing various factors against each other in the balance before deciding where the balance falls".

98. In **RE GW sub nom HARINGEY LONDON BOROUGH COUNCIL v CM (2014)** the applicant local authority applied to be appointed as the deputy for the property and affairs of a 91-year-old man (W) who had Alzheimer's disease.
99. He resided in a care home. A safeguarding alert was raised for financial exploitation after he disclosed that his niece (M), the respondent, was withdrawing money from his bank account. M became abusive when the allegation was made and stated that she helped him pay his bills. W then made a will giving her his entire estate. A special visitor reported that W did not have testamentary capacity and that he had stated that he did not wish M, or anyone, to act as his deputy.
100. W objected to the application and submitted that it was in M's best interests for her to be appointed as his deputy as she was already acting to assist him with his finances. The local authority contended that it should be appointed deputy and that it was in W's best interests to retain some control over his money, and that £200 per week was adequate, with the remainder of his assets invested.
101. It was held
- M was unable to distinguish between what W wanted and what was in his best interests or to let his interests have priority over her own.
 - The Court of Protection had a discretion as to whom it appointed and had to exercise it in the best interests of the person who lacked capacity, **Re BM [2014] EWCOP B20** applied.
 - There was a further need to ensure that the person was not subjected to undue influence.
 - The factor of greatest importance was that W did not want M to look after his money. She was not free of conflict of interest or undue influence.
 - The court had no reservations about appointing the local authority as deputy on the understanding that it was in W's best interests, and less restrictive of his rights and freedom of action, for him to retain control over his own expenditure to a limit of £200 a week.
102. In the case of **Stella Burnard (In her Own Right & as Executrix of Godfrey Harry Burnard, Deceased) v Graham Burnard & 5 others [2014] EWHC 340 (Ch)** it was held that there was no fixed standard of mental capacity for all transactions, but it was necessary that the party in question should have a general understanding of the nature of the transaction. In this case the transaction related to a transfer of shares.

GENERAL DUTIES OF TRUSTEES - A REMINDER

103. The COP may authorise a trust for P.
104. In dealing with P's property as a trustee, one must also take account of the Trustee Act 2000.
105. Section 1 Trustee Act 2000 provides
- (1) Whenever the duty under this subsection applies to a trustee, he must exercise such care and skill as is reasonable in the circumstances, having regard in particular -
- (a) to any special knowledge or experience that he has or holds himself out as having, and
 - (b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect a person acting in the course of that kind of business or profession.
106. However, the above has limited application. It applies to functions specified in Schedule 1 of TA 2000, which comprise
- exercising any power of investment
 - exercising the new duties under the TA 2000 ss 4 and 5 as to reviewing investments and obtaining advice

- the exercise of any power in relation to land including acquisition of land
 - the appointment and review of agents, nominees and custodians
 - the power to insure
 - the exercise of any powers to compromise.
107. The TA 2000 does not apply to dispositive powers of trustees such as discretion to select from a class of beneficiaries, or statutory powers of advancement and maintenance.
108. Outside of the above, the general rule is that the court will not interfere in the absence of bad faith on the part of the trustees and the common law duty will apply, viz, the “prudent person of business standards”.
109. Nowhere in the TA 2000 is there any provision purporting to abolish the common law principle.

Notes prepared by
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James Rudall’s specific experience in dealing with court of protection cases comprises;

- Applications made before the court for the appointment of Deputies.
- Applications made before the court for the removal of Deputies to include removal of solicitor deputies and applications to appoint new professional deputies.
- Applications made before the court for specific directions as to the management of funds held on behalf of the patient to include applications dealing with the purchase and sale of property and dealing with gifts made by persons lacking capacity and dealing with maintenance.
- Applications made before the court for altering directions and limiting powers of deputies.
- Advising litigants in person and solicitors in dealing with court of protection.
- Advising litigants in person as to conduct of litigation generally on behalf of persons lacking capacity and in dealing with and applying to the Court of Protection.
- Applications before the court applying for a statutory will on behalf of elderly persons and relatives of elderly persons who lack sufficient capacity.
- Applications before the court dealing with appointment and removal of Attorney’s under an Enduring or Lasting Power of Attorney.
- Dealing and defending cases brought by the Official Solicitor in respect of persons lacking capacity.
- Applying to the Court of Protection as regards settlements agreed on behalf of persons lacking capacity and writing opinions approving the terms of settlements agreed.
- Dealing with vulnerable adults lacking capacity who have had fraud committed upon them and applying to court to set aside transactions at undervalue or improper gifts.
- Obtaining judgement for fraud on behalf of persons lacking capacity and obtaining court approved settlements on behalf of persons lacking capacity who have suffered from fraud.

PROFILE:

James Rudall is an experienced barrister having a combined total of nearly 16 years in legal practice. James is experienced in advising solicitors, other professionals and individuals. Since qualifying as a solicitor in 2001 and a solicitor advocate (all proceedings) in 2005, James has undertaken numerous trials in the County Court and High Court as lead advocate and has also undertaken a successful case in the Court of Appeal. James was called to the Bar in 2013 at Gray's Inn.

As a former head of commercial litigation at a large leading regional practice together with nearly 16 years dealing with civil disputes, James offers both solicitors and the lay client a wealth of knowledge and experience.

He accepts instructions to undertake all levels of court hearings and is completely flexible when it comes to travel.

PERSONAL:

James is married with two children and is a passionate rugby fan. He enjoys writing and literature of which he has collected a considerable amount. When he gets the time, James is a keen mountain and hill walker, cyclist, sailor, surfer and acoustic guitarist. He also completed the Cardiff half marathon in 2013 and is running again in 2014.



AREAS OF PRACTICE:

- All aspects of Chancery and Commercial litigation
- Company Law
- Partnership Law
- Trust and Probate Disputes
- Court of Protection
- Land and Boundary Disputes
- Professional Negligence
- Planning and Environmental
- Construction
- Banking and Finance
- Consumer Credit
- Personal