WHITE PAPER CONFERENCE
Topic: Welfare deputies

In appointing welfare deputies, what is meant in practice by "only in the most difficult cases"? When and how are such appointments necessary?

Powers of the CoP:

Look at this first to understand the circumstances when a deputy is appointed, which in itself part explains why different approaches are taken to deputies for P&A and PW.

A judge in the COP has **two main options** when faced with a decision, or decisions, in respect of which it is has deemed P lacks capacity to make.

Either the Court can (in line with the s.4 criteria) **make that decision itself**, or it **can appoint someone to do so**.

The COP has the **power to appoint and delegate** decision-making powers to an individual, also known as a deputy. A deputy might be a family or friend or a professional, such as a solicitor, care provider or the local authority.

When deciding whether to appoint any deputy, the Court must have regard to s.16 of the MCA, which states that **(a) a decision by the Court is to be preferred to the appointment of a deputy, and (b) the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable.**

For reasons of practicality, it would be impossible for the Court to make decisions on every issue for every person who is deemed to lack capacity in relation to that issue.

Thus, applications for **property and affairs deputies are frequently made and granted**. On average 15,000 property and affairs deputies are appointed per year. This is because the Court recognises that there is usually an ongoing need to assess and manage P's financial affairs and such action requires little consultation with others.

However, the COP has **historically adopted a cautious approach** when dealing with the appointment of a **welfare deputy**.

In contrast to the situation relating to property and affairs deputies, only 375 welfare deputies are appointed on average per year. This is because the COP recognises that **such decisions are often sensitive and complex in nature, and many decisions concerning incapacitated adults are taken collaboratively by individuals working together, such as families and medical teams.**

In practice, ss.5 and 6 of the MCA provide adequate protection to allow for most everyday welfare decisions to be made in an individual's best interest by treating professionals. It does not however allow a person to be restrained or exclude a person's civil liability for loss or damage or any criminal liability resulting from his or her negligence.

The Court is alive to the fact that delegating decisions in relation to P's health and welfare to another may **represent a significant interference with P's fundamental rights**.

As such, the Court is less likely to grant general decision-making powers to a welfare deputy and instead has a **tendency to deal with applications on a case-by-case basis**, either relating to **specific decisions which cannot be resolved by a team of people**, or which are **so serious that they require Court intervention or approval**.

The Court will often give **directions which are limited to specific issues relating to an isolated welfare matter**. For example:

1) Where P should live;
2) Who P should live with;
3) In relation to P's care arrangements;
4) Facilitating contact between P and other individuals;
5) In relation to social activity, education or training for an individual;
6) To make complaints about care or treatment.

The MCA Code of Practice

The Code of Practice refers to welfare deputies being appointed only in the "most difficult" category of cases (8.38) "deputies for personal welfare decisions will only be required in the most difficult cases where: important and necessary actions cannot be carried out without the court's authority or there was no other way of settling the matter in the best interests [of the patient]".

This statement may have influenced Baker J in G v E (Deputyship and Litigation Friend) [2010] EWHC 2512 (COP) at [57]–[59] where he identified that in some cases it will sometimes be impracticable to insist on decisions being taken by the court for example, such as cases which involve a series of decisions where it 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 latter 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.

Other judges have stressed that 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[14] 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.

Distinction with LPAs

If an individual has appointed a welfare attorney by way of a lasting power of attorney (LPA) prior to losing capacity, then in practice, the MCA will apply in much the same way. However, th e attorney will have **a legal right to be consulted** and will have **legal authority to challenge any decision made if they disagree**.

Attaining the age of 18

When a child turns 18 it marks a transition to an altered legal status carrying both rights and legal responsibilities independent of parental responsibility.

Up until the age of 18, P's parents will have a legal right to be involved in the decision-making process.

Thereafter, where P continues to lack capacity, there is no absolute requirement for parents to be involved in the decision- making process, and the making of decisions will generally pass to professionals involved (subject to the COP's overriding protective jurisdiction).

As such parents will often find themselves considering an application to be appointed as a welfare deputy so that their involvement continues. However, the current approach of the Court to the appointment of welfare deputies, as discussed below, will often mean that applications are unsuccessful, leaving families feeling frustrated and excluded.

Re Lawson, Mottram and Hopton [2019] EWCOP 22

This was a case involving applications for the appointment of welfare deputies for young adults.

In applications by family members of three young adults who might lack capacity, the Court of Protection was required to consider the correct approach to determining whether a personal welfare deputy should be appointed under the Mental Capacity Act 2005 s.16.

The three cases concerned young adults who were congenitally impaired.

Each had supportive parents, and in each case the parents or other close family members were the proposed deputies.

Common ground: Both parties affirmed that the court should have regard to the *"unvarnished words"* of the MCA 2005 when considering the appointment of a deputy.

Difference of view: Where they differed was that the applicants denied that the outcome of the statutory test should be that welfare deputyships would only be granted in exceptional cases or, in the terms of the MCA 2005 Code of Practice, *"the most difficult cases"*.

Interpretation of the Code of Practice and the MCA 2005 had, in the applicants' view, led to **confusion and a lack of clarity** regarding the appointment of welfare deputies.

The result was that personal welfare deputies were not being appointed in circumstances where they should otherwise have been.

Statistics from the Office of the Public Guardian in England and Wales showed a spike in the number of welfare deputies appointed in relation to patients between the ages of 18 and 24.

The applicants submitted that there was an **unduly restrictive regime for appointment of welfare deputies**.

The applicants also argued that the approach to appointing a welfare deputy should take account of the **realities of implementation of the MCA 2005 on the ground** (where it was

alleged that statutory bodies with responsibility for the provision of community care services were appointing themselves as decision-makers for incapacitated people), and that the actual or likely wishes and preferences of the incapacitated adult should play a significant part in determining whether a welfare deputy should be appointed.

By contrast, the **Official Solicitor argued** that the structure of the MCA 2005 and the factors that fall to be taken into account under s4 MCA 2005 mean that the "normal" or "usual" outcome is that it will not be in the best interests of P for the court to appoint a welfare deputy. **The comments in the Code should be seen not as a gloss on the statute, but rather as a reflection of the likely outcome of the unvarnished statutory test.**

In his judgment, Hayden J, Vice President of the Court of Protection, found that the **starting point** in evaluating any application for the appointment of a personal welfare deputy must be by reference to the clear wording of the MCA 2005.

The twin obligations to protect P and to promote his or her personal autonomy as found in Part 1 of the Act apply throughout.

Beyond this, the structure of the Act and the factors which fall to be considered under Section 4 **may well mean that the most likely conclusion in the majority of cases will be that it is not in the best interests of P for the court to appoint a welfare deputy.**

It was emphasised that this **did not constitute a statutory bias or presumption against appointment,** but rather the likely consequence of the application of the relevant factors to the individual circumstances of the case.

Hayden J identified the following principles as applying to the appointment of welfare deputies.

1. The starting point in evaluating any application for a welfare deputy is the clear "unvarnished" wording of the MCA 2005.

2. The Code of Practice is wrong insofar as it suggests that the starting point is that personal welfare deputies should only be appointed in the most difficult cases; The Code of Practice is not a statute, it is an interpretive aid to the statutory framework, no more and no less. It is guidance which, whilst it will require important consideration, will never be determinative.

3. The attainment of the age of 18, marks a transition to an altered legal status carrying both rights and responsibilities. The extension of parental responsibility beyond the age of 18, under the aegis of a welfare deputyship may be driven by a natural and indeed healthy parental instinct but it requires vigilantly to be guarded against.

4. Each case falls to be decided on its merits, and by reference to whether an appointment is in the best interests of P.

5. However, the structure of the MCA 2005 and the factors which fall to be considered pursuant to s.4 may well mean that the most likely conclusion in the majority of cases will be that it is not in P's best interests to appoint a welfare deputy.

6. P's wishes and feelings will form an aspect of that decision (for instance if it is clear that P would wish a family member to be appointed to be their personal welfare deputy).

7. The proper operation of s.4 and s.5 means that, in practice, personal welfare deputies will not often be appointed, in particular because the appointment should not be seen, in and of itself, as less restrictive of P's rights and freedoms than allowing for the normal operation of s.5 decision-making.

In reaching his conclusions, Hayden J very clearly took a side in a debate that has been simmering for some time (and is an extension of that which is troubling the Supreme Court in *Re D* at the moment), namely the extent to which the rights of parents to have a specific role in decisions relating to their children should be extended where those children will always have impaired decision-making capacity

The dilemma encapsulated here extends beyond 18 where the end of legal parental responsibility does not lead to the end of their emotional and moral responsibility. Hayden J's judgment makes clear that majority does, in fact, mean majority, and a deviation from the 'ordinary' decision-making structure set up under s.5 MCA 2005 will have to be justified.

It is clear that many family members feel excluded from decision-making. Sometimes, this is because others involved are seeking to develop P's autonomy and enable them to secure their own life choices; sometimes this is for rather less noble reasons.

But what is also clear is that the legal test for the appointment of a property and affairs deputy and a personal welfare deputy is the same. The starting point for both in evaluating any application for a deputy is the clear "unvarnished" wording of the MCA 2005. There are **no presumptions**, other than the only presumption in the MCA: P has capacity unless proved otherwise.

As per the OS in Lawson, the comments in the Code should be seen not as a gloss on the statute, but rather as a reflection of the likely outcome of the unvarnished statutory test.

That is because of the nature of the decision making in a personal welfare context.

In practical terms, one very clear implication of this judgment is that **it will be necessary to explain in any application for appointment as a personal welfare deputy why the 'collaborative and informal' decision-making structure that the MCA has put in place has not been serving P's interests.**