

# 5 Stone Buildings

## FINANCIAL ABUSE OF P: REMOVING AND DEFENDING DEPUTIES AND ATTORNEYS

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## **IDENTIFYING FINANCIAL ABUSE**

- SD8: OPG Safeguarding Policy – Signs of financial abuse (para 11):
  - Change in living conditions
  - Selling possessions, being unable to pay bills, unexplained lack of money (or account withdrawals)
  - Missing financial documents
  - Changes to financial arrangements (use of bank cards etc.)
  - P being cut off from family, friends or social network
  - Positive change in deputy/attorney standard of living
- Other concerns (short of actual financial abuse) which might be relevant:
  - Failure to co-operate with authorities
  - Acting beyond authority
  - Hostility towards family members/friends/professionals

## WILL THE OPG HELP?

- Functions of the OPG (s.58 MCA 2005):
  - Register of LPAs and deputyship orders
  - Receiving reports (generally annual) from LPAs and deputies (note the level of detail required varies depending on the level of supervision which the OPG decides is appropriate)
  - Supervising deputies (note no equivalent provision for LPAs)
  - Directing a COP Visitor to visit LPA, deputy or P and reporting back to OPG
  - Dealing with representations (including complaints about the way in which LPA or deputy is exercising powers)
- If following investigation the OPG considers financial abuse present (or otherwise not satisfied with the deputy/attorney) it will generally bring an application for removal itself

## WILL ANYONE ELSE HELP: THE LOCAL AUTHORITY

- The LA has a general duty to promote an individual's well being (s.1 Care Act 2014). This includes:
  - Personal dignity
  - Protection from abuse and neglect
  - Social and economic well-being
- If LA has reasonable cause to suspect that individual has need for support or is experiencing/at risk of abuse and is unable to protect themselves:
  - Must make whatever enquiries it thinks necessary to enable it to decide what if any action to take (s.42(1)-(2) Care Act 2014)
  - Abuse includes financial abuse: money/property stolen/misused, defrauded or put under pressure in relation to money/other property (s.42(3) Care Act 2014)
- Every LA must have a Safeguarding Adults Board to help and protect adults from risk of abuse (s.43 Care Act 2014)

## **WILL ANYONE ELSE HELP: THE POLICE/CPS**

- Difficulties:
  - Establishing that a crime has been committed
  - Enough proof to make criminal conviction (on criminal standard) likely/possible
- But consider specific offence of ill-treatment relating to deputies/attorneys (s.44 MCA 2005):  
LPA/EPA/Deputy is guilty of an offence if “ill-treats or wilfully neglects P”
  - Imprisonment of up to 5 years and/or fine if convicted on indictment
- But consider what amounts to “ill-treatment” or “neglect”
  - Reported authorities have focused on physical abuse and neglect
  - Pure financial abuse may not be sufficient (?)
  - But if financial abuse has led to lack of proper care then no reason offence is not made out

## **CONSIDER TEST FOR REMOVAL (DEPUTIES)**

- Deputies appointed by the COP to make decisions for P pursuant to s.16(2)(b) MCA 2005.
  - The court's decision whether to do so is a best interests decision and so subject to the usual s.4 test (s.16(3) MCA 2005).
- COP may vary (which could include restriction of powers) or discharge a deputyship order at any time after it is made (s.16(7) MCA 2005).
  - Court's decision whether to do so is also a best interests decision and so subject to the usual s.4 test (s.16(3) MCA 2005).
- So for deputy to be removed COP only has to be satisfied that that is in P's best interests. But COP may in particular revoke the appointment of deputy or vary deputy's powers where deputy:
  - Has or is behaving in a way that contravenes authority or is not in P's best interests (s.16(8)(a); or
  - Proposes to do so (s.16(8)(b)).

## **APPLICATION OF TEST FOR REMOVAL (DEPUTIES)**

- Although they are both best interests decision, the removal of a deputy does not invoke quite the same discretion as does the initial appointment (EB v RC [2011] EWCOP 3805 citing Holt v the Protective Commissioner (1993) 31 NSWLR 227):
  - Application can be brought by any interested person (including P)
  - Burden of proof is on the person seeking a change in the *status quo*
  - Normally necessary for the person seeking change to show reason for removal
  - Where shown that existing deputy is unsuitable (eg. Incompetent, acted unlawfully, improperly or not in P's best interests) court will normally terminate the appointment and appoint replacement.
  - If unsuitability not an issue or applicant fails to show unsuitability it must be shown forensically than P's best interests will be advanced/promoted by removing deputy and appointing replacement.
  - Standard of proof is balance of probabilities (s.2(4) MCA 2005). It does not have to be "clear and convincing" or "compelling"
  - In considering what is in P's best interests court will have regard to all circumstances (s.4 MCA 2005)

## CONSIDER TESTS FOR REMOVAL (ATTORNEYS)

- The court did not appoint an attorney, P (when capacitous) did so. As such, the decision to appoint a particular person may have been taken when not in P's best interests.
- Grounds for removal of LPA are focused on attorney's behaviour rather than a general best interests test. In order for the COP to remove an attorney (in which case, unless there is a substitute attorney, it will likely appoint a replacement deputy) it must be satisfied that:
  - That attorney has behaved, is behaving or proposes to behave in a way that contravenes authority or not in P's best interests; and
  - P lacks capacity to revoke LPA themselves (need specific evidence of lack of capacity to revoke LPA: see test in SAD v SED [2017] EWCOP 3).
- The behaviour complained of need not relate to actions taken under the LPA (Redbridge LBC v G [2014] EWCOP 17 and Re J [2011] COPLR Con 716).

## **CONSIDER OTHER TESTS FOR REMOVAL (ATTORNEYS)**

- COP may revoke LPA pursuant to s.22(3)(a) if it is satisfied that fraud or undue pressure was used to induce P to:
  - Execute an instrument for the purpose of creating an LPA; or
  - Create an LPA.
- COP may determine that no LPA was validly made if P lacked capacity to enter into the LPA at the time it was executed (s.9(2)(c)).
- COP may determine that no LPA (for P&A) was validly made if attorney was an undischarged bankrupt at the time the LPA was executed (s.9.2(b)/s.10(2)).
- As with deputies, the court must be satisfied to the civil standard (i.e. balance of probabilities) in relation to all grounds relating to removal of attorneys under LPA (as it must in relation to the issue of P's capacity): s.2(4) MCA 2005.

## **CONSIDER OTHER STEPS & RELATED APPLICATIONS**

- If deputy and seeking removal on the grounds of financial abuse consider application to call in the security bond (see e.g. Re Meek [2014] EWCOP 1).
- If attorney and seeking removal on the grounds of financial abuse or deputy and the security bond is not sufficient to make good the full amount then consider whether incoming deputy should be authorised to conduct civil proceedings for recovery of misappropriated sums on P's behalf: s.18(1)(k) MCA 2005.
- If defaulting attorney/deputy is a beneficiary or P's will then consider whether to make an application for authorisation of statutory will for P: s.18(1)(i) MCA 2005.
  - If not aware of contents of P's will consider whether to make an application for disclosure
  - Alternatively for disclosure to incoming deputy and direction that consider whether to make statutory will application

## **DEFENDING THE DEPUTY/ATTORNEY**

- “Ignorance is no excuse”: Re Buckley EWHC 2965 (COP).
  - BUT it is better than wilful/knowning misconduct
- If attorney/deputy made a genuine error as to scope of powers or bad investment etc. then the court may consider whether it is P’s best interests for them to remain (particularly if only other option is panel deputy and P has limited resources):
  - Admit mistake at earliest opportunity: court unlikely to be impressed by intransigence or attempts to excuse the inexcusable
  - Agree to make amends to the extent possible (e.g. if gifts to themselves then agree to pay back)
- If repayment is not feasible or otherwise not on the cards then consider whether application should be made for retrospective authorisation of gifts or other transfers

## **DEFENDING THE DEPUTY/ATTORNEY**

- If there is a genuine explanation/the application is misconceived then need to get that out there as soon as possible (generally avoid recrimination and/or tit for tat at applicant):
  - Records etc.
  - Why said to be in P's best interests (history of giving etc.)
- Be realistic about what is achievable. If the misconduct is very significant then consider standing down at an early stage and agreeing to cooperate:
  - May lead court to conclusion that not in P's best interests for more punitive measures to be taken (particularly if P continues to have good relationship with outgoing attorney/deputy)
  - May avoid costs order
  - May allow outgoing attorney/deputy to have some input in identification of incoming deputy

## INITIAL & INTERIM STEPS IN THE PROCEEDINGS

- If dealing with application for removal of LPA or deputy for P&A the court will allocate to the Property and Affairs pathway following the filing of a COP 5 (Acknowledgment of Service) indicating that removal is opposed (PD 3B, para 3.2(1)).
- No automatic case management hearing. However if necessary then seek interim orders (as opposed to case management directions). Consider:
  - Suspension of attorney/deputy and interim deputy
  - Investigation or supply of documents/financial information by interim deputy
  - If also a statutory will application then consider whether holding will justified and its terms (e.g. if court is not in a position to make determination about wrong doing converting outright gifts to conditional or discretionary ones)
  - Orders to address P's urgent needs?
  - Orders to facilitate P's participation in the process (e.g. s.49 MCA 2005 order for Special Visitor)

## **THE DISPUTE RESOLUTION HEARING**

- Following allocation to P&A Pathway court will either list for DRH or transfer to regional court for listing of DRH (and future case management), para 3.3(1)
- The DRH:
  - All parties must attend
  - Purpose is for court to determine whether case capable of resolution and to avoid unnecessary litigation
  - Court will give its view on likely outcome of proceedings
  - If parties reach agreement to settle the case, court will make final order (if it considers it is in P's best interests)
  - If the parties don't reach agreement the court will give case management directions and list a Final Hearing
- Opportunities/Risks presented by the DRH:
  - The court's view – better to attempt to settle before or after?
  - Ability to agree an outcome court may well not order at Final Hearing
  - Avoiding costs (and risks of a costs order)

## THE FINAL HEARING

- Consider how hearing is to proceed (is XX necessary – probably if serious allegations)
- If acting for deputy/attorney consider whether a non-binary outcome should be sought (either primarily or in the alternative):
  - Increased supervision (see e.g. BP v PP [2015] EWCOP 93)
  - Appointment of professional deputy to act alongside deputy (not realistic option if attorney)
  - Removal of one attorney but retention of other if joint/several appointment (see RE RM [2016] EWCOP 25)
- Costs – Be conscious of the ability of the court to make a punitive costs order (notwithstanding the general rule) when making decisions leading up to the final hearing.



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**ANY QUESTIONS?**

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