

# 5 Stone Buildings

## DEALING WITH P's PROPERTY: PRINCIPLES, ISSUES & PITFALLS

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## SOURCE OF AUTHORITY TO DEAL WITH P'S PROPERTY

- Section 18(1)(b) MCA 2005 – COP has power (s.16(2)(a) MCA 2005) to or authorise deputy to (s.16(2)(b) MCA 2005) to make decision in relation to “*sale, exchange, charging, gift or other disposition of P's property*”.
  - Any authority of a deputy to deal with P's property therefore derived from s.18(1)(b) MCA 2005
- Section 9(1) MCA 2005 provides that an LPA will confer authority on attorney to make decisions about all of any of P's property and affairs provided that certain conditions as to form satisfied and the power registered with the OPG (s.9(2) MCA 2005).
  - Any authority of LPA attorney to deal with P's property derives from s.9 MCA 2005
- EPA Act 1985 (repealed by s.66 MCA 2005) provides that EPA will confer authority on an attorney to make decisions about P's property and affairs (once P is or is becoming incapable).
  - EPA attorney derives authority from Sch. 4 MCA 2005 (which provides for continuing validity of EPAs executed prior to 1 October 2007).

## DOES ATTORNEY/DEPUTY ALREADY HAVE AUTHORITY?

- LPA attorney: Does the LPA contain a restriction on the attorney's powers?
  - Unless the instrument contains a restriction then attorney will have authority to deal.
  - If there is a restriction and it is necessary to deal with P's property then will be necessary to make application to COP for it to make decision itself or for deputy to be appointed in respect of the property.
- Deputy: what does the deputyship order say?
  - Practice not uniform: sometimes specific authority, sometimes full powers of beneficial owner (sufficient to to give authority to deal with property) and sometimes specific restriction. Usually depends on circumstances in which deputy appointed.
  - Form COP1A (filed with application to appoint Deputy for P&A) requires details of P's property and how owned. Box 4.12 asks if authority sought to sell. If at all likely then important that it is ticked and that order contains relevant authority.

## APPLICATIONS FOR AUTHORITY: NON-CONTENTIOUS

- If the application for sale (or other form of dealing) is likely to be non-contentious then can use procedure set out in Practice Direction 9D (see paras 4(e), 5(c)) provided that (para 2):
  - Applicant is Deputy, LPA or EPA attorney.
  - Applicant reasonably considers order sought not *“likely to be significant to P’s estate or to any other or P’s interests”*.
  - Applicant knows or reasonably believes unlikely to be any objections.
- If Practice Direction 9D applies then need to file COP1 (together with any evidence) but:
  - COP1A and COP1B do not need to be filed.
  - COP3 Assessment of Capacity does not need to be filed.
  - Not required to notify or serve on anybody.
- Court may determine on the papers (but note right of reconsideration by filing COP 9 within 21 days) and will give directions as to who should be given notice of order. Or it can give directions as to who should be served with application.

## APPLICATIONS FOR AUTHORITY: CONTENTIOUS

- Practice Direction 9D procedure not available if the sale (or other dealing with P's residence) likely to be opposed or other complicating factor (e.g. conflict of interest if sale to co-owner or attorney/deputy themselves)
  - All of COP1A, COP1B and COP3 Assessment of Capacity required.
  - Is P or family member/interested party opposed because they say P should remain living in the property? If so, then application is welfare matter.
- Consider whether full application may be necessary if applicant is attorney and LPA/EPA specifically restricts the attorney's power to sell
  - Frustrating P's wishes/having insufficient regard for P's autonomy?

## SHOULD/CAN P's RESIDENCE BE SOLD?

- Decision taken in P's best interests (s.1(5) MCA) in accordance with approach set out at s.4 MCA 2005.
- Is it accepted (by P and interested persons) that P will no longer live at the property from now/future point?
  - If not then decision not mere P&A but welfare/mixed decision.
  - Role of a professional deputy/attorney (given general rule as to costs) in relation to welfare/mixed decisions?
- If decision hasn't already been taken for P to be in full time residential placement where will P go?
  - If replacement property is to be purchased then consider authority etc. to purchase
- Consider the position of cohabittees
  - Does P have an obligation to provide housing for them?

## WHAT IF P IS A CO-OWNER OF THE PROPERTY?

- Is P a co-owner?
  - Application to COP for leave to appoint new trustee in place of P (s.36(9) Trustee Act 1925)
  - New trustee cannot be the co-owner
- If deputy/attorney is the co-owner then is there a conflict of interest?
  - Is the property being sold to the co-owner?
  - Consider how best to protect P's interests on valuation/marketing
  - Consider application to COP even if authority not needed

## **CONSIDER P's WILL: DOES ATTORNEY/DEPUTY HAVE IT?**

- Already have a copy of P's will?
- If don't have a copy of P's will: Law Society Guidance (1 March 2017): Disclosure should generally be made to attorney/deputy unless
  - P gave specific instructions not to; or
  - Solicitor has cause for concern re. attorney or deputy.
- If not held by solicitor or request refused consider application to COP for disclosure.

## WHY IS P's WILL RELEVANT TO DEALING WITH PROPERTY?

- Does the will contain a specific gift of the property?
- If it does contain a specific gift then position at common law if a person sells the property = gift adeems.
- But Sch. 2, para 8 MCA 2005 provides statutory exception in case of incapacitated persons if the disposal made under s.18 MCA 2005:
  - Will apply if the COP made the decision to sell the property.
  - Will apply if deputy made the decision to sell the property.
  - Will not apply if LPA attorney made the decision to sell the property.
  - Will not apply if EPA attorney made the decision to sell the property.

## **P'S WILL: WHAT DOES THE DEPUTY/ATTORNEY NEED TO DO?**

- What should the deputy/attorney do if the gift adeems?
  - Is statutory will application necessary?
- What should the deputy/attorney do if the gift does not adeem?
  - Consider practicalities of how Sch.2, para 8 MCA 2005 works in practice.
  - Is statutory will application necessary?



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**ANY QUESTIONS?**

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