

# Financial abuse and deputies: how do you deal with, or defend allegations?

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## Spotting signs of financial abuse

- OPG has a “safeguarding policy” which provides a list of signs:
  - (a) Change in living conditions
  - (b) Money disappearing without a reason
  - (c) Being cut off from family, friends or others
  - (d) The carer’s standard of living improving
  - (e) Changing patterns of spending (eg more money coming in cash from an ATM at different times/places)

## Deputy appointment

- A Deputy is only appointed where the Court of Protection considers that the person lacking capacity – P – is in need of one – to manage their property and affairs
- Remember that s4 of the MCA 2005 says that a decision by the Court is to be preferred to the appointment of a deputy to then make a decision – so before considering a Deputyship, you should ask if it is needed?
- In reality, if dealing with someone's financial affairs, it is likely that a deputyship will be required if they will require ongoing support, assistance and help.
- Even if a Deputy is appointed, they can use their judgment as to whether P can make certain decisions – eg P could have a day to day bank account whilst the Deputy manages investments/property management.

## Due diligence at the time of appointment

- COP has a discretion whether to appoint a deputy.
- Potentially appoint more than one deputy in order to ensure oversight?
- *Re M* [2013] COPLR 91 at [35] reemphasises that an order of preference is spouse, relative, friend and only then professional advisors if the others are not available or suitable.
- But in *re BM* [2014] EWCOP 20, the Court recognized that where there had been financial abuse of P, or there were concerns about the proposed Deputy's dealings with P's assets, or the deputy has an unsuccessful track record in managing their own financial affairs, or if there is friction between family reasons.
- Where a large estate or complex financial dealings, it may well be better to appoint an independent person to stop arguments about conflicts .

## Deputy declaration

- Every proposed deputy has to sign the COP4.
- Sets out the qualities which are required – trustworthy, competent, able to take on the duties of deputies, financial good character (*re JG v ESCC* [2015] EWCOP 82 – will not appoint those with criminal convictions or have been bankrupt).
- Must sign that they are aware of potential conflict of interests (eg being beneficiary of a will).
- Need to ensure that your clients identify and address such conflicts – eg parent who is also a carer, people who have interest in P's property.
- Wives who are financially dependent on P where there were conflicts between children of previous marriages, concerns over where the deputy may benefit from someone's estate (*re AS v LB Islington* [2015] EWCOP 79)

## Limiting the terms of the deputyship where there are cases of concern

- If there are concerns about (a) the financial competence of the deputy or (b) a history of misuse or P's property or © the estate is complex
- The court can be asked to make a limited order by way of :
  - (a) The period of appointment
  - (b) Restrict the sums that a deputy can spend in any one year
  - (c) Exclude the power to buy, sell or charge property
  - (d) Exclude an investment portfolio from the scope of the deputy's authority
  - (e) Require a deputy to have accounts professionally audited
  - (f) Appoint a second deputy (whether relative or professional)

Flexibility vs oversight. YOU MUST EXPLAIN WHAT AUTHORITY IS OR IS NOT NEEDED IN ANY APPLICATION

## Security – protection from abuse

- The Court sets security, which is then placed with the Public Guardian to hold and administer
- Usually 2-3 years of expenditure of P if needed
- Deputies must have indemnity insurance (the premium of which can be reimbursed by the estate once the deputy has been appointed).

## The Public Guardian

- Once the Deputy has been appointed, it is the role of the public guardian to oversee Deputies
- It is the Public Guardian who has the statutory responsibility for supervising deputies (s58 of the MCA 2005)
- This includes dealing with complaints about the way that a Deputy is exercising their powers
- Requiring reports from deputies : this is annual, and includes how the person was involved in decision making if they are a new deputy.
- Can direct a visitor to attend and report to the OPG.
- The Court can ask the OPG for information if it wishes to have information about action in previous years to inform its decision making.

## Role of the OPG in cases of financial abuse

- The OPG has power to investigate, including asking the court to order that bodies provide him with documents, asking the deputy to provide information and asking for information from care homes or social services.
  - The OPG can apply to the court to ask that individuals are removed as deputies : or provide a report under s58 for the court to consider using its powers (for example to curtail/limit the deputyship powers)
  - Only the court has the power to revoke the deputyship if the deputy
    - “is behaving or proposes to behave in a way that contravenes the authority conferred on him by the court or
    - is acting in a way that is not in P’s best interest “
- But think before you do this: is this the only way to resolve the problem (given the cost to P of dealing with the application to remove)

## When doesn't the OPG have power

- The OPG can only investigate those who are currently deputies or attorneys or those who have been authorized by COP to do something for P by way of order .
- It cannot investigate the acts of those acting under an unregistered EPA
- Cannot investigate the actions of a deputy whose appointment has ended or a receiver who is no longer acting.
- Has no powers to investigate on behalf of those who may be subject of abuse but do not have deputies/attorneys
- No power to investigate abuse of appointeeship

## Other ways to deal with suspected financial abuse

- Criminal proceedings: could be fraud or theft. In cases where serious cases of financial abuse, should refer to the police
- Working with the local authority – they will have an interest in P’s welfare and wellbeing and may well be able to assist distressed relatives and friends.
- Seeking applications limiting contact (if there is a new relationship where there is suspicion of coercive control or financial abuse) with the new partner
- Making an application on an emergency basis to appoint a deputy if there are concerns that the individual may lack capacity and/or to make applications under the inherent jurisdiction to restrain use of assets/monies pending forensic examination etc

## Familial conflict and removal of deputies

- Often allegation and counter allegation is made by family members.
- Removing a deputy because of hostility from a sibling, in the absence of any substantive evidence that they have behaved incompetently or without integrity, should require clear evidence
- But sometimes the entrenched hostility prevents proper decision making taking place or causes significant distress to P
- May therefore want to make an application to be removed as a deputy and place an independent person there instead
- But even with a professional deputy, family members will often then direct their hostility to them.

## Removal of LPA

- Much less common for deputy to be considered to have financially abused someone, largely because there is some oversight mechanism
- But for LPA , often cases about revocation , in particular if there are family disputes
- The OPG can and does become involved in this and can apply to revoke the LPA
- But again, there is often no actual “evidence” but just accusation .

## Defending allegations

- Evidence – keep copies of relevant materials to show proper use of the money
- P's wishes and feelings and previous behaviour (eg did she always give generously as Christmas)
- Be able to justify the monies spent as in P's best interests (not yours, or extended family – eg giving money for university for one grandchild and not the other etc)

**Questions?**

# Thank you for listening

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