WHEN SHOULD THE COURT OF PROTECTION APPOINT A HEALTH AND WELFARE DEPUTY?

Re Lawson, Mottram & Hopton [2019] EWCOP 22

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Introduction to Deputies

Section 16(2) MCA 2005 gives the Court of Protection jurisdiction to appoint a deputy to take decisions on behalf of P. Subsection 16(4) provides that when deciding whether it is in P's best interests to appoint a deputy, the court must have regard (in addition to the matters mentioned in section 4) to the principles that: -

(a) a decision by the court is to be preferred to the appointment of a deputy to make a decision, and

(b) the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances.

A deputy does not have power to make a decision on behalf of P in relation to a matter if he knows or has reasonable grounds for believing that P has capacity in relation to the matter[1]. There are certain powers that cannot be conferred upon a deputy[2]. These include:

- power to prohibit a named person from having contact with P;
- power to direct a person responsible for P's health care to allow a different person to take over that responsibility;
- powers with respect to the settlement of any of P's property, whether for P's benefit or for the benefit of others;
- powers with respect to the execution for P of a will[3], or
- powers with respect to the exercise of any power (including a power to consent) vested in P whether beneficially or as trustee or otherwise.

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1 MCA 2005 section 20(1).

2 MCA 2005 section 20(2) and (3).

3 What this restriction means is that the Court cannot delegate to a deputy the decision as to whether a settlement should be made or a will executed on his behalf. If the Court makes a decision on P's behalf to settle property or execute a will, there is no difficulty with a deputy (or any other person) being authorised or directed to carry that decision into effect by executing the relevant documents on P's behalf.

Is a deputy needed?

The precise circumstances which should lead to the appointment of a deputy have proved contentious, particularly in the context of health and welfare deputies. In this regard there is a fundamental difference between the property and affairs decisions and health and welfare decisions. MCA 2005 s5 provides a statutory defence to criminal and tortious liability for acts in relation to the care and treatment of persons who lack capacity, provided that (a) before doing the act the person in question takes reasonable steps to establish whether P lacks capacity in relation to the matter in question, and (b) when doing the act, that person reasonably believes that P lacks capacity in relation to the matter, and that it will be in P's best interests for the act to be done. There is no equivalent provision for acts done in relation to P's property and affairs.

The MCA 2005 Code of Practice puts the position thus:

> "*In most cases concerning personal welfare matters, the core principles of the Act... will be enough to:*
> - *help people take action or make decisions in the best interests of someone who lacks capacity to make decisions about their own care or treatment, or*
> - *find ways of settling disagreements about such actions or decisions."* (Para 8.3)
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> *"In cases of serious dispute, where there is no other way of finding a solution or when the authority of the court is needed in order to make a particular decision or take a particular action, the court can be asked to make a decision to settle the matter using its powers under section 16.*
> *However, if there is a need for ongoing decision-making powers and there is no relevant EPA or LPA, the court may appoint a deputy to make future decisions. It will also state what decisions the deputy has the authority to make on the person's behalf.*" (Para 8.25)
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> "*Sometimes it is not practical or appropriate for the court to make a single declaration or decision. In such cases, if the court thinks that somebody needs to make future or ongoing decisions for someone whose condition makes it likely they will lack capacity to make some further decisions in the future, it can appoint a deputy to act for and make decisions for that person. A deputy's authority should be as limited in scope and duration as possible.*" (Para 8.31)
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> "*Whether a person who lacks capacity to make specific decisions needs a deputy will depend on:*
> - *the individual circumstances of the person concerned*
> - *whether future or ongoing decisions are likely to be necessary, and*
> - *whether the appointment is for decisions about property and affairs or personal welfare.*" (Para 8.34)
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> "*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 is no other way of settling the matter in the best interests of the person who lacks capacity to make particular welfare decisions.*" (Para 8.38)

"*Examples include when:*

- *someone needs to make a series of linked welfare decisions over time and it would not be beneficial or appropriate to require all of those decisions to be made by the court. For example, someone (such as a family carer) who is close to a person with profound and multiple learning disabilities might apply to be appointed as a deputy with authority to make such decisions*
- *the most appropriate way to act in the person's best interests is to have a deputy, who will consult relevant people but have the final authority to make decisions*
- *there is a history of serious family disputes that could have a detrimental effect on the person's future care unless a deputy is appointed to make necessary decisions*
- *the person who lacks capacity is felt to be at risk of serious harm if left in the care of family members. In these rare cases, welfare decisions may need to be made by someone independent of the family, such as a local authority officer. There may even be a need for an additional court order prohibiting those family members from having contact with the person.*" (Para 8.39)

The language of the Code of Practice and particularly the references to "serious dispute" and "most difficult cases" has led to an understanding that personal welfare deputies are appointed much less regularly than property and affairs deputies. In 2018 12,536 orders appointing a property and affairs deputy were made compared with 403 orders for welfare deputies.

The position has been considered in a number of cases. One of the first was *LB Havering v LD & KD*[4] where a submission by the Official Solicitor that welfare deputies need only be appointed in cases which were "unusual or exceptional" was accepted by HHJ Turner QC.

The issue was considered in rather more detail by Baker J in *G v E*[5] where he held that the Act and Code were constructed on the basis that the vast majority of decisions concerning incapacitated adults should be taken informally and collaboratively by individuals or groups of people consulting and working together. He stated that it was "emphatically not part of the scheme underpinning the Act that there should be one individual who as a matter of course is given a special legal status to make decisions about incapacitated persons".

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4 [2010] EWHC 3876 (COP)

5 [2010] EWHC 2512 (COP).

It will sometimes be impracticable to insist on decisions being taken by the court. But because it is important that such decisions should wherever possible be taken collaboratively and informally, the appointments must be as limited in scope and duration as is reasonably practicable in the circumstances. In *G v E* Baker J identified cases which involve a series of decisions (for example, 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 second of these examples is likely to arise more frequently than the first, and that as asset management is likely to be required on an indefinite basis, the appointment of deputies is likely to be more common, and of a longer duration, in property and affairs cases than for personal welfare matters. He quoted a comment of HHJ Marshall QC in *Baker v H*[6] that:

> "the terms of section 18 make it clear that the exercise of the very broad decision-making powers by a property and affairs deputy is readily contemplated"

The judge also identified that comments made by Hedley J in *Re P*[7] that where family members offer themselves as deputies, the court ought to approach such an application with considerable openness and sympathy, were directed at the issue of who should be appointed as a deputy rather than the separate question of whether any deputy should be appointed at all.

In the later case of *SBC v PBA*[8] Roderic Wood J observed that the words of the Code of Practice were only guidance and that the Court should have regard to the unvarnished words of the MCA 2005 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.

In the property and affairs case of *Watt v ABC*[9] Charles J held that the best interests test under s4 MCA 2005 involved the weighing or balancing of competing factors and that it does not fit with presumptions, starting points or a bias that had to be displaced. Referring to welfare cases he observed that a refusal or reluctance to appoint a welfare deputy, simply because it was a welfare case was not justified.

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6 [2010] 1WLR 1103

7 [2010] EWHC 1592 (Fam)

8 *SBC v PBA* [2011] EWHC 2580) (Fam)

9 [2016] EWCOP 2532

***Re Lawson Mottram & Hopton* [2019] EWCOP 22**

This was a test case brought by the parents of three young adults with learning disabilities seeking their appointment as welfare deputies for their respective children. Hayden J, the Vice-President of the Court of Protection identified a preliminary issue as follows:

> "*What is the correct approach to determining whether a welfare deputy should be appointed? In particular should such appointments only be made 'in the most difficult cases' and if so, what does that mean in practice?*"

and invited the Official Solicitor to act as advocate to the court. It should be noted that because the Official Solicitor was acting as advocate to the court he was not acting as litigation friend for any of the three persons in question.

The Applicants sought to argue that there was a confusion and a lack of clarity in the approach taken by the Court of Protection to the appointment of welfare deputies and that the appointment of a family member as P's welfare deputy would be the least restrictive option[10]. They argued that the Code of Practice was wrong to apparently confine welfare deputyships to the "most difficult" cases. They also argued that in practice the MCA 2005 was not working as it was intended to and that the general defence afforded by s5 MCA 2005 had led to professionals assuming responsibility for most best interests decisions for care and treatment with the result that the perspectives of carers and family members were not being properly represented in the collaborative process.

The OS sought to argue that the existing case law was not as confused as the Applicants suggested, although there was a recognition that aspects of the Code of Practice were inconsistent with the statutory test set out in the MCA 2005. The OS argued that the appointment of a welfare deputy was a best interests decision to be determined in accordance with s4 MCA 2005 and that the Court should determine each application on its merits without any starting position or presumption. The OS also cautioned against the appointment of a welfare deputy being seen as a mechanism for the continuation of parental responsibility beyond the age of 18.

In his judgment the judge rejected the Applicants' contention that the existing case law was contradictory and confused. He also identified a trend in Court of Protection jurisprudence to draw back from a risk averse instinct to protect P and to keep sight of the fundamental

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10 MCA 2005 s1(6).

responsibility to empower P and to promote his or her autonomy. The judge identifyied a number of “clear principles”:

(1) The starting point in evaluating any application for appointment of a welfare deputy is by reference to the clear wording of the MCA 2005. Part 1 of the Act identifies a hierarchy of decision making in which the twin obligations both to protect P and promote his or her personal autonomy remain central throughout;

(2) Whilst there is no special alchemy that confers adulthood on a child on his or her 18th birthday, it nevertheless marks a transition to an altered legal status, which carries both rights and responsibilities. It is predicated on respect for autonomy. The young person who may lack capacity in key areas of decision making remains every bit as entitled to this respect as his capacitous coeval. These are fundamental rights which infuse the MCA 2005 and are intrinsic to its philosophy. The extension of parental responsibility beyond the age of eighteen, under the aegis of a welfare deputy, may be driven by a natural and indeed healthy parental instinct but it requires vigilantly to be guarded against. The imposition of a legal framework which is overly protective risks inhibiting personal development and may fail properly to nurture individual potential.

(3) The structure of the Act and, in particular, the factors which fall to be considered pursuant to 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 personal welfare deputy;

(4) The above is not in any way to be interpreted as a statutory bias or presumption against appointment. It is the likely consequence of the application of the relevant factors to the individual circumstances of the case. It requires to be emphasised, unambiguously, that this is not a presumption, nor should it even be regarded as the starting point.

(5) To construct an artificial impediment, in practice, to the appointment of a welfare deputy would be to fail to have proper regard to the 'unvarnished words' of the MCA 2005. It would compromise a fair balancing of the Article 6 and Article 8 Convention Rights which are undoubtedly engaged;

(6) 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. The power remains in the statutory provision;

(7) The prevailing ethos of the MCA is to weigh and balance the many competing factors that will illuminate decision making. It is that same rationale that will be applied to the decision to appoint a welfare deputy;

(8) There is only one presumption in the MCA, namely that set out at Section 1 (2) i.e. 'a person must be assumed to have capacity unless it is established that he lacks capacity'. This recognition of the importance of human autonomy is the defining principle of the Act. It casts light in to every corner of this legislation and it illuminates the approach to appointment of welfare deputies.

(9) P's wishes and feelings and those other factors contemplated by Section 4 (6) MCA will, where they can be reasonably ascertained, require to be considered. None is determinative and the weight to be applied will vary from case to case in determining where P's best interests lie;

(10) It is a distortion of the framework of Sections 4 and 5 MCA 2005 to regard the appointment of a personal welfare deputy as in any way a less restrictive option than the collaborative and informal decision taking prescribed by Section 5;

(11) The wording of the Code of Practice at 8.38 is reflective of likely outcome and should not be regarded as the starting point. This paragraph of the Code, in particular, requires to be revisited.

Having set out his conclusions on the preliminary issue, the judge remitted the three individual applications back to the Court's central registry at First Avenue House for determination.

David Rees QC was called to the Bar in 1994. He was appointed as Queen's Counsel in 2017, as a Recorder in 2012 and as a Deputy High Court Judge in 2018.
David is well known for his experience in wills, trusts, estates and mental capacity matters. He is ranked in Chambers UK Bar Guide 2020 for both Traditional Chancery and Court of Protection, and is the only Silk to be ranked for both Property and Affairs and Health and Welfare work. David is regularly instructed by the Official Solicitor in England and Wales and has appeared in many leading cases under the Mental Capacity Act 2005. Recent cases include ***Re E*** *(decision under section 16 MCA 2005 authorising DNA testing)* ***Re Lawson, Mottram and Hopton*** *(appointment of welfare deputies) and* ***PBM v TGT*** *(capacity to enter into pre-nuptial agreement). David is also regularly instructed in high value and complex probate and inheritance disputes and has recently appeared before the Supreme Court in relation to a dispute under the Inheritance Tax Act 1984. David is the Vice Chair of the Court of Protection Bar Association, the General Editor of Heywood & Massey's Court of Protection Practice and is a member of the Court of Protection Rules Committee. He writes and lectures regularly on all areas of his practice.*