



KINGS
CHAMBERS

AN INTRODUCTION TO THE COURT OF PROTECTION

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THE COURT OF PROTECTION

PROPERTY AND AFFAIRS

Management of P's
property
Sale, exchange, charging or
gifting of P's property
Acquisition of new
property on behalf of P
Execution of P's will

HEALTH AND WELFARE

Challenges to a deprivation
of liberty
Serious medical treatment
Welfare orders including
contact and residence

CAPACITY



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- Capacity is the gateway to the court of protection.
- Section 2 of the Mental Capacity Act 2005:
‘A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of or a disturbance in the functioning of the mind or brain’.

CAPACITY



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- The applicable principles are set out clearly in *Kings College Hospital NHS Foundation Trust v C & V [2015] EWCOP 80 and WBC v Z & Anor [2016] EWCOP 4*
- The test of capacity is approached in two stages.
- First does P suffer from an impairment or disturbance of the mind?
- Secondly, because of that impairment, is P unable to make the relevant decision?
- P is unable to make the decision if (section 3 of the MCA) P is unable to:
 - Understand the information relevant to the decision
 - Retain that information
 - Use or weigh up that information as part of the decision making process
 - Communicate his decision.

CAPACITY TO EXECUTE A LASTING POWER OF ATTORNEY



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- When executing a LPA the test of capacity requires that the donor (*Re Collis [2010] COP 27 October 2010*):
 - Must understand that the LPA cannot be used until it is registered by the Office of the Public Guardian.
 - Must understand that the LPA can be revoked at any time when (s)he has the capacity to do so without the court having to confirm the revocation.
 - Must understand that the authority conferred by the LPA is subject to the provisions of the MCA, in particular sections 1 and 4.

CAPACITY TO EXECUTE A LASTING POWER OF ATTORNEY



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- Must understand that the consequences of deciding one way or another or failing to make the decision – the reasonably foreseeable consequences
- Must understand the prescribed information set out in the LPA concerning the purpose of the instrument and the effect of the LPA:
 - The purpose of the LPA;
 - That the LPA must be registered;
 - What the donee can or cannot do for a donor;
 - Revoking the LPA.



The COP's powers

- The Mental Capacity Act 2005:
 - Section 15 – the power to make declarations on:
 - Whether P has or lacks capacity to make a decision or matters described in the declaration.
 - The lawfulness of any act done or to be done in relation to P
 - Section 16 – the power of the court to make certain decisions on P's behalf or appoint a deputy to make those decisions for P
 - Section 18 – the power to make specific property and affairs decisions including:
 - S.18(1)(b) gift or other disposition of P's property
 - S.18(1)(h) the settlement of any of P's property whether for his benefit or benefit of others
 - S.18(1)(i) the execution for P of a will.

Best Interests



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- The MCA requires the use of the statutory best interest tests for all decisions made on behalf of P.
- The principles of the Act are:
 - A person must be assumed to have capacity unless it is established that he lacks capacity.
 - A person is not be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
 - A person is not be treated as unable to make a decision merely because he makes an unwise decision
 - An act done or decision made under the MCA must be made in P's best interests
 - Before an act is done or decision made regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of P's rights and freedom of action

Best Interests



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- Section 4 of the MCA sets out a compliance checklist and guidance for decision makers/courts
- The key principles are as follows:
 - A best interest decision is a value judgment where an objective decision should be made.
 - A best interest decision will respect P's expressed wishes but will not necessarily follow or give weight to them – Re M [2009] WTLR 1791
 - There is no hierarchy of factors within the structure of a best interests decisions
 - There may be one or more factors of magnetic importance, which determine the outcome of the decision
 - The test often involves a significant element of substituted judgment.
 - Best interest does not cease at the moment of death. It may be in P's best interests to be remembered as having done the 'right thing' by a will.

Procedure in a Nutshell



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- The relevant rules of procedure are ‘The Court of Protection Rules 2017’.
- Proceedings are commenced with a COP1 application form which must (Rule 9.3):
 - State the matter the A wants the court to decide
 - State the order A is seeking
 - Name A, P, Rs and any interested parties

Procedure in a Nutshell



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- The application must be served by A on Rs (Rule 9.6) and any other interested persons (9.10)
- P must be notified (Rule 9.9)
- If P is made a party to the application it should be accompanied by a request for an order appointing a litigation friend.
- It will almost always be necessary to file capacity evidence with the application.

Procedure in a Nutshell



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- Practice Directions that are most likely to be relevant to your probate practice:
 - 9D: applications by deputies, attorneys and donees in relation to P's property
 - 9E: applications relating to statutory wills, codicils, settlements and other dealings with P's property
 - 9F: applications to appoint or discharge a Trustee
 - 9G: applications relating to the Registration of Enduring Powers of Attorney

Examples of the interplay between COP and Private Client



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- LPAs:
 - Contentious applications to revoke/cancel registration of LPA (s.22) because the qualifying criteria might not be met and/or the attorneys are not acting in P's best interests
- Application for a gift from P's estate:
 - Varying the will of an individual the effect of which is to redirect or redistribute P's share in that estate.
 - Will the variation be considered a deprivation of assets?

Examples of the interplay between COP and Private Client



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- Variation of a trust where P is a beneficiary:
 - Section 18 application to the COP
 - N.B. recent case of *ET v JP & Ors [2018] EWHC 685*
- P's estate and inheritance tax planning:
 - *Re JDS: KGS v. JDS [2012] EWHC 302 (COP)*
- Extending a deputy's authority to commence litigation on behalf of P

Examples of the interplay between COP and Private Client

- A beneficiary who lacks capacity – can they give valid receipt?
 - The executors could seek a section 15 declaration from the COP on whether P/beneficiary has the capacity to give receipt for the distribution.
 - Does P have the capacity to manage the money if it is given to them?
 - The executors may need to make an application for the appointment of a deputy for P.

Examples of the interplay between COP and Private Client



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- Statutory wills- a way of avoiding a contentious probate claim?

VAC v JAD & Ors [2010] EWHC 2159

‘Given the importance attached by the Court to the protected person being remembered for having done the “right thing” by his will, it is open to the Court, in an appropriate case, to decide that the “right thing” to do, in the protected person’s best interests, is to order the execution of a statutory will, rather than to leave him to be remembered for having bequeathed a contentious probate dispute to his relatives and the beneficiaries named in a disputed will’

Costs



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- Rule 19.2

'where the proceedings concern P's property and affairs the general rule is that the costs of the proceedings or that the part of the proceedings that concern P's property and affairs shall be paid for by P or charged to his estate'

- Where proceedings concern P's health and welfare the general rule is that there are no order as to costs (19.3)

Costs



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- Rule 19.5 states that a court may depart from the general rule if the circumstances so justify taking into account:
 - The conduct of the parties
 - Whether a party has succeeded on that party's case even if not wholly successful; and
 - The role of any public body involved in the proceedings.

Costs



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- Conduct includes:
 - Conduct before as well as during proceedings
 - Whether it was reasonable to raise, pursue or contest a matter/issue
 - The manner in which the party responded to the application/issue
 - Whether a party, who has succeeded exaggerated any matter raised in their application or response
 - Any failure to comply with a rule, practice direction or court order.

Practical Points to Consider



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1. Does P need to make a decision?
2. Does P lack the capacity to make that particular decision?
3. How can I prove that P lacks capacity on the relevant decision?
4. What application should be made the COP?
5. Is there a relevant Practice Direction I need to comply with?
6. Do I need permission to make the application or do I have standing to make the application?
7. Does P need to be represented?
8. Who are the interested parties that need to be informed of the application?

The End



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- The Public Law team is holding a Court of Protection seminar on 15 October 2018 (venue TBC).
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