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GIFTS IN THE COURT OF PROTECTION

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What is a gift?

- At common law a gift is considered a voluntary transfer of property without valuable consideration.
- Obvious examples of gifts include:
 - Personal possessions such as furniture or jewellery.
 - The transfer of cash sums
- The Mental Capacity Act 2005 does not define the term 'gift'.
- A gift within the remit of the MCA is, however, much broader than a gift at common law, for instance, inter vivos gifts and death bed gifts.

OPG Guidance

- ***‘Giving gifts; a guide to the legal background for deputies and attorneys’*** - Practice Note dated 18 January 2018 from the Office of the Public Guardian defines a gift as follows:

‘A gift is when you move ownership of money, property or possessions from the person whose affairs you manage to yourself or to other people without full payment in return’



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- The OPG considers that a gift includes the following:
 - An interest free loan from P's funds
 - Selling a property for less than its true value
 - Creating a trust of P's property where someone else is the beneficiary.
 - Varying the will of an individual the effect of which is to redirect or redistribute P's share in the estate.
 - Living rent free or at a 'family and friends' rate in P's property.
 - Payment of private school or University fees.



Authority to make a gift

- The authority to make a gift is conferred by the deputy order. The standard order includes the following clause:

‘The deputy may without obtaining authority from the court dispose of P’s money/property by way of gift to any charity to which (s)he made or might have been expected to make gifts and on customary occasions to persons related to or connected with him/her provided that the value of each such gift is not unreasonable having regard to all the circumstances and, in particular, the size of the P’s estate’.



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- Gifts can be made from P's estate without court approval if:
 - Made on a customary occasion to a person related or connected with the donor.
 - A gift to a charity which the donor did or might have been expected to make.
 - Value of the gift is not unreasonable.



Customary Occasion

- Customary occasion is defined in section 12 of the MCA:
 - The occasion or anniversary of a birth, marriage/civil partnership; or
 - Any other occasion on which presents are customarily given within families or among friends or associates.
- Customary – births, birthdays, weddings/civil partnerships, Christmas, Eid, Diwali, Hanukkah and Chinese New Year.
- A gift of surplus income at beginning/end of the tax year does not fall within the definition of customary (see Re PC: [2014] EWCOP 41).



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What is a reasonable gift?

- The MCA does not define what is a 'reasonable' or 'unreasonable' gift for the purposes of the limited authority conferred on deputies.
- A deputy is expected to assess whether or not a proposed gift falls within his or her authority.
- OPG practice note does not provide precise figures.



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- Best guidance is contained within *MJ and JM v The Public Guardian [2013] EWCOP 2966:*
 - Regard must be had to the totality of P's current and anticipated income and capital, expenditure and debts; and
 - Is making the gift in P's best interests?



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- Factors to consider include:
 - The impact of the gift of P's financial situation
 - What, if any, effect will the gift have on income, capital, savings and future needs.
 - Was P in the habit of making gifts of a particular size before they lost capacity?
 - P's life expectancy
 - Will P have to pay for care in the future?
 - Will P be entitled to CHC funding or s.117 funding in the future?
 - Is the gift affordable?
 - To what extent might the gift interfere with P's will?





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The De Minimis Exception

- If a gift falls outside the scope of a deputy's limited authority then an application for the approval of the gift **in advance** must be made to the COP:
 - Section 18(1)(b) – the court's power extends to 'the sale, exchange, charging, gift...of P's property'.
- **UNLESS** the gift falls within the de minimis exception.



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- *MJ and JM v The Public Guardian [2013] EWCOP 2966*
Senior Judge Lush:
 - Applies where the infringement of authority is so minor that an application to the COP would be disproportionate.
 - Construed as covering the use of the annual IHT exemption of £3,000 and annual gifts exemption of £250 per person limited to ten people.



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- A deputy must always make an application for the prospective approval of a gift where it concerns:
 - loans to the deputy or to members of the deputy's family
 - any investment in the deputy's own business;
 - sales or purchases at an undervalue;
 - any other transactions in which there is a conflict between the interests of the donor and the interests of the deputy
 - Gifts which are potentially exempt transfers or made from surplus income to avoid IHT, Re W (enduring power of attorney [2001] 1 FLR 832



Payment to Meet a need?

- A gift must:
 - be in the donor's best interests; **AND**
 - Authorised by the court of protection; **OR**
 - be of sufficiently low value that approval is not required.
- Where a payment is meeting a need a deputy must apply the principles in section 1 and the best interest considerations in section 4.
- *'The deputy make may provisions for the needs of anyone who is related or connected to P if (s)he provided for or might be expected to provide for that person....'*

The Public Guardian's Severance Applications [2017] EWCOP 10



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- District Judge Eldergill was asked to consider whether all payments from P's estate, including those made to meet a need, are by definition a 'gift' and so caught by section 12 of the Act.
- The judge held that this was not the case because, if it were true, it would lead to a '*nightmare*' situation where attorneys would need to apply for approval of historic and regular continuing payments.

Key Conclusions of DJ Eldergill



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1. It is not possible to define precisely the boundary between a gift and a payment to meet a person's needs because each person's situation, resources and circumstances are unique.
2. Marriage and equivalent relationships typically create a relationship of interdependence and mutual support. Dependence is often created by the presence of children or a family member with a disability. These relationships generate needs often met by loved ones within the circle.





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3. Generally gifts lack the regularity of weekly, monthly or periodic payments and are often not supported by an history of frequent similar periodic payments predating the onset of loss of capacity.

4. Payments on customary occasions, such as birthdays, will generally be gifts in the absence of good evidence of a sudden present need which historically the donor would have met or be likely to meet from their own funds.





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5. Historical expenditure of P acts as the '*barometer*' of their wishes, feelings, beliefs and values.
6. The lifestyle enjoyed by P prior to the onset of incapacity sets a benchmark that is relevant to the assessment of need.
7. Funds used to meet continuing needs of dependents which are consistent with historical expenditure of P is likely to indicate a need being met rather than a gift.



The Courts' approach to Best Interests



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- The decided cases illustrate the way in which the Court approaches best interests decisions in relation to gifts.
- The starting point is the checklist in section 4:
 - P's past/present wishes and feelings
 - P's beliefs and values likely to influence the decision if (s)he had capacity and any other factors that P would consider if able to.
 - The views of certain other persons.



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- *Re: G (TJ) [2010] EWCOP 3005*

- The decision is not one of substituted judgment
- The decision, however, P would have made is highly relevant particularly when making provision for a third party.
- A court can therefore take substituted judgment into account.
- Best interests is not synonymous with self interest
- The wishes of P, which are altruistic and not self interested, can be a relevant factor.





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- *Re JDS: KGS v. JDS* [2012] EWHC 302 (COP):
 - Application to transfer £325k from P's estate into a flexible power of appointment trust.
 - Purpose of the gift was to avoid IHT on P's death.
 - Court did not approve the gift.
- The court will carry out the balance sheet approach considering what is the factor of magnetic importance.
- *'It is not the function of the court to anticipate, ring fence or maximise potential inheritance for the benefit of P's family... because this is not the purpose for which the compensation for personal injury was intended'*





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- *Re AK* [2014] EWCOP B11
 - P's deputy sought an order gifting £150k to P's parents for the purpose of building an adapted property in Pakistan.
 - Court approved an interest free loan rather than an outright gift.
 - Loan was considered more appropriate as it enabled AK to retain capital and made compliance by P's parents more likely.



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- *Re A* [2015] EWCOP 46
 - A's professional deputy sought payment of £17k per year from P's personal injury fund to pay for her brother's school fees.
 - Deputy paid the school fees while the application was outstanding. The OS suggested that the deputy should reconstitute immediately arguing that the deputy's function is to protect and conserve the fund



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- The court approved the gift commenting that the OS was *‘unnecessarily intrusive and hostile’* in its approach to the application.
- Concept of mutual dependence- *‘It is impossible to consider the disabled child’s interests in isolation from those of her family as a whole...in considering her bests interests at a particular time the decision maker must take an holistic approach and consider her welfare in the widest sense not just financial but social and emotional’.*



Practice Direction 9D



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- The 'short procedure' is a simplified procedure for routine or simple gift applications by deputies.
- It is suitable for applications concerning:
 - Regular payments from P's estate in respect of deputy's remuneration.
 - Minor variations to expenses paid by P's estate.
 - Non contentious sale of P's property.
 - Gift or loan where sum is not disproportionately large to size of P's estate.
- COP1 application form with supporting evidence.
- There is no requirement for medical evidence but it is best practice to provide up to date information on P's condition, size of the estate and recent decisions made on P's behalf.
- No requirement to serve the application on any other person.





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THE END

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