

# Stepping in

Lynne Bradey discusses new challenges for professional deputies in the UK



#### ABOUT THE AUTHOR

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Acting as a professional deputy for a person who lacks capacity to deal with their own financial affairs is not something to be entered into lightly.

We are seeing an increase in the number of cases where a professional deputy, rather than a family member, is appointed. Sometimes there is nobody available to act – it might just be a matter of there being no spare time or a simple absence of close family.

There might also be nobody who would be suitable to act. In those cases, the Office of the Public Guardian (OPG) will ask a member of their panel of professionals to apply to act as deputy. In other cases, there may be a dispute about an Enduring or Lasting Power of Attorney, which is resolved by the appointment of an independent professional.

Even in cases where there is no dispute and there are involved family members, a professional may be appointed because there is a substantial personal injury award to manage and either the family does not want to act or is unable to obtain the security to do so.

The costs of applying for a professional to be appointed as a deputy and the anticipated future costs, including those of a statutory will application, should be claimed from the defendant as an item of special damages.

This article addresses the practical issues for professional deputies. It highlights opportunities for solicitors to enhance both their client service and their profitability.

## What does 'incapable' mean?

There is a presumption that a person has capacity to make a decision unless the contrary is shown. Therefore, we must not assume that the person for whom we act ('P') lacks capacity to do everything financial. Gone are the days of 'blanket incapacity.' Each decision is looked at individually and P may have the capacity to make some decisions but not others.

That ability may vary according to time of day, from day to day or month to month. Some people, such as those in a persistent vegetative state, will not have the ability to make any decisions at all, but a lot of people will be able to make some decisions. People should be encouraged to make whatever decisions they are able to. Often they will be capable of budgeting from day to day, with or without support, but not of dealing with substantial amounts of money.

It may be appropriate for P to run a bank account, which receives an allowance or even their benefits, and to budget for some items to be paid for from that account. Larger payments, or investment decisions, may be made by the deputy. This can be empowering and can work well. Sometimes, however, it can present its own challenges, for example when P is skilled at getting hold of money but not able to manage it once he has it. This asymmetry may only become apparent with the passage of time, but it is usually important to 'give it a go.'

## How it should work in practice

The Court of Protection is rightly concerned to ensure that professional work is effected at the appropriate level. To administer deputyships effectively, therefore, it is important to have a team of people, each carrying out the appropriate type of work.

While the deputy would normally be the appropriate person to visit P and P's family and to carry out certain complex tasks on behalf of P, it would be more cost effective for somebody at a lower charge out rate to be dealing with the payments from the deputyship account, tax returns and accounts and other administrative matters. It would be appropriate for a more senior fee earner to be making statutory will and other legal applications.

If work is carried out at a level that the Supreme Court Costs Office considers is too high, the hourly rate allowed will be cut to a lower one. Partners paying nursing home fees each month should take note or lose money.

It can be useful for the person with day to day conduct of the matter to be the first point of contact for P and his/her family. This can mean that P always has somebody on the end of the telephone to speak to, as opposed to the professional deputy who, due to the nature of his or her work, may not be in the office. Only matters which need the deputy's personal skillset/input should of course be referred to the deputy. A sieving effect is a useful discipline.

It is always useful to keep a summary notepad on the deputyship file and to ensure that this is up-to-date. It is amazing how often you are asked for details such as P's national insurance number. Also, do not underestimate the importance of a good diary system. It is vital to know when the relevant dates are for tax and OPG supervision purposes. But you also need to be aware that some Orders, particularly those where litigation is ongoing, are time limited.

That means that all of the deputy's powers cease on a certain date. The Court will not contact you to remind you that the order is about to run out. If you have not noticed an expiry it is likely that there will be a delay of

some months before a new application is dealt with and the deputy is able to continue administering the client's affairs. This may be a systemic inadequacy and an irritation, but it is a fact so it must be properly planned for.

Do remember that where your client has been injured and the funds from that injury are held within the Court of Protection, those funds are a disregarded asset for means tested benefits and residential care purposes. You have a duty as deputy to ensure that your client is claiming everything that they are entitled to and this is a point it is easy to overlook. Consider having a regular benefits 'health check', either in house or as part of an arrangement with an external specialist.

The Court was intending to convert all former receiverships into deputyships, but that process seems to have stopped. Orders are now being converted either on a specific application or when there is another application before the court, such as for a statutory will.

Although the majority have been changed, if you have a receivership order, or indeed a deputyship order with powers which are not as wide as you feel would be useful, you should apply to the Court now rather than finding out later that you need to do something in a hurry and you cannot.

### Statutory wills

Deputies should check whether P has a valid will, and if so, whether it is up to date. It is often advisable to apply for a statutory will if the existing arrangements leave something to be desired. For example:

Michael made a will 25 years ago leaving his estate to his mother Edna, and failing that, to his long-term friend Mary. The problem is that Michael's mother passed away 20 years ago, and Mary is the same age as Michael.

Michael has lost the mental capacity to make a valid will. The concern is that if Mary dies before Michael, there will be an intestacy situation as there are no further provisions in the will. Michael's family situation is such that the issue of his uncles and aunts would be

entitled. Some of the family are in Australia, and some could be anywhere.

We know from Mary and from looking through Michael's card and address book that he was in contact with the daughter of his deceased uncle John, who now lives in Australia. He was also in contact with his uncle Albert, who has just died but has a son. Both of these relatives are on his father's side. He does not appear to have had any contact with relatives from his mother's side.

*In order to save Michael's estate a messy and potentially expensive intestacy, the Court orders that we can make a will leaving the entire estate to Mary as before, but with substitute gifts to John's daughter and Albert's son or their issue if they predecease. The executors are also changed as the firm has ceased to exist.*

**“ You have a duty as deputy to ensure that your client is claiming everything that they are entitled to ”**

Historically, before the *Mental Capacity Act* came into force, decisions were made on the basis of a fictitious 'lucid moment' experienced by P during which he was fully aware of all of the circumstances which would affect decisions about a will and was properly legally advised. If the Court were to be asked to depart from a previous will or intestacy, good reasons would need to be shown as to why the proposed will would now be what P would have wanted.

Following the implementation of the *Mental Capacity Act*, two major cases, *re P* [2009] EWHC 163 (Ch)(*Re P*) and *ITW v Z & ORS* [2009] EWHC 2525 (*Fam*) have clarified the Court's approach under the *Mental Capacity Act*. The earlier decisions and the basis upon which they were made have been consigned to the history books.

The overarching principle of the *Mental*

*Capacity Act* that any decision made on behalf of P must be made in P's best interests now applies. In considering best interests, the Court must consider all factors, including P's past and present wishes and feelings, P's beliefs and values, other factors P would be likely to consider if he could and the views of certain others.

It is essential first of all to address P's capacity to make a will. Although P has a deputy, he may still have testamentary capacity. This needs to be established before an application to Court is made. The most efficient approach may be to contact the relevant medical professional with an 'either or' scenario, ie asking the doctor to confirm whether P has testamentary capacity and if not, asking the doctor to complete the enclosed COP3 form.

Once you have confirmation that P lacks capacity you can then draft the application to the Court. This avoids wasting the costs of drafting the application if you leave the COP3 until last and then to your surprise receive confirmation that he actually has testamentary capacity.

Even if P lacks testamentary capacity, the Court will encourage P to participate in the decision as far as possible, consider P's past and present wishes, beliefs and values and take into account the views of third parties as to what would be in P's best interests.

Serving P's best interests by giving effect to his wishes is only part of the picture. The Court is conscious that P's memory will live on after his death and 'for many people it is in their best interests that they be remembered with affection by their family, and as having 'done the right thing' by their Will. The Court is therefore entitled to take into account how P will be remembered after his death.

### Finally....

The secret is to get to know P and his or her circumstances properly, have a properly organised team and to properly bear in mind wider issues such as statutory wills. Who says propriety is dead? ■