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MENTAL CAPACITY HERE AND THERE

Mental capacity, or its absence or loss, and the consequences of its absence or loss, is a very large subject that affects many individuals and their families in different aspects and stages of their lives. In this short talk, I intend to focus just on some aspects of the law and practice which are of particular relevance to lawyers offshore, and who need to know something about the current English law of mental capacity, as follows:

- An overview of the law as it relates to wills, gifts and settlements for the benefit of others
- How are Cayman lawyers likely to come into contact with the English law – the territorial and international reach of the MCA
- Assessment of capacity under the MCA
- Applications to the Court of Protection to direct wills, gifts or settlements for the benefit of others
- Appointing, controlling and removing English office-holders: attorneys and deputies

Overview of the English law of mental capacity in relation to wills, gifts, and settlements for the benefit of others

As every lawyer knows, mental capacity is an essential element in the validity of any legal act engaged in by an adult individual. As there is a long-standing common law (and now statutory) presumption of capacity, the issue of capacity only comes into forensic focus when it is either patently absent or lost, apparently failing, or challenged as part of an attack on the validity of a past legal act, for example when a disappointed beneficiary claims that a donor lacked capacity to make a gift or settlement, or a testator lacked capacity to make a will. The forensic focus on capacity may therefore be either retrospective or prospective.

Under English law, it is now clearly established that retrospective review of the validity of past acts where it is alleged that a settlor/donor/testator lacked capacity for the act in question largely[1] remains a common law exercise involving common law tests of capacity. Two High Court cases decided within days of each other in late 2014 examined the issues in some depth in the context of both gifts and wills. See (1) *Walker v. Badmin* [2014] EWHC 71 (Ch), a probate case decided on 20 November 2014 and holding that the common law *Banks v. Goodfellow* test and not the MCA applied to determine the validity of a will, and that although the tests overlapped, they would not always produce the same result, and (2) *Kicks v. Leigh* [2014] 3926 (Ch) a claim alleging that lifetime gifts had been procured by undue influence, decided on 25 November 2014, where the High Court considered the interplay between the common law and the MCA and held that common law principles continued to apply, although recognising that any difference between the two tests would not have made any difference to the outcome of the case.

It may seem surprising and unsatisfactory that there is not a unified approach to retrospective and prospective validity on the basis of capacity. Prospective validation of such acts is not a matter of common law, but comes within the framework of the Mental Capacity Act 2005 ("the MCA") and the jurisdiction of the Court of Protection ("the Court"). The MCA came into force on 1 October 2007, creating a new statutory jurisdiction for the Court of Protection as a superior court of record. Now that the Act and the Court have been in existence in their current form for nearly a decade, it is worth taking stock of developments, with a focus on those which are particularly relevant to private client lawyers.

Typically, private client lawyers will be concerned with the formal and essential validity, and accurate drafting of dispositions of property made by people who may be long-standing clients, but whose capacity has become questionable or failing. Although the Court of Protection deals with many people (known generically in the legislation as 'P') whose transition from capacity to incapacity is abrupt (as a result of accident or acute illness leading to acquired brain injury), or who have lifelong cognitive deficits, the majority of its decisions concern people who have later-life illnesses of gradual onset,

[1] The Court of Protection will consider retrospectively whether an enduring or lasting power of attorney was valid when it was made, and will also consider ratifying dispositions made outside the authority of an office-holder or without the prior approval of the Court. In doing so, the Court is declaring only that it is satisfied that the disposition was in P's best interests.

with no obvious defining moment of transition to incapacity. Private client lawyers may therefore have to consider both retrospective and prospective validity in a way that other professionals involved with decision-making under the MCA do not. Another distinctive feature of the private client lawyer's work is that disposition in the form of wills, gifts and settlements for the benefit of others involve decision-making of a different nature to many other decisions made under the MCA, because they are essentially altruistic rather than self-interested, and the statutory best interests test was not primarily designed with altruistic decision-making in mind.

Amongst the most significant features of the MCA are:

- The legislation commences with a statement of principles which are intended to be pervasive in all decision-making under the Act (s1).
- It contains a statutory presumption of capacity and definition of what it means to lack capacity (ss2 and 3)
- The MCA and the Court take a unified approach to property and affairs and personal welfare decisions. S16 MCA gives the Court power to make decisions and appoint deputies, and s18 identifies a number of specific property and affairs decisions which may be made, including
  - s18(1)(b) the gift or other disposition of P's property
  - s18(1)(h) the settlement of any of P's property whether for P's benefit or for the benefit of others
  - s18(1)(i) the execution for P of a will
- The MCA requires the use of a statutory best interests test for all decisions made on behalf of a person who lacks capacity (s1(5) and s4). Prior to the MCA the concept of best interests had developed in the context of personal welfare decision-making for adults who lacked capacity. In its 1995 report on Mental Incapacity (Law Com No 231), the Law Commission recommended both the adoption of the best interests principle in the new statutory scheme and the introduction of some statutory guidance as to how best interests were to be defined or ascertained. The Commission emphasised that (at para [3.27])

> 'It should be made clear beyond any shadow of a doubt that acting in a person's best interests amounts to something more than not treating that person in a negligent manner. Decisions taken on behalf of a person lacking capacity require a careful, focused consideration of that person as an individual.'

- The MCA contains an updated framework for the appointment and supervision of office-holders with delegated authority on an incapacitated person's behalf. These office-holders will either be attorneys chosen by the incapacitated person and appointed under an enduring (created pre 1 October 2007) or lasting (created post 1 October 2007) power of attorney, which must be registered with the Office of the Public Guardian in either case, or a deputy or deputies who are appointed by the Court, and who are subject to more stringent supervision, accounting and security requirements than attorneys

The principles and best interests test

Section 1 MCA sets out the principles

> The following principles apply for the purposes of this Act.
>
> (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
>
> (3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
>
> (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
>
> (5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
>
> (6) Before the act is done, or the decision is 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 the person's rights and freedom of action.

Section 4 MCA contains the statutory best interests test. It is not a definition of "best interests" which are always decision-specific, but a compliance checklist and guidance for decision-makers.

4 Best interests

(1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—

(a) the person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.

(2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.

(3) He must consider—

(a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and

(b) if it appears likely that he will, when that is likely to be.

(4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.

(5) [relates to life-sustaining treatment]

(6) He must consider, so far as is reasonably ascertainable—

(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),

(b) the beliefs and values that would be likely to influence his decision if he had capacity, and

(c) the other factors that he would be likely to consider if he were able to do so.

(7) He must take into account, if it is practicable and appropriate to consult them, the views of—

(a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,

(b) anyone engaged in caring for the person or interested in his welfare,

(c) any donee of a lasting power of attorney granted by the person, and

(d) any deputy appointed for the person by the court,

as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).

(8) The duties imposed by subsections (1) to (7) also apply in relation to the exercise of any powers which—

(a) are exercisable under a lasting power of attorney, or

(b) are exercisable by a person under this Act where he reasonably believes that another person lacks capacity.

(9) In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned.

(10) [Definition of "Life-sustaining treatment"]

(11) "Relevant circumstances" are those—

(a)of which the person making the determination is aware, and

(b)which it would be reasonable to regard as relevant.

Prior to the MCA, the pre-2007 Court of Protection had a jurisdiction to direct statutory wills, gifts and settlements, which was exercised on the basis of substituted judgment i.e. making a counterfactual assumption that the incapacitated person had a notional lucid interval in which he would make decisions in the same way as if he were a person of full capacity.

The pre-MCA best interests test developed entirely separately in the context of decision-making about medical treatment and personal welfare, in which the object of treatment and care is to benefit the individual concerned. The expression 'best interests' itself is more closely synonymous with individual welfare than with decisions in which individual self-interest is minimal or absent. By contrast, acts of financial altruism, in particular making a will, may have little or no direct effect on P in his lifetime at all. The pre-Act personal welfare jurisprudence only encompassed altruism to a very limited extent, and without any element of substituted judgment.[2]

The application of the best interests test and the extent to which it marked a "radical" break with the past was delineated in three early decisions on statutory wills or gifts under the MCA: *Re P* [2010] Ch 33 (Lewison J), *Re M* [2009] WTLR 1791 (Munby J) and *RE G(TJ)* [2010] EWHC 2005 (COP). All three emphasise that:

- A best interests decision is a value judgment for the decision maker, who must consider all relevant circumstances and make an objective decision as to what is in P's best interests.
- A best interests decision will respect P's expressed wishes, but not necessarily follow or give weight to them. In *Re M* Munby J said that (1) P's wishes and feelings would always be a significant factor to which the Court must pay close regard; (2) the weight to be attached to P's wishes and feelings would always be case-specific and fact-

[2] See *Re Y* [1997] Fam 110, a decision on whether a mentally incapacitated woman should undergo bone marrow harvesting with a view to prolonging the life of a sibling with whom she appeared to be a donor match.

specific; and (3) in considering the weight and importance to be attached to P's wishes and feelings, the Court must have regard to all the relevant circumstances, including (but not limited to) (a) the degree of P's incapacity; (b) the strength and consistency of the views being expressed by P; (c) the possible impact on P of knowledge that her wishes and feelings were not been given effect to; (d) the extent to which P's wishes and feelings were, or were not, rational, sensible, responsible, and pragmatically capable of sensible implementation in the particular circumstances; and (e) crucially, the extent to which P's wishes and feelings, if given effect to, could properly be accommodated within the Court's overall assessment of what was in his best interests.

- There is no hierarchy of factors within the structure of a best interests decision.
- There may be one or more factors of magnetic importance which determine the outcome of the decision.
- The objective test of best interests contains a significant element of substituted judgment, as best interests include respecting wishes which cannot be ascertained, because P lacks capacity to consider and articulate them, but which the Court presumes P would have in the circumstances, based on what the Court knows of P's personality and beliefs and values and life prior to loss of capacity. In *Re G(TJ)* Morgan J acknowledged the role of presumed wishes in determining the outcome of a gift application.
- Best interests do not cease at the moment of death. Munby J said: "We have an interest in how our bodies are disposed of after death, whether by burial, cremation or donation for medical research. We have, as Lewison J rightly observed, an interest in how we will be remembered, whether on a tombstone or through the medium of a will or in any other way. In particular, as he points out, we have an interest in being remembered as having done the "right thing", either in life or, post mortem, by will." Subsequent cases have taken a varying approach to this concept.
- Not every element of the statutory best interests test in s4 MCA will be relevant to every decision that the Court is asked to take or review, and that some will never be relevant to applications for statutory gifts, settlements and wills. In most such cases, the focus of evidence and argument is on s4(6)(a) and (b), dealing with past and present wishes and feelings, beliefs and values, and on s4(6)(c) which permits inference about assumed present wishes and other matters which P would be likely to consider if s/he were able to do so.

International jurisdiction of the Court of Protection

How are Cayman lawyers likely to encounter the jurisdiction of the Court of Protection under the MCA? The territorial effect of the legislation is principally England and Wales. Section 63 MCA introduces schedule 3 which gives effect to the Hague Convention on the International Protection of Adults and makes related provision as to the private international law of England and Wales. As regards this, paragraph 7 of Schedule 3 provides for the Court to have jurisdiction in relation to—

> (a) an adult habitually resident in England and Wales,
> (b) an adult's property in England and Wales,
> (c) an adult present in England and Wales or who has property there, if the matter is urgent, or
> (d) an adult present in England and Wales, if a protective measure which is temporary and limited in its effect to England and Wales is proposed in relation to him.

In exercising jurisdiction under Schedule 3 the Court may apply the law of another country than England, if the Court thinks the matter has a substantial connection with that country.

Paragraph 13 of Schedule 3 contains provisions relating to lasting powers of attorney. These provisions give the donor of a lasting power a degree of choice of governing law of the instrument, as between the law of England and Wales (the default setting) and the law of a "connected" country i.e. one of which the donor is a national, or in which s/he is habitually resident or in which s/he has property.

There are further specific provisions in relation to wills in paragraph 4 of schedule 2 MCA. A statutory will cannot effectively dispose of immovable property outside England and Wales, or of any other property if P is domiciled outside England and Wales and under the law of his domicile, the issue of testamentary capacity is not to be determined in accordance with English law.

Capacity and its assessment in accordance with the Mental Capacity Act

Capacity and incapacity

The statutory definition of capacity is in sections 2 and 3 MCA and is focused on inability to make decisions. Section 2 defines a person who lacks capacity "in relation to a matter" as someone who "at the material time 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." This is the diagnostic element of the test: there must be "impairment" or "disturbance" – mere indecisiveness or extreme procrastination is insufficient. The words "in relation to a matter" and "at the material time" make it clear that lack of capacity is both decision-specific and time-specific, and this can have an important bearing on the quality of evidence of lack of capacity.

Section 3 is the "functional" test of incapacity:

> **Inability to make decisions**
>
> (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—
>
> (a)to **understand** the information relevant to the decision,
>
> (b)to **retain** that information,
>
> (c)to **use or weigh** that information as part of the process of making the decision, or
>
> (d)to **communicate** his decision (whether by talking, using sign language or any other means).
>
> (2)A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).
>
> (3)The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.
>
> (4)The information relevant to a decision includes information about the reasonably foreseeable consequences of—
>
> (a)deciding one way or another, or
>
> (b)failing to make the decision.

Assessment of capacity

Assessment of capacity is the threshold to the jurisdiction of the Court of Protection. The Court cannot take a decision on a person's behalf unless s/he lacks capacity to take the decision in question, and every application to the Court requires evidence of incapacity. This is generally clinical evidence and is frequently uncontested, in which case it will be determinative of the issue. But where the issue is contested, the judgment is that of the Court, which must be detached and objective in its assessment. Most of the decisions which have most clearly illustrated the way in which the Court evaluates evidence of alleged incapacity and reaches a decision in a contested case have been decisions about medical treatment, including the recent case of *Kings College Hospital NHS Foundation Trust v. C* [2015] EWCOP 80. The issue there was whether a woman in her 50s who had survived a failed suicide attempt had capacity to refuse further medical treatment which would have saved her life, but which she wished to refuse as she felt she had nothing to live for. The judgment, in which the Court found that she had capacity, illustrates with particular clarity and acuity the distinction between an unwise decision and an incapacitous decision.

The judgment on assessment of capacity which is of the greatest relevant to lawyers concerned with property and affairs is *D v. R* [2010] EWHC 2045 (COP). The issue in that case was whether P had capacity to make a decision about litigation which had been commenced by his deputy, and to which P expressed opposition. The litigation was a claim to recover substantial gifts made to D, who had befriended P, on the ground of undue influence. The judge held that P lacked capacity to understand in lay terms the basic nature of an undue influence claim to set aside lifetime gifts. The judgment emphasises the importance of identifying the true nature of the decision which is the focus of the capacity assessment, and likewise the minimum level of information required in order to make such a decision.

Against this background, when instructing an expert, who may not be a lawyer and who may know nothing of P other than what is in recent clinical notes or a clinical referral letter, to assess capacity:

- Explain that the request is for an assessment for the purpose of the MCA, and set out the statutory test of capacity.

- Be as decision-specific as possible. An example: where money has left P's account for some apparent purpose, the nature of the decision is not "did P have capacity to write a cheque for/transfer £N" but "did P have capacity to give/lend/ £N to X for stated/apparent purpose A or to purchase B".
- Identify and provide the minimum level of information that is required in order to make the decision, having regard to the role of "information relevant to the decision" in s3 MCA. This has been judicially defined as "the salient details", and not "all peripheral detail". In the example of P making a significant transfer of funds, the information relevant to the decision would include
    - The stated or apparent purpose of the transfer
    - The immediate background facts to the transfer
    - Whether the transfer was purely gratuitous or had any contractual or other benefit for P
    - If the transfer was purely gratuitous, the identity of the transferee and his/her relationship to and recent history of financial dealings with P
    - The value of the transfer in the context of P's overall financial position, and the consequences of making it (a) as they affect his financial position in his lifetime and (b) as they affect the disposition of his estate after his death.

A model letter of instruction is attached to these notes.

Applications to the Court to direct wills, gifts and settlements

Wills

The Court of Protection alone has jurisdiction to direct a will to be made on behalf of an adult who lacks testamentary capacity. The Court exercises its jurisdiction very frequently, although relatively few of the cases are published, either because they do not come within the current transparency guidelines for publication of anonymised judgments on BAILII, or because in fact the parties reach a compromise which is then approved by the Court as being in the incapacitated person's best interests.

Following the twenty months or so between February 2009 and October 2010 in which *Re P, Re M* and *Re G(TJ)* were decided, it became apparent that despite the "radical" change of approach under the MCA best interests test, in many cases the outcome of a statutory will application was similar or identical to what it would have been under the pre-MCA substituted judgment approach, but the reasoning process that leads to that conclusion, and the presentation of evidence in support of that reasoning process is different. There are perhaps two reasons for this

- In *Re Fenwick* [2009] NSWSC 530, in the New South Wales Supreme Court, Palmer J conducted a spirited review of the English law of statutory wills between 1926 and 2009, in which he criticised the "highly artificial" substituted judgment approach and concluded that:

> "by 2005, when the radically new legislation was introduced, the Courts had for a long time been paying only the scantest lip service to the principles enunciated in *In re D (J)* . . . they were making decisions having regard to *"the best interests of the patient"* and they were determining *"the best interests of the patient"* objectively, having regard to all of the circumstances."

- Following Morgan J's acceptance in *Re G(TJ)* of the relevance of P's inferred present wishes, conjecture about such wishes has played an important part in statutory will (and gift) applications, and to that extent substituted judgment has not merely been subsumed into the best interests test but plays an important part in this example of it. Morgan J said:

  " . . . the word 'interest' in the best interests test does not confine the court to considering the self-interest of P. The actual wishes of P, which are altruistic and not in any way directly or indirectly self-interested, can be a relevant factor.

Further, the wishes which P would have formed, if P had capacity, which may be altruistic wishes, can be a relevant factor. It is not necessary to establish that P would have been aware of the fact that P's wishes were carried into effect. Respect for P's wishes, actual or putative, can be a relevant factor even where P has no awareness of, and no reaction to, the fact that such wishes are being respected."

- A typical modern statutory will is likely to reflect the following:
    - Retention of the broad structure of a previous will (or intestacy) unless there is real doubt about the validity of the previous will or there has been a fundamental change of circumstances since it was made
    - Evidence-based conjecture about P's inferred present wishes
    - Recognition of moral claims e.g. by prospective beneficiaries who have helped or supported P or whose relationship and contact has become more significant to P since P's last will, or who would be eligible claimants under the Inheritance (Provision for Family and Dependants) Act 1975

Gifts and settlements

Attorneys and deputies have very limited power to make gifts out of P's funds. S12 MCA applies to attorneys and its provisions are usually replicated word-for-word in orders appointing deputies. The gift-making powers in s12 MCA are essentially limited to gifts of "reasonable value" to people related to or connected with P on "customary occasions", or to any charity to whom P made or might have been expected to make gifts. Any gifts which fall outside the scope of these provisions, or of the extra-statutory 'de minimis' exception permitting use of the annual IHT £3,000 gift allowance and up to £2,5000 of the £250 small gifts allowance must be the subject of an application to the Court for prospective authorisation.

The decided cases illustrate the way in which the Court approaches best interests decisions in relation to gifts. It will always consider the prudence and affordability of the gift, and take a cautious view of these factors, having regard to P's future needs. In *Re JDS: KGS v. JDS* [2012] EWHC 302 (COP) An application to approve a substantial IHT-planning gift to be made from a young man's personal injuries damages award to his parents was refused by the Court. Although there is nothing objectionable in asking the Court to authorise gifts out of surplus assets/accumulated income or which have legitimate tax avoidance as an object, this case suggested that it was highly improbable

that the Court will ever conclude that it is in P's best interests to make a significant lifetime gift from assets derived from a personal injury/clinical negligence damages award, which is intended to be compensation for foreseeable loss over a long future period. However, in *Re AK* [2014] EWCOP B11 the Court approved a loan to enable AK's parents to provide suitably adapted property in another country for his use when visiting family there, and in *Re A* [2015] EWCOP 46, the Court approved the payment by a professional deputy from a child's damages award of private school fees for the child's brother, whose primary education had suffered because of the impact of A's severe disabilities on their family life. The judge observed that it was:

"impossible to consider the disabled child's interests in isolation from those of her family as a whole . . . . in considering A's best interests at a particular time, the decision-maker must take a holistic approach and consider her welfare in the widest sense, not just financial, but social and emotional"

There have been a number of published reports of cases involving non-professional office-holders who have made flagrantly extravagant and unauthorised gifts to themselves and others e.g. *MJ and JM v. The Public Guardian* [2013] EWHC 2966 (COP), a case in which the judge described the attitude of the office-holders as a "licence to loot", and which contains a detailed comparative law review of the gift-making powers of office-holders and of the extent (or absence) of official published guidance to them. In that case the Court refused to ratify any of the gifts beyond the extent to which it would have authorised use of the annual IHT gift allowances, and a further judgment *(Re Meek* [2014] EWCOP 1) excluded MJ and JM from any benefit under a statutory will.

Appointing or removing an English office-holder

You may be asked to advise on the appointment of an attorney under an English lasting power of attorney, or on the contested appointment of a deputy – either in a case where a person has lost capacity to manage their property and affairs and has never appointed an attorney, or in a case where an existing attorney or deputy is unsatisfactory and the Court is being asked to remove them and appoint a new deputy.

Conditions and restrictions in lasting powers of attorney

The prescribed forms for creating lasting powers of attorney permit the donor of the power to give bespoke guidance to the attorney(s) or place some restrictions on the way in which their powers are exercised e.g. by requiring them to submit annual accounts to a third party for scrutiny. There are a number of examples of the Public Guardian refusing to register a power, or to do so without severing a condition or restriction which would otherwise invalidate the power. However, the extent to which prescribed restrictions can be permissibly restrictive was illustrated in *Re XZ* [2015] EWCOP 35. XZ was a high net worth individual with a multi-jurisdictional lifestyle, mainly based in London. He instructed City of London solicitors to draw up an LPA for him, appointing three close friends and business associates to be his attorneys. The judgment on BAILII has an appendix setting out the seven pages of restrictions and conditions that he included in the LPA, and showing those parts of them that the Public Guardian found objectionable as an "unreasonable fetter on the attorneys' power to act". The broad thrust of these was a mechanism to prevent the attorneys acting without a measure of built-in decision-by-decision certification of XZ's incapacity, and built-in delay in implementing non-urgent decisions. The Court upheld these as effective and said that it was no part of the Public Guardian's role to police the practicality or utility of individual parts of an LPA.

Removal of attorneys

Section 22(3) MCA contains the law on removal of an attorney under an LPA

(3)	Subsection (4) applies if the court is satisfied—	
	(a)	that fraud or undue pressure was used to induce P—
	(i)	to execute an instrument for the purpose of creating a lasting power of attorney, or
		(ii)to create a lasting power of attorney, or
	(b)that the donee (or, if more than one, any of them) of a lasting power of attorney—	

(i)has behaved, or is behaving, in a way that contravenes his authority or is not in P's best interests, or

(ii)proposes to behave in a way that would contravene his authority or would not be in P's best interests.

(4)The court may—

(a)direct that an instrument purporting to create the lasting power of attorney is not to be registered, or

(b)if P lacks capacity to do so, revoke the instrument or the lasting power of attorney.

Numerous published decisions of the Court show that attorneys will be removed for:

- Active or passive mismanagement of P's property and affairs
- Breach of fiduciary duty, in particular by making excessive unauthorised self-interested gifts
- Ignorance of the law by a lay attorney is never accepted as a justification for failing to comply with a minimally acceptable standard of duty

Deputies

Section 16 MCA contains the Court's general power to appoint, discharge and supervise deputies, with further provisions in sections 19 and 20. It is well established in the Court's published decisions that no-one has an automatic right to be appointed as deputy and there is no statutory or other fixed order of preference for categories of candidates for appointment.

> *"When it appoints a deputy, the Court of Protection exercises discretion and it must exercise this discretion judicially and in P's best interests. The court would prefer the appointment of a family member, if possible, in order to respect P's Article 8 right to private and family life and for a number of practical reasons that flow from that. A relative will usually be familiar with P's affairs, and his wishes and his ways of communicating his likes and dislikes. Someone who already has a close personal knowledge of P is also likely to be better able to meet the obligation of a deputy to consult with him, and to permit and encourage him to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him. And, because professionals charge for their services, the appointment of a family member is generally preferred for reasons of economy."*
>
> *Re DG* [2014] EWCOP 31 at paragraph 21

"There are, however, cases in which the court wouldn't contemplate appointing a particular family member or friend as deputy. These include situations where:

(a) the proposed deputy has physically, psychologically, financially or emotionally abused P;

(b) there is a need to investigate dealings with P's assets prior to the matter being brought to the court's attention, and the proposed deputy's conduct is the subject of that investigation;

(c) there is a real conflict of interests;

(d) the proposed deputy has an unsatisfactory track record in managing his or her own financial affairs; and

(e) there is ongoing friction between various family members, which is likely to interfere with the proper administration of P's affairs."

Re BM [2014] EWCOP B20 paragraph 48

Some specific points on deputyship appointments and deputyship contests

- The Court will appoint a property and affairs deputy who is not habitually resident in the UK, if it is satisfied that this is in P's best interests. In *Re DGP* [2015] EWCOP 58, P's brother and niece objected to the appointment of P's daughter, who had emigrated to and settled in the USA decades previously. The judge said that it "used to be a commonly held view" that the Court should not appoint a deputy habitually resident outside its jurisdiction, but that this overlooked the reality of modern life and the availability of online banking, electronic communication and relatively cheap airfares to enable effective management and continuing contact between a foreign-resident deputy and P. He held that "the fact that someone lives outside the jurisdiction should not be an impediment to their appointment as a deputy if, in all other respects, they are the most suitable candidate to be appointed and their appointment is in P's best interests."

- *Re DGP* dealt with a family deputyship, where P's daughter was her closest relative. By contrast, in *Long v. Rodman* [2012] EWHC 347 (Ch), another high net worth, multi-jurisdictional residence and assets case, the Court refused to appoint a foreign office-holder in place of an English appointee. Mrs Rodman, who was a US citizen formerly living in the UK, was moved to the USA and the equivalent

of a property and affairs deputy was appointed by the courts of the state in which she was living. That individual (a Mr Shafer) sought his appointment in place of the English appointee (a Mr Long, a consultant with Charles Russell). The judge said:

18. I am entirely unpersuaded that it is in Mrs Rodman's best interests for me to make an order removing Mr Long as deputy.

19. In the first place, Mr Long is much better qualified than Mr Shafer to act as Mrs Rodman's deputy. Mr Shafer has evidently had considerable experience as a fiduciary in Nevada, latterly providing such services in the areas of probate, guardianship and trust administration through Professional Fiduciary Services of Nevada, Inc. However, there is no evidence that he has previously been involved in a case with a British dimension, nor that he has in the past otherwise acquired experience of English Court procedure or Court of Protection practice. In contrast, Mr Long has had many years' experience of English law and practice, formerly as a partner in Charles Russell and now as a consultant to the firm. His experience includes, in particular, matters relating to the administration of estates and the Court of Protection.

20. Further, Mr Shafer's approach to date has not, I am afraid, been such as to inspire confidence that he would be an appropriate deputy. It might have been hoped that Mr Shafer would seek to collaborate with Mr Long, but that is not the impression I get from the correspondence. From the outset, the letters which Mr Shafer's solicitors, Reed Smith, have sent on his behalf have been such as might be sent in the context of litigation, and I understand that they were in fact written by members of the firm's litigation department. I am not surprised that Charles Russell expressed disappointment at the tone and the "hostile approach". A mass of information and documentation was demanded, in relation to Mr Rodman's estate as well as the affairs of his wife, and, when information was provided, Reed Smith promptly asked for more. To take one example, Reed Smith asked in their first letter for a "short summary" addressing, among other things, "an issue over the extent to which Mr Rodman was beneficially entitled to a number of bearer bonds". Charles Russell devoted a couple of hundred words of their lengthy response to their thinking on this aspect. Reed Smith nonetheless called for Charles Russell to "respond fully", without even explaining why they considered Charles Russell's comments inadequate. There is no evidence that Mr Shafer needed any more information in order to report to the Nevada Court, and I think it very unlikely that he did, especially as the request in question related to Mr Rodman's estate whereas Mr Shafer had been appointed as Mrs Rodman's guardian.

The case is a useful illustration of how not to go about seeking the appointment of a non-UK professional deputy in place of a UK professional deputy, and an indication of the need for a proposed appointee to demonstrate a justification for his or her appointment which outweighs the cost of transfer to a new appointee.

- One of the issues raised in *Long v. Rodman* was the level of fees charged by Mr Long (who was also acting as court-appointed administrator of Mr Rodman's estate) and Charles Russell but the Court did not accept that these were a ground for intervention, describing them as "large sums, but not obviously excessive". Compare *Re A* [2016] EWCOP 3, where a family member objected to the appointment of Suzanne Marriott of Charles Russell, but these objections were overruled, the Court referring to the decision in *Long v. Rodman*.

- Finally, it is important to be aware of the apparent ease but actual difficulty of challenging the decision-making of a professional deputy. The Court of Protection's procedural rules are very different from those of the Civil Procedure Rules, and are designed to meet the objective of a court making a best interests decision rather than of a court deciding who has 'won' adversarial litigation. This means that it is possible for a party to Court of Protection proceedings (who may have a collateral personal motive) to challenge a deputy's decision and/or seek the deputy's removal in circumstances where that party would have no justiciable cause of action in a civil claim. This has considerable nuisance potential in a procedural world where there are no pleadings, striking-out or summary judgment. However, there is an important counter-balance to this. In *Re A* [2015] EWCOP 46 (the sibling school fees case), the judge said:

> 38. In most orders appointing a deputy for property and affairs, the court confers on the deputy a broad discretion which gives them considerable flexibility and freedom in making decisions. They don't have unlimited discretion, of course. The manner in which they exercise their discretion is subject to supervision by the Office of the Public Guardian and ultimately to review by the court.
> 39. In principle, professional deputies are well-placed to know what is, and what is not, in a particular client's best interests and to make decisions accordingly, because of:
> (a) their close and continuous contact with individuals with an acquired brain injury and their families, some of whom are exemplary and others less than perfect;
> (b) their ability to distinguish between requests for expenditure on projects that really are beneficial and life-enhancing and those that are ephemeral and frivolous;
> (c) their experience and expertise in the investment, management and application of damages awards; and
> (d) their knowledge of the MCA and the Code of Practice and the relevant case law.

40. When the court has to decide what is in someone's best interests, it is expressly required to "take into account … the views of … any deputy appointed for the person by the court, as to what would be in the person's best interests" (MCA 2005, section 4(7)(d)). When an experienced professional deputy has gone through the checklist of factors in section 4 of the MCA and has considered all the relevant circumstances and has concluded a particular course of action is in P's best interests, the court should be reluctant to interfere with his decision unless it is plainly wrong.

If you are considering seeking the removal of an appointed deputy, therefore, it is crucial to distinguish evidence that the deputy has acted in breach of his authority or fiduciary position, or positively lacks competence and/or integrity from evidence of mere dissatisfaction with a decision that the deputy has taken which cannot be shown to be "plainly wrong".

BARBARA RICH

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13 May 2016

MODEL LETTER OF INSTRUCTION FOR ASSESSMENT OF CAPACITY UNDER MCA

Dear Dr [ ]

Mr FIRSTNAME SURNAME (dob dd/mm/yy)

Medical opinion as to capacity

1. We write in relation to Mr Firstname Surname ("Mr Surname"). .

2. We are solicitors acting for Mr Surname in relation to [describe retainer]. Our observation of problems with his short-term memory that Mr Surname has shown during our recent meetings with him, have raised our concern about Mr Surname's capacity to give instructions to us and to enter into the transactions in relation to which we have been engaged. Although there is a presumption of legal capacity in English law, the validity of a legal agreement or transaction entered into by a person may subsequently be challenged if there is a genuine question as to whether or not the person had capacity to enter into the agreement or transaction.

3. In the light of these concerns we would be grateful if you could carry out an assessment of Mr Surname's capacity. This assessment will enable us to advise him and Mrs Surname in relation to his participation in the [subject-matter of the retainer], and may be used as evidence in support of an application to the Court of Protection in England, which is the country where Mr Surname is habitually resident. Under the Mental Capacity Act 2005 ("The MCA"), the provisions of which we describe in greater detail below, the Court of Protection has power to make declarations in relation to an adult's capacity, and to take decisions on behalf of a person who lacks capacity. It also has power to appoint a substitute decision-maker (called a "deputy" in the legislation), and indeed frequently does appoint a deputy for property and affairs who is authorised to manage all of the property and affairs of a person who lacks capacity to do so for him/herself. Such a deputy may be a family member or may be a professional person. Adults who retain capacity to do so may themselves appoint an attorney or attorneys under a "lasting power of attorney" to deal with their property and affairs and there is a statutory scheme for creation and registration of these powers. The Court will not appoint a deputy to undertake the same tasks as an attorney under a lasting power of

attorney. Assessment of capacity is the threshold to the Court's jurisdiction and it will not make a decision on behalf of a person unless it is satisfied that the person lacks capacity to take the decision in question.

4. We need to establish whether or not Mr Surname has capacity to continue to give us instructions and if so, whether he has capacity to enter into the [subject-matter of the retainer]. If he does not have this capacity, we then need to establish whether he has capacity to execute a lasting power of attorney, or whether he has capacity to manage his property and affairs in a general sense. If it is the case that he lacks capacity to enter into the [subject-matter of the retainer], and/or to manage his property and affairs in a general sense we anticipate we will then be instructed by Mrs Surname to apply for her appointment as deputy to take these decisions on his behalf.

5. We would therefore like you to assess and report on Mr Surname's capacity to make the following decisions:

(a) To retain us as his solicitors to [describe retainer]
(b) To [define the decisions involved in the retainer]
(c) negotiate the terms of the commercial agreement and lending
(d) To create a lasting power of attorney for property and affairs
(e) To manage his property and affairs in a general sense

6. We set out further information about his circumstances and the [subject-matter of the retainer] below.

The Law

7. You may be familiar with the provisions of the MCA, and with guidance on capacity assessments published by the British Medical Association, available on the internet at http://bma.org.uk/assessingmentalcapacity. We attach a copy of sections 1-3 of the MCA to this letter. The entire Act is available on the internet at http://www.legislation.gov.uk/ukpga/2005/9/contents. In addition to the statutory provisions, we ask you to familiarise yourself with the supplementary guidance in Chapter 4 of the Mental Capacity Act 2005: Code of Practice, which is available on the internet at https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice.

You may also wish to refer to a decision of the Court of Protection which discusses the approach to clinical assessment of capacity for the Court. This case, *D v R (Deputy of S) and S* [2010] EWHC 2405 (COP) is available on the internet at http://www.bailii.org/ew/cases/EWCOP/2010/2405.html. Whilst that decision specifically concerned capacity to litigate, it provides very useful guidance on the preparation of expert reports and capacity assessments under the MCA more generally, and we encourage you to consult it. A discussion of the expert evidence begins at paragraph 48 of that judgment.

8. The test for mental capacity, as set out in ss 1-3 MCA 2005, is a test of inability to make decisions, and has two fundamental elements –

(1) Is there an impairment of, or disturbance in, the functioning of the person's mind or brain? If so;
(2) Does the impairment or disturbance cause the person to be unable to make a specific decision at the time it needs to be made?

9. As set out in s3, a person is unable to make a decision if they are unable –

(1) To understand the information relevant to the decision;
(2) To retain that information;
(3) To use or weigh that information as part of the process of making the decision; or
(4) To communicate their decision (whether by talking, using sign language or any other means).

10. The assessor must also have regard to the guiding principles as set out in s 1.

(1) A person must be assumed to have capacity unless it is established that he/she lacks capacity;
(2) A person is not to be treated as unable to make a decision unless all practicable steps to help him/her to do so have been taken without success;
(3) A person is not to be treated as unable to make a decision merely because he/she makes an unwise decision.

11. Importantly, the test under the Act is "decision specific" rather than global in approach. This is why we have asked you to consider the specific decisions set out above. It does not follow from non-clinical observation of memory problems that the patient lacks capacity to make any specific decision. The test is also "circumstance specific". As such, a person's capacity to make financial decisions depends largely on the value and complexity of their property and affairs. The information which is relevant to a decision will vary in accordance with both the nature of the decision in question and its complexity, having regard to the circumstances of the individual person in question.

12. We set out below relevant information about Mr Surname's circumstances and the specific decisions in question. As regards the general management of his property and affairs, this includes include business matters, legal transactions, and other dealings of a similar kind.

Relevant background circumstances

13. Mr Surname is aged [age]. We understand he will provide you with sight of his previous relevant medical records and give you an account of his general state of health.

Mr Surname's property and financial affairs, and our instructions

14. [Summary of relevant aspects of these i.e. a general picture of his assets and affairs and the regular tasks involved in managing them, and of relevant background to and information about the decisions involved in the subject-matter of the retainer].

The report

15. Your assessment should consider Mr Surname's medical history and financial and personal circumstances. We would be grateful if your written report could articulate how those elements have factored in your assessment, and whether, on the balance of probabilities, you consider that he lacks capacity to make the decisions set out above in accordance with the legal framework of the MCA.

16. We look forward to hearing from you and thank you for your assistance with this matter