COURT OF PROTECTION **No. 12037087**

MENTAL CAPACITY ACT 2005

In the matter of
AS

BETWEEN:

SH

Applicant

- and -

LC

Respondent

This is an objection to an application for the appointment of a panel deputy.

[The Court summarised the background to the application, brought by a solicitor, SH (on the approved panel), that she be appointed property and affairs deputy for an elderly lady suffering from dementia, with specific authority to undertake the sale of a property. AS' niece, LC, objected to the appointment of the solicitor, proposing instead that she be appointed deputy. Before addressing the specific application before it, the Court set out the following as regards the appointment of a deputy]:

The law relating to the appointment of a deputy

Sections 1, 2, 3 and 4 of the Mental Capacity Act 2005 provide that, once it has been established that a person lacks capacity to make a particular decision at a particular time (such a person is referred to as "P" in the Act), then any act done or decision made by someone else on P's behalf must be done or made in her best interests.

The Act does not define "best interests", but section 4 provides a checklist of factors that anyone making the decision must consider when deciding what is in P's best interests. These are:

- whether they are likely to have capacity in relation to the matter in question in the future;
- the need to permit and encourage them to participate, or to improve their ability to participate in the decision-making process;
- their past and present wishes and feelings (and, in particular, any relevant written statement they made when they had capacity), the beliefs and values that would be likely to influence their decision, and any other factors they would consider if they were able to do so;
- if it is practicable and appropriate to consult them, the views of others, such as family members, carers, and anyone else who has an interest in their welfare; and
- whether the purpose for which any act or decision is needed can be as effectively achieved in a manner less restrictive of their freedom of action.

If a person lacks capacity in relation to a matter or matters concerning his or her property and affairs or personal welfare, the Court of Protection may make any decision on her behalf, or may appoint a deputy to make decisions on her behalf in relation to the matter or matters (section 16(2)).

Section 16(4) provides that, when deciding whether it is in P's best interests to appoint a deputy, the court must have regard 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.

Section 19 contains further provisions relating to the appointment of deputies, concluding at section 19(9) as follows:

> "The court may require a deputy –
> (a) To give to the Public Guardian such security as the court thinks fit for the due discharge of his functions, and
> (b) To submit to the Public Guardians such reports at such times or at such intervals as the court may direct."

When it appoints a deputy, the Court of Protection exercises its discretion. It has to exercise this discretion judicially, and in P's best interests. Many of the old authorities that used to govern the appointment of a receiver under Part VII of the Mental Health Act 1983 are probably still relevant with regard to the appointment of deputies.

These authorities generally acknowledged that there was an order of preference of persons who might be considered suitable for appointment as a receiver. I have called it an order of preference, rather than an order of priority, to avoid giving an erroneous impression that certain people were in the past automatically entitled to be appointed as receiver, or are automatically entitled now to be appointed as a deputy. They aren't. The Court of Protection has discretion as to whom it appoints. However, in the past, when appointing a receiver, it traditionally preferred relatives to strangers.

Generally speaking, the order of preference is:
- P's spouse or partner;
- any other relative who takes a personal interest in P's affairs
- a close friend;
- a professional adviser, such as the family's solicitor or accountant;
- a local authority's Social Services Department; and finally
- a panel deputy, as deputy of last resort.

To some extent this is borne out by the statistics. The Office of the Public Guardian supervises 34,000 deputies, 99% of whom are deputies for property and affairs. There are only 342 personal welfare deputies. 53% of deputies are family members; 26% are local authorities, and 21% are professional deputies, though not necessarily panel deputies of last resort.

The court prefers to appoint a family member or close friend, if is possible. This is because a relative or friend will already be familiar with P's affairs, and wishes and methods of communication. 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 P, 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 relative or friend is generally preferred for reasons of economy.

In an unreported case, *In the matter of B* (No. 11579443), in which I handed down judgment on 15 August 2011, I made the following observations about the idea of deputyship of last resort:

> "There is, however, another reason why I am allowing this application, which neither side really touched on at the hearing. It involves the whole concept of deputyship of last resort, and in this respect the history of these proceedings is relevant. Originally, IB applied to be appointed as his mother's deputy for property and affairs. His brother JB opposed the application and there were mutual allegations of financial abuse. A hearing date was set, but shortly before the hearing was due to take place, the brothers agreed a compromise and invited the court to appoint a panel deputy - or deputy of last resort – which court eventually did.
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> There is no longer any dispute between IB and JB and, as I understand it, the entire family unanimously supports IB's application to be appointed as deputy in place of Mr C. The question arises, therefore, whether there is still really a need for a deputy of last resort.
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> In *Re P* [2010] EWHC 1592 (COP) Mr Justice Hedley suggested that "the court ought to start from the position that, where family members offer themselves as deputies, then, in the absence of family dispute or other evidence that raises queries as to their willingness or capacity to carry out those functions, the court ought to approach such an application with considerable openness and sympathy." Michael Kirby, the President of the Court of Appeal in New South Wales, said much the same thing in *Holt v. The Protective Commissioner* (1993) 31 NSWLR 227. His remarks are even more pertinent because, whereas Hedley J was commenting on the court's discretion on an initial application for the appointment of a deputy, Kirby P was considering the somewhat different discretion that arises on an application to remove a deputy.
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> In some Common Law jurisdictions there is even an obligation on a deputy of last resort to seek a less restrictive alternative to his or her own appointment. For example section 744.704 of the 2010 Florida Code, in which the deputy of last resort is referred to as a "public guardian", provides as follows:
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> > (1) A public guardian may serve as a guardian of a person adjudicated incapacitated under this chapter if there is no family member or friend, other person, bank, or corporation willing and qualified to serve as guardian. ….
> >
> > (6) The public guardian, when appointed guardian of an incapacitated person, shall seek a family member or friend, other person, bank, or corporation who is qualified and willing to serve as guardian. Upon determining that there is someone qualified and willing to serve as guardian, either the public guardian or the qualified person shall petition the court for appointment of a successor guardian.
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> I would not go so far as to suggest that a similar positive obligation arises in English Law, but there is a general principle in section 1(6) of the Mental Capacity Act 2005, which states that:

> "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."

> Generally speaking, from P's point of view, the appointment of a family member as a deputy will be a less restrictive alternative to the appointment of a panel deputy, though the question remains as to whether the appointment of a family member will achieve the desired objective as effectively as the appointment of a panel deputy.

There are, of course, cases in which the court would not countenance appointing a family member as deputy. For example, if there has been financial abuse or some other kind of abuse; if there is a conflict of interests; if the proposed deputy has an unsatisfactory track record in managing his own financial affairs; and if there is ongoing friction between various family members. This list is not exhaustive.

Decision

[Upon the evidence before the Court, the Court considered that the application of SH would be "one of last resort, and there is simply no need in this case for an appointment of that nature," and accordingly appointed LC as AS's property and affairs deputy. The Court did not depart from the general rule laid down in rule 156 of the Court of Protection Rules 2007].

DENZIL LUSH
Senior Judge

7 December 2011