



## Options for a local authority for the management of P's finances

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### Introduction

1. In this note, I assume that we are dealing with someone (P) who clearly is not able because of an impairment of, or disturbance in the functioning of, the mind or brain to make decisions for himself about all save perhaps the smallest financial transaction and that situation is permanent.
2. In those circumstances, someone needs to look after P's financial affairs. If there is a Lasting or an Enduring Power of Attorney or a deputy has already been appointed, then the attorney or deputy should deal with P's financial affairs (assuming appropriate powers).
3. If there is no power of attorney or no existing deputy, then the appropriate approach will depend very much on the complexity of P's finances and whether, if a deputy is required, there is a person from P's family or close friends who is willing and suitable to act as deputy.

### Where P has no assets and no income apart from social security benefits

4. If P has no savings and no house or flat to sell and P's income consists solely of benefits, then the easiest route to follow is to

apply to the DWP for the benefits to be paid to an appointee. The appointee, once appointed, can receive the benefits and should set up a dedicated bank account for that purpose.

5. The appointee can deal with any surplus on P's behalf. The appointee cannot, however, get access to any other asset in P's name, although section 8 Mental Capacity Act 2005 (MCA) provides protection to someone (not necessarily an appointee) who applies money in P's possession to meeting expenditure on behalf of P that comes within section 5 MCA.
6. This, in this context, only helps in relation to cash in P's possession. If the money is, say, in a bank account further steps are needed.

### Where P has modest savings

7. In these circumstances, if no volunteer deputy can be found, then the choice is between a professional deputy, a local authority deputy or ad hoc orders. It had been hoped that not for profit organisations might provide deputies, but that has not yet happened.
8. Even with a local authority deputy entitled only to scale charges pursuant to PD19B



supplementing Part 19 Court of Protection Rules, modest savings would be significantly eroded. Such a deputy could charge up to £670 for work up to the appointment of the deputy and annual management fees of £700 in the first year and £585 per annum thereafter (except where net assets are less than £16,000 where the annual management fee is capped at 3% of net assets) and a £195 annual report fee.

9. In addition, unless entitled to remission, P would have to pay the Court of Protection and Public Guardian fees. The former levies an application fee of £400 and a hearing fee of £500, the latter an assessment fee of £100 and annual supervision fees of £320 except where net assets are below £18,000 (to increase to £19,500 on 1 April 2013 and to £21,000 on 1 April 2014) in which case only £35 per annum is charged.
10. Remission of fees is available only where income and capital is very low. Given the miserly rates of interest currently available on savings accounts, a different approach in such circumstances might well be in P's best interests.
11. The Code of Practice gives guidance in relation to the circumstances where such an appointment should be considered at paragraphs 8.35 to 8.36 and 14.16. The latter emphasises that the court should make the decision if possible rather than appoint a deputy and that deputies are more likely to be needed for financial matters where someone needs continued authority to make decisions about the person's money or other assets.
12. Under the old regime, the court frequently used the short order procedure that was available where the value of the estate did

not exceed (latterly) £16,000 or it was otherwise appropriate (such as to authorise a tenancy). In such cases, the fund could be invested with a direction for an annual amount to be paid for P's use.

13. We should also consider the analogy of what happens with court awards under the CPR. The practice direction to CPR Part 21 provides at section 10 that in respect of protected beneficiaries (that is a party who lacks capacity to manage and control any money recovered for him) where the sum is over £30,000, then the court will (in the absence of an existing attorney or deputy) direct an application for the appointment of a deputy by the Court of Protection, but where the sum is less than £30,000, the sum may be retained in court and invested in the same way as a fund for a child.
14. Section 9 of that practice direction deals with investment on behalf of a child and, of particular relevance, is section 9.7 that provides that if the money to be invested is very small, the court may order it to be paid direct to the litigation friend (usually a parent in the case of a child) to be put into a building society account (or similar) for the child's use.
15. The Court of Protection has the power to order the settlement of P's assets (section 18(1)(h) MCA). This power was extensively reviewed in *Re HM* LTL 27/01/2012 [2012] WTLR 281, [2012] COPLR 187 in the context of a large personal injury award. The judge (HHJ Marshall QC), eventually decided that in the circumstances, it was in P's best interests that the award should be administered by a trust rather than a deputy (one of the trustees was a professional the other P's mother).
16. Thus, options to consider may include the



establishment of a trust for P or the payment into court of P's assets with accompanying directions for their application. .

17. Whatever route is taken, P's best interests must lie at the heart of the decision. In these circumstances, P's best interests would seem to lie in seeking by practical means to preserve as much of P's limited means as possible consistent with keeping them safe.

### **Possible conflicts of interest**

18. Often, it will be necessary for a financial deputy to be appointed. Often, the only suitable person available will be an officer of the local authority. What happens, though, when that same local authority is responsible for making an assessment of P's liability to pay residential or domiciliary charges?

19. A deputy is a fiduciary and must not put his interests before P's. Fuller guidance is given by the Code of Practice at 8.55 and 8.56. In particular, the deputy must also respect P's confidentiality.

20. Thus the deputy will be in the position of having to represent P's best interests in any such assessment process and be in possession of confidential information to which the local authority as the assessing body might not be privy.

21. By contrast, as an employee of the local authority, the deputy would owe duties to his employer that might include the duty to disclose information in his possession about P's affairs.

22. The situation would become acute if there were any chance that the outcome of the assessment might be contentious. In those circumstances, the deputy might decide that

it was in P's best interests to challenge the assessment, perhaps by judicial review. It can be seen that making that decision might put a local authority employee in a difficult position. The problem is that there will in such cases probably be no one else suitable to take up the post.

23. What is required is openness. In the first instance, before appointment, the local authority should choose an officer who will not be involved in the assessment process. There should be a "Chinese wall" constructed so that that officer is able to keep confidential P's affairs where it is in P's best interests so to do without being in breach of his duties as an employee. The Court of Protection should be made aware of the fact that the local authority will be making this assessment before the appointment is made.

24. If matters become contentious, then directions can be sought and the Official Solicitor involved as litigation friend so that the deputy, in effect, steps aside from the litigation process. In that way, a practical solution to any potential conflict of interest can be found.

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June 2012

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Simon has wide experience of private client work. He recently acted for Anthony Day in the Chancery Division dispute that he had with the children of the late Sir Malcolm Arnold over the ownership of Sir Malcolm's manuscripts. The dispute centred on the question whether Sir Malcolm had given the manuscripts to his children when in a desperate state or later when he was a patient of the Court of Protection. Questions also arose as to the meaning of Sir Malcolm's will and a later written gift. He successfully obtained a revocation of a grant in *Lamothe v Lamothe* [2006] WTLR 1431 and opposed a daughter's claim to ownership of a flat in *Lalani v Crump* [2007] 8 EG 136 (CS). His membership of the Court of Protection team provides an added dimension of experience in all aspects of property and contractual issues.

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