

PROFESSIONAL NEWSLETTER – ISSUE 1

COURT OF PROTECTION THE ROLE OF THE DEPUTY AND FINANCIAL ADVICE

The Mental Capacity Act 2005 (MCA 2005) came into force on 1st October 2007 and has established a comprehensive framework setting out how decisions should be made on behalf of people whose capacity to make their own decisions is in doubt.

The MCA 2005 incorporates a number of basic principles which must be applied and adhered to as best practice when dealing with people who lack capacity. It incorporates a statutory presumption of capacity and emphasises the fact that any act done, or decision taken, must be in the best interests of the person lacking capacity.

The MCA 2005 has supporting material in the form of Statutory Instruments, a Code of Practice and Guidance. The Law Society has also published a practice note to assist solicitors in advising clients on the specific issues of Lasting Powers of Attorney and Enduring Powers of Attorney.

A fundamental change that has emerged from the new regime is the dealing with the property and affairs of the person lacking capacity, and in particular, the investment of any money belonging to that person.

Prior to the introduction of the MCA 2005 on 1st October 2007, if a person was incapable of managing their property and affairs, an application could be made to the Court of Protection for the appointment of a *Receiver*. The First General Order appointing the Receiver would have made provision for the funds of the person lacking capacity to be paid into court through the account of the Accountant-General of the Supreme Court. The funds would then be invested through appointed financial advisers.

From 1st October 2007, if a person is mentally incapable of managing their property and affairs, an application can be made to the Court of Protection for the appointment of a *Deputy*. The court order appointing the Deputy will usually state that *'the court confers on the deputy general authority to take possession or control of all of [Person's] property and affairs and to exercise the same powers of management and investment as he/she has as beneficial owner, subject to the terms and conditions set out in this order.'*

The role of a Deputy will entail a number of responsibilities and obligations, including acting in accordance with the principles in the MCA 2005, to act or make a decision in the best interests of the person lacking capacity, and to have regard to the guidance in the Code of Practice.

The court may require the Deputy to give an appropriate security by depositing an amount of money or purchase insurance, such as a guarantee bond, to cover any loss to the person lacking capacity should the Deputy fail in his or her duties. The insurer may take legal action against the Deputy to recover any sum it has paid out. The court may also require the deputy to provide regular or periodic reports to the Public Guardian.

The Public Guardian is responsible for the supervision of Deputies and for supporting them in their role. The Office of the Public Guardian will notify the Deputy of the level of supervision that will be appropriate and will take into account the complexity and value of the assets, the relationship and contact between the Deputy and person lacking capacity, the type of decisions to be made, the experience of the Deputy, and support provided to the person who lacks capacity by family, friends and/or professionals.

As part of the supervision process the Deputy may be requested to provide more information about a decision made, or provide supporting documents about a financial transaction.

An area of particular concern arising out of the new regime is the role of the Deputy in investing the funds in the best interests of the person lacking capacity, which in the past, would have been dealt with through the court and not the Deputy. What is clear is the need to obtain professional financial advice from an independent financial adviser experienced in Court of Protection issues to ensure that an investment strategy is in the best interest of the person lacking capacity and that the Deputy's position is protected against civil or criminal proceedings arising out of a decision made or an act done.

Written by Jonathan P Wilkey, Senior Partner of Gwyn James Solicitors,
on behalf of CareFeesAdvisers and Symponia.

Jonathan is a solicitor, lecturer and training consultant who has developed a specialisation in law and the elderly, in particular with regard to community care legislation. He lectures nationally on these matters to accountants, solicitors and financial advisers. A contributor to "Elderly Clients: A Precedent Manual" he is often asked to appear on radio and television to comment on such matters. He is the author of "A Practitioners Guide to Equity Release" published by Jordans in 2007

Mike Migan of CareFeesAdvisers is your local Symponia member - Symponia is a national network of independent financial advisers with expertise in elder client issues, including investments, care fees planning, equity release and mitigating inheritance tax.

To help your clients to comply with the supervision requirements of the Office of the Public Guardian, we can:

- Undertake a financial assessment to include advice on tax and welfare benefits
- Prepare a detailed report and recommendations on an investment strategy
- Assist the Deputy in keeping a record of any decisions made in dealing with the investments to show how a decision was reached, what facts were taken into account and who was consulted.
- Assist the Deputy in completing the annual or periodic report for the Public Guardian
- Assist the Deputy in completing an HM Revenue & Customs annual tax return for the person lacking capacity.

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