Court of Protection and Deputies: a meeting of minds

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Professional Deputies are the champions and protectors of some of the UK’s most vulnerable people – the wards of payments from often hard-fought cases by lawyers and experts in clinical negligence and PI claims. However the day-to-day management of protected parties – deemed as such by the Court of Protection (CoP) – is often blighted by anger and resentment from family members, misinterpretation by the media on such issues and somewhat isolation for the deputies.

Which is why it was so inspiring to see over 150 delegates, including Deputies, Court of Protection experts and lawyers in full attendance at a recent Deputy Day, organised by Frenkel Topping. As well as providing general updates on investments and benefits, the day-long conference aimed to provide a melting pot of expertise in CoP issues, as well as the chance to network with and share common problems and concerns with other Deputies.

What is a Deputy?

A Deputy is appointed by the Court of Protection to look after the personal welfare or estate and affairs of an individual who lacks the mental capacity to manage these themselves. In some cases, a family member is appointed as the Deputy of the vulnerable person, however it is often deemed in the best interest for the CoP to appoint a ‘Professional Deputy’ - generally a team of solicitors and case managers in a law firm. In many cases, the Deputy is often a team of one in the private client department.

A Deputy can only act under a court order from the Court of Protection. This order sets out the Deputy’s powers and entitles the Deputy to act on behalf of the person lacking capacity. A Deputy will not be required if the person lacking capacity has previously made a Lasting Power of Attorney (LPA). In this case, provided the LPA has been properly registered, the attorney can continue to make decisions on behalf of the person lacking capacity.

A misunderstood profession
The Deputy Day event, at the Lancashire Cricket Ground, Manchester, kicked off with the keynote speech from Richard Hartley QC, Cobden House Chambers, who addressed the practical concerns for those involved in Deputyships and the CoP. Deputies, he said, have two responsibilities which are often juxtaposed to one another: firstly, that they must protect the ‘protected party’ (the client) and their assets. However they must also charge for their services and the services of others who look after the client.

“If you Google the Court of Protection, over half of the entries discovered are articles and blogs accusing professional Deputies of theft and fraud – often written by the protected party’s family. This anger and resentment is often borne out of misunderstanding of the role of the Deputy to manage the award and also the risks attached to simply giving the money directly to those closest to the protected individual,” he said, adding: “Even the most savvy and organised individual would struggle with the emotional impact of looking after a family member, such as a son, with a catastrophic brain injury, as well as a multi-million compensation award that needs to be attributed to every need over the course of his life.”

Stories of ‘unfairness’ and ‘theft’ by Deputies are big news for the media, which ‘completely misinterprets’ the reality of the role, the CoP system and the balancing act Deputies must complete on a daily basis. Juggling the demands of the Court with the protection of the individual, as well as the demands from families and costs can be a headache. Those ‘red hot’ phone calls from families, friends and even the client are often an unavoidable consequence of acting in their ‘best interest’.

Playing ‘piggy-in-the-middle’ seemed to resonate with the delegates. Some told me afterwards that to be ‘all things to all men’ isn’t an option. As Hartley QC stated: “If you’re not upsetting some of the people some of the time, you’re not doing your job properly.” Deputy decisions are often made in stressful circumstances, for unpredictable clients. So it struck me that this kind of event wasn’t simply about the professional updates, but about sharing practical issues, bouncing problems off one another and being reassured that - despite the stressful incidents - Deputies are doing an immensely important and valuable job.

Practicalities

Hartley QC added some key points on the issues facing the Deputy role:

- **IT**: this is a recognised efficiency tool, however it doesn’t seem to have hit the CoP system yet – resulting in hours of unnecessary administration and delay in drafting the handwritten forms, send via post. “It amazes me that in the time of the iPad and smart phones, Deputies are subjected to paper forms. This will have to change sooner or later,” he predicted.

- **Correct delegation of work**: Administrative work and lower level obligations of the Deputy should also be, he argued, devolved to the correct grade of expert. For example, you can understand a CoP judge striking through bills for senior Deputies who are fulfilling a general administrative function at a higher grade cost. “Delegating the right work to the right level in the team is likely to ensure chargeable rates are allowed,” he said.

- **Informed clients**: The internet has led to an increase in claims by clients and their families of ‘knowing their rights’. However, as with the misinformation in the press, is this really the case? This is yet another obstacle facing decisions made by Deputies on costs applications to
the CoP as what they believe to be the best interests of the clients is often fought. A solution could be an accessible and client-friendly information booklet on Deputyship, the CoP and an outline of their rights, so they really do have all the information to hand.

- The burden of litigation: When a protected person hasn’t received 100% of the damages claimed for, the Deputy has to balance the damages with applications for benefits and NHS care as appropriate. This demands expert advice and stricter application of costs – often resulting in contentious relations with the client and or their family.

**What is the CoP doing?**

District Judge Ashton OBE hosted a session on the new CoP, rule changes and the benefits of the new system for Deputies. Most delegates were already familiar with the new Court (the CoP is due to move to the Royal Courts of Justice, from Archway, in January 2012). However, District Judge Ashton supported Hartley QC’s comments that there is a ‘general misunderstanding by the media on CoP issues and the rules regarding applications’. He explained that the new Court provided greater training for judges handling these applications, along with a speedier process to allow decisions to be made (on average) in 3-4 working days. He also concurred with the keynote speaker that there are inherent conflicts between empowering the protected party through the Deputy and protecting the individual in their care.

“When operating in the best interest of the clients, it is to take away that empowerment by making the ‘best interest’ decision for them,” he said. The District Judge added this is especially difficult for some clients and families to understand when the issue of capacity isn’t simply about whether or not they understand but whether the protected party is able to make a quality decision based on their understanding, regarding their care / assets / affairs.

A final comment was made on the issue of PI Trusts and when / if these are appropriate for use to administer lump sum / PPOs (periodical Payment Orders) outside of the Court. The very recent decision in the case of *SM v HM* in the CoP, in an Appeal heard by HHJ Marshall concludes that PI Trusts may be appropriate, in certain cases, where in the best interest of the protected party and costs are capped. Full digestion of the judgement is recommended.

**Costs in the CoP**

The detailed assessment of Deputy’s costs in the CoP continues to rise and is set to be gain further complexities due to Jackson LJ’s costs reform. Master Peter Haworth, SCCO, discussed the impact of Jackson’s focus on proportionality for Deputy costs in the bills they prepare for SCCO approval.

Jackson summarised the effect of paragraphs 11.4, 11.5 and 11.7 – 11.11 of the Costs Practice Direction as: “The effect of these paragraphs is that if the base costs are proportionate, then the total of the base cost plus additional liabilities will not be regarded as disproportionate.”

Master Haworth proposed that the CPR (Civil Procedure Rules) be amended to include a definition of proportionate costs, to assist Deputies. He added that Costs are proportionate if, and only if, the costs incurred bear a reasonable relationship to:
1. The sums in issue in the proceedings

2. The value of any non-monetary relief in issue in the proceedings (important for all Deputies)

3. The complexity of the litigation

4. Any additional work generated by the conduct of the paying party

5. Any wider factors involved in the proceedings, such as reputation or public importance

He added: “The rules should also provide that the fact that costs were necessarily incurred does not make them proportionate. This should be stated explicitly.”

Master Haworth outlines the proposed changes to the current rules, to set out what sort of model the SCCO will create for the future. He stated that “A hybrid model – where both reasonableness and proportionality are considered at the same time, whenever an item or category of costs is being assessed / budgeted – is the most likely future model. This means both will be assessed the whole way through the bill, on each item. He advised Deputies to provide a short summary - in a Word document - of the background and history on the case of the protected party, to put the general management costs bill into context (helping with proportionality), plus some indication on the estate value and income received by the protected party. In addition, he recommended sending Draft Orders to the judges for a first check, in order to expedite a Final Order approval. Master Haworth concluded to stress a recurring theme regarding general management costs that: “Deputies need to devolve administrative or lower skilled work down the scale to lower grade (or non-legal administrative staff) to help deal with and meet proportionality issues”.

Continuing Care

For deputies, filling the shortfall in damages is often a time-consuming, stressful and overwhelming responsibility when trying to meet the current and future needs of a protected party. Entitlement to state funded care and treatment is a foggy and complex area, so luckily Stephen Maguire, a barrister from Kings Chambers, was on hand to outline the key issues.

Some of his key points were:

- For Deputies to be appointed at an early stage in litigation when it is evident 100% recovery is not achievable / specific care needs are not available privately / not possible to implement the provisions of the Rehabilitation Code / a percentage chance the condition would develop / unforeseen deterioration / an unrelated condition develops in the future / package of care awarded may have broken down (e.g. the divorce of the client and their carer).

- The hot topic in the press is the sale of assets to meet continuing care needs (especially in terms of care for the elderly). Lawyers must then ensure their clients are properly assessed and that Deputies then ensure the protected party receives the care required.

So which authority has a duty to provide the health / social care requirements? To sum up, the relevance of the National Assistance Act 1948 (in correspondence to the NHS Act 2006), states that if the need is health, the protected person must be referred to the NHS / PCT. If the need is social then
the Local authority must bear responsibility for ongoing care. Both, he added, have an obligation to notify a potential social need, or a health need to the relevant authority if discovered during an assessment - thus eliminating the gap in the provision of care.

Maguire’s essential checklist, to ensure the assessment made on the protected party was correct, states:

- Who has performed the assessment -is the client familiar to them? (the review should be multi-disciplinary)
- Have the treating medical/social team been involved?
- Have ALL the circumstances been taken into account?
- Have the views of those close to the client been considered?
- Does the assessment accurately reflect the client’s position / condition?
- Have the recommendations of the treating team been followed? If not, why not?

Finally, an area of potential ‘big business’ for lawyers, Maguire suggested, are appeals to the Health Service Commissioner / Ombudsman, when the original decision has been upheld but a challenge remains. In times of austerity (although decisions SHOULD be made on a need basis rather than the level of financial pressure on the authority) challenges to decisions are likely to increase.

**Ask the experts**

Financial investments, welfare benefits and regulatory requirements of Deputyship are complex and continually changing aspects of the role. Regardless of the level of damages claimed for, getting the most value out of assessments can help clients and their families – especially if they are on a low income. Lee Ryan, welfare benefits consultant at Frenkel Topping outlined the changes soon to be implemented in the Welfare benefits system – including a move towards conveyor belt-like assessments that could result in a high number of appeals on decisions made. Getting the experts in at an early stage helps to identify the right benefits to apply for and provides up-to-date advice on forms, assessments, appeals and alternative solutions, to ensure that Deputies have discharged their duty of care for the client.

Richard Fraser, Managing Partner at Frenkel Topping agreed on the importance of getting experts in at an early stage – particularly during the litigation process. “Seek endorsements for Periodical Payments Orders (PPOs) at an early stage – encourage the litigators towards this and transfer the risk to Defendants to make structured settlements. It’s proven that these settlements perform far better than a lump sum for the client,” he said - a message that resonated throughout the event.

**Head-to-head**

One of the most valuable sessions of the day was the breakout slot – or mini-debate chambers that allowed Deputies to vent their latest problem; respond to some of the challenges or statements made in the conference and to answer questions sent in before the event.

Some of the main problems and possible responses were:
• Issues with families of protected parties who lack the skills and resources to fully understand and get best value from the Deputy system. RESPONSE: Have a budget meeting with the family to see how and where family funds are allocated to help them understand where the greatest cost is, the impact overspending or needless spend has on the longevity of the damages.

• High demand families. RESPONSE: As Deputies have a life-long relationship with the family, if you can, try to use the litigator to be frank communicators and get your point across – helping to maintain and protect your relationship with the client. If not, the Case Manager can also be helpful here.

• HR issues when looking to employ carers (within the family or via an agency): RESPONSE: A good Case Manager can help overcome and manage the difficulties that arise with self-employment – although with an agency, Deputies explained it was easier as the HR, wage roll and recruitment issues were completed by the instructed company. Some agencies are also happy to take on existing carers, resulting in a consistent and familiar environment for the protected party. This is often essential for cases of brain injury or cognitive impairment.

• Fluctuating Capacity issues. RESPONSE: If a client believes they don’t need a Deputy, then a medical report will direct the situation. In terms of fluctuating capacity (especially if the client is known to abuse substances), there can be controls put in place to empower and at the same time monitor finances. A solution was for limited or daily funds to be dispersed into a debit account for the client. In cases where capacity is regained but the clients are uneasy about the lack of security and protection the CoP offers, a PI Trust or LPA should be set up to assist the management of the damages, as well as offer the client peace of mind as they handle their own affairs.

(A full summary of all breakout session responses are available from Frenkel Topping. Please email alison.taylor@frenkeltopping.co.uk)

The aim of the Frenkel Topping Deputy Day is to provide a forum for professional deputies, at any level, to learn from the teaching and practical guidance given by the experts and benefit from shared experiences through discussions with their peers. Judging by the open sessions at the end of the day – this discussion is incredibly valuable. Not only to provide a fresh pair of eyes and experience on a problem but for those charged with the responsibility of protecting a vulnerable individual – a place to have their value recognised and celebrated.