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THE COURT OF PROTECTION

OVERVIEW AND RESOURCING ISSUES

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About the author

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He spent 2016 on secondment to the Law Commission as a consultant to their Mental Capacity and Deprivation of Liberty Project and throughout 2018 was legal adviser to the Independent Review of the Mental Health Act 1983. He was a special adviser to the Joint Committee on Human Rights for their inquiry into the human rights implications of the Government's response to COVID-19, and is currently the special adviser into their inquiry into human rights in the care setting. He writes this piece in a personal capacity.

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INTRODUCTION

The Court of Protection is important, but little known and generally misunderstood. There is a real likelihood that most families will have to deal with it at some time. Readers of this short piece may themselves find they can no longer manage their own affairs and that their assets and life entrusted to it. Others may be charged with managing the affairs and assets of a close relative.

It is important to us all that the Court functions efficiently and with despatch. We should all take an interest in what it is and how it goes about its business. This paper explains what the court does, why it is important and why more money must be invested in its management if it is to do its job properly.

THE COURT OF PROTECTION

The Mental Capacity Act 2005 ['MCA'] created a specialist court, the Court of Protection, whose core tasks include:

- to determine whether a person has mental capacity to make specific decisions,
- where the person does lack capacity, to make the decision on their behalf and in their best interests or to appoint a deputy to do so,
- to make declarations as to the lawfulness of acts done or to be done in relation to a person,
- to determine questions in respect of Lasting and Enduring Powers of Attorney and Advance Decisions to refuse medical treatment;
- (since 1 April 2009), to hear challenges against so-called deprivation of liberty safeguards ('DOLS') authorisations.

The majority of the Court of Protection's work consists of deciding upon applications relating to the management of the property and affairs of a person lacking the capacity to do so, often by appointing a deputy to do so on their behalf. The vast majority of these decisions will not be contentious and will be made without a hearing; they will often be made by a so-called Authorised Court Officer (an administrative official). These decisions will be very unlikely to result in a written judgment, as the court will simply approve the relevant order put before it. The available statistics do not differentiate between contentious and uncontentious applications, nor do they indicate when an application leads to a hearing, but a reasonable estimate is that at least 95% of all the applications would fall into the category of uncontentious applications determined without a hearing. A very much smaller, but higher profile, part of the Court of Protection's work consists of considering questions of capacity and best interests in the health and welfare context and, related, in the context of considering deprivation of liberty (i.e. compulsory admission to care home or hospital). These can include:

- orders permitting medical treatment to be carried out, in particular in complex or difficult cases;
- decisions and declarations relating to the residence and care arrangements and, often, contact arrangements, for an adult with impaired capacity; and
- cases relating to the intensely personal categories of sex and marriage (almost invariably focusing on the question of capacity: if a person lacks capacity either to consent to sexual relations or to marry, then neither the Court (nor anyone else) can consent on their behalf).

Separately, but alongside these cases, will be those relating to deprivation of liberty, usually brought by on behalf of the person subject to a so-called DOLS authorisation, challenging, usually, whether the deprivation of liberty to which they are subject is in their best interests. This route of access is governed by Section 21A of the MCA 2005. There are a number of difficult issues relating to legal aid in relation to the cases covered in this paragraph, but for present purposes I am focusing on the resources available to the court itself.

THE COURT OF PROTECTION AND RESOURCES: A CINDERELLA COURT

The Court of Protection can – without much poetic licence – be described as a Cinderella court. Whilst, in principle, it has equivalent rank to the other courts (including the High Court), it is often treated, incorrectly, as an offshoot of the Family Division of the High Court. This has caused real practical problems: it was, for instance, not included in the list of courts in which the Coronavirus Act 2020 created an offence of making an unauthorised recording at a time when almost all hearings were being convened remotely. So even the Ministry of Justice forgot about it!

There has also been significant underinvestment in its systems, meaning that, in particular in relation to matters relating to property and affairs (i.e. the bulk of its work), it remains largely paper-based. Some of the adverse consequences of this have been identified by Baroness Finlay, chair of the National Mental Capacity Forum, in her most recent annual report, published on 24 February 2022:[1]

> *The Court of Protection urgently needs a modernised IT system that can cope with the workload, allow tracking of cases and ensure information is generated through proper system reports. During the pandemic the Court managed to continue to function remotely, but the absence of a modern IT system meant that paper files had to be couriered out to judiciary and court staff who were working from home. This was an avoidable expense, created potential security risks as these files contain highly confidential information, and meant that tracking of work was made more difficult. It is to the credit of the Court staff that they managed to maintain a service during lockdown, but the situation needs urgent attention with a modernised information system in place and overall computer upgrades.*

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1057881/nmcf-chair_s-fifth-annual-report-2020-21.pdf

DELAY UNFAIR TO COURT USERS

Security aside, an even more fundamental problem arising out of the lack of resourcing are the significant delays in dealing with applications – especially those for property and affairs deputyship, which remain in the order of (at least) 20 weeks.[2] It is important to remember that deputyship is being sought because authority is needed to administer someone's affairs: until that deputyship is established, there will be no authority to make the necessary decisions in respect of someone with impaired decision-making capacity:

- Bills cannot be paid from the person's funds;
- Assets cannot be realised;
- Proceeds cannot be reinvested.

These are of great practical importance. A spouse who wants to sell the jointly owned home to pay for nursing home fees cannot do so till there is a court order but will have borrow and pay interest in the meantime. All these difficulties occur at a time which is usually distressing enough for the families concerned.

[2] Although it is possible to expedite such applications in truly urgent cases.

THE URGENT NEED FOR FUNDING

Senior Judge Hilder – the judge in charge of the day-to-day running of the court – has made clear in relation to deputyship applications:[3]

> *Unfortunately, this very significant part of the court's work remains predominantly paper based. It is therefore particularly susceptible to being hit by the impact of covid on staffing levels. Without improved resources, both in staff numbers and modern IT, it is not possible to promise rapid improvement. However, the indications from the e-p&a pilots[4] are that timescales are much reduced with these processes. There will be formal review of the pilots, with a view to seeing if they can become standard approaches.*
>
> I would add, however, that absent appropriate funding, it is not possible to see how the pilots could be extended in time, let alone scope.

[3] In the minutes of the Court Users Group held on 27 October 2021 (note, the minutes are subject to approval at the next meeting on 20 April 2022).

[4] A small scale pilot allowing selected firms to apply electronically for deputyship.

CURRENT PROPOSALS ARE WRONG AND MISGUIDED: PRIVATISATION NOT THE ANSWER

It is also worth highlighting that it would appear it is in large part because of the delays noted above that there has been pressure to amend the Mental Capacity Act so as (in effect) to create a process to circumvent the safeguards within the Act in respect of the provision of access to relatively small sums (£2,500) of money held by financial institutions on behalf of people lacking capacity to manage their property and affairs. As the Law Society identified in its response to the Ministry of Justice's consultation on the proposals[5]:

> *5. We agree that any scheme must not adversely affect or limit the safeguards currently in place for vulnerable people, and should not be a way of circumnavigating the processes required by the Court of Protection and legislation, as the consultation rightly acknowledges is already an issue. We are therefore pleased to see that the need to balance simplicity and security is recognised throughout.*
>
> *6. However, we do not agree that the proposed scheme should be run by a financial services firm and we are concerned that this decision seems to be a foregone conclusion. Our members' experience is that financial organisations do not have a reliable understanding of what is meant by 'lacking capacity' as set out in the Mental Capacity Act 2005 or of recognising formal authority, such as deputyship orders, and powers of attorney. […]*
>
> *7. Having a financial organisation run the scheme would reduce the safeguards in place for vulnerable people against fraud, theft or abuse. Authorising access to a person's money, when determining a person's incapacity, is a judicial function and should be treated as one.*

[5] Mental Capacity Act: Small Payments Scheme – Ministry of Justice – Citizen Space. This consultation closed on 12 January 2022

As such, we consider it would be most appropriate for the scheme to be run by the Court of Protection, which provides better protection for the person lacking capacity because:

(i) there is a robust assessment of whether the person lacks capacity;

(ii) the process robustly establishes that the person who is appointed is suitable (and importantly identifies when they are unsuitable);

(iii) the person provides undertaking to the court, that in particular they will follow the Core Principles of the Mental Capacity Act 2005 and make decisions in the person's best interests as set out in the Act;

(iv) the court tailors the order for the needs of the person, including the power to make limited gifts, for example reasonable birthday presents and other decisions such as authority to enter into a tenancy agreement;

(v) the court orders that the person obtains a security bond, which for small funds is a one-off sum in the region of £70 to protect the person's money against poor decisions being made;

(vi) the Office of the Public Guardian has power to investigate concerns raised about poor financial management on behalf of the person and can seek redress and work with other safeguarding partners to take steps to protect the person from abuse.

These safeguards cannot be replicated within the proposed scheme run by financial organisations, and we do not agree that the limit on the amount of money justifies a significant reduction in the security measures applicable to the process

[…]

9. While the Court of Protection would require more resource to efficiently manage a scheme (such as more staff and improved IT), it would not need to be significant. We consider that it is

Very simply, urgent funding is needed. Ministers must not leave Cinderella in the coalhouse any longer. She must be given new clothes!

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