


The Court of Protection
for PI lawyers

Victoria Butler-Cole
@torbutlercole
vb@39essex.com

39essex.com BARRISTERS · ARBITRATORS · MEDIATORS
LONDON · MANCHESTER · SINGAPORE · KUALA LUMPUR




1

Topics

- The roles of the CoP and the QBD
- Financial Deputies
- Deputyship or Trust?
- Deprivation of liberty

39essex.com BARRISTERS · ARBITRATORS · MEDIATORS
LONDON · MANCHESTER · SINGAPORE · KUALA LUMPUR



2

What is the Court of Protection?

- A superior court of record s.45 MCA 2005 which can:
 - decide whether someone has or had capacity
 - make best interests decisions for people who lack capacity
 - authorise/scrutinise deprivations of liberty
 - determine questions relating to lasting powers of attorney
 - appoint financial and health/welfare Deputies


39essex.com BARRISTERS · ARBITRATORS · MEDIATORS
LONDON · MANCHESTER · SINGAPORE · KUALA LUMPUR



3

CoP v QBD – who decides?


- P's capacity to conduct PI proceedings – QBD (and, in theory, CoP)
- Where it is reasonable for P to live/what care to receive in PI proceedings – QBD
- Where it is in P's best interests to live/what care to receive – CoP
- Appointment of Deputy – CoP
- Role/scope of Deputy's appointment - CoP

39essex.com BARRISTERS - ARBITRATORS - MEDIATORS
LONDON - MANCHESTER - SINGAPORE - KUALA LUMPUR  **Essex**
CHAMBERS

4

Re SK [2012] EWCOP 1990


- *The jurisdiction of the Court of Protection is as to best interests and that of the Queen's Bench is compensatory. The tests to be applied, although very similar ("best interests" as against "reasonable needs") are not the same...A defendant not having been a party to the CoP process would not be bound, at a QB hearing as to quantum, by any CoP declaration as to the injured person's best interests.*

39essex.com BARRISTERS - ARBITRATORS - MEDIATORS
LONDON - MANCHESTER - SINGAPORE - KUALA LUMPUR  **Essex**
CHAMBERS

5

Financial Deputies

- Court has power to appoint a financial deputy (s.16 MCA)
- Court must consider capacity, P's best interests, and principles that a decision by the Court is preferable to appointing a deputy, and the deputyship should be as limited in time and scope as possible


39essex.com BARRISTERS - ARBITRATORS - MEDIATORS
LONDON - MANCHESTER - SINGAPORE - KUALA LUMPUR  **Essex**
CHAMBERS

6

Deputy or LPA?

- Capacity required to create an LPA
- Can have capacity to create an LPA but lack capacity to manage finances
- P can choose identity of attorney/s but not Deputy
- Costs incurred by attorneys likely to be lower, but less protection if things go wrong

39essex.com | BARRISTERS · ARBITRATORS · MEDIATORS
LONDON · MANCHESTER · SINGAPORE · KUALA LUMPUR




7

Standard financial Deputy order

- Only authorised to make decisions that P lacks capacity to make
- Further authority from court required to buy or sell property
- Can make gifts and provide for maintenance of people related/connected to P
- Must pay security, set by Court

39essex.com | BARRISTERS · ARBITRATORS · MEDIATORS
LONDON · MANCHESTER · SINGAPORE · KUALA LUMPUR




8

Common problems for financial Deputies

- Whether to give P information about settlement value **EXB v FDZ & Ors** [2018] EWHC 3456 (QB)
- Overlap between financial and welfare decisions
- Maintaining relationship with P and family despite not agreeing to expenditure
- Influence

39essex.com | BARRISTERS · ARBITRATORS · MEDIATORS
LONDON · MANCHESTER · SINGAPORE · KUALA LUMPUR




9

Deputyship or Trust?

- **Watt v ABC** [2016] EWCOP 2532
 - Must identify specific choices and costs of each
 - No presumption in favour of a Deputy – case-specific analysis.
 - Deputy potentially more flexible eg. P with capacity to make day to day decisions, Deputy has power to make longer term decisions
 - Irrevocable Trust might be preferable in some circs
 - Neither protects P from making bad decisions if P regains capacity

39essex.com BARRISTERS · ARBITRATORS · MEDIATORS
LONDON · MANCHESTER · SINGAPORE · KUALA LUMPUR




10

Deprivation of liberty

- Current system – Deprivation Of Liberty Safeguards
 - Continuous supervision & control and not free to leave
 - Administrative system of authorisations in care homes and hospitals
 - CoP applications mandatory in other settings
 - Claims include cost of CoP application and annual reviews by the court

39essex.com BARRISTERS · ARBITRATORS · MEDIATORS
LONDON · MANCHESTER · SINGAPORE · KUALA LUMPUR



11

New scheme - 2020

- MCA Amendment Bill – Liberty Protection Safeguards
 - Every setting covered by administrative system, not just care homes and hospitals
 - No need for court applications unless there is a dispute (in which case P will be entitled to non-means tested legal aid)

39essex.com BARRISTERS · ARBITRATORS · MEDIATORS
LONDON · MANCHESTER · SINGAPORE · KUALA LUMPUR



12

Resources

- <http://www.39essex.com/resources-and-training/mental-capacity-law/>
- <http://www.scie.org.uk/mca-directory/>
- www.mclap.org.uk
- www.mentalhealthlaw.co.uk
- www.courtofprotectionhandbook.com



39essex.com BARRISTERS · ARBITRATORS · NEGOTIATORS
LONDON · MANCHESTER · SINGAPORE · KUALA LUMPUR
