

# Welfare Deputyships

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A portrait of Alex Rook, a young Black man with a large afro, looking slightly to the left. He is wearing a blue t-shirt under a dark blue cardigan. The background is dark.

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# Topics

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- Overview - the debate
- The legal framework
- Brief summary re finance deputyships
- How to apply
- Questions?



# The debate

The nature of welfare deputyships

# The debate

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Are Welfare deputyship orders:

1. An overly restrictive way for parents to continue to make decisions for their children, even though they are now adults, contrary to the ethos behind Mental Capacity Act

or

2. A way of putting the person who lacks mental capacity at the heart of decision making, ensuring that decisions are taken in their best interests by the people who are the experts about them?

# The legal framework

The Mental Capacity Act 2005 and Code of Practice

# The Mental Capacity Act 2005

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The Mental Capacity Act 2005 (the “MCA”) is the main piece of legislation regarding mental capacity. “P” means the person who lacks mental capacity.

The Court of Protection (“COP”) has jurisdiction over matters relating to adults who lack mental capacity.

Under section 16, the COP has two options.

Section 16(2): The court may—

“(a) by making an order, make the decision or decisions on P's behalf in relation to the matter or matters, or  
(b) appoint a person (a “deputy”) to make decisions on P's behalf in relation to the matter or matters.”

# The Mental Capacity Act 2005

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The court will have regard to the following principles under s 16(4):

“(a) a decision by the court is to be preferred to the appointment of a deputy to make a decision, and  
(b) the powers conferred on a deputy should be as limited in scope and duration as possible.”

The principles underlying under the MCA also apply, i.e:

- The court will only appoint a deputy if it is in P’s best interests to do so (section 1(5))
- When determining P’s best interests, the best interests checklist will be considered (section 4)



# The MCA Code of Practice

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The Code provides guidance on how the MCA should be applied in practice.

The Code as currently drafted makes it clear that welfare deputyship orders will not be routinely made.





# The MCA Code of Practice

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## Paragraph 8.3:

“In most cases, the core principles of the Act and the processes set out will be enough to –

- help people take action or make decisions in the best interests of someone who lacks capacity to make decisions about their own care or treatment, or
- find ways of settling disagreements about such actions or decisions.”

# The MCA Code of Practice

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However, three situations are given as examples of when a welfare deputyship may be necessary:

1. particularly difficult decisions
2. disagreements that cannot be resolved in any other way, or
3. situations where ongoing decisions may need to be made about the personal welfare of a person who lacks capacity to make decisions for themselves.

# Difficult decisions

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More detail is given about the “difficult decisions” situation at paragraph 8.31:

“Deputies for personal welfare decisions will only be required in the most difficult cases where:

- important and necessary actions cannot be carried out without the court’s authority, or
- there is no other way of settling the matter in the best interests of the person who lacks capacity to make particular welfare decisions.”

The Code sets out some examples.

# Difficult decisions

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- “Someone needs to make a series of linked welfare decisions over time and it would not be beneficial or appropriate to require all of those decisions to be made by the court. For example, someone (such as a family carer) who is close to a person with profound and multiple learning disabilities might apply to be appointed as a deputy with authority to make such decisions...

# Difficult decisions

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- ...the most appropriate way to act in the person's best interests is to have a deputy, who will consult relevant people but have the final authority to make decisions
- there is a history of serious family disputes that could have a detrimental effect on the person's future care unless a deputy is appointed to make necessary decisions."

# Case law

How has the Court of Protection interpreted the MCA and Code?



# Case law

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- *KD and LD v London Borough of Havering* [2010] EWCOP 3876
- *Re P* [2010] EWHC 1592 (Fam)
- *G v E* [2010] EWCOP 2512
- *Re Lawson, Mottram and Hopton* [2019] EWCOP 22

# Re Lawson, Mottram and Hopton

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- Test case before the Vice-President of the COP, Mr Justice Hayden
- What is the approach the COP should take when deciding whether to appoint a welfare deputy?
- The applicants argued that the ‘unvarnished’ words of the MCA should apply, i.e. is it in P’s best interests to appoint a welfare deputy?
- The applicants’ case was that the wording of the Code, in referring to the ‘most difficult cases’ should not be relied upon

# Re Lawson, Mottram and Hopton

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- Unfortunately, the outcome is not entirely straightforward!
- <https://www.bailii.org/ew/cases/EWCOP/2019/22.html>
- The judge made the following conclusions
- The starting point is the “clear wording of the MCA”.
- The wording of the Code, in particular about the ‘most difficult cases’, is not the starting point, and “requires to be revisited”.

# Re Lawson, Mottram and Hopton

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- There is no statutory presumption against the appointment of a welfare deputy.
- However, “The structure of the [MCA] and, in particular, the factors which fall to be considered pursuant to Section 4 [i.e. the best interests checklist] may well mean that the most likely conclusion in the majority of cases will be that it is not in the best interest of P for the [COP] to appoint a [welfare deputy]”.

# Re Lawson, Mottram and Hopton

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Therefore, the applicants succeeded in convincing the court that the wording of the MCA is the correct approach when the COP is deciding whether to appoint a welfare deputy, and the Code needs to be amended.

However, the judge maintained that when applying the legal test under the MCA, in most cases a welfare deputy will not be appointed.

Possibly, underlying the judge's reasoning is the expectation, as set out in *G v E*, that:

“Experience has shown that working together is the best policy to ensure that incapacitated adults such as E receive the highest quality of care”.

# Re Lawson, Mottram and Hopton

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- Whilst this argument appears sensible if the system worked perfectly, our experience is that many families find public bodies (local authorities, NHS etc) do not properly implement the MCA, and they are often either excluded or not properly involved in making best interests decisions on behalf of their loved ones.
- Our experience is that many judges recognise this mismatch between the law and reality, and are more ready to grant welfare deputyships.



# Re Lawson, Mottram and Hopton

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- However, this does mean that an inconsistent approach seems to have survived the case
- We hope that this may be resolved by the revised code once it is released. But no date as yet for when that may be....

# Property and Financial Affairs Deputyship

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- Note that the MCA as set out above applies regarding finance deputyships, but not the guidance regarding the “most difficult cases.”
- This means that obtaining a financial deputyship order is much more straightforward

**Note however:** Does P have any income or savings other than their benefits?

If not, an application to become the appointee of their benefits should suffice, and deputyship may be rejected for this reason

# How to apply

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- Most of the information you will need, including copies of the forms to complete, information on fees etc, can be downloaded from here:  
<https://www.gov.uk/become-deputy/apply-deputy>
- In our experience, families are often able to apply for finance deputyship without the assistance of a solicitor
- Applications for welfare deputyship are more complex, and a solicitor may help in particular with the drafting of a witness statement to address the issues set out in the talk today.

**Any questions?**