

Financial implications

Reducing the involvement of the Court of Protection in the administration of a patient's finances is laudable but it could lead to higher running costs, says Stephen Ashcroft

THE MENTAL CAPACITY ACT came fully into force on 1 October 2007. Its primary purpose was to combine the personal welfare and healthcare jurisdiction formerly exercised by the family division of the High Court, with the property and financial decision-making jurisdiction of the Court of Protection.

However, the scope of the Act is much wider, and brings far-reaching changes across a much wider spectrum. It has had, and will continue to have, a significant impact on patients (now "protected persons") and their receivers (now "deputies"). These changes are more than just titular, and involve several administrative and more fundamental functions. They also apply to both existing and new deputyships.

The new rules are intended to give the deputy far more discretion and autonomy in dealing with the day-to-day financial matters of the protected party (P). Historically, a receiver would agree a budget on an annual basis with the Court of Protection, who would then arrange for the agreed sums to be paid to the receiver, usually on a monthly basis. Requests for additional capital expenditure, such as replacement vehicles and home improvements or adaptations, would be made on an ad hoc basis and dealt with by the Court of Protection.

In the process of conversion from receiverships to the new deputyships, deputies are, in effect, being given the authority to withdraw £x per annum over a three-year period, without recourse to the Court of Protection to justify the suitability of the expenditure. The amount will usually exceed the previously agreed budget figure, in an attempt to provide leeway for a deputy in the event of unforeseen circumstances, and to minimise the involvement of the Court of Protection.

The downside to the new arrangement is that should a deputy need to submit an application for funds outwith the pre-ordained limit, a fee of £400 is payable on the initial application, and every subsequent variation. Similarly, should any application require an oral hearing, a further fee of £500 is payable. There was no charge for either under the old system.

While the attempt to streamline the system is laudable, and no doubt intended to reduce the number of enquiries handled by the Court of Protection, there is a lot of confusion in this transitional period over what will be charged for, and what will not. A prime example is the issue of tax demands. Where there has been a substantial damages award which has remained on special account, income tax will be payable in the normal way. As interest on special account is paid gross, it is not unusual for the tax bill to be many thousands of pounds. This is rarely included in the annual budgetary calculations, as it is not monies expended for the benefit of P. Will this attract a £400 application fee?

The Court of Appeal decision in *Thompstone* regarding indexation of periodical payments highlights financial advice's importance both before and after settlement

One additional change brought about by the Act is the disbanding of the investment division and the end of the panel brokers. Historically, particularly in large damages cases, in the absence of any investment recommendations from P's own financial advisers (if any), the funds would be invested on behalf of P by one of the courts' panel stock-brokers, and overseen by the investment division.

"Proper advice"

Under the new regime, the court merely requires the deputy to take "proper advice" from a person who the deputy reasonably believes to be qualified to give it by their ability in, and practical experience of, financial and other matters relating to the proposed investment.

Even while the panel brokers were in situ, several specialist financial advisers provided alternative investment proposals for Ps. These advisers were generally well versed in the particular requirements of long-term investment for patients and were familiar with the workings of the court and the office of the public guardian.

While not specifically linked to the Mental Capacity Act, the question of proper financial advice has also been brought to the fore recently by the Court of Appeal decision in *Thompstone*, regarding the indexation of periodical payments. This highlights the importance of financial advice both before and after settlement.

It remains to be seen how this new "open skies" policy will work, but professional and particularly lay deputies, will need to ensure that appropriate advice is being taken, from people not just qualified to give it, but experienced in that particular line of work.

As always, when major changes are introduced into a large bureaucracy, there will be "teething troubles". The conversion from receiverships to deputyships has created an administrative backlog, with confusion about the changes leading to an increased number of enquiries, which further exacerbates the problem.

The objective behind the Mental Capacity Act is eminently sensible, and will ultimately produce a regime which better represents the interests of protected parties in personal and financial welfare matters. But it has come at a cost, which in many cases will be difficult to quantify. The disappearance of the panel brokers has put further onus on deputies to ensure that proper investment advice is taken from persons suitably qualified and experienced to give it. However, as with all changes, once those involved are appraised of the various differences and nuances from the old regime, the benefits of the new streamlined system will bring an improved service for the disadvantaged.

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