

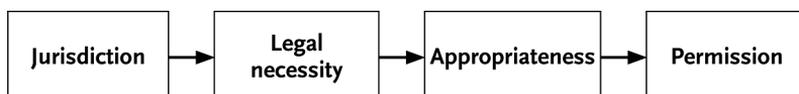
# Is an application appropriate?

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## Introduction

- 5.1 There are many reasons why people ‘go to law’. Not all of them are well thought out, and many people have later regretted doing so in haste. It is sensible, therefore, to consider carefully whether an application to the Court of Protection is necessary as a matter of law, or appropriate as being in the person’s best interests.
- 5.2 The matters to think through before applying include the following:



| <b>JURISDICTION</b>   |   |
|---|---|
| <b>Does the Court of Protection have jurisdiction to consider the proposed application?</b> | <ul style="list-style-type: none"> <li>• There is little point applying to the court unless it has power to grant the remedy sought.</li> <li>• The court’s jurisdiction is defined by the Mental Capacity Act (MCA) 2005. Most obviously, it is a jurisdiction exercisable only over people who lack (or, on an interim basis, appear to lack) capacity.</li> <li>• Remember that a person must be assumed to have capacity unless it is established that they lack capacity. Furthermore, a person is not to be treated as being unable to make their own decision unless all practicable steps to help them to do so have been taken without success, or merely because they make or propose making an unwise decision.</li> <li>• Even if the person is incapacitated, certain family law matters (such as consenting to the making of an adoption order) and Mental Health Act (MHA) matters (treatment without consent under that Act) are excluded from its jurisdiction: see sections 27 and 28.</li> <li>• Depending on the type of decision to be made, the court’s jurisdiction may be restricted to incapacitated adults (eg statutory wills, lasting powers of attorney (LPAs)), to persons aged 16 or over (eg treatment or care issues) or available to people of all ages (property and financial affairs matters where the child’s incapacity is likely to last into adulthood).</li> <li>• Court of Protection Rules (COPR) 2007 SI No 1744 r87 and Practice Direction (PD) 12B contain provisions for disputing the court’s jurisdiction.</li> </ul> |

| <b>LEGAL NECESSITY</b>                |   |
|---------------------------------------|---|
| <b>Is an application necessary?</b>   | In various situations, an application is a legal necessity. For example, in the personal welfare sphere, a case involving non-therapeutic sterilisation or organ donation; in the financial sphere, situations where there is a need for someone with capacity to manage an incapacitated person's property.  |
| <b>APPROPRIATENESS</b>                |   |
| <b>Is an application appropriate?</b> | <p>Even if an application is not necessary, it may still be appropriate to apply because an application is reasonably believed to be in the relevant person's best interests. This is case-specific and depends on many things. For example:</p> <ul style="list-style-type: none"> <li>• Whether what is required can be done lawfully and in the person's best interests without the court's involvement (ask what is in their best interests having regard to their legal rights and circumstances).</li> <li>• The person's wishes, feelings, beliefs and values and all of the other relevant circumstances.</li> <li>• The likely benefits for the person concerned (ask in what ways the application will benefit them).</li> <li>• The likely cost for the person concerned, not just financially but emotionally if personal or family discord is likely to result (ask in what ways the application may cause them harm).</li> <li>• The affordability of proceedings for the relevant person. Even relatively modest costs may be unaffordable. The Court of Protection has the same status as the High Court and the fees charged for applications, legal assistance and reports tend to reflect this. It is essential to avoid <i>Jarndyce v Jarndyce</i> situations where the costs of litigation approach or exceed the value of the estate. Everyone involved is under a duty to deal with the underlying issues in a proportionate and cost-effective manner.</li> <li>• Who is at risk of bearing the litigation costs. It should not be assumed that whatever the merits of the application each party will pay their own litigation costs or that the costs will be recoverable from the incapacitated person's estate. The rules enable the court to have regard to the conduct of the parties, which includes their conduct before as well as during the proceedings, whether it was reasonable for them to raise, pursue or contest a particular issue, etc.</li> </ul> <p style="text-align: right;"><i>continued</i></p> |

|  |  |
|--|--|
|  | <ul style="list-style-type: none"> <li>• The strength of the evidence and the chances of the application succeeding (is there sufficient evidence in support of it and is the court likely to be persuaded to exercise its powers?).</li> <li>• The suitability and appropriateness of the applicant (ought it to be obvious that another person such as a spouse or partner is better placed to apply and will reasonably object?).</li> <li>• Relevant guidance in the Codes of Practice.</li> <li>• The availability of more appropriate alternative procedures or remedies:             <ul style="list-style-type: none"> <li>– Can the matter wait until the person recovers capacity and is able to take the decision for themselves?</li> <li>– Is this the simplest and most appropriate legal way to address this person’s needs?</li> <li>– Can the purpose which the applicant has in mind be as effectively achieved in another way which is less restrictive of the person’s rights and freedom of action?</li> <li>– Where relevant, does the person still have capacity to complete an LPA or advance decision?</li> <li>– Can what is proposed lawfully and appropriately be done in the person’s best interests under MCA 2005 s5?</li> <li>– Does anyone such as an attorney or deputy already have authority to make this decision for the person?</li> <li>– Is it more appropriate to proceed under a different statute, eg guardianship under the MHA 1983, the Children Act 1989 or public health legislation?</li> <li>– If the matter is contentious, are discussions and negotiations really at an end? Is there a possibility of mediation? Would the appointment of an independent mental capacity advocate (IMCA) or a person with a similar independent role help?</li> </ul> </li> </ul> |
| <b>PERMISSION</b>  |  |
| <p><b>If permission to make the application is required, is it likely to be granted?</b></p> | <ul style="list-style-type: none"> <li>• In order to prevent applications which are frivolous, vexatious, an abuse of process or otherwise an illegitimate interference with the interests and rights of the relevant person, the court’s permission is required to make some applications: see MCA 2005 s50 and COPR rr50–52.</li> <li>• When deciding whether to grant permission, MCA 2005 s50(3) requires the court to consider:             <ol style="list-style-type: none"> <li>(a) the applicant’s connection with the person concerned;</li> <li>(b) the reasons for the asking the court to appoint a deputy to make personal welfare decisions for the person concerned;</li> </ol> </li> </ul>  |

|  |  |
|--|--|
|  | <p>(c) in what ways the person concerned will benefit from having a deputy appointed to make personal welfare decisions for them;</p> <p>(d) whether those benefits can be achieved in any other way.</p> <ul style="list-style-type: none"> <li>• Even when permission is required, it is simply a filtering stage. Permission ought to be granted where, having regard to these and any other relevant considerations, on the material available to the court the application deserves fuller investigation by it and, realistically, the order sought may be in the best interests of the relevant person.</li> </ul> |
|--|--|

## Maxims and principles

5.3 Opinion varies otherwise it would not be an opinion. Having acknowledged that, there is a good case for saying that the following common-sense maxims and principles have proved their utility when it comes to reflecting on whether to intervene in someone else's life:

- 1) First, do no harm – there are many we cannot help, but none we cannot avoid harming. This principle is as important to the practice of law as it is to the practice of medicine.<sup>1</sup>
- 2) Give due weight to the importance for the person concerned of their liberty and wish to determine their own course in life.
- 3) In order to avoid disappointment later, be realistic about the proper function of the law and its limits. One can legislate for marriage but not for a happy marriage. The law provides a useful framework for managing conflict, conferring authority, enforcing legal duties and restraining the unlawful exercise of power. It cannot solve family conflict and underlying resentment, that feeling of not being a loved or favoured child, a scarcity of resources, the disease process itself or the fact that the person concerned must soon die.
- 4) Accept that risk cannot be avoided. All personal welfare decisions involve balancing competing risks of which the risk to the person's physical safety is but one. Where appropriate, in order to avoid practising too defensively consider applying (or applying in the alternative) for a declaration that it *is* lawful and in the person's best interests to take the conventional safeguarding risk rather

<sup>1</sup> 'The wicked are wicked, no doubt, and they go astray and they fall, and they come by their deserts; but who can tell the mischief which the very virtuous do?,' Thackeray, *The Newcomes*, Book 1 chapter 20. There is a great deal to be said for 'legal homeopathy': the application of minute, sub-clinical, doses of law. That is tongue-in-cheek, but the lightest touch is often the best.

than to avoid it (by, for example, separating them from their life-partner and removing them to a care home). Let the judge take the strain; that is why they are there.

- 5) Consider the adequacy of your evidence.

## Considering the evidence

- 5.4 Lawyers spend much time discussing new case-law and the nuances of particular sections. However, for every case lost on a point of law, a thousand are lost for want of evidence; and a few more for procedural reasons such as missing time-limits and non-compliance with directions.

- 5.5 The lawyers' old maxim 'only a fool bags himself as a brief' acknowledges that everyone finds it difficult to be objective about a case in which they have a strong personal interest.

- 5.6 Much litigation in the Court of Protection is the result of historic family tensions, in particular disagreements between siblings and step-relations. Strained relationships over many years now colour each child's personal assessment of the evidence as to which of them is best placed to take on day-to-day decision-making for an incapacitated parent.

- 5.7 Where there are longstanding family issues and an application is likely to be opposed, it is sensible to take legal advice on the evidence and merits of a possible application. Litigation is easy to start, often demanding to pursue and sometimes costly to withdraw or settle.

- 5.8 Given human nature, it is also often quite easy for a person to satisfy themselves that an application for a proposed gift or will in their favour is one in the incapacitated person's best interests. Again, it is prudent to take neutral advice on the weight of the evidence and what to expect before setting out. At this point the question to ask is not 'What do I make of it?' but 'What is a judge likely to make of it?'

- 5.9 In the case of local authority safeguarding applications, evidential problems often have a different cause. Local safeguarding investigations rarely involve full disclosure, forensic questioning or independent scrutiny. Consequently, in court the findings reached may not withstand that level of scrutiny. See further chapter 23 in relation to the interaction between safeguarding obligations and going to the Court of Protection.

- 5.10 To summarise, before embarking on litigation that is likely to be contested it is particularly important to assess objectively the strength of one's case and the adequacy of one's evidence.

**Example**

5.11

Mrs Smith is a 95-year-old widow who suffers from moderate to severe dementia. She lives with her son and daughter-in-law, Ms Jones. She is taken to a day centre three times a week by a paid carer. Staff at the day centre notice that she has a bruise and Mrs Smith says that her daughter-in-law caused it and that she is frightened of her. Wessex County Council are contacted and place Mrs Smith in a care home under a 'DOLS order' (Deprivation of Liberty Safeguards), ie a standard authorisation. Several months later, an adult safeguarding investigation concludes on the balance of probabilities that the bruising was non-accidental. The family start Court of Protection proceedings seeking a declaration that it is in Mrs Smith's best interests to return home.

What is the local authority's submission?

That it is in Mrs Smith's best interests not to return to the family home and that she should remain in the care home.

What is the local authority trying to prove?

Ill-treatment by her family.

How does it prove this?

By evidence.

What is the evidence?

The evidence consists of:  
i) the fact that bruising was observed by care home staff; and  
ii) Mrs Smith's statement as to its cause.

How reliable is the evidence?

Given that the family deny ill-treatment, the key evidential questions are:  
a) What is the evidence that the bruising is of a kind consistent with non-accidental injury?  
b) What is the evidence that Mrs Smith is or is not a reliable witness of events, eg that her dementia has not affected her reliability, that she was not led in her account and that she is not motivated by malice?

*continued*

5.12 As to a), bruising may be related to factors such as age, gender, health status and medication. It is necessary to consider the location, age and pattern of the bruising and any other injuries, the physical indicators of abuse, the behavioural indicators of abuse and the pool of possible perpetrators. Ideally, an applicant requires expert contemporaneous mapping and recording of the injuries by a forensic medical examiner and expert interpretation of the evidence recorded by this examination.

5.13 Although one would never take a child care order application to court without obtaining this evidence, strangely, in the case of alleged elder abuse this is very rarely obtained; and by the time the case comes to court, it is too late to obtain it.

5.14 As to b), there are clear evidential problems given the severity of Mrs Smith's dementia, the passage of time, the fact that the allegations are strongly denied and the number of demonstrably inaccurate allegations made by her in respect of other people.

5.15 By the time of the trial, the situation facing the local authority is that there are a number of possible explanations and a pool of possible perpetrators of any non-accidental injury. The alleged perpetrator has no relevant history and Mrs Smith has been living with her family for some years with no previous concerns of this kind being raised. On the evidence, it is accepted that Mrs Smith has made other allegations which must be the result of confusion. The key evidential omission was not obtaining contemporaneous medical evidence and a forensic opinion on the significance (if any) of the bruising.

## Analysing one's own case and evidence

5.16 The approach adopted in the following table is not a substitute for analysing the evidence and taking appropriate advice in each particular case. It is merely an example of how one can devise a simple structure to test the quality and internal consistency of one's own case.

|  | Example 1   | Example 2  | Example 3  |
|--|---|--|--|
| <b>Type of case</b>  | <b>Place of residence dispute</b>                             | <b>Suitability of a deputy</b>                             | <b>Contact dispute</b>                             |
| <b>Jurisdiction: can the court do what you want? (the application)</b> | The court may determine P's place of residence (MCA 2005 s17) | The court may revoke a deputy's appointment (MCA 2005 s16) | The court may decide contact issues (MCA 2005 s17) |

|  | <b>Example 1</b>  | <b>Example 2</b>   | <b>Example 3</b>   |
|--|---|--|--|
| <b>The local authority's best interests submission (the submission)</b>  | It is in P's best interests to reside at care home X, not at her own home                       | It is in P's best interests to remove his current deputy                     | It is in P's best interests not to have unsupervised contact with Y                                    |
| <b>What the local authority is alleging/seeking to prove (the findings sought)</b>   | Ill-treatment at home by relatives  | The existing deputy has stolen money from P                                  | Sexually inappropriate behaviour by Y  |
| <b>The evidence for the allegation (the facts which prove the allegation)</b>  | Bruising<br>P's oral account  | Bank statements<br>Failure to account<br>Failure to explain                  | Staff observations<br>P's oral account   |
| <b>Possible alternative explanations which will need to be ruled out on the balance of probabilities (likely defences)</b> | Innocent alternative cause of the bruising<br>P is an unreliable witness                        | P gifted the money<br>P has capacity<br>P owed the money<br>Money spent on P | P has capacity/consents<br>P enjoys sexual contact<br>Faulty observation<br>P is an unreliable witness |
| <b>Evidence re any less restrictive options</b>  | Exclude a particular relative or restrict contact with them?<br><br>Arrange alternative carers? | Retrospective validation of the transaction if no dishonesty, etc            | The friendship is in P's best interests  |
| P = the incapacitated person   |   |  |  |

## Admissibility and weight of the evidence

- 5.17 Evidence is discussed in detail in chapter 12, but nowadays there are few strict rules concerning the admissibility of evidence, particularly in the Court of Protection.
- 5.18 Part 14 of the COPR deals with evidence and the court's power to control it. Subject to complying with the rules, the court's discretion and the odd caveat, the general position is simply that to be admissible evidence must be relevant. 'Relevance' means relevant to the

issues which the court must decide and evidence is relevant if it makes a matter which requires proof more or less probable.<sup>2</sup>

5.19 If evidence is relevant, one must next consider the weight which a court is likely to give it, that is how credible and persuasive it is. The case may consist of a mixture of agreed first-hand evidence (things actually said to or observed by a witness), disputed first-hand evidence, valid and invalid inferences from agreed or disputed first-hand evidence, hearsay (agreed or disputed ‘facts’ communicated to a witness), inferences from hearsay, assumptions and suspicions (‘It must be, or is likely to be, the case that . . .’), professional presumptions, professional opinions, ‘independent expert opinions’.

5.20 If a matter is likely to be contested, some of the questions to consider at this stage are:

- Can all of our ‘evidence’ be used in court? (This often raises issues of confidentiality; the availability, willingness and compellability of witnesses; and the unrepeatability of some suspicions and corridor conversations.)
- What are the gaps in our evidence?
- Assuming the facts are as stated, are the inferences that have been drawn valid?
- What are the weaknesses in our case?
- How impressive are our witnesses and how expert is our expert evidence?
- What will the other side be saying or putting to our witnesses?
- Does the other side have any good points and is their evidence accurate and reliable?
- Even if our witnesses are right, do we have sufficient evidence that we can provide a better alternative for the incapacitated person to the situation which we are trying to remedy?

## The standard of proof

5.21 The standard of proof in Court of Protection proceedings is always ‘the balance of probabilities’. However, to leave it there is an oversimplification. The more serious the allegation the less likely it is that the event occurred. Hence, the stronger should be the evidence

2 See *Director of Public Prosecutions v Kilbourne* [1973] AC 729, 756. As Lord Bingham once noted, contested trials last long enough as it is without spending time on evidence which is irrelevant and cannot affect the outcome.

before the court concludes that the allegation is established on the balance of probability.<sup>3</sup>

The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A step-father is usually less likely to have repeatedly raped and had non-consensual oral sex with his under age stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.

Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. Ungood-Thomas J expressed this neatly in *In re Dellow's Will Trusts* [1964] 1 WLR 451, 455:

‘The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.’

This substantially accords with the approach adopted in authorities such as the well known judgment of Morris LJ in *Hornal v Neuberger Products Ltd* [1957] 1 QB 247, 266. This approach also provides a means by which the balance of probability standard can accommodate one’s instinctive feeling that even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters.

5.22 It is also necessary to consider the setting within which the ‘evidence’ was given; as to this, see the observations of McFarlane J (as he then was) in *Re SA*:<sup>4</sup>

68. When looking at evidence from a witness who is engaged in providing therapy to an individual who then, during the course of the therapeutic relationship, makes statements which are then produced

3 *Re H (minors) (sexual abuse: standard of proof)* [1995] UKHL 16 paras 73–75; [1996] AC 563, D–H.

4 [2010] EWHC 196 (Admin).

as evidence of the truth, the words of Butler-Sloss LJ in *Re D (Child Abuse: Interviews)* [1998] 2 FLR 10 must be borne in mind:

‘It is essential to distinguish between interviewing the child to ascertain the facts and interviewing to provide the child with help to unburden her worries. The therapeutic interview would seem to me to be generally unsuited to use as part of the court evidence, although there may be rare cases in which it is necessary to use it.’

69. Often the therapist will alert others to matters of concern arising from the therapeutic interview and the child or vulnerable person may then be subject to an interview aimed at the forensic process – as indeed happened here with the ABE interview. In the event the ABE interview did not provide any evidence to support the local authority case and thus reliance is made on the original statements made to AL. I do not regard AJ’s reports as being inadmissible or to be automatically of no weight, but I do have regard to the observations of Butler-Sloss LJ and, the reasons behind them, in being cautious as to the amount of weight that can be attached to the material that originates from the drama therapy sessions.’

## Evidence meeting

- 5.23 Time and resources permitting, there is a lot to be said for having an evidence meeting before issuing what is likely to be a contested application.

## Possible alternative remedies

- 5.24 The practice of law is concerned with remedies – people go to a lawyer or a court for the same reason they see a doctor, in order to obtain a remedy.
- 5.25 Sometimes there will be a more appropriate alternative to making an application to the Court of Protection.
- 5.26 Most courts deal only with litigious matters. The Court of Protection is unusual in that much of its work, particularly on the property and financial side, is non-litigious. Here there is often a common goal, which is to put in place a protective legal framework for a person who is unable to protect and promote their own personal interests.
- 5.27 The remainder of this chapter considers or lists possible alternative remedies under the following headings:
- Non-contentious property and financial matters;
  - Contentious property and financial matters;

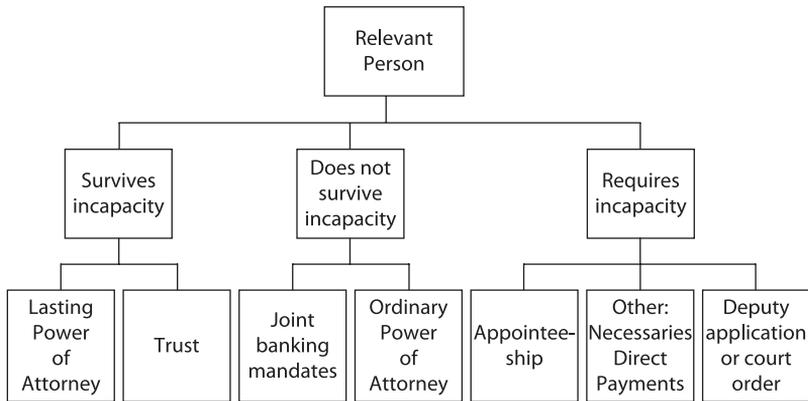
- Non-contentious personal welfare matters; and
- Contentious personal welfare matters.

## Non-contentious property and financial matters

### *Steps to take*

- 5.28 Where a person appears to be incapable of managing their property and affairs or a particular transaction, the first step is to verify this. Capacity often fluctuates, no one is to be found incapable unless all practicable steps to help them make their own decision have been taken unsuccessfully, the correct legal test must be applied and the answer may depend on the significance and complexity of the matter in hand.
- 5.29 If the person does lack capacity, the second step is to establish if and when they may recover capacity, and whether the decision(s) can be postponed until they are able to act for themselves.
- 5.30 If a decision is required now, the third step is to check whether arrangements are already in place for managing the situation. For example, did the person execute an enduring power of attorney (EPA) or LPA when they had capacity, or has a deputy already been authorised to make decisions of this kind?
- 5.31 If not, the fourth step is the check whether the person's affairs are sufficiently complicated to require the appointment of a deputy or whether an alternative procedure will or may suffice.
- 5.32 The court process for appointing a deputy is not onerous in most cases. It consists of ensuring that there is adequate evidence of incapacity, information about the person's finances, identifying possible conflicts of interest and ensuring that close family members are notified and have an opportunity to object to the proposed arrangement.
- 5.33 However, the appointed deputy must then usually take out security, file annual reports with the Public Guardian, pay an annual supervision fee and so forth. It is therefore worth considering whether there are any other suitable ways of managing the person's finances in their best interests which avoid supervision of what hitherto has been the individual's private life and all the expense that goes with that.
- 5.34 Some of the main options are those given in the following table, which is based on one in Ashton's *Elderly people and the law*:<sup>5</sup>

5 G Ashton, *Elderly people and the law*, Butterworths, London, 1995, p299.



### *Lasting power of attorney*

5.35 The best way of avoiding the need for a court-appointed deputy is for the relevant person to execute an LPA, provided of course that they still have capacity to do so.

5.36 The important point to bear in mind is that a person may lack capacity to manage their property and affairs in a general sense, so that the court could lawfully appoint a deputy to manage their estate, but still have sufficient capacity to execute an LPA.

5.37 In other words, the person concerned may retain sufficient capacity to be able to make their own arrangements for the future management of their estate. If so, they can appoint (say) their spouse or partner as their attorney, which avoids the need for the latter to apply to be appointed as their deputy.

5.38 The possibility arises because capacity is 'issue-specific' and depends on the transaction or decision in hand.

5.39 Because the relevant individual's capacity is borderline in such cases, it is imperative to ensure that the certificate of capacity is completed by an independent professional such as a general practitioner or solicitor and to establish that close family members and any other key individuals accept the capacity finding.

5.40 Provided there is nothing untoward, the arrangement has clear advantages in terms of maintaining the historic privacy, simplicity and trust of a long-standing relationship. Although there is a fee to be paid for registering an LPA, this is less than the standard court fee payable when filing a deputy application.

### *Enduring power of attorney*

5.41 Once the MCA 2005 came into force on 1 October 2007 it was no longer possible to execute an EPA. However, EPAs made before then

were not revoked by the Act and continue to have legal effect, subject to the need for registration if the attorney has reason to believe that the donor is becoming mentally incapable of managing and administering their property and affairs.

### Trusts

5.42 It is possible for a person who is concerned that they may be becoming mentally incapacitated to create a trust. This involves transferring money and assets to trustees on terms that require the trustees to manage the trust fund for the benefit of the individual who has created it (and perhaps for the benefit of others also). The relevant test is whether the person has capacity to make the trust at the same time and *Re Beaney*<sup>6</sup> provides some guidance as to this.

5.43 As Ashton noted in 1995, this approach lost some popularity once it became possible for an individual who was beginning to lose capacity to create an EPA. It was then easy for them to enter into a lasting arrangement with a trusted person for the latter to manage the former's property as their agent without the need to create a trust and give up legal ownership of the property to trustees.

There is usually a tension between the settlor's various objectives. He or she will often wish to retain ultimate control over the money and to be able to call for it to be spent on them. However, to obtain tax advantages or to avoid it being taken into account in the assessment of means-tested benefits, it is usually necessary to give up any form of control.

5.44 The tax consequences of placing money in trust need to be carefully considered, as do the extent to which the trustees will be legally obliged to maintain the person who created it. In addition, unless the trust was of a very specific nature, and entered into before there was any reason to believe that the settlor may need residential or nursing care it is extremely unlikely that the trust would be effective at sheltering assets from local authority assessment. Professional advice is essential if a trust is being contemplated. For these reasons the trust is no longer popular as a vehicle for planning for future incapacity.

### Banking arrangements

5.45 Joint accounts and other banking arrangements often seem an attractive proposition from a planning point of view compared with other more formal mechanisms. However, as with all mechanisms, they also have limitations and drawbacks.

6 [1978] 2 All ER 595.

**Third-party mandates**

- 5.46 An account holder who has mental capacity can authorise someone to access their account, for example because they have physical disabilities. This is called a ‘third-party mandate’.<sup>7</sup> A common alternative is for an individual to appoint someone to act as their agent under an ordinary power of attorney. However, neither arrangement survives mental incapacity.

**Joint bank accounts**

- 5.47 It is, of course, common for people to operate a joint account with a spouse, partner, child or other trusted person. A joint account involves two different kinds of legal relationship:

|   |   |
|---|---|
| Legal relationship between the joint account holders  | This is a private matter for the individuals. The individuals agree who pays what amounts in, what may be withdrawn, how the money in the account is split, how any borrowing on the account will be repaid.  |
| Their legal relationship with the bank  | This is controlled by a document called a mandate or authority which each joint-account holder must sign. Often this document forms part of the joint-account application form. Depending on the terms of the mandate, either or both account-holders can withdraw money separately or two signatures may be required. Either way, the general position is that both are individually as well as jointly responsible for all debts on the account, even if one of them puts all the money in and one of them takes all of it out. For this reason, on becoming aware that one of the joint account-holders lacks capacity, a bank will often cancel the joint authority to withdraw funds and effectively ‘freeze’ the account. |
|   | The legal justification is that authority to sign on a joint account entails a continuing consent which is broken by mental incapacity. From the bank’s viewpoint, there is also a risk management issue if one of the account holders lacks capacity to monitor the account and understand how the funds are spent.  |
| <i>Source: ‘You and your joint account’ (AE256), British Bankers’ Association Enterprises, July 2013.</i> |   |

<sup>7</sup> *Guidance for people wanting to manage a bank account for someone else*, AE254, March 2013, British Bankers’ Association, Pinners Hall, 105–108 Old Broad Street, London EC2N 1EX.

- 5.48 There is no single procedure which all banks and building societies adopt when a joint account-holder loses capacity. Different banks have different procedures. The degree of flexibility may sometimes depend on their knowledge of the account and their relationship with the account-holders. In some cases the bank may continue to pay pre-existing direct debits and standing orders for utilities, household bills, residential care fees and living expenses until a deputy has been appointed or a power of attorney has been registered.

### Joint accounts and attorneys

- 5.49 If one joint account holder loses the capacity to operate their account and a registered EPA or LPA is in place, the bank will allow the attorney and account holder with capacity to operate the account independently unless the account holder with capacity objects. In such cases the bank will then usually only allow the account to continue to operate on a 'both-to-sign' basis.<sup>8</sup>

### Limitations and disadvantages

- 5.50 The effect of the death of either account holder may be a particularly relevant consideration if one of them is frail. The general (but rebuttable) rule is that on death money in a joint account passes to the surviving account holder. This leaves room for disagreement in some cases if a parent's will provides for dividing their estate equally among all of their children. In practice, in the event of a dispute about the ownership of funds in an account this will come down to evidence as to the sources of the funds in the account.<sup>9</sup>
- 5.51 A second disadvantage relates to local authority means assessments. There can be a risk that some of the non-incapacitated account

<sup>8</sup> *Guidance for people wanting to manage a bank account for someone else* (see fn 7 above).

<sup>9</sup> The mere fact that the legal title to an account is held in two names does not mean that the beneficial title is held in the same manner – an example of the money in a joint bank account belonging beneficially to one of its signatories can be found in *Day v Harris* [2013] COPLR 254. The beneficial ownership of joint bank accounts is often a difficult question. One difficulty is often proving what was intended, and is often complicated by the competing presumptions of result trust and advancement. *Re Figgis* [1969] 1 Ch 123 is a case where the presumption of advancement was held to apply when a husband in ailing health put an account in his, and his wife's, joint names. In *Re Bishop* [1965] Ch 540 a husband and wife who had contributed unequally to a joint account were each held to be entitled to draw on the proceeds for joint purposes or for their own purpose (the presumption of advancement is to be abolished from a date to be appointed: Equality Act 2010 s199).

holder's funds are means-assessed by the local authority when it comes to assessing the contribution payable towards the incapacitated person's care home costs.

- 5.52 A third disadvantage materialises where a person added to the account then withdraws funds from it for their own benefit. If both had authority to draw on the account, it can be very difficult to prove that the withdrawals were not authorised and difficult to recover the funds.

### *Ordinary power of attorney*

- 5.53 An ordinary or general power of attorney can be effective for a specified period of time (for example, to cover a trip abroad) or run indefinitely until the donor brings it to an end by revoking it. The authority granted by the document is automatically revoked if the donor becomes mentally incapacitated.
- 5.54 Because the donor must be legally competent, an ordinary or general power of attorney does not need to be registered by the Public Guardian.

### *Appointeeships*

- 5.55 A deputyship may be unnecessary where the person's income consists solely of a state pension or benefits and they have no savings or equity in a house that needs to be sold.
- 5.56 In such cases, a spouse, partner or other suitable person can apply to the Department for Work and Pensions (DWP) for the pension or benefits to be paid to them as the person's 'appointee'. The appointee is authorised to receive the benefits and manage the benefit income. The appointee has various responsibilities and functions. The appointee:
- must report any change in the person's circumstances that may affect benefit entitlement;
  - may sign on behalf of the person if they are a non-tax payer to enable bank and building society interest to be paid without deducting income tax;
  - can only deal with the person's income from benefits, except for small amounts of savings which can be used to meet unforeseen emergencies.
- 5.57 Once the proposed appointee has completed the usual form, a representative from the DWP may visit the relevant person or ask for evidence confirming that they are no longer able to act on their own behalf.

- 5.58 Current departmental guidance is that the appointee should, wherever possible, be a close relative who lives with the person or visits them frequently. In certain circumstances, the appointee may be a friend, neighbour or professional carer.
- 5.59 An appointee who does not wish to continue in the role can resign and the DWP can revoke an appointeeship if it has evidence that the appointee is not acting in the person's best interests.
- 5.60 The regulations provide that a court-appointed deputy automatically becomes the relevant person's appointee in place of any existing appointee, but are silent as to the effect of registering an EPA or LPA.

### **Limitations and disadvantages**

- 5.61 The limitations of an appointeeship arrangement are fairly obvious: an appointee does not have authority to deal with capital or with other income belonging to the incapacitated person. A court order and/or the appointment of a deputy will be necessary if authority is required to manage other assets which the relevant person lacks capacity to manage, such as real property, personal possessions, cars, shares and so on.
- 5.62 Unspent pension and benefits may constitute capital. The general view for some time now has been that a deputy application is unnecessary provided that the appointee only holds a 'reasonable sum' of accrued savings. However, some banks set limits on the amount of money that a person can have in an appointeeship account.

### *Other options*

- 5.63 A number of other provisions are helpful on occasion.

### **Payment for necessary goods and services**

- 5.64 MCA 2005 s7(1) provides that: 'If necessary goods or services are supplied to a person who lacks capacity to contract for the supply, he must pay a reasonable price for them.' By subsection (2), 'necessary' means suitable to a person's condition in life and to his actual requirements at the time when the goods or services are supplied.
- 5.65 This provision combined the old common law rule relating to services with the statutory rule in the Sale of Goods Act 1979 relating to goods. Thus, if the milkman carries on delivering milk to the house of someone who has a progressive dementia, they can expect

to be paid. If, however, a roofer puts a completely unnecessary new roof on to that person's house, when all that was required was a minor repair, then the rule will not apply.

### **Expenditure on the person's behalf**

5.66 MCA 2005 s8(1) provides that where someone does an act to which section 5 applies which involves expenditure in connection with another person's care or treatment then it is lawful for them to pledge payment from the person's estate and also to apply money in the person's possession to meet the expenditure.

5.67 Furthermore, if expenditure is borne on the person's behalf by the individual acting under section 5, it is lawful for the latter to reimburse themselves from any money in the person's possession or to be otherwise indemnified by them.

5.68 This restates the common law rules which provided that a person acting as an 'agent of necessity' for another person should not be out of pocket as a result. However, nothing in the clause allows a carer to gain access to the relevant person's funds where they are held by a third party such as a bank or building society.

### **Direct payments**

5.69 Direct payments are local authority cash payments for people who have been assessed as being entitled to help from social services and who would like to arrange and pay for their own, independently contracted, care and support services.

5.70 Where a person with eligible needs lacks capacity to consent to the making of direct payments, a suitable person can be appointed to manage the payments on their behalf.<sup>10</sup> This could be an attorney, deputy, DWP appointee or other person such as a carer.

5.71 The suitable person is the only person who can access and manage the direct payment. The account should be in their name but identified as being held on behalf of the person the payments are for (for example, 'Joan Smith on behalf of Edward Smith').<sup>11</sup>

10 See (in England) Care Act 2014 s32, and the Care and Support (Direct Payments) Regulations 2014 SI No 2871. In Wales, the relevant provisions are contained in the Social Services and Well-being (Wales) Act 2014 s50 and the Care and Support (Direct Payments) (Wales) Regulations 2015 SI No 1815.

11 *Guidance for people wanting to manage a bank account for someone else* (see fn 7 above).

### Personal health budgets

- 5.72 Since October 2014, people receiving NHS Continuing Healthcare at home have had the right to receive a personal health budget. This can be paid to someone suitable on behalf of an incapacitated person: see regulations 5 and 6 of the National Health Service (Direct Payments) Regulations 2013<sup>12</sup> which are concerned with the appointment of representatives and nominees for incapacitated persons.

### Court orders other than deputyship

- 5.73 Where the authority of the Court of Protection is required, it is not always necessary to appoint a deputy.

- 5.74 The court is frequently asked to make single orders dealing with matters such as authorising an individual to sign or surrender a tenancy agreement, to litigate on an incapacitated person's behalf, to access their health or social care records, to challenge NHS funding decisions, to ratify a gift and so on. In some cases it ought not to be necessary to obtain a court order, for example in relation to access to records, but the applicant has been frustrated in their attempts to persuade the relevant authority that they are suitable or that the step is in the incapacitated individual's best interests.

- 5.75 Apart from one judge who occasionally does so, the court no longer makes the kind of old-style 'short order' previously made under the pre-MCA legislation or any contemporary variant of it. However, the legislation does include the principle that a single order is to be preferred to the appointment of a deputy and some estates are small and simple enough that what is required can be achieved in a single order.

### Contentious property and financial matters

- 5.76 Litigation or some formal action may be inevitable if a matter is contentious. The alternative ways forward then need to be explored. Consider the time limits for each possible court action<sup>13</sup> or complaint, the funding options for each and the remedies afforded by each. The aggrieved person needs to be clear about the outcome they wish to achieve – damages, the reversal of a funding decision, better services, disciplinary proceedings, the investigation and deregistration of a care home or service provider, an injunction, a prosecution, an

12 SI No 1617.

13 Where the claim is not for damages but what is known as equitable relief, for example an injunction, the equitable defence of laches (unreasonable delay in bringing the claim) may be raised.

apology, publicity – and who has power to provide that kind of remedy. Remember that the Court of Protection is not a regulatory, investigatory or complaints body, nor is it an inspectorate. Ombudsmen and regulators usually require that a complaint has been investigated locally and the service provider been given a fair opportunity to deal with the situation before considering a complaint.

5.77 Where possible, take professional legal advice or advice from Citizens Advice or a similar organisation. Be fair. Avoid multiple complaints to multiple bodies. This demoralises professionals, creates chaos and delay and damages the complainant's case. Be polite – apart from the fact that unpleasant emails and tweets are upsetting for those concerned, and may constitute a criminal offence, they are damaging when later produced in court and may have a bearing on who pays the litigation costs. Most important of all, if any step is being taken on behalf of an incapacitated person, remember that you must act in their best interests. Therefore apply the MCA 2005 s4 considerations and try to maintain a good relationship, or at least a working relationship, with their professional carers, family members, representatives and friends.

| <b>PROPERTY AND FINANCIAL AFFAIRS – POSSIBLE ALTERNATIVE REMEDIES</b> |   |
|---|---|
| <b>Remedy</b>   | <b>Possible relevance</b>   |
| <b>MCA 2005 matters</b>   |   |
| <b>Best interests meetings</b>  | If the contentious matter is connected with different opinions as to what is in an incapacitated person's best interests with regard to their property and finances, consider whether there is a professional such as a solicitor or a neutral family member who could convene a best interests meeting. Explore what kinds of formal mediation and alternative dispute resolution (ADR) are available locally.   |
| <b>Complaints about a deputy or donee</b>                             | <ul style="list-style-type: none"> <li>• The Public Guardian supervises court-appointed deputies and deals with representations (including complaints) about the way in which a deputy or donee of an LPA is exercising their powers. These functions may be discharged in co-operation with any other person who has relevant safeguarding functions such as a local authority or the police.</li> <li>• On application by the Public Guardian, the Court of Protection can order that any security bond in place is 'called in' to make good the loss.</li> </ul> |

| Remedy   | Possible relevance  |
|--|---|
| <b>Complaints about court funds</b>                                | Contrary to inaccurate press reports, the Court of Protection does not hold or administer funds on behalf of incapacitated people. It is the Court Funds Office (CFO) which provides a banking and administration service for the civil courts throughout England and Wales. See the Court Funds Rules 2011 SI No 1734 or contact the Court Funds Office, Glasgow G58 1AB.  |
| <b>Complaints about an NHS or social services funding decision</b> |   |
| <b>NHS</b>   | As to appeals against NHS decisions that a person does not qualify for NHS continuing healthcare, see the section below dealing with personal welfare matters.  |
| <b>Local authority</b>   | As to local authority community care means assessments and charges, see the section below dealing with personal welfare matters.  |
| <b>Ombudsmen and regulatory bodies</b>                             |   |
| <b>Ombudsmen</b>   | <p>Depending on the nature of the grievance, a number of ombudsmen and regulatory bodies may exercise a relevant function:</p> <ul style="list-style-type: none"> <li>• The Financial Ombudsman Service deals with complaints about banking, insurance, loans, credit and other financial services.</li> <li>• The Pensions Ombudsman deals with complaints and disputes about the way that occupational pension schemes and personal pensions are run. The complainant must usually have asked the Pensions Advisory Service for assistance first.</li> <li>• The Solicitors Regulation Authority (SRA) is a regulatory body which deals with failures to comply with professional obligations such as the duty to keep the person's affairs confidential or the duty to act honestly and with integrity.</li> <li>• The Bar Standards Board (BSB) is the equivalent regulatory body for barristers.</li> <li>• The Legal Ombudsman deals with complaints that a poor service has been provided by a barrister, solicitor or legal executive, eg a failure to keep the client properly informed.</li> <li>• The Housing Ombudsman Service deals with complaints from people who receive a direct service from registered social landlords in England and certain other landlords who are members of the scheme, including bodies which take over homes transferred from local authorities.</li> </ul> <p style="text-align: right;"><i>continued</i></p> |

| Remedy   | Possible relevance   |
|--|--|
| <b>Raising the matter with an elected representative or publicising it</b> |  |
| <b>MP</b>  | A request to the relevant person's MP concerning the provision of a public service often produces positive action. However, MPs cannot properly become involved in litigation issues being dealt with by a court.  |
| <b>Councillor</b>  | Similarly, a request to the person's local councillor about the provision of social services by (or through) the local authority can be effective.   |
| <b>Media/press</b>   | This may be an option but it is a legal minefield and one to be exercised with tremendous caution in relation to someone who lacks capacity to decide for themselves whether to waive their usual right to privacy and confidentiality. Consider their capacity to make the decision for themselves, whether <i>you</i> have any legal right to waive their right to privacy or confidentiality, whether therefore you may be liable to the incapacitated person, the best interests considerations in MCA 2005 s4, the law relating to defamation (libel, slander) and the legal rights and remedies of the other people involved.  |
| <b>Other kinds of legal proceedings (civil)</b>                            |  |
| <b>Actions relating to vulnerable or incapacitated persons</b>             | <ul style="list-style-type: none"> <li>• As to the enforceability of contracts entered into by an incapacitated person, a contract is not enforceable against them if a) the relevant person was incapable of understanding the nature of the contract they were entering into and b) the other contracting party knew of their incapacity at the time, or knew of such facts and circumstances that they must be taken to have known of the incapacity. A separate rule applies to the supply of necessary goods and services, which is now set out in MCA 2005 s7.</li> <li>• A gift made by an incapacitated person may be avoided in the circumstances set out in <i>Re Beaney</i> ([1978] 2 All ER 595 at 600). In the case of a simple and trivial gift, such as giving a small present to a friend, there is not much to it and very little to grasp in order to make a valid gift. More significant transactions – those where the reasonably foreseeable consequences are more significant for the person concerned – by definition require the capacity to understand and weigh the more significant consequences.</li> <li>• Unless the commission of a tort (civil wrong) requires specific intention, such as malice, avoiding legal liability may be limited to acts done while in a state of automatism, although there is a lack of recent authority.</li> </ul> |

| Remedy   | Possible relevance  |
|--|---|
| <p><b>Standard actions</b></p>   | <ul style="list-style-type: none"> <li>The common law duties of an attorney include duties a) of utmost good faith, b) to keep accounts, c) to disclose all relevant facts in certain transactions, d) not to make secret profits, e) to discharge duties with reasonable care.</li> </ul> <p>The relevant person has the usual range of available remedies in relation to breach of trust, breach of contract and torts (other civil wrongs which give rise to a right to a remedy, eg conversion, deceit, trespass to land, trespass to goods, nuisance, negligence).</p> |
| <p><b>Other kinds of legal proceedings (criminal)</b></p>              |   |
| <p><b>Offences relating to vulnerable or incapacitated persons</b></p> | <p>Fraud Act 2006 s4 (abuse of position) makes it a criminal offence where a person intentionally and dishonestly takes advantage of their position.</p>  |
| <p><b>Standard offences</b></p>  | <p>Incapacitated persons have the protection of the usual criminal laws relating to property, theft, fraud, false accounting, etc. Where justified, a concerned person may ask for an investigation to be undertaken by the police, the local authority adult safeguarding team, the DWP Fraud Investigation Unit or the fraud unit of a bank or other financial institution.</p>   |

## Non-contentious personal welfare matters

- 5.78 Non-contentious routine care and treatment is usually provided under the protection of MCA 2005 s5 without any application to a court.
- 5.79 If the relevant person still has capacity to appoint an attorney in relation to their future care and treatment, or some aspect of it, then this mechanism ensures that decisions are always made either with their own consent or that of a trusted person. They may also wish to consider making an advance decision to refuse treatment.
- 5.80 Direct payments and personal health budgets paid to a suitable person acting for, and hopefully with, the individual also enable care and treatment to be provided in a way which is consistent with the principles of the MCA 2005.
- 5.81 Guardianship under the MHA 1983 can provide a useful light-touch safety-net for citizens who are vulnerable to self-neglect or abuse but historically it is not favoured by local authorities, for reasons that appear to be almost entirely irrelevant.

- 5.82 The Children Act 1989 provides an alternative age-dependant framework in some cases.

## Contentious personal welfare matters

- 5.83 Most personal welfare litigation in the Court of Protection involves either:
- a public authority (such as a local authority or NHS trust) in dispute with a person alleged to lack capacity and/or one or more family members; or
  - a dispute between family members, in particular siblings, as to what personal welfare arrangements are in an incapacitated person's best interests.
- 5.84 Before commencing court proceedings, it is important to:
- Remember the duty to act in the relevant person's best interests, not one's own.
  - Remember that the normal rule in personal welfare proceedings is that each party bears their own legal costs and that the cost of independent expert reports is usually apportioned between the parties. Unless legally aided, the expense can be significant.
  - Remember that the Court of Protection cannot review NHS and local authority funding decisions. Provided they do not act so irrationally that it constitutes acting unlawfully, etc, it is for local and other public authorities, not judges, to decide how to allocate their limited resources. Furthermore, the funds available to public authorities, and levels of taxation and public expenditure, are political decisions, that is matters for all of us, ie for voters not judges.
  - Consider the likely emotional cost of being involved in prolonged litigation.

| <b>PERSONAL WELFARE MATTERS – POSSIBLE ALTERNATIVE REMEDIES</b> |  |
|---|--|
| <b>Remedy</b>   | <b>Possible relevance</b>  |
| <b>MCA 2005 matters</b>   |  |
| <b>Best interests meetings, ADR</b>                             | <ul style="list-style-type: none"> <li>• Consider, and where practicable explore, non-litigious ways of resolving the outstanding issues. The court expects those involved in an incapacitated person's care to co-operate where possible in seeking to ascertain and promote that person's best interests before asking a court to intervene and rule on the matter.</li> </ul> |

| Remedy  | Possible relevance   |
|---|--|
|   | <ul style="list-style-type: none"> <li>• Where relevant, ask the local authority or NHS body to convene a ‘best interests meeting’ at which the outstanding issues can be discussed and hopefully a way forward agreed.</li> <li>• Alternatively, or in addition, ask the local authority or NHS body for a professional second opinion as to the matter in dispute and the person’s best interests.</li> <li>• Explore what kinds of formal mediation and ADR are available locally.</li> <li>• Consider whether a neutral family member or professional such as a solicitor not involved in the dispute may be willing and able to mediate.</li> </ul> |
| <b>Alleged unlawful deprivation of liberty</b>            | If an incapacitated person is being deprived of their liberty in a care home or hospital without there existing any legal order or authority which authorises this, consider requesting the relevant local authority to review whether there is an unauthorised deprivation of liberty before applying to the Court of Protection. The non-court procedures relating to unauthorised deprivation of liberty are set out in MCA 2005 Sch A1 paras 67–73.  |
| <b>Deprivation of liberty: requesting a Part 8 review</b> | An application may be made to the Court of Protection challenging a standard authorisation authorising a deprivation of liberty. An alternative procedure in appropriate cases which does not rule out applying to the court if the outcome is adverse is to ask the local authority to undertake a ‘Part 8 review’. In general, it must do so if it receives a request from the person concerned or their representative. The procedure is set out in MCA 2005 Sch A1 Part 8.   |
| <b>Complaints about a deputy or donee</b>                 | The Public Guardian supervises court-appointed deputies and deals with representations (including complaints) about the way in which a donee of an LPA or a court-appointed deputy is exercising their powers. These functions may be discharged in cooperation with any other body with relevant statutory functions such as a local authority or police.   |

*continued*

| Remedy  | Possible relevance  |
|---|---|
| <b>Complaints about an NHS or social services decisions in relation to funding and services</b> |   |
| <b>NHS</b>  | <ul style="list-style-type: none"> <li>• ‘NHS continuing healthcare’ (CHC) refers to a package of ongoing care arranged and funded solely by the NHS where it has been assessed that the individual’s primary need is a health need. It can be provided in any setting. In a person’s own home, it means that the NHS funds all of the care required to meet the person’s assessed health needs. In care homes, it means that the NHS makes a contract with the care home and pays the fees for the person’s accommodation as well as all their care.</li> <li>• The <i>National framework for NHS continuing healthcare and NHS funded nursing care</i> sets out the principles and processes for determining eligibility. (Available at: <a href="https://www.gov.uk/government/publications/national-framework-for-nhs-continuing-healthcare-and-nhs-funded-nursing-care">https://www.gov.uk/government/publications/national-framework-for-nhs-continuing-healthcare-and-nhs-funded-nursing-care</a>)</li> <li>• The initial assessment consists of a screening checklist completed by a healthcare professional or social worker. Depending on the outcome, the relevant person will either be found to be ineligible for NHS continuing healthcare or be referred for a full multi-disciplinary assessment. A ‘decision support tool’ (ie detailed form) must then be completed which records the person’s assessed needs – no needs, low, moderate, high, severe, priority – across a number of ‘domains’ (behaviour, cognition, psychological needs, communication and mobility, etc) in order ‘to inform’ the final decision as to whether the person does have a primary health need.</li> <li>• There is a three-stage appeals process: Stage one involves an appeal to the relevant clinical commissioning group (CCG). Stage 2 involves a request to NHS England for an independent review. Stage three involves requesting a review by the Parliamentary and Health Service Ombudsman (see below).</li> <li>• NHS continuing healthcare should not be confused with NHS-funded nursing care. A person who lives in a care home who requires care from a registered nurse may be entitled to NHS-funded nursing care (FNC). The standard rate is £112 per week, and the higher rate £154.14 per week.</li> </ul> |

| Remedy   | Possible relevance  |
|--|---|
| <b>Local authority</b>                                       | <ul style="list-style-type: none"> <li>• If the relevant person does not qualify for NHS continuing healthcare, their local authority will be responsible for their care needs and for providing services for which they are eligible. Care services from the local authority are usually means-tested. In other words, if the person is eligible for local authority community care services, their finances are assessed and they may be required to pay some or all of the cost of the services.</li> <li>• Complaints about community care assessments and services are subject to the Local Authority Social Services and National Health Services Complaints (England) Regulations 2009 SI No 309.</li> <li>• The complaint is made initially to the local authority. A further complaint to the Local Government Ombudsman may then be possible if the complainant remains dissatisfied.</li> <li>• The Local Government Ombudsman cannot question the merits of community care funding decisions or professional judgements which have been reached properly. However, the Ombudsman can consider how those decisions were reached and whether they have been implemented properly (maladministration and service failure issues).</li> </ul> |
| <b>Judicial review</b>                                       | <p>In some cases, it may be possible to apply to the Administrative Court (a specialist court within the Queen's Bench Division of the High Court) for judicial review of a funding decision on the basis that the decision was unlawful. This might be because the decision of the NHS body or local authority was irrational, procedurally unfair, outside its legal powers, in breach of the Human Rights Act (HRA) 1998 or in breach of European Union law.</p>   |
| <b>Other complaints about the person's treatment or care</b> |   |
| <b>NHS complaints</b>  | <ul style="list-style-type: none"> <li>• The NHS Constitution explains people's rights when it comes to making a complaint.</li> <li>• In England, every NHS organisation must make arrangements for dealing with complaints in accordance with the Local Authority Social Services and National Health Services Complaints (England) Regulations 2009. Regulation 14 imposes a duty on NHS bodies to provide a written response to complaints.</li> </ul> <p style="text-align: right;"><i>continued</i></p>   |

| Remedy | Possible relevance  |
|--------|---|
|        | <ul style="list-style-type: none"> <li>• The standard complaints procedure is a two-tier procedure. The complaint must initially be made to the service provider (eg the GP or hospital) or to the commissioner of the service. Since the abolition of primary care trusts (PCTs) in 2013, NHS England commissions most primary care services, such as GP and dental services, while CCGs oversee the commissioning of secondary care such as hospital care and some community services.</li> <li>• A patient advice and liaison service (PALS) is available in all hospitals. It offers confidential advice, support and information to patients, families and carers.</li> <li>• In addition, an NHS Complaints Advocacy Service was established on 1 April 2013. Local authorities now have a statutory duty to commission independent advocacy services to provide support for people making, or thinking of making, a complaint about their NHS care or treatment.</li> <li>• Where a complaint is not resolved at the first-tier, the complainant may take it to the second stage, which is to refer the matter to the Ombudsman.</li> <li>• In England, the Parliamentary and Health Service Ombudsman is the final step for people who want to complain about being treated unfairly or receiving a poor service from the NHS, government departments (including the Ministry of Justice, the Department of Health and the DWP) and other public organisations (such as the Care Quality Commission (CQC)).</li> <li>• Much of the primary legislation governing the Ombudsman's remit is set out in the Parliamentary Commissioner Act 1967; Health Service Commissioners Act 1993; Parliamentary and Health Service Commissioners Act 1987; Health Service Commissioners Act 1993; Health Service Commissioner (Amendment) Act 1996.</li> <li>• In Wales, the bodies which the Public Services Ombudsman for Wales may investigate include the Welsh Assembly Government; a local health board; an NHS trust managing a hospital or other establishment or facility in Wales; an independent health provider; and a family health service provider.</li> <li>• See the Public Services Ombudsman (Wales) Act 2005.</li> </ul> |

| Remedy  | Possible relevance   |
|---|--|
| <p><b>Local authority and other care services</b></p> | <ul style="list-style-type: none"> <li>• The Local Authority Social Services and National Health Service Complaints (England) Regulations 2009 apply if a local authority provided or commissioned the care service.</li> <li>• The complainant must normally make the complaint initially to the local authority or to the person or body which provides the commissioned service. If the complaint cannot be resolved at this level, the second stage is to refer it to the Local Government Ombudsman.</li> <li>• Where the care is provided under a private contract with the provider, rather than commissioned by a local authority, the CQC requires all registered care providers to have an effective complaints process. The Local Government Ombudsman may now also investigate the complaint but expects the complaint to be made to the service provider in the first instance.</li> <li>• Provided that (in most cases) the local authority or care provider has had a reasonable opportunity to deal with the matter, the Ombudsman can investigate complaints about issues such as alleged poor-quality care, fees and charges, poor complaint handling, delay, assessments of need, safety and safeguarding. The Ombudsman's remit in some matters extends to personal care at home and supported living services for someone with learning disabilities.</li> <li>• A complaint may be made by a suitable representative if the person is incapable of nominating someone to make it for them.</li> <li>• Much of the relevant primary legislation is set out in the Local Government Act 1974 Parts III and IIIA; Health Act 2009; Regulatory Reform (Collaboration etc between Ombudsmen) Order 2007 SI No 1889.</li> <li>• In Wales, the bodies which the Public Services Ombudsman for Wales may investigate include local authorities (including county/county borough councils and community councils); independent social care providers and social landlords such as housing associations.</li> </ul> <p style="text-align: right;"><i>continued</i></p> |

| Remedy  | Possible relevance   |
|---|--|
| <b>Access to health and social care records</b> |  |
| <b>NHS and social services records</b>          | <ul style="list-style-type: none"> <li>• The Data Protection Act (DPA) 1998 applies to the records of living persons.</li> <li>• It provides that an individual who makes a request in writing and pays the relevant fee is generally entitled to given a copy of information held about them in an intelligible and permanent form unless this would involve 'disproportionate effort'.</li> <li>• There is a discretion to disclose information to the carers of an incapacitated adult in order to allow them to exercise their rights as carers where the consent of the person being cared for cannot be obtained.</li> <li>• Special rules apply to health and social work records. Access to health records may be refused on medical advice by the information holder ('data controller') if disclosure would be 'likely to cause serious harm to the physical or mental health or condition of the data subject or another person'. The information holder can only do this after consulting the 'appropriate health professional' (meaning the person most recently responsible for the patient's clinical care in connection with the subject matter of the request).</li> <li>• There is a similar provision in relation to social work records. In this case, however, the decision rests with the social work authority alone, with no obligation to consult the relevant professional.</li> <li>• The Access to Health Records Act 1990 now applies only to records of deceased persons created since 1 November 1991.</li> <li>• The Access to Medical Reports Act 1988 concerns medical reports prepared for employers and insurance companies.</li> <li>• Complaints that information has been disclosed to a third-party without a court order requiring or authorising this usually turn on whether there has been an unlawful breach of confidentiality or privacy or a breach of the DPA 1998 principles in relation to processing personal data fairly and lawfully.</li> </ul> |

| Remedy  | Possible relevance  |
|---|---|
| <b>The Information Commissioner</b>   | The Information Commissioner enforces and oversees the DPA 1998 and the Freedom of Information Act 2000, for both England and Wales. A person denied access to records may complain using the NHS and local authority complaints procedures and then, if a local resolution is not achieved, to the Information Commissioner's Office.  |
| <b>Other Ombudsmen and Commissioners</b>  |   |
| <b>Older People's Commissioner for Wales</b>                                      | The Commissioner may review the way in which the interests of older people are safeguarded and promoted when public bodies discharge, propose to discharge or fail to discharge their functions. It can also investigate whether certain bodies' advocacy, whistle-blowing and complaints arrangements are effective in safeguarding and promoting the interests of relevant older people in Wales. The Commissioner may examine the case of an older person in relation to a matter which affects the interests of a wider group of older people and not just the individual concerned. See the Commissioner for Older People (Wales) Act 2006.  |
| <b>Regulatory bodies</b>  |   |
| <b>NHS hospitals, local authority care services, private and voluntary sector</b> | <ul style="list-style-type: none"> <li>• The CQC is the regulator of health and social care in England. In general terms, it registers and inspects all health and social care provision and seeks to ensure that they meet essential standards of quality and safety.</li> <li>• The Health and Social Care Act 2008 (Regulated Activities) Regulations 2010 SI No 781 set out the essential standards of quality and safety expected from service providers of regulated activities, such as care homes. These are set out in regs 9–24 and are supported by compliance guidance.</li> <li>• The CQC deals with complaints about the standards of care homes, hospitals and other registered services as a whole rather than with the kind of individual complaint of poor service dealt with by ombudsmen.</li> </ul> <p style="text-align: right;"><i>continued</i></p> |

| Remedy   | Possible relevance   |
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|  | <ul style="list-style-type: none"> <li>• Monitor is responsible for authorising, monitoring and regulating NHS foundation trusts. Whereas the CQC is responsible for service standards and safety, Monitor is concerned with governance issues – the ability of an NHS foundation trust board to do their job and to provide the necessary service.</li> <li>• In Wales, the Care and Social Services Inspectorate Wales (CSSIW) is the body equivalent to the English CQC. It regulates and inspects domiciliary services and care homes for adults including those providing nursing care in order to ensure that they meet national minimum standards.</li> </ul> |
| <b>Individual practitioners</b>  | <ul style="list-style-type: none"> <li>• The General Medical Council (GMC) regulates doctors.</li> </ul>   |
|  | <ul style="list-style-type: none"> <li>• The Nursing and Midwifery Council (NMC) regulates nurses and midwives.</li> </ul>   |
|  | <ul style="list-style-type: none"> <li>• The Health and Care Professions Council (HCPC) regulates psychologists, social workers in England (in Wales, this is done by the Care Council for Wales) and speech and language therapists.</li> </ul>   |
| <b>Other ‘avenues’ for complaints and grievances</b>   |  |
| <b>MPs, local authority councillors, media/press</b>   | As to these options, see the section above dealing with property and financial affairs.  |
| <b>Other kinds of legal applications and proceedings (civil)</b>   |  |
| <i>The relevance of these options depends on whether a public authority or family member is seeking a safeguarding-type remedy or an incapacitated person (or someone on their behalf) is seeking to enforce their legal rights.</i> |  |
| <i>Possible remedies for public authorities<sup>a</sup></i>  |  |

[a] See also the guide published by the Social Care Institute for Excellence: *Gaining access to an adult suspected to be at risk of neglect or abuse* ([www.scie.org.uk/care-act-2014/safeguarding-adults/adult-suspected-at-risk-of-neglect-abuse/](http://www.scie.org.uk/care-act-2014/safeguarding-adults/adult-suspected-at-risk-of-neglect-abuse/)) addressing an issue which often arises in the context of the discharge of safeguarding obligations under the Care Act 2014 (in England) or the Social Services and Well-Being (Wales) Act 2014 (in Wales).

| Remedy  | Possible relevance  |
|---|---|
| <p><b>Application under the High Court's inherent jurisdiction</b></p>          | <ul style="list-style-type: none"> <li>• The exercise of the High Court's inherent jurisdiction may be used to obtain appropriate orders where a person not incapacitated by mental disorder or mental illness is vulnerable and is reasonably believed to be (i) under constraint; or (ii) subject to coercion or undue influence; or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent. See <i>DL v A local authority</i> [2012] EWCA Civ 253, (2012) 15 CCLR 267.</li> <li>• The purpose of the jurisdiction is facilitative rather than dictatorial. Its purpose is to facilitate the process of unencumbered decision-making by those with capacity free from external pressure or physical restraint.</li> </ul> |
| <p><b>MHA 1983 powers</b></p>   | <p>The MHA 1983 includes various provisions relating to compulsory admission to hospital, in particular sections 2, 3 and 4. The community provisions include reception into guardianship and sections 115 (entry to and inspection of private premises); 135 (warrants to search private premises and to remove to a place of safety persons suspected to suffer from mental disorder); and 136 (removal by police to a place of safety of persons in public places who appear to be suffering from mental disorder and to be in immediate need of care or control).</p>   |
| <p><b>Protecting the person's moveable property under the Care Act 2014</b></p> | <ul style="list-style-type: none"> <li>• Care Act 2014 applies when a person is provided with accommodation under the Care Act 2014 or admitted to hospital.</li> <li>• It imposes a statutory duty on the relevant local authority to take reasonable steps to prevent or mitigate loss or damage to the person's moveable property if the person is unable to protect or deal with it and no other suitable arrangements are in place.</li> <li>• A power is given to the local authority to enter the person's premises in order to take the steps necessary to protect their moveable property. Any reasonable expenses incurred in protecting the property are recoverable from the person concerned.</li> </ul> <p style="text-align: right;"><i>continued</i></p>  |

| Remedy   | Possible relevance   |
|--|--|
| <b>Emergency police powers to save life, limb, etc</b> | Police and Criminal Evidence Act (PACE) 1984 s17(1)(e) authorises a police constable to enter and search any premises for the purpose of saving life or limb or preventing serious damage to property.   |
| <b>Public health remedies</b>                          | <ul style="list-style-type: none"> <li>• Public Health Act 1936 s83 allows the local authority to require the cleansing (by disinfecting and decorating) of any premises which are in such a filthy or unwholesome condition as to be prejudicial to health or are verminous.</li> <li>• Sections 84 and 85 contain supplementary provisions concerning the ‘cleansing or destruction of filthy or verminous articles’ and the ‘cleansing of verminous persons and their clothing’.</li> <li>• Environmental Protection Act 1990 Part 3 provides local authorities with abatement powers in relation to ‘premises in such a state as to be prejudicial to health or a nuisance’.</li> <li>• Powers of entry, if need be under warrant, are contained in Public Health Act 1936 s287 and Environmental Protection Act 1990 Sch 3.</li> <li>• Local authorities and social landlords may take action under the no-nuisance terms in tenancy agreements.</li> <li>• See <i>Professional Practice Note: Hoarding and how to approach it – Guidance for Environmental Health Officers and others</i>, Chartered Institute of Environmental Health, September 2012. (Available at: <a href="http://www.cieh.org/uploadedFiles/Core/Policy/Publications_and_information_services/Policy_publications/Publications/Hoarding_PPN_May09.pdf">www.cieh.org/uploadedFiles/Core/Policy/Publications_and_information_services/Policy_publications/Publications/Hoarding_PPN_May09.pdf</a>.)</li> </ul> |
| <i>Possible remedies for the incapacitated person</i>  |  |
| <b>Damages claim in the civil courts</b>               | Under English law, an individual may be entitled to compensation if they have been injured as a result of the negligence of another person. Other actionable civil wrongs include trespass to the person (assault, battery), nuisance, breach of privacy and breach of confidentiality.  |

| Remedy                         | Possible relevance   |
|--------------------------------|--|
| <b>HRA 1998 claim</b>          | <p>The HRA 1998 makes it unlawful for a public authority to act incompatibly with the rights conferred by the European Convention on Human Rights. It allows a case to be brought in a UK court or tribunal against the authority if it does so. However, a public authority will not have acted unlawfully under the Act if as the result of another Act of Parliament it could not have acted differently. The Act extended the power to award damages for the breach of a convention right to any court that has the power to order payment of damages or compensation in a civil case.</p>   |
| <b>Equality Act (EqA) 2010</b> | <ul style="list-style-type: none"> <li>• The EqA 2010 provides that a person is disabled if they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. All employers and service providers in England, Wales and Scotland must follow the EqA 2010.</li> <li>• A person (A) discriminates against a disabled person (B) if: <ul style="list-style-type: none"> <li>(a) A treats B unfavourably because of something arising in consequence of B's disability, and</li> <li>(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.</li> </ul> </li> <li>• This prohibition does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.</li> <li>• EqA 2010 s19 deals with indirect discrimination, section 26 with the harassment of disabled people, section 27 with victimisation and Part 3 of the Act with the provision of services.</li> <li>• The EqA 2010 repealed and replaced the Disability Discrimination Act 1995.</li> </ul> |
| <b>Family law remedies</b>     | <ul style="list-style-type: none"> <li>• The Family Law Act 1996 allows non-molestation orders and occupation orders to be made in respect of 'associated persons' such as married persons, civil partners, cohabitants, relatives, parties to family proceedings and persons who have or have had an intimate personal relationship.</li> </ul> <p style="text-align: right;"><i>continued</i></p>  |

| Remedy                            | Possible relevance  |
|-----------------------------------|---|
|                                   | <ul style="list-style-type: none"> <li>• A power of arrest may not be attached to a non-molestation order. However, breach of such an order without reasonable excuse is a criminal offence and also a contempt of court.</li> <li>• An occupation order is an order by which the court regulates occupation of the home by declaring a person's entitlement to occupy it, prohibiting someone's right to occupy it and so on. Such orders may be made in respect of associated persons who share, have shared or intend to share a dwelling house as their home.</li> <li>• It is often said that the Court of Protection cannot prohibit the rights of occupation of capacitated people and cannot therefore exclude a joint owner or spouse from a dwelling-house. However, there is no case in point.</li> <li>• A power of arrest may be attached to an occupation order and breach of such an order is also a contempt of court.</li> </ul> |
| <b>Anti-harassment injunction</b> | <ul style="list-style-type: none"> <li>• The High Court and the county court have jurisdiction to grant an injunction under the Protection from Harassment Act (PHA) 1997.</li> <li>• Section 1 provides that a person must not pursue a course of conduct:               <ul style="list-style-type: none"> <li>(a) which amounts to harassment of another, and</li> <li>(b) which the person knows or ought to know amounts to harassment of the other.</li> </ul> </li> <li>• An actual or apprehended breach may be the subject of a claim in civil proceedings. An injunction may be made and the court may also award damages for (among other things) any anxiety caused by the harassment and any financial loss resulting from it. (A person who pursues a course of conduct in breach of section 1 also commits a criminal offence.)</li> </ul>   |
| <b>Common law injunctions</b>     | <p>It is still possible to obtain a common law injunction in the context of common law proceedings for torts such as assault, battery, trespass to the person and nuisance. However, it is relatively unusual for a situation not to be covered either by the Family Law Act 1996 or by the PHA 1997, eg where the behaviour complained of does not amount to a course of conduct involving associated persons.</p>   |

| Remedy  | Possible relevance   |
|---|--|
| <b>Compensation for criminal injuries</b>   | Victims of violent crimes can apply to the Criminal Injuries Compensation Authority (CICA) for compensation. It does not matter that a prosecution was not brought or that the perpetrator could not be held responsible because they were suffering from a mental disorder. The claim must be brought within two years from the date of the incident. A responsible person can make a claim on behalf of an incapacitated victim.   |
|   | <b>Other kinds of legal proceedings (criminal)</b>   |
| <i>A remand in custody, bail conditions and/or term of imprisonment may serve to protect an incapacitated person.</i> |  |
| <b>Offences relating to vulnerable or incapacitated persons</b>   | <ul style="list-style-type: none"> <li>• MCA 2005 s44 created an (ambiguous) offence of ill-treatment or wilful neglect. It applies to deputies, donees (LPA or EPA) and anyone who has the care of a person who lacks capacity or whom the carer reasonably believes lacks capacity.</li> <li>• Courts and Criminal Justice Act 2015 s20 created an offence for a paid care worker to ill-treat or wilfully to neglect an individual for whom they are caring. A care worker also includes those with managerial responsibility and directors (of equivalents) of organisations providing such care. A separate offence under section 21 exists in relation to care providers in respect of serious management failures giving rise to offences committed by care providers within their employ.</li> <li>• Domestic Violence, Crime and Victims Act 2004 s5 makes it an offence to cause or allow the death of a vulnerable adult.</li> <li>• MHA 1983 s127 makes it an offence for an officer or employee of an NHS hospital, independent hospital or care home to wilfully neglect or ill-treat a person who suffers from or appears to be suffering from a mental disorder. A like offence is committed if someone who has such a person in their custody or care ill-treats or wilfully neglects them.</li> <li>• The Sexual Offences Act 2003 includes various relevant offences such as sexual activity with a person with a mental disorder impeding choice and sexual activity by a care worker with a person with a mental disorder.</li> </ul> |

*continued*

| Remedy  | Possible relevance  |
|---|---|
| <b>Standard offences</b>                            | Incapacitated persons are also protected by the general criminal law (eg the Offences Against the Person Act 1861 and public order offences) but the likelihood of a successful prosecution may be affected by their inability to give evidence at trial.   |
| <b>Harassment and malicious communications, etc</b> | <ul style="list-style-type: none"> <li>• PHA 1997 s1 is dealt with above.</li> <li>• Criminal Justice and Police Act 2001 s42A makes it an offence to harass a person in their home.</li> <li>• The Malicious Communications Act 1988 provides that persons who send letters, electronic communications or make telephone calls with intent to cause distress or anxiety are guilty of a criminal offence.</li> </ul> |
|   | <ul style="list-style-type: none"> <li>• Communications Act 2003 s127 makes it an offence to send a message which the perpetrator knows to be indecent, obscene, of a menacing character or grossly offensive for the purpose of causing annoyance, inconvenience or needless anxiety.</li> </ul>   |