COURT OF PROTECTION **No. 11843118**

MENTAL CAPACITY ACT 2005

In the matter of
GM

BETWEEN:

MJ and JM

Applicants

- and -

THE PUBLIC GUARDIAN

Respondent

Introduction

1. The applicants are GM's late husband's great-niece, MJ, who was born in 1952, and his niece, JM, who was born in 1941. They are her deputies for property and affairs.

2. They have applied to the court for the retrospective approval of a number of gifts they have made from GM's funds to themselves, their families, some friends and several charities, and also for the court to agree what they have described as their deputyship expenses.

3. From time to time in this judgment there are references to a dispute between the applicants and the care home in which GM resides about the kind of clothes she should wear. This is rather like the subplot in a play by Shakespeare, in as much as it is slightly subversive and distracts from the issues on which the court is required to adjudicate. Nevertheless, it complements the main theme and adds a touch of realism.

The background

4. GM was born in October 1919. Her husband, Bert, died in 1961.

5. They had one child, Barbara, who died in 2010, aged 67. Barbara died intestate, a spinster without issue, and her estate, which amounted to just over £300,000, passed to GM absolutely. GM already had assets of her own worth just under £200,000.

6. GM's income is almost exactly £200 a week and comes from the state retirement pension, attendance allowance and an occupational pension. Because her savings are not in her own name, but held in her deputies' names, she does not receive any investment income.

7. GM and Barbara lived together in a small town in Derbyshire, but since Barbara's death GM has resided in a residential care home in the same town. The fees are £495 a week.

8. GM has not made a will, and the persons who would be entitled to her estate on intestacy are her late brother's daughter and the issue of her late brother's deceased son. According to the

applicants, who are related to her by marriage rather than blood, GM has not had any contact with members of her own family for more than twenty years.

9. GM has vascular dementia, which was first formally diagnosed in 2007.

10. On 25 August 2010 the court made an order appointing MJ and JM jointly and severally to be her deputies for property and affairs.

11. The order required the deputies to obtain and maintain security in the sum of £275,000. The premium for the security bond, which is payable from GM's estate, is £550 a year, and the purpose of the bond is to restore to GM's estate any loss that may have arisen as a result of the wrongful acts or omissions of her deputies.

12. Paragraph 2(c) of the order gave the deputies the following authority to make gifts:

> "The deputies may jointly and severally (without obtaining any further authority from the court) dispose of money or property of GM by way of gift to any charity to which she made or might have been expected to make gifts and on customary occasions to persons who are related to or connected with her, provided that the value of each such gift is not unreasonable having regard to all the circumstances and, in particular, the size of her estate."

The application

13. On 11 October 2011 the applicants applied for the following order. At that stage they were not legally represented. Accordingly, the wording of the order they were seeking was rather unconventional, even eccentric.

> "Gifts + donations already made be approved.
>
> Gifts + donations made on behalf of GM as one off's and covering the year prior to us obtaining the order and funds.
>
> Future gifts + donations will be for present time + therefore more modest.
>
> GM's wishes known to us having known her all our lives. She was very fond of golden labradors, wildlife, the countryside, Codnor Castle, history, the environment, education, children, MJ and family and JM and family, and the Christadelphians.
>
> We have acted as we thought the C.O.P. order granted us, enabling us to gift and donate in relation to the size of the estate. As GM is 92 years old we believe approx £200,000 to be adequate and if this is not enough [*for her to live on*], there is no way she will go short."

14. The application was accompanied by a witness statement, in which MJ said as follows:

> "Having a close relationship with GM and Barbara we feel the gifts and donations made on their behalf are in accordance with their wishes and that they were made as per the C.O.P. given to us 25/8/10 and were reasonable taking into account the size of the estate, and has left her with approx £200,000 and she is 92 yrs old.
>
> The gifts made this year relate to backdated payments as well as the current year – due to us not having access to funds until Nov 2010. We feel strongly that these would have been approved by GM if possible and certainly Barbara.

> GM had been a widow for over 50 yrs. Barbara had never married or had a boyfriend. They had been inseparable for 50 yrs doing everything together having same interests. Barbara carried a card saying she was a carer for GM and if anything happened to her we should be contacted and would know what to do. No other visitors apart from us for the past 20 years.
>
> We visit GM at least weekly (each) so she gets at least 2 visitors a week.
>
> We visit Barbara + Bert's grave to keep tidy + put flowers. This was done before Barbara's death and we have kept this up.
>
> We regularly take GM out by taxi, walks, play games etc. We do not take our duties lightly. We spend hours chatting (the deputies) regarding joint outings with GM sorting GM's wardrobe for the seasons.
>
> We met with Keith Robinson from the Office of the Public Guardian at the nursing home and afterwards received a letter saying we were coping with our duties well."

15. Keith Robinson had recommended that the applicants apply to the court for the retrospective approval of the money they had given away on GM's behalf.

16. As I have already mentioned, at this stage in the proceedings the applicants were not legally represented and there was no inkling of the magnitude of the gifts they were asking the court to ratify. As finally formulated, their application was for the approval of the gifts specified in paragraphs 25 to 31 below and the expenses described in paragraph 32.

Procedural matters

17. On 22 May 2012 I made an order joining the Public Guardian as the respondent and asking him to file a position statement by 13 July 2012. The applicants were given an opportunity to respond to the position statement by 10 August, and the matter was listed for an attended hearing on 22 August 2012.

18. On 9 July 2012 Sonya Hanson, an investigations officer with the Office of the Public Guardian, made a position statement and it would appear that on 30 May 2012 the Public Guardian had filed an application notice (of which the court had, and still has, no record) requesting that he compile a section 49 report, instead of a position statement.

19. There is an important difference between these two types of document. Under section 49 of the Mental Capacity Act 2005, the Public Guardian has extensive investigative powers, which he does not have if he is simply asked to make a position statement.

20. Accordingly, at the hearing on 22 August 2012, the Public Guardian was ordered to prepare a section 49 report by 31 October 2012, and the court requested him specifically to address the following matters in his report:
    (a) exactly how much had been gifted by the deputies, and to whom, and for what purpose;
    (b) exactly how much remained in GM's estate, including the assets that would have passed to her on Barbara's death in 2010;
    (c) the Public Guardian's view on whether it would be appropriate for the court retrospectively to approve any of the gifts made by the deputies and, if so, to what extent; and
    (d) the Public Guardian's recommendations regarding the future of the deputyship.

21. When they appeared at the hearing on 22 August 2012, the applicants were litigants in person. Because they were oblivious to the seriousness of the situation, I recommended that they seek legal advice and suggested that it may also be appropriate to consider making an application to the court for authority to execute a statutory will on GM's behalf. Having given advice of this nature, I recused myself from adjudicating on any statutory will application.

GM's choice of clothes

22. In the position statement of 9 July 2012 Sonya Hanson referred to a visit that had been carried out a week earlier by Christopher Carter, a Court of Protection General Visitor. She said:

> "8. A visit report dated 2nd July 2012 advised that GM is 'well cared for at (the residential care home) and all her basic needs are met.' The visitor commented that the deputies visit faithfully and are supportive of all her basic needs. They pay GM's fees regularly by banker's draft. The care home advised that she receives a weekly discounted rate of £495.00. The visitor advised that since GM's admission her weekly fees had been below that of other residents because the care home proprietors felt that the client did not have much money and did not wish the deputies to consider uprooting her. The visitor stated that the impression in the care home is that money is very limited for GM and she herself told our visitor that 'she does not have the money to buy things.'
>
> 9. The home advised the visitor that GM received £314.00 in personal allowance from 25th August 2010 to 25th August 2011. It was spent on either hairdressing or chiropody. They stated that the cost of the chiropody was strongly queried by the deputies as they felt it should be paid for by the NHS due to GM's diabetes.
>
> 10. The care home manager advised the visitor that 'the nieces had insisted that no money be left for GM to choose her own clothes (either when a discount clothing sale is put on in the home or by being taken out by a carer to the shops).' The visitor stated that 'the deputies have emphasised to the care home staff that they are not able to authorise or make available additional money,' implying that this is because of restrictions placed on them in having to account to the Office of the Public Guardian.
>
> 11. The report advised that the care home records show that GM's spending money is only topped up when it is getting very low and staff say that they have to remind the nieces about this. However the staff also confirmed that the nieces do regularly bring clothes in for GM which they have purchased for her. The visitor said 'GM is both capable and would appear to the staff to greatly enjoy looking at and choosing clothes for herself when the opportunity arises. The manager felt strongly that an allowance of even £100 extra per year through the resident spending money account for GM to choose some of her own clothes would significantly enhance the quality of her life.'"

23. The applicants took exception to the suggestion that they were denying GM the right to choose her own clothes, and in a witness statement MJ stated:

> "It is correct that JM and I are unhappy about the clothes purchased by GM. However, it is also correct that the type of clothing sold by the company restricts GM's choice. She is not allowed to express her own taste because no clothes which were or are her taste are sold by the company. I believe that this restricts GM's civil liberty to make a choice if these are the only clothes she is allowed to wear. …
>
> We are dedicated to GM having choice in her everyday life. In fact we would wish her to have more choice than she does at the moment with regard to choosing her own clothes. We wish to make clear that having known GM all these years it is upsetting for us to see her dressed in clothes she would have said were inappropriate for her but we shall keep our thoughts to

ourselves and continue to provide her with a large range of choice over and above what the home can provide so her choices are not restricted."

24. This was still a burning issue even at the final hearing on 3 April 2013, when the applicants said that the clothes that GM chooses for herself are cheap and tawdry in appearance and quality. She likes sequined dresses, which are terribly difficult to wash and iron, though the applicants had to concede that they don't do her washing and ironing personally. The care home takes care of her laundry.

Quantification of the gifts and expenses

25. Eventually, it emerged that the applicants were seeking approval of gifts of £231,259.50 and expenses of £46,552.24, making a grand total of £277,811.74.

26. The charitable gifts that they wished the court to ratify were as follows:

Christadelphian Church	20,000
Scottish National Trust	6,852
Derbyshire Wildlife	5,000
Guide Dogs for the Blind	5,000
RSPB	5,000
Codnor Castle	5,000
Nottingham University	5,000
Derby Hospital	5,000
Air Ambulance	500
	£57,352

27. The gifts that MJ had received personally were:

Rolex watch	18,275
Ring	16,500
Alexander McQueen handbag	995
Perfume	86
Cash gift from Barbara's estate	20,000
	£55,856

28. The gifts that JM had received personally were:

Omega watch	17,000.00
Ring	3,575.00
Ring	6,736.00
2 Mulberry handbags	1,085.50
Perfume	86.00
Cash gift from Barbara's estate	20,000.00
	£48,396.50

29. Throughout these proceedings MJ and JM described the watches and the rings they had bought as 'heirlooms', which they had acquired in memory of GM and Barbara with the intention that they would be passed down through the family from generation to generation.

30. The larger cash gifts made to family and friends were:

MJ's daughter, RJ	10,000
MJ's daughter, KT	10,000
MJ's husband	10,000
JM's daughter, SB	10,000
JM's granddaughter, DB	10,000
JM's grandson, JB	10,000
Barbara's friend, SG	1,000
SG's daughter	500
SG's granddaughter	500
SG's other granddaughter	500
	£62,500

31. There were also some other, smaller gifts that the applicants had made to their families:

MJ's daughter, RJ	Vivienne Westwood handbag	170	
	Birthday present	500	
	Christmas present	500	
			1,170
MJ's daughter, KT	Vivienne Westwood handbag	135	
	Birthday present	500	
	Christmas present	500	
			1,135
MJ's husband	Derby County season ticket	510	
	Christmas present	1,000	
			1,510
JM's daughter, SB	Vivienne Westwood handbag	170	
	Christmas present	1,000	
			1,170
JM's granddaughter, DB	Vivienne Westwood handbag	170	
	Birthday present	500	
	Christmas present	500	
			1,170
JM's grandson, JB	Birthday present	500	
	Christmas present	500	
			1,000
			£7,155

32. In addition to the gifts they had received, MJ and JM also claimed and sought the court's blessing for the deputyship expenses they had incurred. Each of them had bought a car and a computer. MJ purchased a Mini Countryman for £25,200 and JM bought a Ford Fiesta for £19,393.21. MJ had purchased an Apple MBPRO, which together with the software, came to £1,299.99, and JM opted for a Sony laptop and an Epson printer, the combined cost of which was £659.04. They claimed that they had bought the cars so that they could visit GM and the computers so that they could keep any eye on her investments online.

The section 49 report

33. The section 49 report was prepared for the Public Guardian by Sonya Hanson and was dated 24 October 2012. It was seventeen pages' long.

34. The following balance sheet, which doesn't quite balance, appeared on page 11:

FUNDS RECEIVED BY DEPUTIES	£
From GM	181,543.36
From Barbara's estate	315,908.80
Total	£497,452.16

FUNDS DISPOSED OF OR HELD BY THE DEPUTIES	£
Charity	57,352.00
Family and friends	62,500.00
MJ	55,856.00
JM	48,396.50
Other	7,155.00
Car for MJ	25,200.00
Car for JM	19,393.21
Computer for MJ	1,299.99
Computer for JM	659.04
Expenditure for GM	4,098.00
Nursing home fees	40,559.94
Assets remaining in GM's estate	177,230.96
Total	£499,701.54

35. From page 15 onwards the Public Guardian made the following recommendations:

> "The Public Guardian's position is that the deputies have made unauthorised gifts totalling £171,407.50 from GM's estate to themselves and their immediate family.
>
> The Public Guardian believes that this level of gifting by the deputies is excessive, not in the best interests of GM and is inconsistent with the deputies' fiduciary duty of care. In addition, the deputies have exceeded the authority given to them to act on GM's behalf in respect of her property and affairs and have exposed themselves to allegations of self-dealing.
>
> In addition, the Public Guardian also questions if the deputies had the authority to spend a total of £46,553.14 in purchasing a car and computer each and then claim them as 'deputyship expenses'. It is the Public Guardian's opinion that the cars and computers are further unauthorised gifts which the deputies had no authority to make to themselves.
>
> The Public Guardian has calculated that almost 44% of GM's total assets have been disposed of by way of gifts made by the deputies to themselves and their family where they had no authority to do so. Therefore, the Public Guardian cannot recommend to the court that the gifts shown below can be approved retrospectively.

Detail	Amount
Gifted to immediate family	£67,155.00
Gifted to MJ	£55,856.00
Gifted to JM	£48,396.50
Deputy 'expenses'	£46,553.14
Total	£217,960.64

However, the Public Guardian feels that the £2,500 gifted to SG and her immediate family should be approved. Barbara died intestate and her estate in its entirety passed to GM and it is understandable therefore that the deputies would want to make small gifts to individuals they feel that Barbara would wish to acknowledge. Deputies claim that they were following the instructions given to them by Barbara immediately before she died. In addition, the evidence supplied by the deputies suggests that Barbara and SG had a very close friendship with SG providing support for Barbara at a very difficult time.

Finally, the Public Guardian would not wish to seek any directions from the court in respect of the donations made by the deputies totalling £57,352.00 from GM's funds to charitable organisations.

GM has £177,230.96 left in her estate. The assets passed to her on the death of BM are outlined in the body of the report.

Notwithstanding the matter of what to the Public Guardian is the unauthorised gifting, the Public Guardian is also concerned that the deputies are not acting in accordance with the Code of Practice by not respecting GM's wishes in terms of the clothes she might wish to purchase from her own funds on the grounds that they are 'unsuitable'. The Public Guardian would say that this is an example of 'substitute decision-making' by the deputes rather than as the Code at section 5.23 advises that: '*The decision maker should make sure that all practical means are used to enable and encourage the person to participate as fully as possible in the decision-making process and any action taken as a result, or to help the person improve their ability to participate*.'

There is no indication that GM was involved in the decision-making process concerning the important matter of making substantial gifts and purchasing the heirlooms, just as she has not been supported by the deputies in purchasing the clothes she now wishes to wear. The Public Guardian's position is that GM has the right and sufficient funds to allow her to make such relatively insignificant purchases as she may wish to, where she retains the capacity to make a choice (however unwise it may seem to the deputies). There is evidence that GM has the capacity to make such choices which bring her pleasure and as such she should be encouraged to do so. Her deputies have not been supporting her rights in this.

Therefore, the Public Guardian would ask the court to consider dismissing the current deputies and that a panel deputy be appointed in their place to investigate the previous deputies' handling of GM's finances and if necessary call in the security bond and take any other action as might be considered appropriate to restore GM's estate to its proper level.

The current deputies should be directed to provide a full, final account to the new deputy.

The new deputy should also consider making an application to the court to consider if a statutory will should be made for GM."

The applicants' submissions

36. On 4 February 2013 I made a further directions order, enabling the applicants to respond to the section 49 report, if they wished, and listing the application for a final attended hearing on Wednesday 3 April 2013.

37. The applicants sought advice from Ann-Marie Aston of Williamson & Soden Solicitors, who instructed Miss Kerry Bretherton of Tanfield Chambers to represent them at the hearing on 3 April 2013. Shortly before the hearing, Miss Bretherton filed the following position statement on their behalf:

1. This matter is listed for a final hearing before Senior Judge Lush at 11am on 3 April 2013. The matters which are to be considered by the court are whether the current deputies should be replaced by a panel deputy and whether gifts made by them should be retrospectively approved. MJ and JM wish to remain as deputies and seek orders approving the gifts which they made.

2. There is no issue concerning capacity in this case. It is clear that GM lacks capacity and will not recover capacity.

3. It is equally clear that GM requires a deputy. The only issue is whether the role should be fulfilled by the existing deputies or a panel deputy. It is submitted that there is no reason why the current deputies should not continue to fulfil the role. The concerns of the OPG in the section 49 report are noted.

4. However, it is relevant that the deputies made very substantial gifts to charity believing that this is what GM would have wanted them to do. This corroborates their account of matters that they believed they were acting in her best interests and in accordance with her wishes rather than attempting to profit from the role. Further concerns can be avoided by greater supervision from the OPG or by specifying a financial limit on gifts or even prohibiting gifts not approved in advance by the OPG.

5. In particular, there is an issue concerning new clothes for GM. It is entirely appreciated that the home are attempting to give GM a choice, in accordance with the principles of the MCA 2005. However, it must also be the case that her wishes and feelings were she to have capacity should be respected. MJ and JM have strong views that the quality and style of clothes being offered to GM by the home are not in accordance with her taste.

6. Perhaps a way forward on this issue would be for them to purchase clothes for her in accordance with the styles she would have preferred and enabling her to select which clothes she retained. Most online clothes stores are prepared to fund unworn items purchased. This approach would meet the need to give her choice and ensure that proper quality clothes were provided. This is the type of involvement that would be missing were a panel deputy appointed.

7. With regard to the retrospective approval of the gifts the court is asked to approve those gifts. As indicated above the range and nature of the gifts demonstrate that there was no intention to commit financial abuse. The deputies acted as they believed GM would have acted and are those closest to her.

8. The deputies are concerned about the quality of the current care home. However, they properly recognise that any move for GM may be so disruptive in light of her age, that it would be counter-productive. The deputies consider that medical evidence in support of any move would be required.

9. There remains outstanding the question of a statutory will. Plainly a statutory will is needed and the deputies will review the position after the hearing on 3 April 2013 with a view to considering whether it is appropriate to make such application.

10. The court is asked to direct that the current deputies remain in post, with any restrictions upon the power to make gifts which the court considers appropriate. The deputies seek approval for those gifts which have been made.

The hearing

38. The hearing took place on Wednesday 3 April 2013 and was attended by Kerry Bretherton of counsel, Ann-Marie Aston, solicitor, and MJ and JM. Marion Bowgen of the OPG appeared on behalf of the Public Guardian.

39. In response to questions asked by Mrs Bowgen, both of the applicants conceded that:

    (1) Prior to their appointment as deputies they had signed a deputy's declaration (form COP4), which contains a number of undertakings. The first two are as follows:

        > "I will have regard to the Mental Capacity Act 2005 Code of Practice and I will apply the principles of the Act when making a decision. In particular I will act in the best interests of the person to whom the application relates and I will only make those decisions that the person cannot make themselves.
        >
        > I will act within the scope of the powers conferred on me by the court as set out in the order of appointment and will apply to the court if I feel I need additional powers."

    (2) They had not read the Mental Capacity Act 2005 Code of Practice and had no knowledge of the provisions of chapter 8, *What is the role of the Court of Protection and court-appointed deputies?* They were unaware of paragraph 8.47, which says:

        > "Once a deputy has been appointed by the court, the order of appointment will set out their specific powers and the scope of their authority. On taking up the appointment, the deputy will assume a number of duties and responsibilities and will be required to act in accordance with certain standards. Failure to comply with the duties set out below could result in the Court of Protection revoking the order appointing the deputy and in some circumstances the deputy could be personally liable to claims for negligence or criminal charges of fraud."

    (3) They had not discussed any of their gift-making proposals with GM.

    (4) They had no evidence of the extent to which GM had given presents to them and other family members in the past. However, they said that GM and BM used to treat them to a nice meal or pay the entrance fees when they went somewhere on a day's outing. GM had bought a fan heater for MJ's daughter when she was at university and, as far as any cash gifts were concerned, they tended to be in the region of £20.

    (5) They had invested the rest of GM's funds in bank accounts and premium savings bonds in their own names - some in MJ's sole name, others in JM's sole name - but, having received legal advice, they had arranged for these investments to be transferred back into GM's name.

40. In response to a question I asked her, JM said that, if GM had made a will, they would possibly have acted differently, but that the gifts they had made were in memory of Barbara, anyway, and had been taken from her estate, rather than GM's.

41. There was also a hint that, if the court were to remove the applicants as deputies, their humiliation and loss of face vis-à-vis the care home staff would be such that they would find it difficult to continue visiting GM.

Deputyship expenses

42. Section 19(7) of the Mental Capacity Act 2005 provides that:

> "The deputy is entitled –
> (a) to be reimbursed out of P's property and affairs for his reasonable expenses in discharging his functions, and
> (b) if the court so directs when appointing him, to remuneration out of P's property for discharging them."

43. The Act distinguishes between two kinds of entitlement: the reimbursement of expenses, on the one hand, and remuneration, on the other. A deputy is entitled, as of right, to be reimbursed for the expenditure he incurs in carrying out his functions, though a 'reasonableness test' arises as to the amount he can actually recover.

44. The Office of the Public Guardian publishes a booklet called *A guide for Deputies appointed by the Court of Protection* (OPG510), which is available in both hard copy and on the OPG website. Page 22 of this guide states as follows:

> "Will I be reimbursed for my expenses?
>
> The Act allows you to be reimbursed for reasonable expenses incurred when acting as a Deputy. Examples of expenses include telephone calls, travel and postage.
>
> Expenses are not payment for your time spent while acting as a Deputy – this is called remuneration and can only be claimed if the Court order specifically states it. If you wish to receive remuneration you should ask the Court to consider this in your initial application.
>
> The expenses you are entitled to claim and what is considered reasonable will vary according to the circumstances of each case. It depends on what you are required to do and also the value of the estate of the person who lacks capacity.
>
> The OPG expects that you will only claim reasonable and legitimate expenses. If you claim more than £500 in expenses per year the OPG may require you to explain your expenses in detail and frequently.
>
> If your expenses are considered unreasonable you may be asked to repay them, and in extreme cases the OPG may apply to the Court to cancel your appointment."

Decision on deputyship expenses

45. MJ and JM are claiming deputyship expenses of £46,552.24 for the cars and computers they bought from GM's funds.

46. The purpose of reimbursing a deputy for the expenses he has incurred is to ensure that he is not 'out-of-pocket' for the services he has rendered.

47. In this case, the deputies have not incurred any pecuniary loss and I agree entirely with the Public Guardian's submission that the cars and computers are not 'expenses' at all, but additional unauthorised gifts, which the deputies had no authority to make to themselves. Accordingly, I refuse to ratify this expenditure.

The scope of a deputy's authority to make gifts

48. Section 16(2)(b) of the Mental Capacity Act 2005 provides that the court may appoint a deputy to make decisions on behalf of 'P', which is the shorthand term used in the Act for the person who lacks capacity or to whom the proceedings relate.

49. Section 16(3) states that the powers of the court under section 16 are subject to the provisions of the Mental Capacity Act 2005 and, in particular, sections 1 (the principles) and 4 (best interests).

50. Section 16(4) provides that the court may "confer on a deputy such powers or impose on him such duties, as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order or appointment made by it under subsection (2)."

51. Section 18(1)(b) provides that the powers of the court under section 16 extend to making a gift or other disposition of P's property.

52. Paragraph 2(c) of the order of 25 August 2010 appointing JM and MJ as GM's deputies defined the scope of their authority to make gifts in the following terms:

> "The deputies may jointly and severally (without obtaining any further authority from the court) dispose of money or property of GM by way of gift to any charity to which she made or might have been expected to make gifts and on customary occasions to persons who are related to or connected with her, provided that the value of each such gift is not unreasonable having regard to all the circumstances and, in particular, the size of her estate."

53. Similar wording appears in almost every order appointing a deputy for property and affairs, and the intention of the court is that deputies should have the same powers to make gifts as attorneys acting under an Enduring Power of Attorney ('EPA') or a Lasting Power of Attorney ('LPA').

54. It is important that deputies and attorneys should:
    (a) realise that they have only a very limited authority to make gifts;
    (b) understand why their authority is limited; and
    (c) be aware that, in an appropriate case, they may apply to the Court of Protection for more extensive gift-making powers.

55. The wording of the authority conferred on deputies is based on the provisions of section 12 of the Mental Capacity Act 2005, which defines the scope of the authority of a donee of an LPA to make gifts of the donor's property.

56. Section 12 is, in turn, based on section 3(5) of the Enduring Powers of Attorney Act 1985, which defined the scope of the authority of an attorney acting under and EPA to make gifts of the donor's property. Although the 1985 Act was repealed when the Mental Capacity Act came into force, section 3(5) has been re-enacted as paragraph 3(3) of Schedule 4 to the Mental Capacity Act 2005.

57. The Enduring Powers of Attorney Act 1985 was based on recommendations made by the Law Commission in its report *The Incapacitated Principal*, which was published in July 1983. In that report the Law Commission wrestled with various philosophical arguments that highlight the tension that exists in this jurisdiction in striking the right balance between state intervention and a *laissez-faire* environment.

58. Having stated that its first consideration was "that a capable donor should be able to direct his affairs as he wishes without requiring the consent of others", the Law Commission went on to say, at paragraph 3.11:

> "The second consideration is the need to protect the interests of the donor when he has become incapable. Once that event has happened, the attorney would, in the absence of special safeguards, be able to use his power without any supervision by anybody. The donor's incapacity involves a material change of circumstances and deprives him of the control that a capable attorney can exercise over his attorney to prevent misuse of the power, accidental or otherwise. While we do not think that deliberate fraud would be likely to be commonplace, we suspect that many relatives of donors might be tempted to use their EPAs in ways which were not strictly for the donor's benefit. This would not necessarily be done dishonestly. Attorneys might persuade themselves that, if their donor had been capable, he would have wanted them to benefit from his property out of gratitude for their help. Or they might wish to reduce the incidence of taxation that would arise on the donor's death by giving away much of his estate in advance."

59. At paragraph 3.11 of *The Incapacitated Principal* the Law Commission recommended as follows:

> "*Gifts*. We have already pointed out that attorneys may be tempted to help themselves to the donor's property, albeit with the best of intentions. We accordingly recommend that the authority of the EPA attorney to make gifts of the donor's property should be limited."

60. The Law Commission then went on to set the limit in the terms that were later to appear in section 3(5) of the Enduring Powers of Attorney Act 1985, and at paragraph 4.29 of the report said this:

> "We accept that these limitations on the attorney's authority may be considered by some people to be either unnecessary or arbitrary. Not for the first time in this project, however, we have had to balance considerations of simplicity and freedom of action against the need to protect donors from exploitation. On balance we feel that limitations are necessary. As for the limitations being arbitrary we have endeavoured to give such authority as we think most attorneys would be ever likely to need."

61. There was a footnote to paragraph 4.29, which said, "If greater authority were needed it might be possible to obtain this with leave of the court: see para. 4.83(vii) below." Paragraph 4.83(vii) said:

> "*Authorising benefits to others*. We have already recommended restrictions on the attorney's authority to use his EPA to benefit persons other than the donor himself. Such restriction would operate even if the EPA purported to give the attorney a greater authority in this respect. These restrictions were designed to protect the donor's interests but we see no reason why the Court should not be able to relax them and give the attorney greater authority to benefit others (including himself) provided that such greater authority was not prohibited by the instrument."

62. Clause 2(c) of the order appointing MJ and JM as deputies allows them to make gifts provided that three conditions are satisfied. These are:
    - the *timing* of the gift must fall within the prescribed parameters;
    - the *recipient* must either be a charity, or an individual who is related to or connected with GM; and
    - the *value* of the gift must be not unreasonable, having regard to all the circumstances and, in particular, the size of GM's estate.

63. As regards timing, the deputies can make a gift to charity at any time, but in the case of an individual, the gift must be made 'on customary occasions'. The expression 'customary occasion' was not defined in the order appointing MJ and JM as deputies, but it is defined in section 12(3) of the Mental Capacity Act 2005 as follows:

"Customary occasion" means –

(a) the occasion or anniversary of a birth, a marriage or the formation of a civil partnership, or

(b) any other occasion on which presents are customarily given within families or among friends and associates.

64. As regards the recipient of any gift, a person must be someone who is *related to* or *connected with* GM. As section 12(3)(b) of the Act indicates, generally this is likely to mean family, friends and associates. The deputies may also make gifts to any charity to which GM made or might be expected to make gifts if she had the capacity to make such a decision herself. The words "might be expected to make" allow new gifting, which is not generally permitted in the comparable legislation in some other common law jurisdictions.

65. As regards the amount given, the gift must be of such a value that it can properly be described as *not unreasonable*. This should be ascertained by having regard to <u>all</u> the circumstances, although by way of emphasis reference is made to the size of GM's estate.

66. In this context 'estate' should be construed as meaning the totality of P's current and anticipated income and capital, expenditure and debts.

67. The first and paramount consideration must be whether the gift is in P's best interests, and other circumstances to which regard should be given, in addition to the size of P's estate, include, but are not limited to, the following:
    - the extent to which P was in the habit of making gifts or loans of a particular size or nature before the onset of incapacity;
    - P's anticipated life expectancy;
    - the possibility that P may require residential or nursing care and the projected cost of such care;
    - whether P is in receipt of aftercare pursuant to section 117 of the Mental Health Act 1983 or NHS Continuing Healthcare;
    - the extent to which any gifts may interfere with the devolution of P's estate under his or her will or intestacy; and
    - the impact of Inheritance Tax on P's death.

68. In the past, the Court of Protection and the Office of the Public Guardian have avoided issuing guidelines that could be construed as prescribing a specific limit on the extent to which deputies and attorneys can make gifts. In some common law jurisdictions, however, legislators have considered it desirable to prescribe a limit on the amount that can be gifted annually by deputies or attorneys.

69. For example, in Alberta, Canada, the primary legislation is the Adult Guardianship and Trustee Act (AGTA), which came into force on 30 October 2009. 'Guardianship' means personal welfare decision-making and 'trusteeship' refers to financial decision-making on behalf of incapacitated adults. AGTA is widely regarded as the most progressive and state-of-the art statute of its kind in the world. The secondary legislation, the Adult Guardianship and Trustee Regulation, AR 219/2009, regulation 14(1) provides that:

> "The total value of gifts made by a trustee in a year out of the represented adult's property under section 60(2) of the Act shall not exceed 5% of the represented adult's taxable income for the previous year."

70. In British Columbia, the primary legislation is the Powers of Attorney Act 1996, section 20(1)(c) of which provides that, "An attorney may make a gift or loan, or charitable gift, from the adult's property if the enduring power of attorney permits the attorney to do so or if …. the total value of all gifts, loans and charitable gifts in a year is equal to or less than a prescribed value."

71. Section 3 of the Power of Attorney Regulation, B.C. Reg. 20/2011, which has been effective since 1 September 2011, gives the following prescribed value:

> "For the purposes of section 20(1)(c) of the Act, the total value of all gifts, loans and charitable gifts made by an attorney in a year must not be more than the lesser of:
> (a) 10% of the adult's taxable income for the previous year; and
> (b) $5,000."

72. The Canadian dollar is currently worth about 65 pence, so the maximum amount that could be gifted by an attorney on behalf of an incapacitated donor in British Columbia would be £3,250 a year.

73. I am not entirely convinced that these examples strike the right balance between autonomy and protection. Nevertheless, they do emphasise that the threshold at which the value of a gift made by a deputy or attorney could be considered as 'not unreasonable' is likely to be low.

Decision

74. I am satisfied that, on the balance of probabilities, GM lacks the capacity to make substantial gifts or to ratify, or not to ratify, the gifts that have been made on her behalf by the applicants.

75. Her GP completed an assessment of capacity form (COP3) on 18 January 2012, in which he said that she had been suffering from vascular dementia since 2007, and as a result was unable to make a decision for herself in relation to her financial affairs. He went on to comment that:

> "GM has no understanding of the extent of her investments and estate.
>
> Once told of the extent of her estate she is unable to repeat it back to me a few minutes later, having forgotten it.
>
> GM is unaware of her next of kin (she believes her deceased daughter to be alive). She has no understanding of her estate and investments and no concept of the need to pay for her accommodation."

76. Accordingly, the court may intervene and make a decision on her behalf in her best interests.

77. Applying the checklist of considerations in section 4 of the Mental Capacity Act 2005, as to what would be in GM's best interests, subsection (3) requires us to consider whether it is likely that she will at some time have capacity in relation to the matter in question and, if so, when that is likely to be.

78. In response to the question in form COP3, "Do you consider there is a prospect that [she] might regain capacity in the future in respect of the decision to which the application relates?" her GP replied:

> "No. GM is suffering from an irreversible slowly progressive dementia."

79. Subsection (4) requires us, so far as reasonably practicable, to permit and encourage GM to participate as fully as possible in making this decision.

80. In this respect, we must have regard to the Public Guardian's position statement of 9 July 2012, in which Sonya Hanson referred to the visit made by a Court of Protection General Visitor a week earlier. At paragraphs 13 and 14 she said:

> 13. The Visitor advised that '*GM has no awareness that she or anyone acting on her behalf has made any gifts*.' The visitor asked GM if she would make gifts to her nieces JM and MJ. The visitor advised '*while acknowledging that they were good and came to see her, she immediately said 'Why? They've never given me any money.' She was puzzled by my suggestion that people sometimes gave to charities and I noted her reactions to a sample I listed:*
> a. Guide Dogs, '*I don't think so*.'
> b. Eye Hospital, '*My eyes are all right*.'
> c. Air Ambulance, '*I don't know*.'
> d. National Trust for Scotland, enthusiastic, '*I love Scotland, so yes*.'
> e. RSPB/Scottish Birds, '*I like birds but I couldn't support them*.'
> f. Derbyshire Wildlife, '*No*.'
> g. Christadelphian Church, '*Yes, they're very good*.'
>
> 14. The visitor advised '*GM clearly had reservations about giving much money away because she was insistent that she didn't have any money herself. She was shocked when I said that she did have some money*.'

81. Section 4(6) of the Act requires us to consider, so far as is reasonably practicable, GM's past and present wishes and feelings (and, in particular, any relevant written statement made by her when she had capacity); the beliefs and values that would be likely to influence her decision if she had capacity, and any other factors that she would be likely to consider if she were able to do so.

82. As regards GM's past wishes and feelings, there is relatively little to go on and unfortunately there is no relevant written statement made by her when she still had capacity; particularly a will, which would have indicated the intended recipients of her bounty. What we do know, however, is that, according to the form COP1A, completed by MJ on 11 October 2011, before she lost the capacity to manage her financial affairs, GM had set up a monthly direct debit for £20 payable to the National Deaf Children's Society. Surprisingly, this was not one of the many charities to which the applicants made a substantial gift on her behalf. This level of gifting is consistent with the applicants' evidence at the hearing on 3 April 2013 that, before the onset of her vascular dementia, GM made relatively modest monetary gifts in the region of £20 a time. As regards GM's present wishes and feelings, the Court of Protection Visitor's observations are noted.

83. Finally, section 4(7) requires us to have regard to the views of others, including the deputies themselves, as to what would be in GM's best interests and, in particular, as to the matters mentioned in subsection (6).

84. We have heard the views of MJ and JM and, not unexpectedly, they submit that, if she had capacity, GM would have made the gifts that they have made on her behalf. There was an added complication, in that, whenever they were not entirely sure whether GM would have made these gifts, they resorted to claiming that her daughter Barbara would have made them. We only have their word to go on. What we do know for certain is that neither GM nor Barbara ever made a will containing gifts of the nature made by the applicants.

85. The wording of the order appointing deputies for property and affairs envisages a threshold, albeit an imprecise one, beyond which any gifting by them could be regarded as unreasonable. For convenience, I shall call it the 'reasonableness threshold.'

86. The reasonableness threshold differs from case to case depending on the individual circumstances.

87. In *Re Buckley: The Public Guardian v C* [2013] COPLR 39, at paragraph 43, I said that:

> '… subject to a sensible *de minimis* exception, where the potential infringement is so minor that it would be disproportionate to make a formal application to the court, an application must be made to the court for an order under section 23 of the Mental Capacity Act 2005 in any of the following cases:
>
> (a) gifts that exceed the limited scope of the authority conferred on attorneys by section 12 of the Mental Capacity Act …'

88. *Re Buckley* involved a Lasting Power of Attorney but the same principle would apply to a deputyship, where the wording of the order appointing the deputies is virtually identical to that in section 12 of the Mental Capacity Act.

89. Being both proportionate and pragmatic, and to prevent the court from being overwhelmed with applications, with which it does not have the resources to cope, this *de minimis* exception can be construed as covering the annual IHT exemption of £3,000 and the annual small gifts exemption of £250 per person, up to a maximum of, say, ten people in the following circumstances:
    (a) where P has a life expectancy of less than five years;
    (b) their estate exceeds the nil rate band for Inheritance Tax ('IHT') purposes, currently £325,000;
    (c) the gifts are affordable having regard to P's care costs and will not adversely affect P's standard of care and quality of life, and
    (d) there is no evidence that P would be opposed to gifts of this magnitude being made on their behalf.

90. The *de minimis* exception referred to in the preceding paragraph does not apply to potentially exempt transfers, or to the use of the normal expenditure out of income exemption, where the authorisation of the court is required under section 18(1)(b), section 23(4) and paragraph 16(2)(e) of Schedule 4 to the Mental Capacity Act 2005.

91. GM's estate does exceed the nil rate band by quite some margin, and, as she is 93½, it would be reasonable to assume that her life expectancy is less than five years. Hence, the reasonableness threshold in this case would be £4,500 a year. This comprises the annual IHT exemption of £3,000 (which, presumably, would have been split equally between MJ and JM) and the annual small gifts exemption of £250 per person for six other people who are related to or connected with GM; namely, MJ's husband and their two daughters, and JM's daughter and two grandchildren.

92. On this basis, MJ and JM had the authority, under paragraph 2(c) of the order appointing them as deputies, to make gifts not exceeding £4,500 a year to persons who are related to or connected with GM and, strictly speaking, in order to comply with the wording of the order, they should have spread the payment of this sum over customary occasions during the year, such as birthdays and Christmas.

93. Accordingly, in this case, I am able to approve the following gifts:

The applicable IHT exemptions for the years 2010/11, 2011/12, and 2012/13.	£13,500
As stated in the section 49 report, "the Public Guardian would not wish to seek any directions from the court in respect of the donations made by the deputies totalling £57,352 from GM's funds to charitable organisations."	£57,352
As stated in the section 49 report, "the Public Guardian feels that the £2,500 gifted to SG and her immediate family should be approved."	£2,500
	£73,352

94. I have allowed gifts to the applicants and their families totalling £13,500 because, for the reasons stated above, to this extent they did not contravene their authority. However, I have disallowed any more extensive gifts to them and their families for the following reasons.

95. I do not accept that the gifts they made were in GM's best interests. They are completely out of character with any gifts she made before the onset of dementia. There was no consultation with her before they were made and there was no attempt to permit and encourage her to participate in the decision-making process, or to ascertain her present wishes and feelings.

96. Nor do I accept the applicants' argument that they believed that the order appointing them allowed them to make gifts on such an extensive scale. They should have been aware of the law regarding their role and responsibilities. Ignorance is no excuse.

97. The fact that GM's remaining assets were in the names of one or other of the applicants, rather than in GM's name, is a further example of what is, at best, ignorance, and, at worst, stealth.

98. I realise that MJ and JM are the only visitors that GM receives, but this does not give them a licence to loot, and I was unimpressed by the veiled threat that, if the court were to remove them as deputies, they would find it difficult to continue seeing GM.

99. If they had made a proper application for the prospective approval of gifts, I would possibly have allowed them to make gifts to themselves and their families to mitigate the incidence of IHT on GM's death, but only if they had been the residuary beneficiaries under her will.

100. GM is currently intestate, and MJ and JM have no entitlement to her estate on death. It was for this reason that I suggested, at the hearing on 22 August 2012, that they obtain legal advice and consider making an application for a statutory will. I am surprised that, seven months later, no further action has been taken in this respect.

101. In this case, a statutory will is the missing piece in the jigsaw and, until it is in place, the picture is incomplete.

102. The applicants were seeking approval of gifts and expenses totalling £277,811.74. The approval of only £73,352 has left them personally liable to GM's estate in the sum of £204,459.74, which they must pay back.

103. I shall not attempt to prejudge the outcome of any statutory will application, but, if an order is made for the execution of a will on GM's behalf, there is a possibility that MJ and JM could become her residuary beneficiaries, in which case their liability to her estate may become less relevant.

104. On the other hand, the judge who considers the statutory will application may take the view that, if she had testamentary capacity and was fully aware of what has been going on, GM would be outraged by the applicants' conduct and would make no provision for them at all.

105. Alternatively, the judge may find that GM's intestate heirs have had closer contact with her than the applicants suggest, or that certain charities, such as the Christadelphian Church, the Scottish National Trust or the National Deaf Children's Society, have a more meritorious claim on her bounty and should receive the lion's share of her estate.

106. In any event, there is no immediate need to call in the security bond, and any decision to enforce it can be deferred until a statutory will has been executed and the picture is complete.

107. For the purposes of section 16(8) of the Mental Capacity Act, I am satisfied that the deputies have behaved in a way that contravened the authority conferred on them by the court and was not in GM's best interests.

108. I am not persuaded by any of Miss Bretherton's submissions on their behalf, and I have no hesitation in revoking their appointment as deputies. GM's finances are in disarray because of their conduct, and it is in her best interests that someone with experience of cases of unjust enrichment and restitution, such as a panel deputy, is appointed to manage her affairs in their place.

DENZIL LUSH
Senior Judge
22 April 2013