GIFTS MADE BY PATIENTS

Senior Judge Lush has recently given helpful guidance on the circumstances in which a deputy or the donee of a lasting power of attorney may make gifts out of P's estate, without requiring the court's authorisation, and the circumstances in which the court may authorise such gifts when the attorney or deputy makes a specific application.

So far as an attorney is concerned, section 12 Mental Capacity Act 2005 (the Act) authorises him to make gifts on customary occasions to persons including himself, who are related to, or connected with the donor, or to any charity to whom the donor made or might have been expected to make gifts if the value of each gift is not unreasonable having regard to all the circumstances and, in particular, the size of the donor's estate. Customary occasions are defined as including anniversaries of births, marriages or the formation of a civil partnership or any other occasion on which presents are customarily given within families or among friends or associates.

So far as deputies are concerned, it is usual for a deputyship order to permit deputies to make gifts in similar circumstances.

Recent cases have shown just how limited these powers are. In the case of *Re Joan Treadwell (Deceased)* (2013) EWHC 2409 (COP) the joint deputies had made gifts totalling £59,000 over three years even though P's income was only £10,000 per year. Senior Judge Lush required the deputies to repay all but £15,000 of the gifts by enforcing the security bond to that extent.

The Judge held that with an income of £10,000 per year anything over £100 for a christening or graduation gift or £50 for a housewarming gift would not be reasonable and that the order (which was in the usual form) authorised gifts of no more than about £1,000 per annum above which permission (or in this case ratification) was required.

In *Re GM* (2013) EWHC 2966 (COP) Senior Judge Lush ordered the repayment of approximately £205,000 worth of gifts. He stated that, even in the case of substantial estates, authorisation should be sought whenever gifts over the annual IHT exemptions were contemplated.

Even if the attorney or deputy considers that a gift can be made without authorisation, within the guidelines set out above and within the powers of the deputyship order or section 12(3) of the Act, the attorney or deputy must still be satisfied that the gift is in P's best interests. Likewise, that will be the touchstone if the attorney or deputy applies to the court for authorisation.

Senior Judge Lush gave further guidance in this regard in *Re JDS* (2012) EWHC 302 (COP). There P had been awarded damages for clinical negligence and his deputy sought authorisation of the transfer of £325,000 of the award of over £2 million into a fund to mitigate the effect of inheritance tax. It was said that this was in P's best interests, because it did not affect his financial security but allowed him to make provision for his parents and mitigate IHT, and that would give effect to the wishes and feelings that he would have had if capacitous.

The application was refused. It was opposed by the Official Solicitor, principally on the grounds that he did not believe that it was in P's best interests to dispose of such a large amount of capital that may be needed in years to come.

The court carried out the usual "balance sheet" exercise and it is clear that little weight was given to how P might have wished to be a donor or to be remembered after his death, partly, at least, because of the fact that P had been severely injured at birth and had no comprehension at all of the meaning of giving.

Before the Act came into force the court could approve gifts to persons or for purposes for whom or for which the patient might be expected to provide if he were not mentally disordered (the "substituted judgment" approach). That allowed the former Court of Protection to permit gifts, one aim of which at least was tax planning, on the basis that that is what P would have wanted to do if he had capacity.

The "best interests" test is stretched to its limit when considering gifts from the estate of patients who have had and will have no capacity to comprehend the nature of gifts. By contrast, the old substituted judgment test worked logically and effectively.

In *Re G (TJ)* (2010) EWHC 3005 (COP) at paragraph 37 Morgan J stated his provisional view that a court could conclude that it was in P's best interests for the court to give effect to wishes which P would have formed if he had capacity . That is encouraging, but begs the question why is it P's best interests to give away his property if P cannot understand the notion of giving?

Sometimes we make gifts in the hope, or expectation, of receiving an advantage in return. But what of pure charitable giving, since, strictly applied, the best interests test leaves little room for such giving in a case where P has no concept of charity.

Re JDS was a case where, perhaps, the application was made too early in P's life. It will be interesting to see how the courts react to a similar application made later in P's life. In such circumstances, the court will have to face the issue of how it can be in P's best interests to make a gift where P has and had no comprehension of giving.