# Elder Law

# Discharging a Court of Protection Security Bond After P Dies

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*This article examines the case law and practitioner literature on when Court of Protection security bonds are discharged after P dies. It will show that the assumed interpretation of the relevant regulation is incorrect. It will argue that legal and practical reasons support the conclusion that such security bonds may, but need not, be discharged two years after P dies.*

## Introduction

When a court appoints a person, S, to act as a deputy for a protected party, P, it can require S "to give to the Public Guardian such security as the court thinks fit for the due discharge of his functions".[1] In practice, a court will almost always require S to provide security where (s)he will be managing P's property and affairs.[2] The purpose of the security is not to punish S, but instead to provide a "speedy and effective remedy" for P if S later defaults.[3] Carefully crafted rules set out how S must provide the security, when S may start to execute their duties and how the Public Guardian can confirm that adequate security has been obtained.[4]

These rules also specify the situations in which S's security is discharged. In this context reg.37(3)(a) of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 ("the 2007 Regulations") states that

> "the security may not be discharged … if [P] … dies, until the end of the period of 2 years beginning on the date of his death".

There is very little judicial guidance on the interpretation of this phrase, but practitioner works seem almost unanimous in their interpretation: S's security is *automatically* discharged two years after P's death. Moreover, more recent texts have started to take even firmer positions in support of this interpretation. However, this article will show that, properly interpreted, reg.37(3)(a) means exactly what it states—that S's security *may*, but need not, be discharged two years after P's death. Furthermore, there are clear practical benefits in having a discretionary rather than a mandatory rule.

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[1] Section 19(9)(a) of the Mental Capacity Act 2005.

[2] *Heywood and Massey: Court of Protection Practice* (London: Sweet & Maxwell), para.8–030.

[3] *Heywood and Massey: Court of Protection Practice* (London: Sweet & Maxwell), para.8–030; *Re Meek* [2014] EWCOP 1; [2014] 4 WLUK 449 at [93] (HH Judge Hodge QC).

[4] Regulations 33–37 of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 and r.24.3 of the Court of Protection Rules 2017.

## Regulation 37

Regulation 37 of the 2007 Regulations is entitled "Discharge of any endorsed security" and the relevant part provides as follows:

> "(2) The security may be discharged if the court makes an order discharging it.
> (3) Otherwise the security may not be discharged—
> (a) if the person on whose behalf S was appointed to act dies, until the end of the period of 2 years beginning on the date of his death; or
> (b) in any other case, until the end of the period of 7 years beginning on whichever of the following dates first occurs—
> (i) if S dies, the date of his death;
> (ii) if the court makes an order which discharges S but which does not also discharge the security under paragraph (2), the date of the order;
> (iii) the date when S otherwise ceases to be under a duty to discharge the functions in respect of which he was ordered to give security."

Despite being in force for over a decade, only one reported case has cited reg.37(3)(a), and even then the remarks made in that case were obiter. At least two major practitioner works do not mention the substance of reg.37(3)(a) at all,[5] and others merely quote its words verbatim when explaining the law and add no further clarification or analysis.[6] However, the majority of sources, including Practice Direction 24B to the Court of Protection Rules 2017, prefer to use mandatory language and imply that security bonds are automatically discharged after two years have elapsed since P's death.

## The assumed status quo: automatic discharge after two years

Five sources suggest a draconian interpretation of reg.37(3)(a) that *requires* bonds to be discharged after two years have passed since P's death. The first four of these sources give oblique support to that interpretation, but the most recent work takes a firm stance.

*Treadwell, Re* is, to this author's knowledge, the only reported case that cites reg.37(3)(a).[7] The issue was whether a security bond could be enforced against a deputy who had dissipated over £50,000 of P's income and capital to try to undermine the effect of P's statutory will. Senior Judge Denzil Lush held that the bond could be enforced to the value of £44,375.[8] Judge Lush explained reg.37(3)(a) as follows:

> "In respect of deaths after 1 May 2010, a security bond taken out by a deputy *will remain in force until the end of the period of two years beginning with the date of death* or until it is discharged by the court" (emphasis added).[9]

The natural reading of the emphasised passage is that a security bond will (automatically) cease to remain in force after two years have passed since P's death. However, as P had died only nine months prior to the decision, *Treadwell* did not discuss reg.37, or the discharging of security bonds, any further. The court simply enforced the bond, so the above remarks were obiter. Four other sources take a similar approach, although none mentions *Treadwell*.

First, para.8 of Practice Direction 24B to the Court of Protection Rules 2017 (which came into force on 1 December 2017) cites reg.37(3)(a) for the following proposition:

[5] G.R. Ashton et al, *Court of Protection Practice* (LexisNexis, 2018) and A. Ruck Keene et al, *Court of Protection Handbook*, revised 2nd edn (Legal Action Group, 2018).
[6] E.g. *Halsbury's Laws of England* (LexisNexis, 2013) Vol.75: Mental Health and Capacity, para.755, fn.5; and *Atkin's Court Forms* (LexisNexis), Vol.26(2): Mental Health and Incapacity: Court of Protection, para.167.
[7] *Treadwell deceased, Re* [2013] EWHC 2409 (COP); [2013] 7 WLUK 965.
[8] *Treadwell deceased, Re* [2013] EWHC 2409 (COP); [2013] 7 WLUK 965 at [96].
[9] *Re Treadwell deceased* [2013] EWHC 2409 (COP); [2013] 7 WLUK 965 at [76].

> "Any security bond taken out by the deputy will remain in force until the end of the period of 2 years commencing with the date of P's death, or until it is discharged by the court."

This closely follows Judge Lush's phrasing in *Treadwell, Re*, and again implies that the bond will automatically be discharged after two years have passed since P's death. The wording of para.8 is adopted verbatim in para.172 of the August 2018 edition of *Atkin's Court Forms*, Vol.26(2): Mental Health and Incapacity: Court of Protection (Pt I).

The second source is the Public Guardian Practice Note (SD15) on the OPG's approach to surety bonds, as updated on 31 August 2017.[10] The Note adopts a similar interpretation and states that "upon cessation of the deputyship the bond *will lapse* in line with the timescales in regulation 37(3) as amended" (emphasis added). The Note does not distinguish between regs 37(3)(a) and 37(3)(b).

Third, *Heywood and Massey: Court of Protection Practice* (updated April 2015) states at para.8–031D that:

> "Once endorsed by the bond provider, the security bond will (unless discharged by an order of the court) remain in place until […] if P died on or after May 1 2010, the end of the period of two years beginning with his death."

The final source is the clearest. Without citing any authorities in support, para.7.27 of *A Practitioner's Guide to the Court of Protection*, published in May 2018, states the following in a passage that discusses what happens when P dies:

> "The former deputy may make an application notice in form COP9 to be formally discharged as deputy, although in practice this tends not to happen, as security bonds will automatically expire two years after death."

The apparent status quo is now clear: it is assumed that reg.37(3)(a) requires S's bond to be discharged automatically two years after P's death.

## Principles of statutory interpretation

It is respectfully submitted that the apparent status quo overlooks three fundamental principles of statutory interpretation.

First, courts should apply "the plain meaning rule". In *Pinner v Everett*[11] Lord Reid set out how the court should approach issues of statutory construction:

> "In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word of phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature, that it is proper to look for some other possible meaning of the word or phrase. We have been warned again and again that it is wrong and dangerous to proceed by substituting some other words for the words of the statute."

Second, the court may consider other parts of the same statute to help interpret one particular provision: *Spath Holme*.[12]

[10] Available at: *https://www.gov.uk/government/publications/public-guardian-practice-note-surety-bonds/opgs-approach-to-surety-bonds* [Accessed 30 November 2018].

[11] *Pinner v Everett* [1969] 1 W.L.R. 1266, 1273; [1969] 3 All E.R. 257, 258-259.

[12] *R. (on the application of Spath Holme Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 A.C. 349, 398; [2001] 2 W.L.R. 15 (Lord Nicholls).

Third, legislation does not have to be ambiguous before a court may consider relevant Explanatory Notes as a useful aid to construction: *Flora v Wakom*.[13]

## The correct interpretation: may means may

It is submitted that the natural and ordinary meaning of reg.37(3)(a) is clear. As cited in full above, it states that "the security *may* not be discharged … until the end of the period of 2 years beginning on the date of his death". It is submitted that the key word, as emphasised, is "may", so that reg.37(3)(a) means that S's bond may be discharged out of court *any time* after two years have passed since P's death. This conclusion is support by established principles of grammar, other provisions in the 2007 Regulations, and the relevant Explanatory Notes.

First, the natural, grammatical meaning of reg.37(3)(a) is clear. Over a century ago Cotton LJ stated in *Re Baker*[14] that

> "great misconception is caused by saying that in some cases 'may' means 'must'. It never can mean 'must', so long as the English language retains its meaning; but it gives a power."

While *Baker* is a Victorian bankruptcy case the substance of which has no bearing on Court of Protection law, it is submitted that it is authority for a timeless proposition of English grammar: that "may" is a permissive word—one that connotes possibility, not necessity.

Pursuing this reasoning, it is submitted that the phrase "may not" is similarly permissive in nature. For example, the sentence "John may not leave before 18:00" does not mean "John must leave at 18:00". Instead, the natural and ordinary meaning is that "John may leave at 18:00 *or any time thereafter*". Therefore, the natural and ordinary meaning of reg.37(3)(a) is that "the security may be discharged *at any point after 2 years have passed since P's death*". Indeed, to use the wording of Lord Reid in *Pinner*,[15] "it is wrong and dangerous to proceed by substituting" the phrase "shall/will be discharged" for the phrase "may not be discharged".

Second, if the draftsman of reg.37(3)(a) had wished to facilitate the draconian interpretation favoured by the apparent status quo, (s)he would simply have used the phrase "shall be discharged … on" rather than "may not be discharged … until". Indeed, this is the approach taken in reg.37(3A) of the 2007 Regulations, which states:

> "Where S has replaced a security ('the original security') previously given by S and the Public Guardian has provided notice in accordance with regulation 35(4), *the original security shall stand discharged* 2 years from the date on which that notice was issued unless discharged by earlier order of the court upon application under paragraph (2)." (emphasis added).

Therefore the proper inference to draw from reg.37 as a whole is that reg.37(3)(a) is intended to have a different effect to reg.37(3A): reg.37(3A) is the mandatory provision and reg.37(3)(a) is the permissive provision.

Third, this approach is supported by the Explanatory Notes to the legislation that amended reg.37(3) to its current form. Regulation 37(3) was amended by reg.4 of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian (Amendment) Regulations 2010. The Explanatory Note to the 2010 regulations states:

> "Regulation 4 substitutes an amended paragraph (3) into regulation 37 (discharge of any endorsed security) of the principal Regulations. The substituted paragraph (3) reduces to 2 years the 7-year

[13] *Flora v Wakom (Heathrow) Ltd* [2006] EWCA Civ 1103; [2007] 1 W.L.R. 482 at [15]–[16] (Brooke LJ).
[14] *Baker, Re* (1890) 44 Ch. D. 262 at [270]; [1890] 3 WLUK 38.
[15] *Pinner v Everett* [1969] 1 W.L.R. 1266, 1273; [1969] 3 All E.R. 257.

period during which a security may not be discharged in cases where the person for whose benefit the security was given dies."

This Note is instructive; it repeats the crucial wording of reg.37, "may not be discharged", but puts that wording in a slightly different sentence. That phrasing is still most compatible with the permissive approach to reg.37(3)(a) advocated for in this article.

The best counter-argument to the permissive approach to reg.37(3)(a) would be to attempt to rely on the "mischief rule" of statutory construction. The counter-argument would run like this: reg.37(3) arguably contains quasi-limitation periods for S's liability on the security bond, and extending its reach by following the permissive interpretation would defeat Parliament's clear intention. However, two responses may be made. First, it is open to doubt whether this is the true mischief at which reg.37(3) is aimed; the rules regulating deputies' security bonds are equally concerned with protecting P's interests as with protecting S from undue liability.[16] Second, even assuming that the counter-argument accurately describes the mischief at which reg.37(3) is aimed, Lord Neuberger has recently confirmed that the mischief rule does "not represent a licence to judges to ignore the plain meaning of the words that Parliament has used".[17] For the reasons given above it is submitted that the plain words of reg.37(3)(a) are clear and should not be overridden on the basis of a doubtful purpose.

## Conclusion: when this interpretation matters

When established principles of statutory interpretation are applied to reg.37(3)(a) it is clear that a Court of Protection deputy's security bond is not automatically discharged two years after P's death. Instead, it is merely *liable* to be discharged from that date onwards.

This has an important practical consequence. In long-running disputes over S's conduct, the financial interests of P's estate are protected, as there remains a definite "pot" from which to pay out for S's defalcations. If the bond automatically expired, then S could quite conceivably have insufficient funds to pay in full a judgment debt given against him/her more than two years after P's death for mismanagement of P's affairs. This risk would be particularly acute for lay deputies without other insurance cover.

Unfortunately, it seems unlikely that a suitable test case will be forthcoming. The only way that this issue will be settled is if the Public Guardian omits to challenge a deputy's actions for more than two years after P's death and the deputy attempts to rely on the "quasi-limitation" defence in reg.37(3)(a). However, reg.40 of the 2007 Regulations allows the Public Guardian to require the deputy to file a final report after P's death. Although only high-level guidance is given in the Public Guardian's practice note,[18] ss.3 to 4 suggest that the default position will be to require all deputies to file a final report within 21 days of notification by the Public Guardian. Even if extensions are granted, and time is built in for delays and Public Guardian administration, it seems unlikely that in any normal case two years would elapse after P dies before matters relating to S's security are challenged. For example in *Re Treadwell*[19] the Public Guardian had challenged S's actions within two months of P's death.

Furthermore, anecdotal evidence suggests that some (but by no means all) security bonds are already worded to allow them to remain in force for more than two years after P's death. Therefore, reg.37(3)(a) will likely not matter in the vast majority of cases. However, the interpretation advocated for in this article is essential to protect fully P's interests in those cases when the Public Guardian delays in its investigations, the terms of the security bond follow the assumed status quo, and S is uninsured and impecunious.

[16] *Heywood and Massey: Court of Protection Practice* (London: Sweet & Maxwell), para.8–030; *Re Meek* [2014] EWCOP 1; [2014] 4 WLUK 449 at [93] (HHJ Hodge QC).

[17] *Williams v Central Bank of Nigeria* [2014] UKSC 10; [2014] A.C. 1189 at [72].

[18] Practice Note 01/2012 on deputy final reports, available at *https://www.gov.uk/government/publications/public-guardian-practice-note-deputy-final-reports* [Accessed 30 November 2018].

[19] *Re Treadwell deceased* [2013] EWHC 2409 (COP); [2013] 7 WLUK 965.