IN THE COURT OF PROTECTION Case No: 12112224

IN THE MATTER OF THE MENTAL CAPACITY ACT 2005

IN THE MATTER OF CJF

B E T W E E N :

LCN

Applicant

-and-

1) KF
2) AH
3) EH
4) CJF (By his Litigation Friend, THE OFFICIAL SOLICITOR)

Respondents

Before District Judge Beckley sitting at First Avenue House on 26th November 2018

Justin Holmes, Counsel for the Applicant, Eliza Eagling, Counsel for the First Respondent, Simon Heapy, Solicitor for the Second and Third Respondents and Ruth Hughes, Counsel for the Fourth Respondent.

1) This is an application under section 18(1)(h) of the Mental Capacity Act 2005 for the settlement of CJF's property on trust.
2) The application was made on 20th November 2018 and the matter was heard urgently on 26th November 2018 for reasons set out later in this judgement. An order was made authorising the execution of a settlement on the day of the hearing. I agreed to provide a written judgement given the lack of authority on the settlement of property in circumstances such as in this case.
3) I would like to thank all the representatives in this case for their very able assistance. I would also thank LCN, CJF's deputy, for the very professional manner in which she has carried out her role.

Background

4) The circumstances of this case are very sad. CJF was born on 2nd October 2005; he sadly died on 4th December 2018 when he was just 13-years old.
5) Because of complications at the time of birth he suffered severe neurological disabilities. He had no independent movement, he was without speech and had severe visual impairment. CJF required support for all aspects of personal care including feeding and bathing. He needed to be lifted with a hoist and required 24-hour supervision.
6) CJF's mother, KF, was 18 when CJF was born. His biological father denied paternity and played no part in CJF's life. KF's own health was permanently damaged by the birth

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complications. She looked after CJF for the early part of his life but he was then looked after by LR, foster parent who was unrelated to KF, and a Special Guardianship order was made.

7) On 14th August 2012, LCN, the applicant in these proceedings, was appointed as deputy for property and affairs for CJF.
8) LR instructed solicitors to claim damages for CJF against the NHS trust responsible for his care at birth. The claim was settled in February 2013 with a lump sum payment of £823,943 and staggered periodic payments which in 2018 were £88,250 per annum.
9) Sadly, just before settlement of the clinical negligence claim LR died. Following LR's death the Special Guardianship order was transferred to LR's daughter, EH and EH's husband, AH. EH was living with her mother when LR started to look after CJF. EH and AH also have 2 young daughters who considered CJF to be their brother.
10) On 25th September 2013, a property (referred to in this judgement as 1AY) was purchased and adapted for CJF's needs using CJF's funds. EH, AH and their 2 daughters have lived with CJF at 1AY since the purchase.
11) At the time of the clinical negligence litigation, a consultant paediatric neurologist had concluded that, although it was very difficult to forecast, CJF was likely to live to around the age of 19. Unfortunately, that view turned out to be overly optimistic and on 16th November 2018, CJF's consultant paediatric surgeon advised that CJF had entered a palliative phase in his care as no further treatment was possible and that his life expectancy was now only 4 to 6 weeks.
12) By the time of the hearing it was expected that CJF would die in a matter of days. As noted earlier in this judgement, CJF died the following week.

The Application and party's responses to it

13) LCN made an application on 20th November 2018 for the settlement of CJF's assets including his property at 1AY on revocable trust for himself during his lifetime and thereafter for 1AY to pass to EH and AH and the residue of CJF's estate to pass to KF.
14) LCN filed a witness statement on 21st November 2018 proposing the settlement of CJN's estate on a disabled persons trust under section 89 of the Inheritance Act 1984 and exhibiting a proposed trust deed. LCN proposed that 1AY should pass to EH and AH effectively free of inheritance tax, i.e. that CJF's estate should pay the inheritance tax thereby reducing the residue of the estate which would pass to KF.
15) The Official Solicitor was invited to act as CJF's litigation friend by order of 20th November 2018 and had accepted the invitation by 23rd November 2018. The Official Solicitor supported LCN's proposal that 1AY should pass to EH and AH effectively free of inheritance tax.
16) KF filed an acknowledgement of service and witness statement on 22nd November 2018. She accepted that 1AY should pass to EH and AH but opposed it being passed effectively free of inheritance tax.
17) AH filed an acknowledgement of service and witness statement on 23rd November 2018. On behalf of EH and himself he supported the proposal of LCN.

The Law

18) Section 16 of the Mental Capacity Act 2005 allows the court to make decisions on P's behalf in relation to P's property and affairs where P lacks capacity in relation to those matters.
19) By section 18 (1), the powers under section 16 as respects P's property and affairs extend in particular to–(h) the settlement of any of P's property, whether for P's benefit or for the benefit of others

20) Any decision made must be in P's best interests (Section 1(5)).
21) Section 4(2) states that 'The person making the determination must consider all the "relevant circumstances" and section 4(11) says that, "Relevant circumstances" are those (a) of which the person making the determination is aware, and (b) which it would be reasonable to regard as relevant.
22) By section 4(6), the person making the decision must consider, so far as is reasonably ascertainable (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity), (b) the beliefs and values that would be likely to influence his decision if he had capacity, and (c) the other factors that he would be likely to consider if he were able to do so. By section 4(7) the person making the decision must take into account, if it is practicable and appropriate to consult them, the views of (a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind, (b) anyone engaged in caring for the person or interested in his welfare, (c) any donee of a lasting power of attorney granted by the person, and (d) any deputy appointed for the person by the court, as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).
23) In *Re M (Statutory Will) [2011] 1 WLR 344* , Munby J made a number of points regarding best interests in relation to the making of a statutory will:
(i) The 2005 Act lays down no hierarchy as between the various factors listed in section 4 which have to be borne in mind, beyond the overarching principle that what is determinative is the judicial evaluation of what is in P's 'best interests.'
(ii) The weight to be attached to the various factors will, inevitably, differ depending upon the individual circumstances of the particular case.
(iii) In any given case there may be one or more features or factors which are of 'magnetic importance' in influencing or even determining the outcome.
(iv) P's wishes and feelings will always be a significant factor to which the court must pay close regard.
(v) The weight to be attached to P's wishes and feelings will always be case-specific and fact-specific.
(vi) In considering the weight and importance to be attached to P's wishes and feelings the court must have regard to all the relevant circumstances. These may include:
• The degree of P's incapacity;
• The strength and consistency of the views expressed by P;
• The possible impact on P of knowing that his wishes and feelings are not being given effect to;
• The extent to which P's wishes and feelings are, or are not, rational, sensible, responsible and pragmatically capable of implementation; and
• The extent to which P's wishes and feelings, if given effect, can properly be accommodated within the court's overall assessment of what is in his best interests.
(vii) It may be in P's best interest to avoid post-death litigation.
24) Lewison J gave the following guidance *in Re P [2010] Ch 33* on best interests insofar as they relate to making a Will for someone: 'There is one other aspect of the "best interests" test that I must consider. In deciding what provision should be made in a will to be executed on P's behalf and which, ex hypothesi, will only have effect after he is dead, what are P's best interests? Mr Boyle stressed the principle of adult autonomy; and said that P's best interests would be served simply by giving effect to his wishes. That is, I think, part of the overall picture, and an important one at that. But what will live on after P's death is his memory; and for many people it is in their best interests that they be remembered with affection by

their family and as having done "the right thing" by their will. In my judgment the decision maker is entitled to take into account, in assessing what is in P's best interests, how he will be remembered after his death.'

25) Morgan J in *Re G(TJ) [2010] EWHC 3005 (COP)* held that, 'The best interests test involves identifying a number of relevant factors. The actual wishes of P can be a relevant factor: section 4(6)(a) says so. The beliefs and values which would be likely to influence P's decision, if he had capacity to make the relevant decision, are a relevant factor: section 4(6)(b) says so. The other factors which P would be likely to consider, if he had the capacity to consider them, are a relevant factor: section 4(6)(c) says so. Accordingly, the balance sheet of factors which P would draw up, if he had capacity to make the decision, is a relevant factor for the court's decision. Further, in most cases the court will be able to determine what decision it is likely that P would have made, if he had capacity. In such a case, in my judgment, P's balance sheet of factors and P's likely decision can be taken into account by the court. This involves an element of substituted judgment being taken into account, together with anything else which is relevant. However, it is absolutely clear that the ultimate test for the court is the test of best interests and not the test of substituted judgment'.

26) The representatives were unable to find authority on the settlement of a child's property in circumstances such as in this case, but all agreed that the authorities in relation to the making of statutory wills, as set out in the paragraphs above, have relevance to such a decision.

Capacity

27) Section 2(1) of the 2005 Act holds that for the purposes of the Act a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in, the functioning of, the mind or brain. By section 2(5), subject to section 18(3), the powers under section 16 may be exercised on behalf of a person who has not reached the age of 16 if the court considers it likely that he will still lack capacity to make decisions in respect of that matter when he reaches 18.

28) I have had regard to the COP3 medical certificate provided by Dr Lewis Rosenbloom. He states that CJF 'has severe brain damage occasioned in connection with his birth.' He states that 'he cannot understand or express an interest in financial affairs' and that he won't acquire capacity in the future, e.g. when he reached 16, 'because of the very severe extent of his brain damage'.

29) I was satisfied that CJF did lack capacity to manage his property and affairs at the time of my decision and that he would still have lacked capacity to manage his property and affairs when he reached 18.

The Potential Agreement

30) It was almost agreed between the parties that an order should be sought in which 1AY passed to AH and EH but that they would be liable for paying inheritance tax in the sum of £40,500, which could be deferred using a 10-year instalment option. The residue of CJF's estate would then pass to KF. However, over the course of the weekend when KF, AH and EH were all spending time with CJF that potential agreement broke down. KF felt that she was unable to come to an agreement at such a difficult time and that any decisions should be postponed until after CJF died. It was explained that the Court of Protection would then no longer have any jurisdiction to make an order. After that explanation was given, KF was again willing to make the agreement, but at this point AH and EH wanted the decision to be made by the Court rather than between the Parties.

CJF's Estate

31) It was agreed between the Parties that CJF's estate was worth around £660,000 with the main asset being 1AY which was valued at around £350,000.
32) The Inheritance Tax liability of the estate would be in the region of £117,000.
33) These figures could only be estimated because the costs of these proceedings would, under the usual rule (COPR19.2) be payable from the CJF's estate and those costs would only be assessed at the conclusion of the proceedings.

Intestacy

34) By the rules of intestacy, CJF's estate would be divided equally between KF and CJF's biological father, stated by KF to be BJF. This is subject to section 18 of the Family Law Reform Act 1987 which raises a rebuttable presumption that BJF pre-deceased CJF as his name did not appear on CJF's birth certificate. KF was able to contact BJF, but only through social media. That contact was sufficient, in my view, to rebut the presumption. If the court did not approve the settlement of CJF's property, it would be divided equally between KF and BJF with nothing passing to EH and AH.
35) It would be open to EH and AH to make an application under the Inheritance (Provision for Family and Dependants) Act 1975, but the outcome of such an application was uncertain.

Biological Father

36) Whilst BJF was a potential substantial beneficiary under the rules of intestacy, I decided that the hearing should proceed despite his absence and despite him not having been served with the application. When the application was made his name was unknown to LCN so he was neither made a party nor named as a person to be served with or notified of the application. At the time of the hearing he had been identified by KF but his address was still unknown.
37) In *Re AB* (2013) EWHC B39 (COP), District Judge Batten held that, in general, permission to dispense with service or notification should only be made in exceptional circumstances where there are other compelling reasons for doing so. Senior Judge Lush in *I v D* (2016 EWCOP 35) at [40] set out the factors which the court should take into account when considering dispensing with service. These factors include the article 6 ECHR rights of the person who is not served. The judgement noted that different factors may apply where there is genuine urgency and there is a need to balance the prejudice of proceeding in the absence of an affected party against the prejudice to the incapacitated person or another party of not proceeding at all.
38) In this case, I consider that there were exceptional circumstance justifying proceeding without BJF being notified. These circumstances were his complete lack of involvement in CJF's life and care and his denial of paternity. There was a genuine urgency and balancing the prejudice of proceeding in the absence of BJF with the prejudice to EH and AH of not proceeding, I considered that the hearing had to take place despite the lack of service on BJF.
39) It was agreed between the parties, and I ordered, that attempts should be made after the hearing to locate BJF and serve him with a copy of the final order so that it would be open to him to apply to set aside or vary it.
40) Given KF's evidence, which I accepted, that BJF had played no part in CJF's life and that he denied paternity, it would have been wrong to delay proceedings with the significant risk that the rules of intestacy would apply to CJF's estate.

Reasoning

41) I have to make a decision that would be in CJF's best interests. This involves a consideration of the matters set out in section 4 of the 2005 Act.

42) The parties agree, and I find, that the authorities on the making of a statutory will apply to the settlement of CJF's estate in this case. I was advised by Miss Hughes that between 1925 and 1959 the Court had no power to make a statutory will and so would have approved settlement trusts as an alternative.
43) CJF had expressed no wishes and feelings as to what should happen to his estate after he died. The evidence of those who cared for him and the medical evidence suggests that CJF was unaware that he had an estate that could be passed on. He was aware that he was being looked after by people who loved and cared for him and is likely to have been aware that the home he was living in had been adapted to improve his quality of life.
44) The beliefs and values that I find would have been likely to have influenced his decision are a wish to provide for those who loved and cared for him and that includes KF as well as EH and AH. He would also have wanted EH's and AH's daughters to be looked after.
45) Other factors that he would likely to consider if her were able to do so would be the effect that caring for CJF had on EH's and AH's financial situation. EH was unable to work due to her caring responsibilities and AH took a lower paid job in order to be able to make more time for CJF as well as the rest of his family. I am told by LCN, and I accept, that EH and AH refused care payments they would have been entitled to from CJF's estate, benefiting his estate to the sum of around £240,000. I find that CJF would have wanted EH's and AH's daughters to have been able to remain in their home and to be able to continue attending their local school.
46) Another factor that I find CJF would have been likely to consider is the fact that KF, as a young single mother, looked after him in the early stages of his life and that she has suffered long-term medical consequences as a result of the complications at his birth.
47) I find that CJF is likely to have considered that his biological father, BJF, who played no part in his life should not stand to gain from CJF's estate.
48) I have carefully considered the views of LCN, KF, EH and AH. As stated above, there was considerable agreement between the court appointed deputy and those who have cared for CJF and who are interested in his welfare. All agreed that 1AY should pass to EH and AH and that the residue of the estate should pass to KF. I take that agreement into account and see no reason to depart from it.
49) The question remains whether AH and EH should be effectively liable for some of the Inheritance Tax liability or whether the liability should all be borne by the estate, and in effect KF.
50) Turning to the statutory wills authorities, this is not a case where there is tension between CJF's wishes and feelings and his best interests. How CJF will be remembered may be a factor for me to take into account, but I do not find that my decision regarding the settlement of his estate will affect the way he is remembered, given that he expressed no wishes and feelings about that.
51) For me, the magnetic factor when considering the beliefs and values that CJF would be likely to consider and the other factors he would have considered were he able to do so is a concern that AH, EH and their daughters can remain securely in the home that they shared with CJF. That had been his home for the majority of his life and a home where he had been provided with care and love.
52) In evidence, AH said that the family would be able to pay the £40,500 share of Inheritance Act over 10 years and had been willing to agree that with the other parties. However, it was clear that it would be a financial struggle for the family to do so.

53) I do not consider that it would be in CJF's best interests for there to be any risk to the security and stability of EH's and AH's home and therefore I consider that they should inherit 1AY effectively free of Inheritance Tax.

54) Ms Eagling very effectively submitted that KF would perceive such an outcome to be a criticism of her difficulties in coming to an agreement over the weekend before the hearing. I want to stress that my decision involves no criticism of her in any way. I understand the difficulty and emotions involved in trying to come to a decision during the final days of CJF's short life.

55) The order I made on 26 November 2018 is as follows:

WHEREAS

1. The Applicant LCN was appointed as deputy for the property and affairs of CJF by order dated 14 August 2012;

2. CJF is in a very serious medical condition and his medical advisers have advised the Applicant that he has only days to live; and

3. The Applicant has made an application for a settlement to be made on behalf of CJF

***UPON HEARING** Mr Justin Holmes, Counsel for the Applicant, Miss Eliza Eagling, Counsel for the First Respondent, Mr Simon Heapy for the Second and Third Respondents, and Miss Ruth Hughes, Counsel for the Fourth Respondent*

IT IS ORDERED THAT:

1. The Applicant be authorised and directed in the name and on behalf of CJF forthwith and in any event by 4pm on Tuesday 27th November 2018 to:

(a) Execute a settlement in the form annexed to this order ("the Settlement"); and initialled by District Judge Beckley.

(b) Execute a form TR1 and/or such other deeds and/or documents as may be necessary to transfer 1AY to Irwin Mitchell Trustees Ltd to be held on the trusts declared in the Settlement; and

(c) Transfer the sum of £172,000 to Irwin Mitchell Trustees Ltd to be held on the trusts declared in the Settlement.

2. The costs of the parties to this Application are summarily assessed and shall be paid forthwith.

3. The Applicant shall by 4pm on Tuesday 27th November 2018 instruct an enquiry agent to find the address for service of BJF and if and when that agent is able to establish an address for service for him, shall serve a copy of this order upon him.

4. *BJF may apply within 21 days of the date on which the order was served upon him to have the order set aside or varied pursuant to Rule 13.4 of the Court of Protection Rules 2017 ("the Rules"). Any such application must be made on Form COP9 and in accordance with Part 10 of the Rules.*

District Judge Beckley
3 January 2019