5 Stone Buildings

Court of Protection Seminar

27 June 2017

at

The Royal College of Surgeons

35-43 Lincoln's Inn Fields

London WC2A 3PE

www.5sblaw.com

#5sblaw

1.5 hours

5.30 pm	**Registration, tea and coffee**
6.00 pm	**Welcome and introduction - David Rees QC**
6.05 pm	**Revising the Best Interests Test – The Law Commission's Proposals** *Barbara Rich*
6.25 pm	**Case Law Update and LPA Drafting Issues** *David Rees QC*
6.50 pm	**Statutory Wills in the Spotlight? Re: JKS [2017] EWCOP 8** *Christopher Tidmarsh QC and Mathew Roper*
7.15 pm	**Panel Discussion on Financial Abuse** *Christopher Tidmarsh QC, David Rees QC, Barbara Rich, Mathew Roper and Ann Stanyer*
7.25 pm	**Questions and Closing Remarks**
7.30 pm	**Drinks Reception**

Barbara Rich specialises in contentious succession and trusts litigation, and in the property and affairs jurisdiction of the Court of Protection under the Mental Capacity Act 2005, often of substantial value and/or legal complexity and importance. She is recommended as a leading junior for traditional Chancery work in both Chambers UK and the Legal 500 directories guide. In Chambers UK 2017 she was listed as a starred individual in the Court of Protection practice area, where "being against her in court is a challenge for any opponent because judges really trust her. She is compelling and has the ear of the court in a way which is totally deserved". Barbara is also an enthusiastic and effective mediator with substantial mediation experiences. She is the consultant editor of Jordan's Elder Law Journal and assistant editor of Heywood & Massey: Court of Protection Practice. She is regularly in demand for speaking engagements within her field of expertise.

David Rees QC is well known for his experience in wills, trusts, estates and Court of Protection matters. He is ranked in Band 1 for Traditional Chancery and as Star Individual in Court of Protection in Chambers UK Bar Guide 2017 where he is described as "one of the leading lights in the field" who "is able to look at matters from every conceivable angle and give holistic and pragmatic advice on problems put before him". He is regularly instructed by the Official Solicitor and appears before all levels of judge in the Court of Protection. He has appeared in many leading cases under the Mental Capacity Act 2005 including Watt v ABC (2016 - use of personal injury trusts in place of deputyships); Re D (2016 – dispensing with service of statutory will application on affected individual); PJV v Assistant Director Adult Social Care Newcastle City Council & Another (2015 – role of Court of Protection in creating trust of Criminal Injury Compensation payments); and Health Service Executive of Ireland v PA & Others (2015 - recognition and enforcement of foreign judgments). David is the General Editor of Heywood & Massey's Court of Protection Practice and is a member of the Court of Protection Rules Committee and Court of Protection Users Group. David was appointed as a Recorder on the South Eastern Circuit in 2012 and writes and lectures regularly on all areas of his practice and took silk in 2017.

Christopher Tidmarsh QC has a wide-ranging Chancery practice. He has considerable experience of contentious and non-contentious aspects of the administration of trusts both on and offshore. His practice includes rectification and setting aside for mistake, variation of trusts, removal of trustees/personal representatives, challenging and defending probate (capacity, want of knowledge and approval), proprietary estoppel, breach of trust claims, trust aspects of divorce proceedings, advice on tax issues, advice on administration and drafting. He recently acted in ADS v DSM (a statutory will appeal).

Mathew Roper has a broad Chancery practice with a particular emphasis on trusts, estates, related professional negligence and the property and affairs jurisdiction of the Court of Protection. His Court of Protection practice focuses on contested deputyship, statutory will and estate planning applications. He also receives regular

instructions to act in proceedings concerning the validity, registration and revocation of Enduring and Lasting Powers of Attorney. He recently acted in ADS v DSM (a statutory will appeal).

Ann Stanyer is a partner at Wedlake Bell. Her practice covers a wide range of trust, probate and private wealth management work for both large, complex estates and settlements. She advises trustees on tax and estate management issues and provides advice on UK and foreign succession issues. She also regularly advises on Property and Affairs and Personal Welfare Lasting Powers of Attorney, the registration of Enduring Powers of Attorney, applications to the Office of Public Guardian and Court of Protection including tax planning and statutory will applications. Ann has just had a book 'Financial Abuse of Older Clients: Law, Practice and Prevention' published by Bloomsbury Professional and will be joining the panel discussion at the end of the talks.

5 Stone Buildings

Revising the Best Interests Test – The Law Commission's Proposals

Barbara Rich

THE ROLE OF WISHES AND FEELINGS IN THE MENTAL CAPACITY ACT BEST INTERESTS TEST

THE MENTAL CAPACITY ACT 2005 s4 AS ORIGINALLY ENACTED

As everyone knows, s4 of the Mental Capacity Act 2005 contains a non-hierarchical list of issues for consideration in taking a best interests decision for an adult who lacks capacity. This list includes, at s4(6), considering, so far as 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.

JUDGMENTS OF THE COURT OF PROTECTION SINCE 1 OCTOBER 2007

Quite early in the post-enactment life of the MCA, in the autumn of 2008, the role of wishes and feelings in the best interests test was judicially considered, by HHJ Hazel Marshall QC in *C v V* [2008] EWCOP B16. This was a successful appeal of a decision by a district judge about the appointment of a property and affairs deputy for the elderly parents of two sisters who had been appointed as their parents' attorneys under EPAs, and were in dispute about the timing of their application to register the instruments. The judge was concerned that the district judge had given insufficient weight to the parents' wishes that their daughters should act jointly (not jointly and severally) in deciding to appoint one of them as property and affairs deputy. HHJ Hazel Marshall QC described the "major changes" embodied in the MCA, the second of which was "the emphasis throughout the Act on the ascertainment of the actual or likely wishes, views and preferences of the person lacking full capacity." She said:

> *55. In my judgment it is the inescapable conclusion from the stress laid on these matters in the Act that the views and wishes of P in regard to decisions made on his behalf are to carry great weight. What, after all, is the point of taking great trouble to ascertain or deduce P's views, and to encourage P to be involved in the decision making process, unless the objective is to try to achieve the outcome which P wants or prefers, even if he does not have the capacity to achieve it for himself?*
>
> *56. The Act does not, of course, say that Ps' wishes are to be paramount, nor does it lay down any express presumption in favour of implementing them if they can be ascertained. Indeed the paramount objective is that of P's "best interests". However, by giving such prominence to the above matters, the Act does, in my judgment recognise that having his views and wishes taken into account and respected is a very significant aspect of P's best interests. Due regard should therefore be paid to this recognition when doing the weighing exercise of determining what is in P's best interests in all the relevant circumstances, including those wishes.*

57. As to how this will work in practice, in my judgment, where P can and does express a wish or view which is not irrational (in the sense of being a wish which a person with full capacity might reasonably have), is not impracticable as far as its physical implementation is concerned, and is not irresponsible having regard to the extent of P's resources (ie whether a responsible person of full capacity who had such resources might reasonably consider it worth using the necessary resources to implement his wish) then that situation carries great weight, and effectively gives rise to a presumption in favour of implementing those wishes, unless there is some potential sufficiently detrimental effect for P of doing so which outweighs this..

58. That might be some extraneous consequence, or some other unforeseen, unknown or unappreciated factor. Whether this further consideration actually should justify overriding P's wishes might then be tested by asking whether, had he known of this further consideration, it appears (from what is known of P) that he would have changed his wishes. It might be further tested by asking whether the seriousness of this countervailing factor in terms of detriment to P is such that it must outweigh the detriment to an adult of having one's wishes overruled, and the sense of impotence, and the frustration and anger, which living with that awareness (insofar as P appreciates it) will cause to P. Given the policy of the Act to empower people to make their own decisions wherever possible, justification for overruling P and "saving him from himself" must, in my judgment be strong and cogent. Otherwise, taking a different course from that which P wishes would be likely to infringe the statutory direction in s.1(6) of the Act, that one must achieve any desired objective by the route which least restricts P's own rights and freedom of actions.

A few months later, in February 2009, in *Re P* [2009] EWCOP 163, the first major decision on statutory wills under the MCA, Lewison J considered HHJ Marshall QC's analysis of the role of wishes and feelings in the statutory best interests test and said:

41. I agree with the broad thrust of this, although I think that HH Judge Marshall QC may have slightly overstated the importance to be given to P's wishes. First, section 1 (6) is not a statutory direction that one "must achieve" any desired objective by the least restrictive route. Section 1 (6) only requires that before a decision is made "regard must be had" to that question. It is an important question, to be sure, but it is not determinative. The only imperative is that the decision must be made in P's best interests. Second, although P's wishes must be given weight, if, as I think, Parliament has endorsed the "balance sheet" approach, they are only one part of the balance. I agree that those wishes are to be given great weight, but I would prefer not to speak in terms of presumptions. Third, any attempt to test a decision by reference to what P would hypothetically have done or wanted runs the risk of amounting to a "substituted judgment" rather than a decision of what would be in P's best interests. But despite this risk, the Act itself requires some hypothesising. The decision maker must consider the beliefs and values that would be likely to influence P's decision if he had capacity and also the other factors that P would be likely to consider if he were able to do so. This does not, I think, necessarily require those to be given effect. As the Code of Practice explains (§ 5.38):

> *"In setting out the requirements for working out a person's 'best interests', section 4 of the Act puts the person who lacks capacity at the centre of the decision to be made. Even if they cannot make the decision, their wishes and feelings, beliefs and values should be taken fully into account – whether expressed in the past or now. But their wishes and feelings, beliefs and values will not necessarily be the deciding factor in working out their best interests. Any such assessment must consider past and current wishes and feelings, beliefs and values alongside all other factors, but the final decision must be based entirely on what is in the person's best interests."*

Re P has been followed in many other decisions about statutory wills and gifts, its first and weightiest review and endorsement being *Re M, ITW v. Z* [2009] EWCOP 2525, another statutory will case. Munby J said:

i) First, P's wishes and feelings will always be a significant factor to which the court must pay close regard: see Re MM; Local Authority X v MM (by the Official Solicitor) and KM [2007] EWHC 2003 (Fam), [2009] 1 FLR 443, at paras [121]-[124].

ii) Secondly, the weight to be attached to P's wishes and feelings will always be case-specific and fact-specific. In some cases, in some situations, they may carry much, even, on occasions, preponderant, weight. In other cases, in other situations, and even where the circumstances may have some superficial similarity, they may carry very little weight. One cannot, as it were, attribute any particular a priori weight or importance to P's wishes and feelings; it all depends, it must depend, upon the individual circumstances of the particular case. And even if one is dealing with a particular individual, the weight to be attached to their wishes and feelings must depend upon the particular context; in relation to one topic P's wishes and feelings may carry great weight whilst at the same time carrying much less weight in relation to another topic. Just as the test of incapacity under the 2005 Act is, as under the common law, 'issue specific', so in a similar way the weight to be attached to P's wishes and feelings will likewise be issue specific.

iii) Thirdly, in considering the weight and importance to be attached to P's wishes and feelings the court must of course, and as required by section 4(2) of the 2005 Act, have regard to all the relevant circumstances. In this context the relevant circumstances will include, though I emphasise that they are by no means limited to, such matters as:

a) the degree of P's incapacity, for the nearer to the borderline the more weight must in principle be attached to P's wishes and feelings: Re MM; Local Authority X v MM (by the Official Solicitor) and KM [2007] EWHC 2003 (Fam), [2009] 1 FLR 443, at para [124];

b) the strength and consistency of the views being expressed by P;

c) the possible impact on P of knowledge that her wishes and feelings are not being given effect to: see again Re MM; Local Authority X v MM (by the Official Solicitor) and KM [2007] EWHC 2003 (Fam), [2009] 1 FLR 443, at para [124];

d) the extent to which P's wishes and feelings are, or are not, rational, sensible, responsible and pragmatically capable of sensible implementation in the particular circumstances; and

e) crucially, the extent to which P's wishes and feelings, if given effect to, can properly be accommodated within the court's overall assessment of what is in her best interests.

THE ROLE OF INFERRED PRESENT WISHES

However, Lewison J's warning about "any attempt to test a decision by reference to what P would hypothetically have done or wanted" has been gradually eroded as the role of putative or inferred present wishes in a best interests decision has been increasingly acknowledged – see for example *Re G(TJ)* [2010] EWCOP 3005.

55. 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. Nonetheless, the substituted judgment can be relevant and is not excluded from consideration. As Hoffmann LJ said in the Bland case, the substituted judgment can be subsumed within the concept of best interests. That appeared to be the view of the Law Commission also.

56.** Further, the word "interest" in the best interests test does not confine the court to considering the self interest of P. The actual wishes of P, which are altruistic and not in any way, directly or indirectly self-interested, can be a relevant factor.* ***Further, the wishes which P would have formed, if P had capacity, which may be altruistic wishes, can be a relevant factor. It is not necessary to establish that P would have been aware of the fact that P's wishes were carried into effect. Respect for P's wishes, actual or putative, can be a relevant factor even where P has no awareness of, and no reaction to, the fact that such wishes are being respected.

Having discussed the principle in this way, Morgan J went on to apply it in his decision, which was about authorising the payment of substantial lifetime maintenance to Mrs G's adult daughter, a commitment at a level which she had not been asked to make in her capacitous lifetime, as follows:

65. Having identified the factors as best I can, it emerges that the principal justification, so far as Mrs G is concerned, for making the order for maintenance payments in favour of C, is that those payments would be what Mrs G would have wanted if she had capacity to make the decision for herself. I recognise that this consideration is essentially a "substituted judgment" for Mrs G. I am also very aware that the test laid down by the 2005 Act is the test of best interests and not of substituted judgment. However, for the reasons which I have tried to set out earlier, the test of best interests does not exclude respect for what would have been the wishes of Mrs G. A substituted judgment can be subsumed into the consideration of best interests. Accordingly, in this case, respect for what would have been Mrs G's wishes will define what is in her best interests, in the absence of any countervailing factors. There are no such countervailing factors here. I therefore conclude that an order which provides for the continuation of maintenance payments to C is in the best interests of Mrs G.

There could not be a clearer illustration than this of putative present wishes "what Mrs G would have wanted" being determinative of the outcome of a best interests decision.

In practical terms, as many cases I have been professionally involved with since *Re* G have shown, putative or inferred wishes are always likely to play an important part about best interests decisions which concern acts of altruism such as gifts and wills. This is because gifts and wills

made by an adult who has legal capacity are nothing but expressions of wishes, and capacity goes to the root of validity of these dispositions. When the Court of Protection accepts jurisdiction, on the basis of the adult's incapacity, to make a gift or will decision, it is often, as in *Re G(TJ)*, in circumstances where there is no guiding expression of past wishes, and P is incapable of expressing any present wishes.

In the realm of personal welfare, where decisions to be taken for an adult who lacks capacity do not generally have an altruistic element, but where "best interests" is much more closely synonymous with "self interest", decided cases under the MCA have also considered, and increasingly emphasised the importance of the individual's wishes and feelings in determining their best interests – see in particular, *Aintree Hospitals NHS Foundation Trust v James* [2013] UKSC 67, the first case under the MCA to reach the Supreme Court. Mr James was in a minimally conscious state and the hospital in which he was being treated applied for a declaration that some of life-saving treatment could be withheld in the event of clinical deterioration. Mr James' family opposed the application and the judge at first instance refused to make the orders sought by the hospital. Their appeal succeeded, however, and although Mr James died before the case reached the Supreme Court, his widow was given permission to appeal in view of the importance of the issues and the difference of approach between the trial judge and the Court of Appeal. The Supreme Court held that the purpose of the best interests test is to consider the decision to be taken from the individual in question's point of view, and that insofar as it is possible to ascertain that individual's wishes and feelings, these should be taken into account because "they are a component in making the choice which is right for him as an individual human being".

More recently, past wishes and feelings played a pivotal role in the decision in *Briggs v. Briggs* [2016] EWCOP 53, which dealt with the withdrawal of life-support from a man, Paul Briggs, who was in minimally conscious state following a road accident. Paul Briggs was an army veteran and a serving police officer who had witnessed the aftermath of numerous road traffic accidents. He had made no advance declaration of his wishes, but the Court accepted his putative present wish, as articulated by his family – in particular of his wife, and based on her knowledge of him and general observations he had made in the past about the quality of life of survivors of serious traffic accidents, that he would not wish to carry on living in a severely incapacitated condition, and this was at the heart of the Court's decision that it would be in his best interests for life-support to be withdrawn, despite the opposition of the clinicians treating him and the Official Solicitor acting his litigation friend. Celia Kitzinger, Professor in Sociology

at University of York and Jenny Kitzinger, Professor at Cardiff University School of Journalism, Media and Cultural Studies, co-founders of the Coma and Disorders of Consciousness Research Centre, who were present at the hearing and live-tweeted it with the permission of the Judge, have written an article[1] about the consideration of a patient's wishes in decisions to withdraw clinically assisted nutrition and hydration arising from the case. As they have observed, the case engages fundamental principles in weighing up the preservation of life against individual self-determination. *Briggs* is a stark example of a case in which P's present wishes are completely unascertainable but the Court was prepared to make inferences based on past wishes and views expressed when he did have capacity.

THE LAW COMMISSION'S PROPOSALS FOR AMENDMENT OF s4 MA

In March 2017 the Law Commission published its final report *on Mental Capacity and Deprivation of Liberty* (Law Com no 372), accompanied by a draft Bill. The impetus for the report and the principal focus of its contents is the law of deprivation of liberty of those who lack capacity to consent to care or treatment, but the report also includes a section on the place of wishes and feelings in best interests decisions. At paragraph 1.36 of the report this is described as a recommended reform to improve decision-making across the MCA as a whole. The Law Commission say (at paragraph 14.1)

"our overarching intention is to ensure that the person for whom or about whom decisions are taken is placed at the heart of decision-making".

The Law Commission consultation paper which preceded the report argued that the law as it stands fails to give sufficient certainty for decision-makers on how much emphasis should be given to the person's wishes and feelings. It made a provisional proposal for an amendment to s4 MCA to establish that decision-makers should begin with the assumption that the person's past and present wishes and feelings should be determinative of the best interests decision.

The Law Commission summarise the responses to the proposal in the consultation paper in the March 2017 report. A majority of consultees agreed with the proposal. It is interesting that the Essex Autonomy Project, which is a research and knowledge-exchange initiative based in the School of Philosophy at Essex University, and which published its own comprehensive paper on

[1] When 'Sanctity of Life' and 'Self-Determination' clash: *Briggs v Briggs* [2016] EWCOP 53 – implications for policy and practice http://jme.bmj.com/content/43/7/446

best interests decision making under the MCA in February 2012[2], suggested an approach based on a "rebuttable presumption" that wishes and feelings should be followed, and only departed from if there were "compelling reasons" or "serious adverse consequences" to justify doing so. This approach is remarkably close to that of HHJ Hazel Marshall QC in *C v. V*, an approach which could have been judicially entrenched as the correct approach to the best interests test in the MCA as it stands, in *Re P* and *Re M*, had the judges in those cases wished to do so. As *Re P* made clear, however, there is a major difference between agreeing with the broad thrust of what another, less senior, judge has said, and endorsing it word-for-word.

The nature and scope of the disagreement with the Law Commission's proposal is also interesting (paragraph 14.9):

> *"Those who disagreed with the proposal often argued that in many cases following the person's wishes and feelings would be unrealistic and impractical. It was further suggested that uncertainty would arise in cases where, for example, past and present wishes and feelings conflicted, were unclear, or fluctuated. There was opposition to the proposal from some members of the judiciary who argued that the proposal would simply lead to debate about whether or not there was "good reason" to depart from the assumption, and that all that was needed was to properly apply the MCA as it stands."*

The judicial opposition could fairly be described as "thoroughly question-begging", because as *Aintree Hospitals v. James* illustrated, there is scope for judicial dissent as to what is involved in properly applying the MCA as it stands.

I think there is greater substance in the other negative reasons summarised by the Law Commission. It isn't at all difficult to think of examples of cases where past and present wishes and feelings have conflicted, were unclear or fluctuated. For example, where a testator has said different things to different times to prospective beneficiaries of their estate. The Law Commission's proposal requires a great deal of weight to be put on the integrity of the forensic process where there is evidence of conflict, fluctuation or lack of clarity between past and present wishes. It raises a genuinely difficult question of relative evidential weight to be put on (a) the timing of a past expression of wishes – does the later reliably supersede the earlier, or is the later vitiated by declining capacity/absence of free will as a result of the pressure exercised by others, and (b) the formality of a past expression of wishes – does the earlier and more formal carry weight over the later and less formal? This can be very specifically tested in the context of wills, where there is at least one unreported decision of the Court of Protection on a statutory will application, which gives greater weight to the formality with which past wishes were

[2] https://autonomy.essex.ac.uk/resources/best-interests-decision-making-under-the-mental-capacity-act/

expressed in the form of an earlier will than to the relative informality of wishes expressed in instructions to a solicitor for a new will which were never completed.

More generally, there is a valuable discussion of "collision" of past and present wishes in theory, in practice and in the future in an article written by Alex Ruck Keene, Rachel Cooper and Thomas Hobbs[3]. This article was published after the Law Commission's proposals and notes that these proposals do not offer any statutory solution to resolution of conflicts between past and present wishes. The authors make the following suggestions, with a view to advancing the debate amongst lawyers and in argument in future cases:

- Considering a different approach in cases where it is known whether or not the person in question will ever regain capacity and know whether or not their pre-incapacity wishes were honoured
- Placing a different weight on prior wishes and feelings "if they relate to a situation what they have not had direct experience of, but rather represents their best projection of what they might wish in that situation"
- Taking a "more radical step", suggesting that "where there is a true clash between the person's past wishes and feelings and their present expression, then it is, in fact, wrong as a matter of principle to seek to balance one against the other and to say that one should trump the other. Rather, we might want to say that the one cancels the other out, and that the decision-maker should therefore proceed as if this were a person in respect of whom there were no ascertainable wishes and feelings."

As the Law Commission state in their report (paragraph 14.10), consultation has reinforced the view that s4 MCA should be amended in order to give additional weight to a person's wishes and feelings. The alternative to amendment – revisions to the Code of Practice to emphasise the importance of wishes and feelings "would represent a wasted opportunity for a number of reasons". These are, in summary:

- The fact that best interests decisions "regularly fail to give essentially any weight to – let alone prioritise – the person's wishes and feelings". The Law Commission disagree with the judges that it is simply a matter of applying the law properly, observing that s4 sets out a procedure, rather than a substantive outcome.

[3] When past and present wishes collide: the theory, the practice and the future 2017 Eld LJ 2/132

- The fact that circumstances have changed greatly since the introduction of the MCA, which had its roots in the Law Commission's work in the 1990s, predating developments such as the Human Rights Act 1998 and the ratification of the UN Convention on the Rights of Persons with Disabilities.

> *"The trend in national and international developments in the context of decision-making on behalf of others is firmly toward requiring greater account to be taken of the wishes and feelings (or will and preferences) of the individual concerned. In our view these developments need to be reflected at the core of the MCA."*

- The concern expressed by the judiciary that the proposal would lead to debate about whether or not there was good reason to depart from wishes and feelings was "not a wholly undesirable outcome". Best interests decisions "will inevitably provoke debate and this focus would be a step forward from the current focus of debate on whether any weight should be given to wishes and feelings at all.

- Although the idea of rebuttable presumption is attractive, it would not fit into the procedural requirements of section 4 MCA. "Logically, the introduction of a duty to make wishes and feelings generally determinative would require the amendment of section 1 (not section 4) in order to give them a higher status than best interests. However, we did not consult on this, and such a reform would be far beyond our remit."

- Another rejected idea is the suggestion that s4 should be amended to provide that best interests determinations should not be based on any unjustified assumptions that less weight should be given to wishes and feelings because the person lacks capacity. The Law Commission rejected this as "insufficiently robust" and also as giving rise to difficulty in determining what was an "unjustified assumption" or "less weight".

The legislative proposal which is put forward in the draft Bill is that s4(6) should be amended to require that the individual making the best interests determination must ascertain, so far as is reasonably practicable:

(2) The person's past and present wishes and feelings (and, in particular, whether there is any relevant written statement made by him or her when they had capacity);

(3) The beliefs and values that would be likely to influence the person's decision if he or she had capacity; and

(4) Any other factors that the person would be likely to consider if he or she were able to do so;

And in making the determination must give particular weight to any wishes or feelings ascertained.

This formulation replaces the requirement for a decision-maker to "consider, so far as reasonably ascertainable" by imposing a positive duty: "our intention is to ensure that in most cases there would be a clear duty to ascertain wishes and feelings; it would be rare, in our view, for this not to be reasonably practicable." It is also the Law Commission's intention to "give ascertained wishes and feelings a higher status than all the other factors which a decision maker is required to consider under section 4(6). It is also our intention that, as a general rule, the stronger and clearer the ascertainable wishes and feelings, the greater the weight that should be given to them".

The Law Commission suggest that further teeth would be given to this approach by placing additional requirements on professionals to explain their decisions not to follow a person's ascertainable wishes and feelings, and by elaboration in a new Code of Practice on the steps which could be taken by the decision-making.

In their discussion of the proposed legislative change, the Law Commission consider that it would be right to say of cases of inconsistent or non-existent past and present wishes that it is not reasonably practicable to ascertain them and therefore that no obligation to give them particular weight would arise. In other words, such cases would continue to be decided as they have been decided under the MCA as it stands, and I think it's reasonable to suppose that putative present wishes would continue to have the role in MCA decision making that they do.

As to whether this amendment will become law at any time in the near future, this must be open to doubt. Last week's Queen's Speech said that the government would "reform mental health legislation", but this is not the same thing as mental capacity legislation. The Law Commission's website states that it is awaiting a response from the Government to the draft Bill. Unfortunately, that may be a lengthy wait.

5 Stone Buildings

Case Law Update and LPA Drafting Issues

David Rees QC

INTRODUCTION

There have been far fewer reported Court of Protection judgments in the past nine months or so, not least because of the lack of a Senior Judge for much of that period. However there have still been a number of interesting decisions. The main part of this talk will be looking at the decision of District Judge Eldergill in *The Public Guardian's Severance Applications* [2017] EWCOP 10 which was handed down on 19th June 2017 and which deals with a number of common errors which can arise in the preparation of LPAs and the extent to which these can be overlooked or severed by the Court.

However, I will start by dealing briefly some recent changes in the Court's rules and practice directions and summarising the key points of two appellate decisions.

CHANGES TO RULES AND PRACTICE DIRECTIONS

Changes to the Court of Protection Rules 2007 were introduced from 6th April 2017 by the Court of Protection (Amendment) Rules 2017 (SI 2017/187). These effected two changes:

(1) The introduction of a power (rule 203 and PD 23C) enabling the Court of Protection to make civil restraint orders against litigants who repeatedly make applications which are totally without merit. These provisions replicate the similar powers found in the Civil Procedure Rules 1998.

(2) The introduction of rules governing applications relating to the Court of Protection's international jurisdiction under Schedule 3 MCA 2005 (rules 204 to 209 and PD 24A). These cover the following applications:

    (a) Applications under MCA 2005 Sch3 paras 20 and 22 for the recognition and enforcement of foreign protective measures;

(b) Applications under MCA 2005 Sch 3 para 14 for the COP to disapply or modify a foreign lasting power; and

(c) Applications for a declaration under MCA 2005 s15(1)(c) that a donee of a foreign lasting power is acting lawfully when exercising that power.

Further changes have been introduced by amendments to Practice Directions. These include:

(3) Widening the number of situations where the disclosure of information relating to COP proceedings is permitted (PD 13A). The changes mean that a legal representative can now (where necessary) disclose information about the proceedings to their professional indemnity insurers.

(4) Extend the Transparency Pilot to cover serious medical treatment cases under PD 9E. The most recent form of transparency order is available at:

https://www.judiciary.gov.uk/wp-content/uploads/2017/06/transparency-pilot-standard-order-20170620.pdf

***SECRETARY OF STATE FOR JUSTICE V STAFFORDSHIRE COUNTY COUNCIL & OTHERS* [2016] EWCA CIV 1317**

In this case the Court of Appeal upheld the decision of Charles J in *Staffordshire County Council v SRK & Others* [2016] EWCOP 27. I discussed the first instance decision in this case at the 5 Stone Buildings Court of Protection seminar on 21 November 2016 and as the Court of Appeal has essentially simply upheld the first instance judgment I am not going to deal with it in detail again.

The key point of the case (and the primary point of concern for property and affairs deputies and attorneys) is that a private care arrangement that has been organised and paid for by a deputy, attorney or trustee may nevertheless be imputable to the State and thus a

deprivation of liberty for the purposes of art. 5 ECHR. What this means in practical terms is that such arrangements will need to be authorised by the Court of Protection under MCA 2005, ss. 16(2)(a) and 4A. The Court of Appeal upheld the conclusion of Charles J that although the State was not directly responsible in such cases for the deprivation of liberty, it nevertheless knew or ought to know of the situation on the ground and as such had obligations under art.5 ECHR. The judge held that the knowledge exists in such cases because the court that awards the damages, the Court of Protection when appointing a property and affairs deputy for P and the deputy (or the trustees or attorney or other person to whom the damages are paid) should all be aware that the care and treatment of a person in SRK's position creates a situation on the ground that satisfies the objective and subjective components of a deprivation of liberty. In such circumstances, absent the making of a welfare order by the Court of Protection there are insufficient procedural safeguards to satisfy the State's positive obligations under art. 5 ECHR.

It would appear from the judgment of Charles J that any arrangement that deprives P of his liberty that is made as a result of an award of personal injury damages (whether it is organised by a deputy, attorney or the trustees of a personal injury trust) may need to be authorised by the Court of Protection under MCA 2005, ss 16(2)(a) and 4A. Likewise any such arrangement that is made by a deputy (whether funded by personal injury damages or otherwise) may also be imputable to the State by virtue of the role of the Court of Protection in the appointment of the deputy and again may require authorisation.

Where a care regime that gives rise to the deprivation of liberty has been put in place by a deputy administering a personal injury, the deputy should:

(1) raise the issue of the deprivation of liberty with the care providers and relevant local authority; and (unless the local authority itself takes action to have the deprivation of liberty authorised)

(2) if the regime is indeed the least restrictive option, apply to the court for a welfare order under s.16(2)(a) MCA 2005 authorising it. The question of who should

make the application to the Court of Protection to authorise any deprivation of liberty carries cost implications. Charles J's judgment suggests that a deputy (and by implication an attorney or a trustee administering a personal injury award) has a positive obligation to make the application to the court, if the care provider or local authority did not do so. The precise basis for that duty is not explored in any detail in Charles J's judgment and was not dealt with by the Court of Appeal.

N v ACCG & Others [2017] UKSC 22

The other recent appellate decision is that of the Supreme Court in *N v ACCG* (an appeal from the decision of the Court of Appeal in *Re MN (Adult)* [2015] EWCA Civ 411 which was itself an appeal from the decision of Eleanor King J in *ACCG & Another v MN & Others* [2013] EWHC 3859 (COP)). This was a personal welfare case relating to a profoundly disabled man (MN). The case arose from a dispute as to whether it was in MN's best interests for his mother to be involved in his personal care or for him to have visits to the family home. However, the key point relates to the limits of the jurisdiction of the COP.

By the time the case reached the first instance hearing in COP the relevant Clinical Commissioning Group had indicated that it was not prepared to commission or fund arrangements under which MN would visit the family home or have his mother involved in his personal care. These were therefore not options "on the table". Eleanor King J, the Court of Appeal, and ultimately the Supreme Court all agreed that the COP has no greater power to oblige others to do what is best than P would have himself. This must mean that, just like P, the court can only choose between the "available options". It cannot compel a public authority to offer an option it is not willing to make available, even if it considers that the provision of such an option would be in P's best interests. A challenge to a decision by a public authority not to make an option available would need to be made by judicial review (or where appropriate to a statutory tribunal), in the same way that a capacitous person would have to challenge a funding decision.

LPA PITFALLS – *THE PUBLIC GUARDIAN'S SEVERANCE APPLICATIONS* [2017] EWCOP 10

District Judge Eldergill handed down judgment in this case on 19th June 2017. The decision related to eighteen separate lasting powers of attorney which the Public Guardian had referred to the Court because he considered that they failed to comply with the prescribed regulations.

In order for an instrument to take effect as a LPA under the MCA 2005 it must meet certain prescribed requirements. These are to be found at sections 9 to 11 and Sch 1 of the MCA 2005 and in the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (SI 2007/1253). These include the need for the instrument to be made on the prescribed form, of which there have now been three versions for each of the two types of LPA (property and affairs and health and personal welfare). The most recent versions of the form have applied since July 1, 2015.

Among the other statutory requirements is s 10(4) MCA 2005 which provides that an LPA may appoint attorneys to act:

(a) jointly;

(b) jointly and severally; or

(c) jointly in relation to some matters and jointly and severally in relation to other matters.

What is not permissible is the sort of arrangement which arose in the context of an EPA in *Re E (Enduring Power of Attorney)* [2001] Ch 364 where the donor appointed her three daughters to act "jointly save that any two of my attorneys may sign".

Similarly, an LPA cannot confer power on an attorney to make gift other than on certain occasions prescribed in MCA 2005 s 12(2)[1].

The MCA provides for a modest degree of flexibility where an instrument intended to take effect as an LPA fails to comply with the prescribed formalities. Thus MCA 2005 Sch 1 para 3 provides:

(1) If an instrument differs in an immaterial respect in form or mode of expression from the prescribed form, it is to be treated by the Public Guardian as sufficient in point of form and expression.

(2) The court may declare that an instrument which is not in the prescribed form is to be treated as if it were, if it is satisfied that the persons executing the instrument intended it to create a lasting power of attorney.

In addition MCA 2005 Sch 1 para 11 provides a mechanism which enables the Court of Protection to sever provisions which would be ineffective as part of an LPA or would prevent the instrument as operating as a valid LPA[2].

---

[1](2) The donee may make gifts—

(a) on customary occasions to persons (including himself) who are related to or connected with the donor, or

(b) to any charity to whom the donor made or might have been expected to make gifts if the value of each such gift is not unreasonable having regard to all the circumstances and, in particular, the size of the donor's estate.

[2](1) If it appears to the Public Guardian that an instrument accompanying an application under paragraph 4 is not made in accordance with this Schedule, he must not register the instrument unless the court directs him to do so.

(2) Sub-paragraph (3) applies if it appears to the Public Guardian that the instrument contains a provision which—

The Public Guardian appears in the past couple of years to have become increasingly interventionist in taking points about the validity of restrictions or conditions within LPAs. There are however, limits on his power to intervene. In *Re XZ* [2015] EWCOP 35 the Public Guardian took issue with an extremely complex set of provisions placed by the donor into an LPA. However Senior Judge Lush held that they did not contravene the requirements of the MCA 2005 and that neither the Court nor Public Guardian were concerned with whether a restriction that does not contravene the terms of the MCA 2005 may pose practical difficulties in its operation.

In *The Public Guardian's Severance Applications* District Judge Eldergill reviewed the provisions which enable the Public Guardian and the Court to ignore or cure defects in LPAs and through the 18 specific cases that he considered, identified a number of common

---

(a) would be ineffective as part of a lasting power of attorney, or

(b) would prevent the instrument from operating as a valid lasting power of attorney.

(3) The Public Guardian—

(a) must apply to the court for it to determine the matter under section 23(1), and

(b) pending the determination by the court, must not register the instrument.

(4) Sub-paragraph (5) applies if the court determines under section 23(1) (whether or not on an application by the Public Guardian) that the instrument contains a provision which—

(a) would be ineffective as part of a lasting power of attorney, or

(b) would prevent the instrument from operating as a valid lasting power of attorney.

(5) The court must—

(a) notify the Public Guardian that it has severed the provision, or

(b) direct him not to register the instrument.

issues upon which he was able to give guidance. Key among the issues considered were the following:

(1) "Differs in an immaterial respect"

District Judge Eldergill provided some guidance as to what defects could be ignored by the Public Guardian on the basis that the instrument differed only in an immaterial respect in form or mode of expression from the prescribed forms. He held that among such defects would be minor misspellings of names and addresses, entering a person's last name in the first names box and *vice-versa*, omitting a person's title (Mr, Ms, etc), using and attaching continuation sheet 1 but not crossing the 'More replacements' box, and so on, all of which fall squarely within what the judge termed the 'pettifogging' category of defects. The use of a superseded version of the prescribed form has also been held to fall into this category (*Re Lane*).

In *SHH* the failure by a witness to a health and welfare LPA to print her name and address next to her signature in the section where the donor authorised her attorneys to give or refuse consent to life-sustaining treatment was considered to be a material defect, but one which still permitted the court to treat the instrument as if it were in the prescribed form. Conversely if the prescribed form is not executed in the correct order, this is fatal to registration (*Re Sporne).*

(2) Joint and Several Appointments

At section 3 of the current iteration of the LPA form is the box at which the donor chooses whether they wish their attorneys to act:

(1) Jointly;

(2) Jointly and severally; or

(3) Jointly with regard to some matters and jointly and severally with regard to other matters.

Section 7 of the form permits the donor to provide "preferences" and "instructions" to their attorneys. A number of the cases referred to the Court by the Public Guardian raised conflicts between the donor's choice in section 3 and the preferences and/or instructions contained in section 7. Thus:

(a) In *MC* the donor had indicated that the attorneys were to act jointly and severally, but had then provided an instruction:

> *"Any financial decisions up to the value of £150 can be made independently by my attorneys. However any financial decisions over this amount must be agreed upon by both my attorneys".*

The Public Guardian suggested that this instruction needed to be severed as being inconsistent with the joint appointment. However District Judge Eldergill held that the donor's intention had been clear (and permissible) and instead directed that the power should be construed as if the donor had ticked the "jointly with regard to some matters and jointly and severally with regard to other matters" box in the form. Several of the other cases referred to the Court by the Public Guardian raised a similar issue.

(b) On the other hand in *JF* the donor had appointed her partner (OM) and two daughters to act as her attorneys jointly and severally but had included an instruction in section 7

> "*My two daughters (if surviving) must always agree on any decision jointly before any actions regarding my estate can be implemented. OM may act as an attorney independently of my daughters".*

The judge agreed with the Public Guardian that this arrangement was not possible under the existing legislation (although the desired result could be legitimately achieved by creating two concurrent LPAs one appointing OM, and the other

appointing the two daughters as joint attorneys). The judge therefore had two choices; either to sever the provision or direct that the power should not be registered. With JF's consent he severed the provision. Again a number of the cases referred to the Court by the Public Guardian raised similar issues.

(3) Conditions on the appointment of replacement attorneys

In *SG* the donor had appointed her son as attorney and her daughter-in-law as a replacement attorney. However, in the "instructions" box in section 7 of the form she sought to impose a condition that the replacement attorney should only act if "*she remains legally married to my son at the point that he becomes unable to act as my attorney*". The judge held that the imposition of such a condition was permissible.

(4) Gifts and maintenance

The judge was faced with a number of cases where the donor had sought to include directions or wishes relating to gifts or the maintenance of others. In *DH* the donor had included the following words in the "preferences" box in section 7 "I would like my grandchildren to be each given £1,000. I would like any funds left over, to be equally shared between my children." The judge held that this did not require severance. It was simply a wish that the attorneys should consider when the time came for them to act under the power. Importantly, it did not operate to give the attorneys power to make such gifts, they would still need to apply to the court for an order permitting them to make the gifts. The position may well have been different had the words appeared in the "instructions" box rather than the "preferences" box.

The judge also considered the vexed question of the extent to which it is permissible for a donor under an LPA to use a donor's funds to maintain another person to the same extent that the donor might have been expected to do. By way of background to this issue; section 3(4) of the Enduring Powers of Attorney Act 1985 (now MCA 2005 Sch 4 para 3(2)) conferred an express power upon attorneys to use the donor's funds to maintain others in these circumstances. Such powers are also routinely conferred upon property and affairs deputies. There is no equivalent express power conferred on LPA attorneys

under the MCA 2005. In my view, it is clear from the Law Commission report that ultimately led to the MCA 2005 that the Commission took the view that the "best interests" test was sufficiently wide to enable an attorney in appropriate circumstances to use the donor's funds to meet another person's needs.

However this view was not shared by the Public Guardian or Senior Judge Lush who in a number of cases decided in 2012/13[3] held that guidance in LPAs instructing or requesting attorneys to maintain third parties was impermissible and should be severed. Judge Lush took the view that guidance indicating that the attorneys could maintain a spouse (and possibly minor children) was permissible on the basis that a husband or father had a common law duty to maintain. Even then a request that the maintenance of a spouse should be considered a "priority" were severed (*Re Buckley*).

In *The Public Guardian's Severance Applications* District Judge Eldergill took a different approach from Senior Judge Lush. Unfortunately he does not refer to any of Judge Lush's decisions in the judgment and it is unclear whether they were referred to him in the course of argument. This leaves an unfortunate inconsistency between a fully reasoned judgment of a Tier 1 Judge (DJ Eldergill) and a number of briefly summarised decisions of a Tier 2 Judge (SJ Lush). It is to be hoped that this inconsistency is resolved sooner rather than later.

The difference in approach taken by District Judge Eldergill can be seen from the following examples:

(a) In *JG* the judge declined to sever the words "I would like my attorneys to consider my son as my main priority when making decisions". He held that this was simply a written expression of the donor's wishes and feelings to which the attorneys should have regard under section 4(6). Acting in

[3] Unfortunately, only brief summaries of the decisions were published. No reasoned judgments were made public.

the donor's best interests does not preclude an attorney from giving weight to the interests of other persons important to the donor. The words complained of did not prevent the LPA from taking effect as an LPA (cf the very similar words severed by Senor Judge Lush in *Re Buckley*).

(b) In *PG* the donor had a daughter who herself lacked capacity to take decisions. The LPA included an "instruction" in section 7 of the form that "my attorneys must ensure that [my daughter's] needs are met". The judge declined to sever the provision. He took the view that making payments from a donor's funds to meet the needs of a third party would be capable of being in the donor's best interests and thus permissible under an LPA. He also took the general lack of applications to the COP for authority by attorneys to make provision for family members as an indication that in most cases families continue to operate with a common-sense understanding of what kind of expenditure is permissible.

The judge recognised that it is not possible to precisely define the boundary between an impermissible gift on the one hand, and a permissible payment to meet another's needs on the other. However he sought to set out the features that may distinguish one from another:

(i) Marriage and equivalent relationships typically create a relationship of interdependence and mutual support, and dependence is commonly created by the presence either of children or a family member with a significant disability. Such relationships commonly generate needs met by other loved ones within the circle. In very general terms, gifts lack the regularity of weekly, monthly and other periodic payments to meet the needs of family members and dependants, and often are not supported by a history of frequent similar periodic payments predating the onset of incapacity.

(ii) Where a spouse or partner attorney applies part of the donor's funds to meet their own continuing needs and those of other dependants in a way which - allowing for any reduction in family income and assets caused by care home fees or loss of earnings and any increase in the donor's own needs - is consistent with the donor's historical expenditure prior to the onset of incapacity then this is likely to be an indicator that it is a need that is being met, not a gift. Because the donor has entrusted such decisions to their attorney, rather than left them to a court, the courts are likely to be reluctant to interfere without good evidence that the attorney has not applied the requirements of section 4 when making their best interests decision. Such expenditure is consistent with the donor's historical expenditure which acts as a barometer of their wishes, feelings, beliefs and values, and the lifestyle enjoyed prior to the onset of incapacity sets a benchmark that is relevant to the assessment of need. In order not to allow for any doubt at all, a prudent donor may wish to make the matter explicit by including a condition or statement in their LPA about future provision for the needs of specified persons.

(iii) Payments on customary occasions such as birthdays will generally be gifts, not payments to satisfy a need. Likewise, the making of one-off payments in the absence of good evidence of a sudden present need which historically the donor would have met or be likely to meet from their own funds may be construed by a court as a gift. Therefore, given that an attorney who breaches any of their duties is personally liable to compensate the donor for any loss thereby sustained to the donor's estate, the prudent course would be to apply for the court to authorise such a payment.

CONCLUSIONS

The following lessons can perhaps be drawn from these decisions:

(1) Take care when drafting LPAs. Irritating though some of the rules for the creation of an LPA may be it is important to follow them. Even if the mistake can be remedied, it will still be embarrassing if the Public Guardian has to apply to the Court for an order waiving the defect or severing an impermissible provision. It may also have costs consequences[4].

(2) Take particular care when seeking to impose restrictions or conditions on how joint and several attorneys are to act. It is not permissible under the current legislation to require decisions to be taken by a majority of attorneys. They must either act jointly or jointly and severally. If the donor is insistent that this is what he wants, consider using two concurrent powers to achieve the intended result.

(3) Expressing the donor's wishes as "preferences" in section 7 of the LPA form is less likely to lead to problems than expressing them as "instructions".

(4) It is possible to include wishes about gifting in the "preferences" part of section 7. However the attorneys need to clearly understand that they cannot make gifts beyond those permitted by section 12 MCA 2005 and will need to make a separate application under section 16 MCA 2005 to give effect to the expressed wishes.

(5) An attorney under an LPA can certainly use the donor's funds to maintain the donor's spouse or minor children (provided always that it is in the donor's best interests to do so). In the light of District Judge Eldergill's decision, it is unlikely

[4] An application under MCA 2005 Sch 1 para 3(2) that a defective instrument should be treated as if it were in the prescribed form would normally be made by the donor or attorney and a court fee would be payable. An application to sever an impermissible provision is usually made by the Public Guardian with the donor's consent and no fee is currently payable.

that the court or Public Guardian would take issue with the attorney using the donor's funds to maintain another individual not within this very narrow class (for example, a partner, adult child or grandchild). Past wishes, feelings and actions will be of particular relevance to any assessment of best interests on this point and where such future maintenance is envisaged it would be sensible to foreshadow this by including appropriate instructions and preferences within the LPA form.

(6) Where there is a doubt as to whether a payment is a gift or the meeting of another person's needs, it is better to err on the side of caution and seek permission from the court.

Aspects of these notes are derived from the author's contributions to Heywood & Massey's Court of Protection Practice *and are reproduced with the permission of the Publishers Sweet & Maxwell.*

drees@5sblaw.com

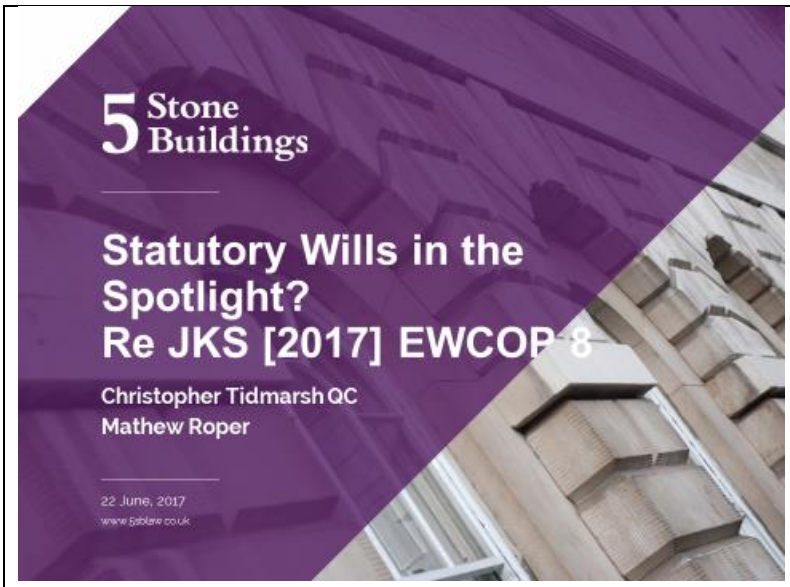
5 Stone Buildings

Statutory Wills in the Spotlight?

Re: JKS [2017] EWCOP 8

Christopher Tidmarsh QC

Mathew Roper



5 Stone Buildings

JKS

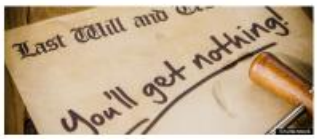
- Born in September 1930
- First language: Punjabi
- Moved to England in 1950s
- Two sons: D and A
- Husband died in December 2009
- Dementia since c. 2014

5 Stone Buildings

Property Transfers

- JKS' matrimonial home and some land had been transferred into the names of A and his wife for no or little consideration in April 2003 and August 2009 respectively
- JKS claimed to have discovered these transfers shortly before her husband's death
- A contended that JKS was aware of the transfers

5 Stone Buildings



The 2010 Will

- In June 2010 JKS made a will leaving her estate to D.
- A contemporaneous capacity assessment was undertaken and the will was read over to JKS through a Punjabi interpreter.
- JKS' instructions to the will draftsman were recorded as follows:

> "I confirm you having instructed me that you wished to leave your entire estate to your son D and nothing to your other son A due to the fact that A already had the family home valued at around £1,000,000 transferred into his own name. In addition your late husband bought a shop for A during his lifetime and you purchased a house for him many years ago so that he now owns two properties. Furthermore you instructed me that since your husband's death, A has been very aggressive and abusive towards you and tried to physically attack you when you sought to enquire about how he managed to get the property transferred into his sole name. You also instructed me that you have a close relationship with D and his children but no relationship with A's children."

- In September 2011 A's solicitors served a notice on JKS purporting to determine her licence of her matrimonial home.

5 Stone Buildings

The Chancery Proceedings

- In August 2012 JKS brought a claim in the Chancery Division to set aside the property transfers on the basis that A had procured them by undue influence and/or, in the case of the land, at a time when JKS' husband lacked capacity.
- JKS' witness statement in the Chancery proceedings stated, amongst other things, as follows:

"19. ..When I heard about [the property] being in my son's name, I immediately asked A about it when he came to visit us. He would not answer me and became physically and verbally abusive. He held a chair at me and a walking stick and threatened to hit me with it if I carried on asking him questions about the transfer..He later made abusive telephone calls to me when I was very distressed just after my husband's death. He would also telephone me in the middle of the night and sometimes he would not even say anything on the phone which scared me. Since this, A and [his wife] have cut off all contact with me and I have not seen them since my husband's funeral."

"27. ...I am desperately worried about what A will do to get me out of my house..My husband would be horrified to know that I am in this terrible situation now. All of this has made me very depressed and unwell."

5 Stone Buildings

The Compromise

- A trial of the Chancery proceedings was listed in June 2014. However, shortly before the trial JKS lost capacity to conduct proceedings and a solicitor, MH, was appointed to act as her litigation friend.
- MH agreed a compromise, subject to the Court's approval. The Court's order made declarations of undue influence and incapacity and set aside the property transfers. Separately, the terms of a schedule were approved on behalf of JKS and ordered to be carried into effect.
- Clause 3 of the schedule provided as follows:

"3. [MH] will apply, once the deputyship order is made, for a Statutory Will for all her estate in the UK to be made for [JKS] on the following terms:
(a) that [MH] will be the named executor..
(b) that [JKS']estate in the UK be given to her two sons, [D], and [A] in equal shares absolutely
(c) that [A] be given an option to purchase [the property]."

- Clause 4 provided that A and his wife would not defend the Chancery proceedings. Clause 5 provided that A and his wife would pay 55% of JKS' costs.

5 Stone Buildings

22 June 2017

Approval

The Court:

- declared (in the absence of any opposition from D) that the transfers had been obtained by undue influence and set them aside;
- approved the compromise on behalf of P

www.5sblaw.co.uk 7

5 Stone Buildings

COP Proceedings

- MH was appointed JKS' deputy in November 2014.
- In October 2015 MH issued an application for a statutory will in substantially the same terms of the compromise.
- JKS was joined as a party and the Official Solicitor was invited to act as her litigation friend.
- Steps were taken to encourage JKS' participation and to ascertain her wishes and feelings. This resulted in six records of JKS' current wishes and feelings being placed before the Court of Protection.

www.5sblaw.co.uk 8

5 Stone Buildings

JKS' Wishes and Feelings

1) Before making the statutory will application MH took steps to ascertain JKS' wishes and feelings. First, in February 2015 there was a meeting at JKS' home attended by MH and his solicitor, D and his family and a Punjabi translator.

"MH I understand that the remainder of estate is to be split equally between your two sons
JKS No need to give to my younger son [A] because he never comes to visit me."

(2) A second meeting took place at JKS' home in June 2015. In attendance were MH and his solicitor, D and his family and a Punjabi interpreter.

"We asked whether she wished to give a sum of money to anyone. She said that she wishes to give D all cash held in bank accounts and all chattels..

She said that she wishes D to take care of her funeral arrangements..

She said many times that she wished for all of her estate to go to D as A doesn't visit her and became upset when we explained the terms of the settlement reached that MH would make application for a statutory Will for all of her estate to be divided between A and D in equal shares.

5 Stone Buildings

(3) In June 2016 JKS was assessed at her home by a consultant old age psychiatrist. D's wife was present for part of the assessment. The form COP3 recorded the following wishes:

"..she has repeated that she does not want to leave anything to her son A or his children."

(4) In January 2016 a further meeting took place at JKS' home. In attendance were MH and his solicitor and a Punjabi translator. D's wife was asked to leave before the meeting commenced.

"MH: Last time we discussed that your whole estate should be divided between A and D.
JKS: I have not seen A since he was born.
MH: His lawyer said he has been to see you
JKS: Not true
JKS: Whoever is looking after me should get my estate.
MH: So if both are looking after you they should get 50/50
JKS: No A did not come to his Father's Funeral"

"JKS: I will transfer my house to D.
MH: You cannot."

"Sol: Do you want a meeting with A
JKS: No"

5 Stone Buildings

(5) Given JKS' expressions of wishes and feelings the Official Solicitor instructed a General Visitor to attend on JKS as his agent. The visit took place at JKS' home in April 2016. D and his family were at the home but not present throughout the Visitor's interview.

"...JKS said, and this was repeated several times throughout our meeting, that her younger son (A) never came to visit her. He never sees her or helps her, especially after her husband died and she did not want to give anything to him, not a single penny.

The adjective I would use to describe how she said this is adamant and she became quite animated when discussing this."

"I explained to her that I had read her statement and in this she said that she and her husband had always tried to treat their two sons equally.
Q. Had something happened to change that?
A. JKS said again that A never came to see her whereas D and his wife and son came to look after her.
Q. I asked her when was the last time she saw A?
A. She did not know.

Then she repeated that she thought of A and his wife as dead.
'He's dead he does not look after me I don't look after him. It's finished'
JKS also remarked that D was her eldest son and he looked after and that was why she wants to leave things to him and his family."

"Q. I asked her who did she want to have her house and money?
A. She said D and his family – they look after her."

5 Stone Buildings

(6) In May 2016 a further meeting took place at JKS' home. This was arranged without notice to the Official Solicitor notwithstanding his appointment as JKS' litigation friend and legal representative. In attendance were MH and his solicitor, A and his family, A's solicitor and a Punjabi interpreter.

"There is no dispute between us (looking at A). There is no problem I want my two sons to have an equal share. Everything is clear they must get 50/50 between them. They are my children, I will look after them. I will do what I want."

"Whatever I have is for my sons"

5 Stone Buildings

Final Hearing

- Final hearing before HHJ Walden-Smith on 2 November 2016
- Written judgment dated 18 November 2016 (*Re J* [2016] EWCOP 52)
- MH was authorised to execute a will in JKS' name dividing the estate 75% to D and 25% to A
- The Judge ordered that all parties' costs, save the costs of A's attendance on JKS on 25 May 2016 (in respect of which there was no order), be subject to a detailed assessment on the standard basis and paid by JKS
- A's application for permission to appeal was refused

5 Stone Buildings

The Appeal

- 19 grounds of appeal:
  - The contractual effect of the Compromise and its impact on the application for a statutory will (grounds of appeal 1-7)
  - Independently of the contractual effect of the Compromise, the trial Judge's assessment of various facts, the exercise of her discretion and her conduct of the trial unfairly (grounds of appeal 8-18)
  - A's costs of 25 May meeting (ground of appeal 19)
- 3 days before Mr Justice Charles (30-31 March, 3 April 2017).
- Written judgment dated 24 May 2017 (49 pages).

Representation of P

"...although I understand that the approach taken in this case of joining P as a respondent and inviting the Official Solicitor to act as P's litigation friend works well in a great number of applications for a statutory will, there may be a need in some cases for the COP when making that invitation to the Official Solicitor and for the Official Solicitor when deciding whether or not to accept it to consider whether a professional deputy should make the application for P or act for P at least until it is made clear whether there is or is not a dispute."

www.5sblaw.co.uk 15

Practice Direction 13B

"4.7 Where appropriate, the preliminary documents for a final hearing should include:...

(b) the findings of fact that the court is being invited to make and the factors based on such findings or agreed facts that the court is being invited to take into account..."

www.5sblaw.co.uk 16

5 Stone Buildings

Statutory Wills

- MCA 2005, section 18(1)(i).
- The Court is required to make a value judgment as to what is in P's best interests.
- There is no statutory definition of "best interests" in MCA 2005
- Section 4 does however contain a number of considerations, including P's past and present wishes and feelings (and in particular any relevant written statements made when P had capacity), the beliefs and values that would influence his or her decision and any factors P would consider if he or she were able to do so. The views of P's deputy and all those interested in P's welfare are also relevant considerations. More generally, the Court must consider "all relevant circumstances" (MCA 2005, section 4(2))
- There is no hierarchy between the various factors; the individual circumstances of each case will dictate the weight to be attached to the various factors; and there may be one or more factors of "magnetic importance" which influences or determines the application

www.ssblaw.co.uk 17

Re S [2010] 1 WLR 1082

"...in my judgment, where P can and does express a wish or view which is not irrational (in the sense of being a wish which a person with full capacity might reasonably have), is not impracticable as far as its physical implementation is concerned, and is not irresponsible having regard to the extent of P's resources...then that situation carries great weight, and effectively gives rise to a presumption in favour of implementing those wishes, unless there is some potential sufficiently detrimental effect for P of doing so which outweighs this."

www.ssblaw.co.uk 18

Re M [2009] EWHC 2525 (Fam)

"(1) First, P's wishes and feelings will always be a significant factor to which the court must pay close regard

(2) Secondly, the weight to be attached to P's wishes and feelings will always be case-specific and fact-specific...

(3) Thirdly, in considering the weight and importance to be attached to P's wishes and feelings the court must of course, and as required by section 4(2) of the 2005 Act, have regard to all the relevant circumstances. In this context the relevant circumstances will include, though I emphasise that they are by no means limited to, such matters as:

(a) the degree of P's incapacity, for the nearer to the borderline the more weight must in principle be attached to P's wishes and feelings...;

(b) the strength and consistency of the views being expressed by P;

(c) the possible impact on P of knowledge that her wishes and feelings are not being given effect to...;

(d) the extent to which P's wishes and feelings are, or are not, rational, sensible, responsible and pragmatically capable of sensible implementation in the particular circumstances; and

(e) crucially, the extent to which P's wishes and feelings, if given effect to, can properly be accommodated within the court's overall assessment of what is in her best interests."

Aintree Hospitals NHST v James [2014] AC 591

"...in so far as Sir Alan Ward and Arden LJ were suggesting that the test of the patient's wishes and feelings was an objective one, what the reasonable patient would think, again I respectfully disagree. The purpose of the best interests test is to consider matters from the patient's point of view. That is not to say that his wishes must prevail, any more than those of a fully capable patient must prevail. We cannot always have what we want. Nor will it always be possible to ascertain what an incapable patient's wishes are. Even if it is possible to determine what his views were in the past, they might well have changed in the light of the stresses and strains of his current predicament."

5 Stone Buildings

Wishes and Feelings

- Despite suggestions to the contrary at the permission hearing and throughout the appeal, Charles J did not seek to depart substantially from the position on wishes and feelings propounded by Munby J in *Re M*
- Particular emphasis was placed on JKS' capacity and allegations of undue influence
- Charles J held that the "rationality" of wishes and feelings are to be assessed objectively
- Charles J appears to limit the relevance of P's likely displeasure with an outcome to issues of implementation

www.ssblaw.co.uk 21

15 So, in my judgment an approach to the respective weight to be given to expressions of P's testamentary wishes that failed to take account of P's capacity when they were made and so, amongst other things: i) P's ability at the relevant times to take account of relevant past and present circumstances, ii) the factual accuracy of reasons expressed by P at the relevant times, iii) any influences to which P may be subject at the relevant times, and iv) the way in which P's wishes and feelings had been obtained would not comply with the approach dictated by the MCA.

www.ssblaw.co.uk 22

148 I consider that these examples of the approach taken by the COP judge to the wide-ranging disputes read alone, and in the context of her judgment as a whole, found the conclusion that her approach to the wide ranging and serious family disputes resulted in unfairness to A and was so an error of principle because...it failed to recognise, or to properly recognise, that there were serious allegations against D that were relevant to the assessment of the weight to be given to expressions by JKS of her wishes and feelings.

149 The last of those failures led to a further error of principle or failure by the COP judge to take relevant features into account in her assessment of the weight to be given to JKS's wishes and feelings that D should inherit her estate and in particular those made by her after she had lost capacity.

150 ...the reliance by the COP judge on the expertise of professionals who she considered would be alert to any indication that JKS was being unduly pressured to say things against A and her conclusion that it was unrealistic to suppose that a pressured view could be held by JKS until such time as she spoke to the Psychiatrist and the Court of Protection visitor are built on sand. Firstly, as I have set out above there is no evidence that either of them addressed this issue and if they, or those instructing them, did I was not given a good reason why it was thought appropriate to interview JKS when D and/or his wife remained in the house. Secondly, there was no evidence that the relevance of (a) the existence of serious allegations against D, (b) the point that the Chancery Allegations and the Chancery Behaviour Allegations were disputed or (c) the point that what JKS was saying about her existing relationship with A, his wife and children was or may be more significantly inaccurate than for example the Psychiatrist's comment on what JKS was saying about it (see paragraph 79 above) was appreciated or properly appreciated by either of them when they conducted their interviews.

5 Stone Buildings

Obtaining P's Wishes and Feelings

- The existence of disputes of fact means that anyone recording wishes and feelings must take steps to ensure so far as possible that:
  - P is seen in circumstances that reduce family influences
  - The history provided to a doctor or Visitor is balanced and distinguishes between proven fact and assertion
  - The questions must be appropriately framed to determine why P is expressing certain views
- The suggestion in this case was that JKS should not have been interviewed in her own home and that it was not sufficient to merely interview her in private. It was apparently necessary for JKS to be taken to a neutral venue by strangers!

5 Stone Buildings

Inferring/Imputing Wishes and Feelings?

- Charles J was critical of the trial Judge for failing to afford weight to what he inferred to be JKS' wishes and feelings when the compromise was entered into by her litigation friend:

> "103 The absence of any indication before the Chancery judge or the COP judge that JKS was expressing wishes and feelings to the effect that she was not content with the compromise put forward and approved on her behalf founds the inference that it accorded with her wishes and feelings, or at least did not conflict with them, because if she was expressing views against it her litigation friend should have drawn those to the attention of the Chancery judge and the COP judge.."
>
> "113 she failed to consider whether:
> i) the intentions she identified provide an expression of the testamentary wishes and intentions of JKS at a time when, and as part of the arrangements by which, she recovered her matrimonial home and so greatly increased the value of her estate, or
> ii) JKS did this by entering into the Chancery Settlement Agreement with the approval of the Chancery court."

- The difficulty is that it was far from clear that JKS was consulted about the compromise and certainly there was no record of her wishes at that time.
- Some consideration needs to be given to whether the Court should draw inferences about P's historic wishes and feelings. Of course the Court can consider anything P might consider if he or she had capacity, but that requires a slightly different weighting. They are after all not her expressed wishes and don't require consideration of the effect their non-implementation will have on P. Moreover, in this case it is submitted that this issue was inseparable from the effect of the compromise on the statutory will application and whether or not the fact of that settlement was a factor of "magnetic" importance. Charles J held that the compromise was not binding and did not suggest it amounted to a "magnetic" factor.

5 Stone Buildings

Doing "The Right Thing"

- In *Re P* [2010] Ch 33 at paragraph [47] Lewison J held that "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". This statement was endorsed by Munby J in *Re M* [2011] 1 WLR 344
- However, the difficulties inherent in that consideration were set out by Morgan J in *Re G(TJ)* [2010] EWHC 3005 (COP) at paragraph [53]. This has since been accepted and applied by HHJ Behrens in *NT v FS and others* [2013] EWHC 684 (COP))
- Case specific difficulties were also raised by HHJ Lush in *Re JC* [2012] WTLR 1211

Re G(TJ) [2010] EWHC 3005 (Fam)

"I agree that this factor can create difficulties. First, in the case of a completely incapacitated person, the making of the gift or the terms of the will are decided upon by the court and not by P. In such a case, P has not done anything, in that the decision has been made for P and not by P. This point will have less force where P has participated in the decision or where the decision respects P's actual wishes. There can also be a difficulty with the prediction that P, after his death, will be remembered with affection by his family for having done the right thing. Some families do not agree. Some gifts or statutory wills are made as a result of a direction of the Court of Protection where the court has had to prefer some family members to other family members. Some family members will think that the court has done the right thing and some will think that the court has done the wrong thing."

www.5sblaw.co.uk 27

5 Stone Buildings

- At first instance in HHJ Walden-Smith applied *Re G(T.J)* as follows:

  "I do not consider that much, if any, weight should be given to the consideration of whether the terms of any statutory will would mean that J(KS) is remembered by her family as 'having done the right thing'. As Morgan J said in *Re G(T.J) [2010] EWHC 3005 (Fam)* where the Court of Protection directs the making of a statutory will *"Some family members will think that the court had done the right thing and some will think that the court has done the wrong thing."*

- Charles J was critical of this approach:

  "18 …In the particular circumstances of *G(T.J)* Morgan J did not attach weight to this factor but this does not mean that in other cases it will not be a factor that the decision maker is entitled to and should take into account.

  19 Accordingly, in my view the COP judge was wrong to conclude, in the general way that she did, that not much, if any, weight should be given to this factor because some members of a family will think that the court has done the right thing and others that it has done the wrong thing. No doubt when there is a contest between members of a family this is likely and in some cases it may mean that 'doing the right thing' is too subjective to carry weight but in others it may not."

www.5sblaw.co.uk 28

5 Stone Buildings

- It is respectfully submitted that Morgan J's statement is correct and not confined to the facts of that case
- JKS' interest was in *being remembered with affection by her family* for having done "the right thing". In many cases it will be possible to achieve that outcome. However, the test, as is clear in the light of Baroness Hale's comments in *Aintree* at paragraph [45], is subjective rather than objective
- In the premises, the HHJ Walden-Smith was right (or at least within the broad ambit of her discretion) to afford little if any weight in this case to JKS being remembered for having done "the right thing" from A's point of view in circumstances where D would have though she had done "the wrong thing"
- It was also questionable whether weight could properly have been afforded to a decision by the Court to divide her estate between D and A in equal shares since it would be an act by the Court notwithstanding JKS' desire to do otherwise

www.5sblaw.co.uk 29

5 Stone Buildings

www.5sblaw.co.uk 30

5 Stone Buildings

Relationship Between Compromise and CoP

- Can a compromise bind the CoP
  - S4 MCA 205
  - Allen v Distillers [1974] QB 384

5 Stone Buildings

What Can be agreed? (para 90)

- Anything.
- Potential clash with s4 MCA
- Possible approaches
  - judge applies s4
  - Same judge sits as judge of CoP and approves at same time
  - Judge approves compromise conditional on CoP approval

5 Stone Buildings

Suggested Approaches (para 159)

- Full explanation to Trial Judge of what intended
- Trial judge should record what approach is to approval
- Trial judge should say whether approval dependent on any outcome in CoP and how CoP will be invited to approach compromise
- P's wishes and feelings should be sought and recorded
- Thought should be given to whom the parties would be in application to CoP

5 Stone Buildings

The Decision

What was compromise trying to do?

- MH's confusion
- A's contention
- OS's contention

5 Stone Buildings

www.5sblaw.co.uk 35

5 Stone Buildings

Contract to make a will

- Parties could have agreed that P would make a will
- Difficulties with s4 MCA (para 90)
- Judge thought that difficult to say whether in P's best interests. (cf actual decision)
- Judge accepted that was not the agreement (cf argument)

www.5sblaw.co.uk 36

5 Stone Buildings

- MH did not even meet P before entering compromise
- D objected to the compromise
- MH wrote to D immediately before compromise saying that time to object was in front of CoP

5 Stone Buildings

- A argued that P was bound not to oppose a will in a form other than that set out in Compromise
- OS submitted that:
  - Agreement was that deputy would make an application
  - P could not bind herself not to oppose a will in form set out in Compromise because:
    CoP's role was inquisitorial; and
    agreement clearly not intended to bind D

5 Stone Buildings

www.5sblaw.co.uk 39

5 Stone Buildings

- But decided that P could not, without a change of circumstances, oppose will on basis of allegations made in Chancery proceedings (para 134)
- D could oppose
- Judge also allowed appeal on grounds of a number of "mistakes" made by the CoP judge

www.5sblaw.co.uk 40

5 Stone Buildings

5 Stone Buildings

The Judge's Lessons

- In his view there should have been a greater focus on what was agreed, what was agreed could stand as allegations and what needed to be decided
- P should have been interviewed in a neutral situation; away from family members and should have discussed the compromise and A's statement

5 Stone Buildings

www.ssblaw.co.uk 43

5 Stone Buildings

- In fact all that was impossible. When judgment was handed down, it was common ground that it was not possible to interview P away from the house, there had to be a family member present to let someone in (as P would not answer the door) and that there was no real chance of getting any more detail from P.

www.ssblaw.co.uk 44

5 Stone Buildings

www.sblaw.co.uk 45

5 Stone Buildings

The Take Away

- How do parties cope when there are potentially many factual issues?
- Should the parties have produced a list of factual disputes pursuant to PD13B?
- Had they done so there was at least a chance that a sensible hearing could have taken place

www.sblaw.co.uk 46

ctidmarsh@5sblaw.com

mroper@5sblaw.com