

IN THE COURT OF PROTECTION

Case No: 12791319

First Avenue House
42 – 49 High Holborn
London WC1A 9JA

Date: 4 November 2016

Before:

District Judge Glentworth

Between :

SAD (1)

Applicants

ACD (2)

SED

Respondent

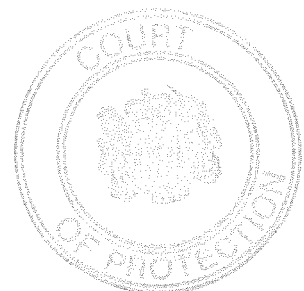
Francesca Gardner (instructed by Clarion, solicitors) for the **Applicants**
David Rees (instructed by Hugh Jones, solicitors) for the **Respondent**

Hearing date: 10 October 2016

JUDGMENT

IMPORTANT NOTICE

The judge has given permission for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the incapacitated person and members of their family and of any individuals referred to in this Judgment must be strictly preserved. All persons, including representatives of the media must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.



District Judge Glentworth:

1. This application raises issues in relation to a Lasting Power of Attorney for property and affairs (an LPA) under which SAD and ACD (the Applicants) were appointed attorneys by their mother, SED (the Respondent). The Applicants were represented by Francesca Gardner of counsel and the Respondent by David Rees, also of counsel. There was a directions hearing on 22 August 2016 when this final hearing was listed and it was agreed that it would proceed on the basis of submissions only.

Background

2. The Respondent was born in 1963 and is now aged 53. On 1 April 2014 she made the LPA appointing her mother, CL, and her two daughters, the Applicants, as her attorneys. The power was registered by the Public Guardian on 16 July 2014. On 25 September 2015 the Respondent executed a deed, which was prepared and witnessed by Steven Felts of Christopher Davidson Solicitors LLP, revoking the LPA. The Public Guardian cancelled the registration on 19 October 2015. On 4 December 2015 the Applicants made their application objecting to the revocation and cancellation on the basis that the Respondent lacked capacity to make the relevant decisions. They were also concerned to prevent the Respondent's sale of her property in the UK, in Wiltshire (the Property). The Respondent owns another property in Greece, on the island of Aegina, which is where she is living at present. In addition, she is the beneficiary of substantial funds, in the region of £3 million, which are held for her on a bare trust. The trustees of the settlement are her brother, AL and Andrew Wriglesworth of Wrigleys solicitors.
3. On behalf of the Respondent it is confirmed that no issues arise under Schedule 3 of the Mental Capacity Act 2005 (the MCA)
4. It is unfortunate that these issues which concern the revocation of the LPA and the sale of the Property have given rise to conflict between this mother and her daughters. There is no doubt that the Applicants made this application motivated by a concern for their mother and her mental, physical and financial wellbeing. It is also undeniable that the application and the concerns which prompted it have damaged their relationship because both the Applicants and the Respondent make reference to it. All three want to resolve the situation without irreparable harm being done. Each puts their case on the basis that it is their proposals advanced in submissions at this hearing which offer the best solution for the Respondent.

This application

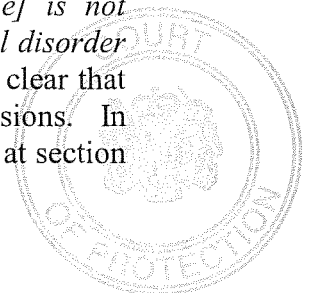
5. At the hearing on 22 August 2016 the issues identified for this hearing were:
 - i) whether the Respondent lacked capacity to revoke the LPA on 25 September 2015;
 - ii) whether the LPA should be reinstated;



- iii) whether HJTC Ltd should be appointed to act as the Respondent's property and affairs deputy; and, if the court decides that it should
 - iv) whether the deputy should be authorised to sell the Property
6. The parties were concerned to avoid a situation where evidence would need to be called and witnesses subjected to cross-examination because they were worried that this would cause further damage in what is already a difficult situation. However, with the agreement of parties, the Respondent spoke to me in the presence of both counsel and responded to the questions which I raised with her. She gave her explanation of how the LPA came to be executed. I am aware from the written evidence filed on behalf of the Applicants that her version of events is not agreed. She spoke of the difficulties she experienced with the practical effect of her daughters being her attorneys, feeling that it was a reversal of the parent/child roles causing disruption to what has always been a good relationship. She feels that the conflict over financial matters impacts on her relationships with other members of the family who have been drawn into the difficulties posed by the current situation. She simply feels that the arrangement is unworkable. She spoke positively about her relationship with the proposed deputy and members of his staff. She accepted that she needs assistance at present and was clear that what she wanted was a professional relationship which would leave her familial relationships free from conflict about financial matters.

The law

7. For the purposes of section 2 of the Mental Capacity Act 2005 (MCA), '*... a person lacks capacity in relation to a matter if at the material time she is unable to make a decision for herself in relation to the matter because of an impairment of, or disturbance in the functioning of, the mind or brain*'. I have been provided with a report by Dr Bruce Scheepers, Consultant Neuropsychiatrist, dated 3 June 2016. He was asked to assess the Respondent's capacity to:
- i) revoke her LPA on 25 September 2015;
 - ii) make a decision about the sale of the Property;
 - iii) give instructions to change the trustees of her settlement.
8. He gave his opinion that the Respondent, '*... has a Bipolar Affective Disorder which has followed a fluctuating course over the last fifteen years and she is currently in a mild hypomanic phase.*' [D6] In addressing the factors set out at section 3 of the MCA, Dr Scheepers was satisfied that the Respondent, '*... is capable of understanding those matters that may require a decision in relation to all the matters in question with support ... she is capable of retaining information for long enough to communicate a decision ... [she] is not capable of weighing matters in the balance on account of her mental disorder ...*' Although he does not specifically address the matter, it is quite clear that the Respondent does not lack the ability to communicate her decisions. In giving his opinion, Dr Scheepers acknowledges the principle set out at section



1(4) of the MCA that, '*A person is not to be treated as unable to make a decision merely because she makes an unwise decision*'. It is his opinion that the Respondent lacks capacity in relation to each of the specific areas he was asked to address.

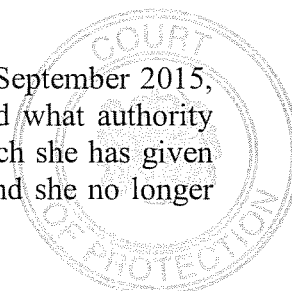
9. The Respondent does not accept Dr Scheeper's opinion that she suffers from bipolar disorder. At paragraph 5 of her witness statement (which I think must be dated 17 August 2016 although it is not possible to read the date on the signature page) she says, '*I have previously been diagnosed with mental health problems although I do not accept that I have bipolar disorder. I accept that I have suffered from depression in the past. I have been sectioned under the Mental Health Act 1983 on two occasions ...*' Having considered the Dr Scheepers' report carefully I can see no basis on which I should depart from accepting his diagnosis which is clearly supported by other evidence and, with the exception of the Respondent's expressed view, there is nothing to challenge it. As I understand the Respondent's case, she accepts that, at present, she lacks capacity to manage her property and affairs and requires support. She says that should be by the appointment of a deputy rather than by restoring the Applicants' powers under the LPA. She takes issue with Dr Scheepers' assessment that she lacked capacity to revoke the LPA in September 2015.

Revocation of the LPA

10. The powers of the court in relation to the validity of LPAs are set out at section 22 of the MCA which, at section 22(2)(b), provides that the court may determine any question relating to, '*whether the power has been revoked ...*' There is no reported decision as to what is required to satisfy the court that the donor does not lack the capacity to make the decision to revoke in accordance with the provisions of sections 2 and 3 of the MCA. I have been referred by counsel for the Respondent to the guidance given in *Re S* 13 March 1997, an unreported decision of Master Lush (as he then was) in relation to an enduring power of attorney, where he found that the donor should understand:
- i) who the attorneys are;
 - ii) what authority they have;
 - iii) why it is necessary or expedient to revoke the power; and
 - iv) the foreseeable consequences of revoking the power.

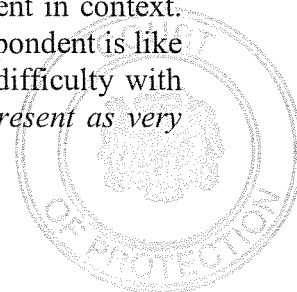
Whilst I must guard against setting too high a test of capacity, I would suggest that it is also appropriate to consider whether the donor is able to weigh and take into consideration her reasons for the original decision to appoint the attorneys.

11. There can be no doubt that, at the time of the revocation in September 2015, the Respondent understood both who her attorneys were and what authority they had. Her reasons for revoking the power are those which she has given consistently, that she was coerced into granting the power and she no longer



wants her daughters to be her attorneys. It is argued on the Applicants' behalf that the situation the parties now find themselves in is one which the Respondent wanted to protect herself against. Past experience shows that the current mild hypomanic phase will come to an end. There have been similar episodes previously which have resulted in difficulties which the Respondent wanted to guard against happening again. That is why she chose to execute the LPA when she did.

12. As far as the revocation is concerned, there is contemporaneous capacity evidence from Steven Felts of Christopher Davidson, solicitors, who was instructed by the Respondent at the time. His file note appears as exhibit SED2 to her witness statement. He came to the conclusion that the Respondent did not lack capacity to revoke the LPA. His opinion differs from that of Dr Sheepers and I must have regard to the fact that Mr Felts had the opportunity to assess her at the time the deed was signed. I also remind myself that, while the opinion of an independent expert such as Dr Sheepers must be accorded appropriate weight, the capacity assessment of a professional, such as a solicitor, may, in the circumstances of the case, be preferred.
13. Mr Felts deals with the question of capacity on the second page of his attendance note where he says, *'In SF's opinion [the Respondent] knew that she had prepared a Lasting Power over her property and financial affairs, she knew that she did not want her mother and her daughters to act in relation to her property and finances and it appears that she has been dealing with her property and finances herself for some time. I therefore considered that she has the mental capacity to revoke her lasting Power of Attorney over her property and financial affairs'* [C120]
14. It is apparent from the contents of the attendance note that this solicitor had no previous experience of being instructed by the Respondent which means that he had nothing to measure her current presentation against. He was also not aware of her financial situation and the arrangements made for the management of her money. To him, she repeated her assertion that she did not have bipolar disorder and that, *'... she had a doctor in Athens that says she doesn't have bipolar'*. I have indicated that I accept the evidence of Dr Sheepers with regard to diagnosis. The Respondent also asserted to Mr Felts that she had, *'... never taken any drugs for it ever.'* [C229]. It is clear from the medical records examined by Dr Sheepers that was not correct. Dr Sheepers was able not only to assess the Respondent but to set the information she volunteered to him against what was contained in her medical records. Mr Felts was clearly alive to the issue because his note records, *'It may well be that [the Respondent] does have bi polar disorder or some form of mental disorder and she complained of depression but that she is now fine ...'* However, I must take into account the evidence filed on behalf of the Applicants who know the Respondent intimately. That was not information available to Mr Felts. Dr Sheepers was able to put his assessment in context. He identifies the importance of having a picture of what the Respondent is like when, *'euthymic or 'normal' in mood'* [D7]. He highlights a difficulty with assessment when he comments that the Respondent, *'... can present as very*

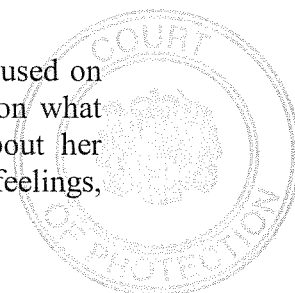


plausible and reasonable until some of her assertions or statements are challenged or she behaves in ways that are disinhibited or impulsive. I have also noted how a loss of insight appears to be a prominent feature of her mental state when she is unwell. [D7]

15. Having considered the evidence on capacity of both Dr Sheepers and Mr Felts I consider, on balance, that the assessment of Dr Sheepers is to be preferred. It was made in circumstances where he had access to all the relevant information, much of which was not available to Mr Felts. The Respondent complained that her attorneys were seeking to control her finances and that she had only signed the LPA under duress because she was threatened that, '*... her brother (who had control over her finances via a trust fund) would cut her off*' [C119]. I have read all the written evidence and I do not accept that that was the position. It calls into question the Respondent's judgment in using and weighing the information when deciding that it was necessary or expedient to revoke the power. I accept the evidence filed on behalf of the Applicants that the Respondent willingly entered into the LPA to ensure that her financial position would be protected should she have a further episode of hypomania. When that point arrived she clearly knew who her attorneys were and what authority they had. She had an understandable reason for wanting to revoke the power but I am not satisfied that she was able to use or weigh the information about why it was expedient or necessary or properly to consider her current wishes and weigh them against her purpose in signing the LPA in the first place. Given that, at that point, there was no proposal, as there is now, to appoint a deputy to manage her property and affairs, I am not satisfied that she was able to use or weigh the information about the foreseeable consequences of revoking the power. On that basis, I am satisfied that the Respondent lacked capacity to revoke the LPA on 25 September 2015. The evidence is that the hypomanic phase persists and I am satisfied, on the basis of the evidence which I have already addressed, that the Respondent currently lacks capacity to revoke her LPA.

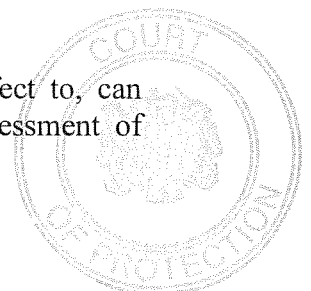
Revocation of the LPA

16. The Respondent's case is that, should I decide as I have, rather than reinstate the LPA I should revoke it. The court's power in this regard is set out at paragraph 22(3) of the MCA which provides that the court may revoke the LPA if P lacks capacity to do so if, in effect, it finds that the behaviour of the attorneys is not in P's best interests. Guidance on the principles to be applied in making a best interests decision is set out at section 4 of the MCA. I note that there is no hierarchy as between the various factors and that, in any particular case, there may be a factor which is of 'magnetic importance'. Section 4(7) makes it clear that it is necessary to take into account, if it is practicable and appropriate to consult them, the views of a number of people as set out there, including the donee(s) of a lasting power of attorney granted by P.
17. The cases advanced by both the Applicants and Respondent have focused on the Respondent's wishes and feelings, the Applicants concentrating on what the Respondents past actions in entering into the LPA tell me about her intentions and the Respondent focusing on her current wishes and feelings,

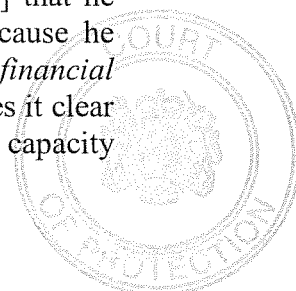


which she has held for some time. The Applicants would say since the latest episode of hypomania. No question has been raised about the Respondent's ability to enter the LPA which stands therefore as a relevant written statement by her when she had capacity.

18. The Applicants' case is put on the basis that, when she did not lack the capacity to do so, the Respondent made an arrangement which was designed to cater for those periods when she no longer has the capacity to manage her property and affairs. It is their view that she will suffer significant distress when she finds that her preparations have come unstuck in such a way that, rather than her finances being managed by those close to her, a professional has been appointed bringing implications both in relation to costs and greater formality. They are concerned at the potential loss of the flexibility which the use of an LPA provides. It is submitted on behalf of the Applicants that reinstatement of the LPA would be the least restrictive option. They are concerned that the trust funds which have been paid direct to the Respondent would be channelled via the deputy who would then make decisions about their release in the Respondent's best interests. They point to the fact that at present the Respondent has money directly in her control and it is not their intention to change that. They say that finding for them in relation to the LPA would prevent life changing decisions being made for the Respondent at a time when she lacks capacity and would preserve what had been intended to be the status quo until she is in a position to look at the matter again and make these decisions for herself, when she has recovered from this most recent episode.
19. There can be no doubt about the Respondent's current wishes and feelings. They are clearly shown by her action in seeking to revoke the LPA, her written evidence, what she said to me and the submissions made on her behalf at the final hearing. The Respondent not only opposes her daughters continuing to act on her behalf but has also made it clear that she does not want her mother to act under the power of attorney either. On her behalf, I am reminded that in considering the weight and importance to be attached to those wishes and feelings I must have regard to all the relevant circumstances of the case as identified in *Re M (Statutory Will)* [2011] 1 WLR 344 at paragraph 35 including:
- i) the degree of P's incapacity;
 - ii) the strength and consistency of P's views;
 - iii) the possible impact on P of knowing that her wishes and feelings are not being given effect to;
 - iv) 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;
 - v) 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

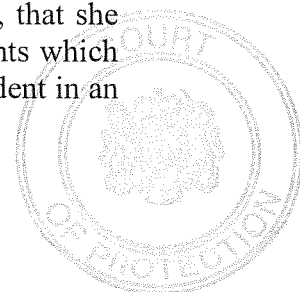


20. Amongst other things, the Respondent relies on the provision at section 1(6) of the MCA, which requires the court to have regard to the need to give consideration to whether what is required can be as effectively achieved in a way which is less restrictive of her rights and freedom of action. Both the Applicants and Respondent therefore place reliance on the Respondent's wishes and feelings and submit that it is their solution which will achieve a result which is less restrictive than the alternative.
21. The only evidence that the actions of the Applicants as attorneys have behaved in a way that is not in the best interests of the Respondent relates to the impact on the Respondent of their attempts to assert their authority as attorneys against her express wishes. They have set out clearly and cogently what their concerns are and why they have felt it necessary to act. They have grown up with the problems presented by their mother's mental ill health. They love her and, now they are adults and in a position to do so, they want to do what they can to protect her. However, it is those very actions which have caused such distress and conflict between them. I accept that they were right to be concerned when the Respondent originally purported to revoke the LPA because she did not accept that she was unwell and had no intention of putting any alternative arrangement in place. The position is different now because, on her behalf, it is accepted that, if the LPA is not reinstated, the court should appoint a property and affairs deputy.
22. On balance, I accept that in this case I should not reinstate the LPA. I am well aware of the strength of feeling on both sides. The situation is particularly difficult for the Applicants who, I am satisfied, made the application because they were concerned to try and ensure that their mother's plans made when she was well should not be frustrated. What no one could fully have anticipated was the impact which trying to do what they believed their mother intended would have on the relationship between her and her daughters when faced with the reality of the situation. I accept the submission made on the Respondent's behalf that the Applicants' approach to this case does not properly take account of the fluctuating nature of the Respondent's condition or the harm which could result from a failure to respect and give effect to her current wishes and feelings. I note the Respondent's expressed wish to reset her relationship with the Applicants. That is something they want too. I am satisfied that this will not be possible if they continue to have responsibility for making financial decisions on behalf of the Respondent with all that goes with that. Those actions and the associated financial discussions have been the trigger for difficult and stressful interactions between mother and daughters which cannot be in the Respondent's best interests.
23. I note the opinion expressed by Dr Sheepers that the combination of an LPA and bare trust would be least restrictive of the Respondent's rights and freedoms and enable her to make her own decisions as far as possible [D10]. However, it is apparent from what he says later in his report [D11] that he does not fully appreciate the position where there is a deputy because he speaks of the effect being to, '*... remove her right to make all financial decisions.*' That is not correct because section 16 of the MCA makes it clear that the deputy can only make a decision on P's behalf where P lacks capacity



to make that decision for herself. The fact that, at present, I am satisfied that the Respondent lacks capacity to make significant financial decisions, such as a decision to sell the Property, does not mean that she also lacks capacity to make smaller decisions for herself. The powers of a deputy do differ from those of an attorney under an LPA because that enables the attorneys to make any decision on P's behalf unless specifically excluded under the power. There is no evidence that Respondent currently lacks capacity to continue to manage the money which she receives on a regular basis from her trustees.

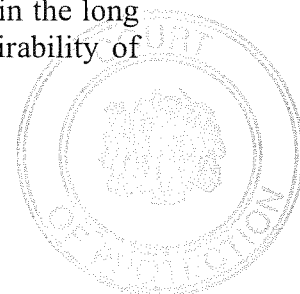
24. On that basis, I am satisfied that it is not in the Respondent's best interests for her attorneys to continue to manage her property and affairs and I will revoke the LPA and appoint HJTC her property and affairs deputy as she requests. In making my decision, I have balanced the relative advantages of reinstating the LPA and of revoking it on the basis that control over the Respondent's property and affairs will be taken over by a deputy.
25. The obvious advantage of reinstating the LPA would be that it would restore the position to that which the Respondent originally intended it should be at the time she made it. However, its reinstatement would be contrary to the Respondent's current wishes and feelings. She says that she now accepts that it is appropriate for someone else to manage her personal financial position but would prefer that to be a professional. That is not what she originally intended but I take into account that since the LPA was made she has experienced the practical effect of giving that power to the Applicants and found that, in her current condition, she cannot tolerate what she sees as their 'interference'.
26. The Respondent has spoken positively about the appointment of her chosen deputy because, at present, she has a good working relationship with Hugh Jones and the members of his team at HJTC. I am well aware that the situation may change, particularly if she and her deputy disagree about issues of capacity and what is in her best interests. I take into account the experience of the proposed deputy, the good relationship which has already been established and the skill which I know will be deployed to resolve problems in the relationship which may arise in the future.
27. The Respondent could, of course, apply to discharge the appointment but that would require a decision of the court. That highlights the fact that the appointment of a property and affairs deputy gives less flexibility than an LPA. If the deputy considered that the Respondent had ceased to lack capacity to manage her property and affairs then there would be no basis on which the jurisdiction of the court could continue to be exercised on her behalf. It would be necessary to make an application in accordance with the provisions of rule 202 of the Court of Protection Rules 2007 (COPR) to discharge the appointment. The existence of the LPA, once made and registered, is not dependent on questions of capacity or lack of it. However, it is not without its own issues, as these proceedings have demonstrated. The Respondent was able to satisfy a solicitor, whom she did not know, that she did not lack the capacity to revoke it. That started the chain of events which led to this hearing. The conflict has put both Applicants and Respondent in an unbearably difficult situation.



28. The matter is finely balanced. The Respondent's wishes and feelings have been a focal point, both her past wishes and feelings relied on by the Applicants and demonstrated by her making the LPA and her present wishes and feelings which have formed the basis for her objection to this application and the submissions made on her behalf. For the Applicants it was submitted that significant weight should be placed on the fact that the LPA is clear evidence from a time when the Respondent did not lack capacity of what she intended should happen when, as she was aware was likely, she again lost capacity to manage her property and affairs. On her behalf, I was referred to the decision of Peter Jackson, J in *Wye Valley NHS Trust v. Mr B* [2015] EWCOP 60. It was submitted that the Respondent's is a fluctuating condition. It is part of who she is. She has a cyclical illness and it cannot be said that her wishes and feelings can be delineated in a way which gives more weight to those expressed in a phase when the hypomania is absent than when, as now, it is something which she is living with and which affects her behaviour. The general policy behind the MCA is to empower people to make their own decisions and to promote individual autonomy. Any argument advanced on the basis that it is necessary to save the Respondent from herself must be strong and cogent.
29. In my judgment, this case is one where the Respondent's wishes and feelings are central to my decision. This is the first occasion when the Respondent has experienced a period of hypomania since the LPA was made and had direct experience of the arrangements she set up as a result. She has raised very real concerns about the difficulties she has experienced. I am satisfied that although it was her intention that her close family members should be responsible for managing her personal finances now that she has experienced that in practical terms she finds the reversal of roles, where her daughters are exerting financial control, uncomfortable. It is for this reason that she sought to revoke the LPA and that she has contested this application. For the reasons I have given, I am satisfied that it is in her best interests for the LPA not to be reinstated and for a deputy to be appointed. I will make the order which was proposed on her behalf and appoint HJTC the Respondent's property and affairs deputy.

Sale of the Property

30. The Applicants are concerned that the Respondent lacks capacity to make a decision about the Property and that if authority is given to sell it at present a decision will be made which she will regret. The Respondent set out her reasons for wanting to sell, including the financial implications of owning a property of that type. Those made practical sense. She is not living in it at present. She is, however, content for it to be retained as a base for her daughters until the younger finishes university. The Applicants are concerned that selling the Property will leave the Respondent without a home in the UK and is not a sensible move financially. The Respondent was clear that she feels it is a drain on her finances and she does not want to keep it in the long term. She is aware of the issues should she sell and of the desirability of maintaining a home in the UK.



31. I am satisfied that I should authorise the deputy under section 16(2)(b) of the MCA to sell the Property because it is the deputy who will then make the decision in her best interests taking all the current circumstances into account, including consulting with those people who are closest to the Respondent. He will, of course, consult her but ultimately the decision will be his as long as the Respondent continues to lack capacity to make that decision for herself.

Costs

32. The general rule set out at paragraph 156 of the COPR is that, '*... the costs of the proceedings ... that concerns P's property and affairs, shall be paid by P or charged to her estate*'. Neither party made any submissions on the question of costs. Any application for a departure from the general rule must be made within 14 days of the date on which this judgment is handed down otherwise the order will be drawn with the normal provision for costs.

Order

33. I will invite counsel to file a draft order incorporating the terms of this judgment for approval within seven days of service of it. The order should provide for the appointment of HJTC to be made by a separate order which will be drawn by the court. In order to set the level of security it will be necessary for a COP1A to be filed with the draft order identifying the assets which will be under the control of the deputy under the terms of the order.

