Neutral Citation Number: [2019] EWCOP 22

Case No: 13272740, 1327671 AND 1327262T

COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/06/2019

Before :

THE HONOURABLE MR JUSTICE HAYDEN
VICE PRESIDENT OF THE COURT OF PROTECTION

- -

Between :

In the matter of Domenica Lawson
(1) Rosa Monckton
(2) Dominic Lawson
(3) Savannah Lawson — **Applicant**
Official Solicitor — **Advocate to the Court**

In the matter of Oscar Mottram
(1) Simon Mottram
(2) Lucy Mottram — **Applicant**
Official Solicitor — **Advocate to the Court**

In the matter of Oliver Hopton
(1) Caroline Hopton — **Applicant**
Official Solicitor — **Advocate to the Court**

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Ms Victoria Butler-Cole QC (instructed by Irwin Mitchell Solicitors) for the **Applicants**
Mr David Rees QC (instructed by the Advocate to the Court)

Hearing date: 25th March 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE HAYDEN

Mr Justice Hayden :

1. I am concerned with three applications for permission to apply for the appointment of personal welfare deputies (PWD), pursuant to Sec. 16 Mental Capacity Act 2005 ('MCA 2005'). Following a Directions hearing on 19th November 2018 my order made provision for the following:

> 1. *There shall be a hearing to determine (a) whether permission should be granted in each application and (b) the preliminary issue raised by the applications, the two matters being intrinsically related.*
>
> 2. *The Official Solicitor shall be appointed as advocate to the court.*
>
> 3. *The Public Guardian is invited to file written submissions, or to participate as a respondent if so advised.*
>
> 4. *The applicants have permission to provide documents filed in the applications to the Official Solicitor and the Public Guardian.*
>
> 5. *The Official Solicitor has permission to file witness evidence, if so advised, by 14 January 2019.*
>
> 6. *The applicants, the Official Solicitor, and if so advised the Public Guardian shall exchange skeleton arguments by 4pm on 4 February 2019.*

2. The *'preliminary issue*' was framed as: "What is the correct approach to determining whether a welfare deputy should be appointed?"

3. In particular focus was the question as to whether such appointments should only be made "*in the most difficult cases*" and if so, to consider *"what the implications for that are in practice?"* I directed that these matters should be listed for determination at a single hearing. I am grateful to the Official Solicitor for accepting appointment as Advocate to the Court and to Mr David Rees QC, who has acted on his behalf.

4. As Mr Rees pointed out in the prefacing remarks to his submissions, the role of the Advocate to the Court is a circumscribed one. It is helpful to remind the profession and inform the wider readership of this judgment of its limitations and its obligations. **The Attorney-General's memorandum, 19th December 2001, [2002] Fam Law 229** notes:

> *"It is important to bear in mind that an advocate to the court represents no one. His or her function is to give the court such assistance as he or she is able on the relevant law and its application to the facts of the case."*

The function of the Official Solicitor here is entirely different to his role as litigation friend. It is necessary to identify, unambiguously, that at this hearing he does not act for any of the three young people subject to the applications.

5. The Court of Protection is enabled to arrange for preliminary issues of this kind to be determined pursuant to the Court of Protection Rules 2017:

> *3.1 (2) The court may –*
>
> *….*
> *(h) direct a separate hearing of any issue;*
> *…*
> *(n) take any step or give any direction for the purpose of managing the case and furthering the overriding objective.*

6. Though I am considering the scope and breadth of the applicable provisions, it is right that I highlight something of the circumstances of the three young people on whose behalf the applications are brought. The mothers of each applicant were present in Court. It is manifest that they are highly motivated to achieve all that is possible for their children. However, the point they raise is identified by them as having much wider application for vulnerable young adults generally. Their case has been crowdfunded.

7. In addition to what I have read about these young adults, I have also been provided with video recordings of each. Oscar Hopton is now aged 24 years old. He is non-verbal and has been diagnosed with autism, severe learning disabilities, epilepsy, anaphylaxis and gut problems. He is fortunate to be able to live in a self-contained flat in his parents' house. He requires 24-hour care, and is in receipt of a significant package of care funded by London Borough of Brent and Brent Clinical Commissioning Group, though the two statutory bodies are engaged in a long-running dispute over what his care needs are and which of them should be providing funding. In common with the other two young adults, I was struck by how impressively well cared for Oscar is. Also, if I may say so, I had at least a glimpse of how physically and emotionally exhausting it must be for the parents to meet his needs. It is obvious that each of the parents in this case, though sensitive to the challenges they must confront, nonetheless properly regard their responsibilities as a privilege.

8. Domenica Lawson is now 24 year old young woman who has Down's Syndrome and a learning disability. The video of her is a delight to watch. She is full of life and a very engaging personality. She communicates her love and affection for others, both spontaneously and fulsomely. Though this is beguiling, I suspect it also adds to her essential vulnerability. I am told that she requires individual support to keep her safe, and some assistance with everyday activities. That said, she has obvious ability and enthusiasm for life which is not even remotely eclipsed by her disabilities. During term time she lives in a flat, supported by carers, funded by East Sussex County Council. Domenica attends college four days a week. She also spends a great deal of time with her parents.

9. Oliver Hopton is a 20 year old young man. He has a diagnosis of severe autism. I found his situation particularly affecting. He requires constant supervision and support with everyday activities. I am told that Oliver has previously suffered assault

and mistreatment in two residential placements. I have little doubt that it is because of this truly disturbing history that he now lives at home with his mother and brother. His mother provides the bulk of Oliver's care. Again, if she will permit me to say so, it is clear that she is heroic in her love for and commitment to her son. In case she does not realise it, it requires to be said, she is doing an absolutely brilliant job.

10. Whilst I am highlighting the individual circumstances of each young adult, I nonetheless bear in mind that interpretation of the relevant provisions requires me to recognise the potential for wider resonance. These individual cases have some similarities (i.e. they concern young adults; congenitally impaired, with supportive families; in each case parents or other close family members are proposed Deputies, one of the proposed Deputies for Domenica is her sister). There is a wider variety of cases to contemplate. These will include, for example, complex medical conditions; acquired catastrophic brain injury; issues relating to undue influence; deputies who are non-family members and/or professional deputies.

Appointment of a Deputy: MCA 2005

11. The provision in focus here is Section 16 MCA 2005. It provides for the appointment of deputies. No distinction is made between financial and welfare deputies. It is necessary to set the section out in full:

> *"16 Powers to make decisions and appoint deputies: general*
> *(1) This section applies if a person ("P") lacks capacity in relation to a matter or matters concerning–*
> *(a) P's personal welfare, or*
> *(b) P's property and affairs.*
>
> *(2) The court may–*
> *(a) by making an order, make the decision or decisions on P's behalf in relation to the matter or matters, or*
> *(b) appoint a person (a "deputy") to make decisions on P's behalf in relation to the matter or matters.*
>
> *(3) The powers of the court under this section are subject to the provisions of this Act and, in particular, to sections 1 (the principles) and 4 (best interests).*
>
> *(4) When deciding whether it is in P's best interests to appoint a deputy, the court must have regard (in addition to the matters mentioned in section 4) to the principles that–*
> *(a) a decision by the court is to be preferred to the appointment of a deputy to make a decision, and*
> *(b) the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances."*

12. Ms Butler-Cole QC, who appears on behalf of the Applicants, properly emphasises the guidance in the explanatory notes to s.16 which read as follows:

> *"68. Subsection (4) requires the court to consider two additional principles, further emphasising the 'least restrictive intervention' principle mentioned in section 1(6). The first additional principle is that a decision of the court is preferable to the appointment of a deputy and the second is that, if a deputy is appointed, the appointment should be as limited in scope and duration as is reasonably practicable in the circumstances. In welfare (including health care) matters a deputy is never required in order for care or treatment to be given to a person because section 5 provides sufficient scope for carers and professionals to act. Nevertheless, a deputy may be particularly helpful in cases of dispute. For matters concerning property and affairs, a deputy may be needed in order to provide the authority to deal with contractual matters and where there is an on-going need for such decisions to be taken. Subsection (5) enables the court to grant the deputy powers or impose duties on him as it thinks necessary to avoid repeated applications to the court. However, it also enables the court to require the deputy to seek consent before taking certain actions. Subsection (6) gives the court an 'own motion' power to make whatever order is in the person's best interests."*

13. The MCA Code of Practice also contains guidance in respect of both deputyship applications, generally, and in respect of welfare decisions in particular. Mr Rees is careful to point out that the status of the Code of Practice is essentially, in this context, an aid to interpretation. Lamentably, the Court of Protection does not have a Statutory Rules Committee, notwithstanding the efforts of four consecutive Presidents of the Court and that of two Vice-Presidents. I have recently been reassured, at the highest level, that this will be remedied *"as soon as Parliamentary time becomes available"*. The Court does have an Ad-hoc Rules Committee which functions effectively. This committee did not have input into the first version of the Code of Practice. Its role was confined to the Court of Protection Rules 2007 and accompanying practice directions. Section 42 MCA 2005 requires the Lord Chancellor to issue one or more Code of Practice dealing with many prescribed matters, including:

    i. *the guidance of persons acting in connection with the care or treatment of another person under s 5 MCA 2005;*
    ii. *the guidance of deputies appointed by the court, and*
    iii. *such other matters concerned with the MCA 2005 as he thinks fit.*

14. The present Code of Practice, encompassing each of the above, was laid before Parliament on 23rd April 2007. The MCA Code of Practice is currently the subject of a review by the Ministry of Justice and a call for evidence in this regard closed on 7th March 2019. It is tentatively anticipated that a new Code of Practice will be laid before Parliament later this year. MCA 2005 Section 42(4) imposes a duty on certain persons to have regard to a relevant code; the class of persons subject to this duty includes deputies appointed by the Court under Section 16(2)(b) MCA 2005, persons acting in a professional capacity and persons acting for remuneration.

15. Section 42(5) provides, in relation to civil proceedings, that if it appears to a court that a provision of the Code of Practice is relevant to a question arising in the proceedings, that provision must be taken into account in deciding the question.

16. It is axiomatic that the Code of Practice is not a statute. It is an aid to the interpretation of the law, not a primary source of law. I agree with the submission of Mr Rees that where a conflict arises between the Act or the Rules or, indeed existing authority, and the Codes of Practice; it is the MCA 2005 (or as the case may be, the COPR 2017 or case law) which must be taken as representing the law. Thus, Mr Rees submits, by way of parity of analysis, that in ***An NHS Trust v Y*** **[2018] UKSC 46**; the Supreme Court concluded that the Code could not create a substantive obligation to apply to the Court in every case where the withdrawal of Clinically Assisted Nutrition and Hydration (CANH) was proposed (per Lady Black):

> *"97. In contrast to the statute itself, the Mental Capacity Act 2005 Code of Practice does speak of applications to court in cases such as the present, but is contradictory in what it says about them. Paras 5.33 and 5.36 speak in terms of an application being made if there is any doubt or dispute about the doctor's assessment of the patient's best interests. Although para 6.18 suggests that the court "has to make"/"must be asked to make" the decision about withholding or withdrawing artificial nutrition and hydration from a patient in PVS, that statement seems to have been derived from the case law, which dealt only in terms of good practice, not of legal obligation. And paras 8.18 and 8.19, to which para 6.18 invites reference, say that an application "should" be made to the court and that "as a matter of practice" such cases "should be put to the Court of Protection for approval", referring to a "case law requirement to seek a declaration", the source of which is given as the Bland case. A Code in these rather ambiguous terms, plainly attempting to convey what the cases have so far decided, cannot extend the duty of the medical team beyond what the cases do in fact decide is incumbent upon them. Whatever the weight given to the Code by section 42 of the MCA 2005, it does not create an obligation as a matter of law to apply to court in every case."*

If the Code of Practice does not accurately reflect the law, then that must be regarded as issue which is best addressed through the ongoing review of the Code. I do not take Ms Butler-Cole as arguing against this point which, it seems to me, is at least as a general proposition, redundant of contrary argument.

17. Wood J set out the approach in ***PBA v SBC*** **[2011] EWHC 2580 (Fam); [2011] COPLR Con Vol 1095:**

> "*67…[the Court] should look at the unvarnished words of the Statute consistent as that approach is with the contemporaneous practice of interpreting statutory provision and the law in general, but in doing so I can take account of the guidance in the Code in coming to my conclusions. I prefer the analysis of Mr McKendrick on behalf of the applicant and accordingly construe the threshold test for the appointment of a deputy, whilst not failing to keep sight*

> *in managing the appointment of the need for any deputy to engage in the collaborative approach which will include collaboration with members of the family as enjoined by Hedley J and Baker J in the cases of Re P (Vulnerable Adult: Deputies) and G v E (above) and in taking into account, as any deputy should, the guidance given in the Code of Practice. My reasons for preferring Mr McKendrick's interpretation are as follows:*
>
> *(i) the words of the statute are the essential provisions laid down by Parliament;*
> *(ii) whatever its genesis and weight, the Code of Practice is indeed only guidance;*
> *(iii) there is a reasonable expectation in the Code that its provisions should be followed;*
> *(iv) departure from it, if undertaken, should require careful explanation;*
> *(v) as I have said already, it remains essentially guidance – however weighty and significant – and is not the source of the relevant power which is to be found only in the statutory provision;*
> *(vi) in any event, I do not interpret (if I may respectfully say so) the careful and erudite discussion of this issue by Baker J or indeed His Honour Judge Turner QC (quoted above) as advocating a contrary approach."*

18. Additionally, Ms Butler-Cole marshals Chapter 14 of the Code as part of her contention that there exists an unduly restrictive regime of appointment for welfare deputies. That chapter is headed ***'What means of protection exist for people who lack capacity to make decisions for themselves?'*** Ms Butler-Cole emphasises the following guidance:

> *14.15 Individuals do not choose who will act as a deputy for them. The court will make the decision. There are measures to make sure that the court appoints an appropriate deputy. The OPG will then supervise deputies and support them in carrying out their duties, while also making sure they do not abuse their position.*
>
> *14.16 When a case comes before the Court of Protection, the Act states that the court should make a decision to settle the matter rather than appoint a deputy, if possible. Deputies are most likely to be needed for financial matters where someone needs continued authority to make decisions about the person's money or other assets. It will be easier for the courts to make decisions in cases where a one-off decision is needed about a person's welfare, so there are likely to be fewer personal welfare deputies. But there will be occasions where ongoing decisions about a person's welfare will be required, and so the court will appoint a personal welfare deputy (see chapter 8).*

> *Scenario: Appointing deputies*
> *Peter was in a motorbike accident that left him permanently and seriously brain-damaged. He has minimal awareness of his surroundings and an assessment has shown that he lacks capacity to make most decisions for himself.*
> *Somebody needs to make several decisions about what treatment Peter needs and where he should be treated. His parents feel that healthcare staff do not always consider their views in decisions about what treatment is in Peter's best interests. So they make an application to the court to be appointed as joint personal welfare deputies.*
> *There will be many care or treatment decisions for Peter in the future. The court decides it would not be practical to make a separate decision on each of them. It also thinks Peter needs some continuity in decision-making. So it appoints Peter's parents as joint personal welfare deputies.*

19. Accordingly, it is against this backdrop that I consider the guidance in the Code of Practice, relating to deputyship applications. Inevitably, these have been much in focus during submissions by both counsel and must be set out in full:

> ***8.3*** *In most cases concerning personal welfare matters the core principles of the Act and the processes set out in chapters 5 and 6 [best interests, and protection for people offering care and treatment] will be enough to:*
> *• help people take action or make decisions in the best interests of someone who lacks capacity to make decisions about their own care or treatment, or*
>
> *• find ways of settling disagreements about such actions or decisions.*
>
> *…*
>
> ***8.25*** *In cases of serious dispute, where there is no other way of finding a solution or when the authority of the court is needed in order to make a particular decision or take a particular action, the court can be asked to make a decision to settle the matter using its powers under section 16. However, if there is a need for ongoing decision-making powers and there is no relevant EPA or LPA, the court may appoint a deputy to make future decisions. It will also state what decisions the deputy has the authority to make on the person's behalf.*
>
> ***8.26*** *In deciding what type of order to make the court must apply the Act's principles and the best interests checklist. In addition, it must follow two further principles, intended to make any intervention as limited as possible:*
>
> *• Where possible, the court should make the decision itself in preference to appointing a deputy.*
>
> *• If a deputy needs to be appointed, their appointment should be as limited in scope and for as short a time as possible.*
>
> *…*

> ***8.31*** *Sometimes it is not practical or appropriate for the court to make a single declaration or decision. In such cases, if the court thinks that somebody needs to make future or ongoing decisions for someone whose condition makes it likely they will lack capacity to make some further decisions in the future, it can appoint a deputy to act for and make decisions for that person. A deputy's authority should be as limited in scope and duration as possible (see paragraphs 8.35-8.39 below).*
>
> …
> *When might a deputy need to be appointed?*
> ***8.34*** *Whether a person who lacks capacity to make specific decisions needs a deputy will depend on:*
> *• the individual circumstances of the person concerned*
> *• whether future or ongoing decisions are likely to be necessary, and*
> *• whether the appointment is for decisions about property and affairs or personal welfare.*

20. The critical guidance relating to welfare decisions needs to be highlighted and with (my) emphasis:

> *Personal welfare (including healthcare)*
> ***8.38*** *Deputies for personal welfare decisions will* ***only*** *be required in* ***the most difficult*** *cases where:*
> *• important and necessary actions cannot be carried out without the court's authority, or*
> *• there is no other way of settling the matter in the best interests of the person who lacks capacity to make particular welfare decisions.*

21. The illustrations for the implementation of this code are also of particular importance:

> ***8.39*** *Examples include when:*
> *• someone needs to make a series of linked welfare decisions over time and it would not be beneficial or appropriate to require all of those decisions to be made by the court. For example, someone (such as a family carer) who is close to a person with profound and multiple learning disabilities might apply to be appointed as a deputy with authority to make such decisions*
> *• the most appropriate way to act in the person's best interests is to have a deputy, who will consult relevant people but have the final authority to make decisions*
> *• there is a history of serious family disputes that could have a detrimental effect on the person's future care unless a deputy is appointed to make necessary decisions*
> *• the person who lacks capacity is felt to be at risk of serious harm if left in the care of family members. In these rare cases, welfare decisions may need to be made by someone independent of the family, such as a local authority officer. There may even be a need for an additional court order prohibiting those family members from having contact with the person.*

22. Ms Butler-Cole has surveyed a wide range of material in the attractive presentation of her argument. It is challenging to encapsulate the breadth and ambit of her submissions. Nonetheless it is necessary to do so. Central to her case and strongly

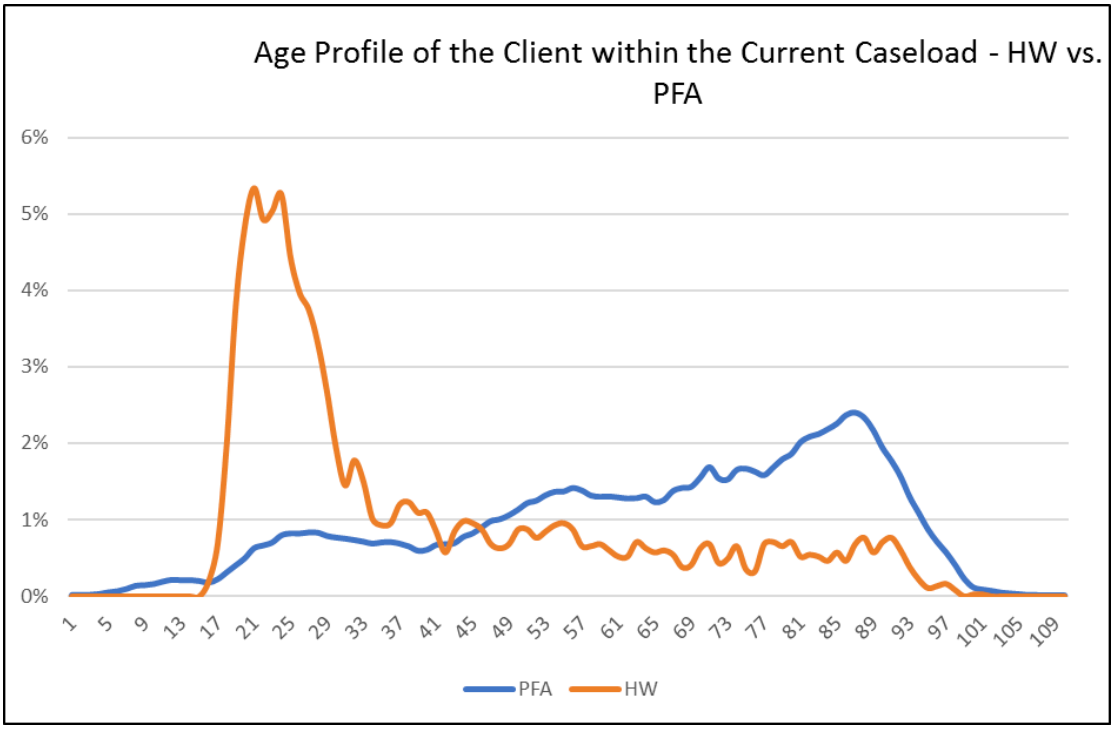
disputed by the Official Solicitor, is her contention that there is currently *'confusion'* and *'lack of clarity'* as to the correct approach to be taken in the appointment of a welfare deputy. She argues that the restrictive assumption on appointment of PWD's is misconceived and has led to a different threshold for appointment in welfare as opposed to financial issues. Further and, as I see it, in the alternative, Ms Butler-Cole argues that the phrase *'the most difficult cases'* used in the Codes of Practice, as part of the criteria of appointment of PWD's is, on a proper construction, *'apt to cover the relatively common scenario represented by these applicants'*. Her final and supplemental submission is that the expressed or interpreted wishes and preferences of an incapacitated adult should play *'a significant part'* in determining the application for appointment of a PWD, given that the decision is a *'best interests one'* which automatically imports consideration of both P's actual or likely wishes.

23. In his equally erudite submissions Mr Rees covers substantial forensic territory. In summary, he submits that in each individual case the Court is required to determine whether (having regard to the statutory principles embodied in the MCA 2005) it is in P's best interests to appoint a personal welfare deputy. There should, he contends, be no ***'starting point'*** or ***'presumption against the appointment of personal welfare deputies'*** (my emphasis). However, Mr Rees analyses both the structure of the MCA 2005 and the principles embodied within it as likely to lead to the outcome that the appointment of a personal welfare deputy will not usually be regarded as being in P's best interests.

24. Mr Rees expands his argument by pointing to what he identifies as the *'fundamental difference between the status of adults and children'*. A PWD should not become a process by which adults are effectively infantilised.

25. Finally, it is contended by the Official Solicitor that the elevation of the importance of P's wishes or likely wishes, implicit or perhaps explicit in Ms Butler-Cole's argument, is a distortion of the defining principles of the MCA, set out in Section 4.

26. Pursuant to my order of 19th November 2018 (see para 1 above), a statement has been filed by Ms Julie Lindsay, Chief Operating Officer, Office of the Public Guardian in England and Wales (OPG). The statement provides the Court with details of the role of the Public Guardian in relation to the supervision of deputies in general and the work done with PWDs in particular. The statement contains some useful data. Property and affairs deputyships endure (in the sense that the "case remains active") for an average of 3.58 years. PWD cases average 4.35 years. The age of the individuals subject to PWD is on average younger than those subject to a property and affairs deputyship. The graph provided shows a spike between the ages of 18 and 24 years of age. This strikes me as poignant, it occurs precisely at a stage when all parents are most anxious about their children managing in an adult world. This natural and human anxiety must be particularly frightening and profound for the parent of a child facing adulthood with significant disabilities.



27. The number of PWDs (including hybrid appointments) received since 2007 has grown significantly. In 2007 there were only three PW cases. In 2005 there were ninety-five. There was a significant spike in 2015, for no reason that I have been able to identify and the numbers have remained relatively static since then (averaging around 375 per year). Of course, this must be placed in the context of very significant increases in applications generally. Ms Lindsay has provided some useful information from the OPG which places these appointments in practical context and casts light on the realities of what is involved as a PWD. This data is important in understanding the likely consequences of the different constructions contended for. This, it must be remembered, was identified as part of the exercise in the Court's directions of 19th November 2018. At risk of overburdening this judgment I consider it useful to highlight the following passages from Ms Lindsay's statement:

> *"Supervision of Personal Welfare deputies*
>
> *a. PW deputies are supervised via visits, ongoing contact with deputies and annual self-reporting. Within the first few weeks of receiving an order appointing a PW deputy there is initial phone contact made with the deputy to introduce OPG, clarify the deputy's duties and responsibilities, and check that they understand the terms of their court order. This does not extend to legal advice. A deputy will be provided a guidance booklet 'How to be a Health and Welfare Deputy' (SD4) and will be referred to their duties under the MCA 2005 and the Mental Capacity Act 2005: Code of Practice…*
>
> *b. In hybrid cases, a deputy will also be provided with guidance in relation to their role as deputy for property and affairs. Within the first six months, a visit is arranged. If the OPG are satisfied that there are no concerns regarding the deputyship, a further visit will*

typically take place 18 months later. That is two visits in two years. After that the visits will occur every two- three years, with phone call support provided for ongoing guidance, to answer queries and to give the deputy the option of an annual visit if necessary. Visits are carried out by Court of Protection Visitors appointed by the Lord Chancellor under ***section 61 of the MCA 2005*** *and are arranged by OPG pursuant to* ***section 58(1)(d) of the MCA 2005.*** *In some cases, a Special Visitor may carry out a visit when there is a need for expert medical opinion however in most cases, visits are carried out by a General Visitor who will typically have some form of social work or other relevant background.*

c. The visitor will normally see the deputy and the person subject to the order, and will assess whether the deputy is making use of the order, if s/he is involving the person in decisions where possible, and if not possible, is making decisions in the best interests of the person. The visitor will also seek comments from any relevant care provider, etc in order to get their view on how the deputy is acting under their order. Following the visit, the visitor will compile a report that details the visit and the information they have obtained. In each report the visitor rates the visit 'green', 'amber' or 'red'. A 'green' visit indicates that the visitor believes there are no concerns regarding the case and will result in the visit schedule as set out in paragraph 17 above. An 'amber' visit indicates that the visitor believes there is follow up action required by OPG but that is not urgent and will result in a visit 18 months later unless the visitor recommends otherwise. A 'red' visit indicates that the visitor believes there is urgent follow up action required by the OPG and will often result in a visit within the next 12 months unless the visitor recommends otherwise.

d. All visit reports are reviewed by the Health and Welfare Team and are followed up with the deputy and others as appropriate, the team addresses any recommendations made by the visitor and to resolve any questions or concerns. Some deputies get yearly visits for extra support if required. For example, where both the deputy and the client are blind. The deputy is also required to complete an annual report (form OPG104) which outlines the decisions that have been made, and how the MCA 2005 was complied with…

e. It is not practical for the deputies to provide details in relation to every decision that they have supported the vulnerable adult with. As such the annual report is only asking in respect of larger decisions. All reports from health and welfare deputies are subject to review by case managers on the Health and Welfare Team and any concerns or questions are followed up with the deputy.

f. Where it is deemed appropriate that follow up action is taken by OPG, whether that is resulting from information that has been gathered following a visit, a submitted annual report or has otherwise been brought to OPG's attention (E.g. by a concern raiser); an OPG case manager will continue to monitor the case

> *until the matter is resolved or it is considered necessary for OPG to take further action. Depending on the circumstances, a matter may be resolved by action that is taken either by the deputy or another person. In every case, OPG will keep in contact with a deputy through telephone calls and letters to support the deputy and ensure any action recommended by OPG is carried out. There is an expectation that a PW deputy, having agreed to take on the role and having received guidance and support from the OPG as outlined above, will have an understanding of the MCA 2005 and understand that they are required to include the relevant local authority and NHS organisation in any decision making. In some circumstances, OPG may offer further support and guidance to a deputy and signpost them to further information where necessary. Where there is a dispute between a PW deputy and another relevant authority or organisation, OPG will often try to assist those involved in the dispute to resolve the matter and may advise when it might be necessary to consider that an application to the court is made."*

28. In summary, at the end of her statement, Ms Lindsay identifies the kind of concerns that arise in relation to the actions of PWDs:

> *"There is little concern in the majority of cases regarding the actions of a deputy appointed to make decisions in regard to someone's PW. However, it is the experience of this office that where the active involvement of OPG is required, this generally involves cases where there is a concern that a deputy does not fully understand their duties and or authority granted under their order, and:*
>
> *a. makes decisions on behalf of a vulnerable adult that they are either deemed to have capacity to make or can express a clear wish to the contrary; and/or*
>
> *b. makes continual and/or unreasonable demands of professionals and those involved in the vulnerable adult's care that negatively impacts on the provision of care that is otherwise deemed to be in the vulnerable adult's best interests.*
>
> *In the last two years, OPG has seen an increase in PW deputy appointments where the court application papers do not appear to identify specific decisions that a proposed deputy anticipates needing to make. In these cases and others (where the specific purpose for the appointment has passed) it is suggested that there does not appear to be any action taken by a PW deputy but are nevertheless still be subject to the same level of supervision and must therefore still account to OPG and will be liable to pay OPG supervision fees."*

The Case Law

29. The case law has been cited to me extensively but it has focused upon four cases in particular: ***KD v Havering*** **[2010] EWHC 3876 (COP) [2010] COPLR Con Vol 809;** ***Re P*** **[2010] EHWC 1592 Fam [2010] 2 F.L.R. 1712, and** ***G v E*** **[2010] 2512 (COP); [2011] 1 F.L.R. 1652, and** ***SBC v PBA and Others*** **[2011] EWHC 2580 (Fam), [2011] COPLR Con Vol 470.** In fact, a number of these cases are primarily concerned with the identity of the PWD rather than the criteria for appointment which is touched on only tangentially.

30. In G v E (supra) Baker J, as he then was, considered an application by P's sister and a foster carer jointly to be appointed as PWDs. There was, as sadly can arise, a background of conflict between P's family and the Local Authority. Baker J refused the application:

> "*56 The vast majority of decisions about incapacitated adults are taken by carers and others without any formal general authority. That was the position prior to the passing of the MCA under the principle of necessity: see Re F (supra) and in particular the speech of Lord Goff of Chieveley. In passing the MCA, Parliament ultimately rejected the Law Commission's proposal of a statutory general authority and opted for the same approach as under the previous law by creating in section 5 a statutory defence to protect all persons who carry out acts in connection with the care or treatment of an incapacitated adult, provided they reasonably believe that it will be in that person's best interests for the act to be done. Crucially, however, all persons who provide such care and treatment are expected to look to the Code. Certain categories of person are required by the statute, under section 42(4), to have regard to the Code (for example, anybody acting in relation to the incapacitated person in a professional capacity). In addition, however, as the Code itself makes clear, the Act applies more generally to everyone who looks after incapacitated persons, including family carers. Although not legally required to have regard to the Code, the Code itself stipulates that they should follow the guidance contained therein insofar as they are aware of it."*

31. I do not consider that Baker J was saying anything that is inconsistent with my reasoning above, relating to the weight to be given to the Code of Practice. Baker J amplified his approach to the construction of the Act and the Code by analysing the scheme of the MCA as a whole in these terms:

> *"57 The Act and Code are therefore constructed on the basis that the vast majority of decisions concerning incapacitated adults are taken informally and collaboratively by individuals or groups of people consulting and working together. It is emphatically not part of the scheme underpinning the Act that there should be one individual who as a matter of course is given a special legal status to make decisions about incapacitated persons. Experience has shown that working together is the best policy to ensure that incapacitated adults such as E receive the highest quality of care. This case is an*

> *example of what can go wrong when people do not work together. Where there is disagreement about the appropriate care and treatment, (which cannot be resolved by the methods suggested in Chapter 15) or the issue is a matter of particular gravity or difficulty, the Act and Code provide that the issue should usually be determined by the court. The complexity and/or seriousness of such issues are likely to require a forensic process and formal adjudication by an experienced tribunal.*
>
> *58 To my mind, section 16(4) is entirely consistent with this scheme. Manifestly, it will usually be the case that decisions about complex and serious issues are taken by a court rather than any individual. In certain cases, as explained in paragraphs 8.38 and 8.39 of the Code, it will be more appropriate to appoint a deputy or deputies to make these decisions. But because it is important that such decisions should wherever possible be taken collaboratively and informally, the appointments must be as limited in scope and duration as is reasonably practicable in the circumstances.*
>
> *59 Clearly, practicalities will be an important consideration in determining an application for the appointment of a deputy. As the examples in paragraphs 8.38 and 8.39 demonstrate, it is sometimes impracticable to insist on decisions being taken by the court. The instances which stand out are those which involve a series of decisions (for example, about medical procedures) and where the assets of an incapacitated adult are of a magnitude that requires regular management. Common sense suggests that the second of these examples is likely to arise more frequently than the first, and that the appointment of deputies is likely to be more common for property and affairs than for personal welfare. …"*

32. It appears to have been argued before Baker J that Hedley J's comments in Re P (supra) were intended to indicate that family members should perhaps, as a matter of course, be appointed PWDs, irrespective of the circumstances. Baker J goes to some lengths to refute this. It seems to me that it would require a complete distortion of Hedley J's judgment to extract such a conclusion from it. The judgment is simply not directed to the relevant exercise. Baker J is addressing the applicable criteria in the way that I am required to. He observes the following:

> *"61 It is axiomatic that the family is the cornerstone of our society and a person who lacks capacity should wherever possible be cared for by members of his natural family, provided that such a course is in his best interests and assuming that they are able and willing to take on what is often an enormous and challenging task. That does not, however, justify the appointment of family members as deputies simply because they are able and willing to serve in that capacity. The words of section 16(4) are clear. They do not permit the court to appoint deputies simply because "it feels confident it can" but only when satisfied that the circumstances and the decisions which will fall to be taken will be more appropriately taken by a deputy or*

> *deputies rather than by a court, bearing in mind the principle that decisions by the courts are to be preferred to decisions by deputies. Even then, the appointment must be as limited in scope and duration as is reasonably practicable in the circumstances. It would be a misreading of the structure and policy of the statute, and a misunderstanding of the concept and role of deputies, to think it necessary to appoint family members to that position in order to enable them better to fulfil their role as carers for P."*

33. Baker J returned to his consideration of these issues in **A Local Authority v TZ [2014] EWCOP 973.** The Court was considering an application to appoint a Local Authority employee as a welfare deputy for a young man who needed considerable support in decision taking in the interpersonal sphere and particularly about those with whom it was safe to commence a relationship:

> "*79. Thus the Act and Code create a hierarchy of decisions and decision makers. The vast majority of decisions are taken by those individuals involved in the care, treatment and support of P, either individually, or collaboratively, without application to the court and without any individual or group of individuals being given any special status such as deputy. More serious decisions may be referred to the court which, under s. 16, may either make the decision itself or appoint a deputy to do so. The terms of section 16(4) are clear. A decision by the court is to be preferred to the appointment of a deputy to make the decision and the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances. In certain cases, as explained in paragraphs 8.38 and 8.39 of the Code, it will be more appropriate to appoint a deputy. But because it is important that such decisions should wherever possible be taken collaboratively and informally, such appointments must be as limited in scope and duration as is reasonably practicable."*

34. The position of the Official Solicitor is recorded but not commented upon:

> *"On behalf of the Official Solicitor, Mr McKendrick submits that the appointment of a welfare deputy is both an unnecessary and disproportionate intrusion into TZ's right to respect for his private life, and contrary to his best interests.*

35. I am bound to say that I consider that when evaluating both the statute and the Code in relation to the appointment of a "decision maker", which in truth is the essence of the role of the PWD, it requires to be justified by reference to the legitimacy of its objectives and the proportionality of its intervention i.e. it must engage with the rights protected by Article 8 ECHR. Ms Butler-Cole points to the following paragraph, in which she respectfully submits that Baker J leans too heavily, in his analysis, on the provisions of the Code regarding them as, in effect, a primary source of law rather than interpretative guidance:

> *"I do not consider that this is an appropriate case for the appointment of a welfare deputy. The Code clearly provides that deputies for personal welfare decisions will only be required in the most difficult cases (paragraph 8.38) and that, for most day to day actions or decisions, the decision-maker should be the carer most directly involved with the person at the time (paragraph 5.8). That is simply a matter of common-sense. If a situation arises in which TZ is perceived to be at risk, a decision needs to be taken by the person on the ground who is giving him support. It would be impractical to refer the decision to anyone else, either the Court or a deputy. Any decision that has to be taken arising out of an immediate risk of harm should be taken, so far as possible, collaboratively and informally by TZ's care worker."*

36. Inevitably, counsel in their submissions have concentrated on the case law relating to the appointment of welfare deputies rather than those for financial affairs. I note that the case law in relation to the appointment of property and affairs deputies is almost entirely focused on the suitability of the individual, rather than the necessity for an appointment. However, Mr Justice Charles, as Vice-President of the Court of Protection, made the following observations in **Watt v ABC [2016] EWCOP 2352**, which are of some application here. I highlight those passages which I consider to be of relevance:

> *"73.* ***It might be said that the principles that s. 16(4) of the MCA requires the COP to have regard to, in addition to those set out in s. 4 (the best interests test), when deciding whether it is in P's best interests to appoint a deputy, namely:***
>
> ***i) a decision by the court is to be preferred to the appointment of a deputy to make a decision, and***
> ***ii) the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances create a presumption or bias against (rather than for) the appointment of a deputy.*** *However, in my view this is not the case and all that this sub-section does is to add factors that the COP is to take into account and weigh in reaching its decision. So those particularised factors have to be weighed against factors that would favour the appointment of a deputy rather than the COP making a series of orders. To my mind this applies whether or not the deputy is appointed to make decisions relating to property and affairs or welfare or both. In both property and affairs cases and welfare cases there will be important one off decisions and in such cases the principles and so factors set out in s. 16(4) would be likely to point in favour of the COP making the decisions. But in both a need to make a number of decisions on a single matter (e.g. selling a house or a course of treatment), or on a number of day to day matters over a long period (e.g. management of a person's day to day affairs relating to expenditure and/or their care and support plan) will often arise that will clearly outweigh the principles identified in s. 16(4).*

> *In many such cases regular return to the COP would be unnecessarily time consuming, emotionally stressful and expensive and so contrary to P's best interests. I add that it seems to me that a refusal or reluctance based on s. 16(4), or a general approach, to appoint a deputy in welfare cases simply because they are welfare cases and s. 5 applies is not justified."*

37. In the above paragraph Charles J has identified the central issue in entirely uncompromising terms: i.e. is there a presumption or bias against the appointment of a PWD in the Code and statutory scheme?

38. Also filed within the application is a statement by Dr Lucy Series, research fellow and lecturer in the School of Law and Politics at the University of Cardiff. Dr Series has worked on a range of research projects concerning the UN Convention on the Rights of Persons with Disabilities. She has given evidence to the National Institute for Clinical Excellence (NICE), relating to supported decision taking and provided technical expertise to the World Health Organisation (WHO). In her witness statement she observes the following:

> *"The presumption against personal welfare deputyship*
>
> *As interpreted by the courts, the provisions of s16 MCA have been treated as a statutory bias against appointing personal welfare deputies. The 2009 report of the Court of Protection reported an 80% rate of refusal of personal welfare applications, reduced to 70% in 2010. The reason for this was given as follows (emphasis added):*
>
> *(1)There are several reasons why the court does not consider it necessary to appoint a deputy to make personal welfare decisions. The main reason is that section 5 of the MCA confers a general authority for someone to make decisions in connection with another's care or treatment, without formal authorisation, provided: that P lacks capacity in relation to the decision; and it would be in P's best interests for the act to be done.*
>
> *(2)Another reason is that, when considering the appointment of a deputy, the court is required to apply the principles in section 16(4) that: "(a) a decision of the court is to be preferred to the appointment of a deputy to make a decision; and (b) that the powers of the deputy should be as limited in scope and duration as is practicable in the circumstances." In reality,* ***a deputy is rarely needed to make a decision relating to health care or personal welfare, because section 5 already gives carers and professionals sufficient scope to act.***
>
> *(3)The final reason is that* ***personal welfare decisions invariably involve a consensus between individuals connected with P - healthcare professionals, carers, social workers and family - about what decision is in P's best interests.*** *If the court appoints a personal welfare deputy, particularly if it's done without a hearing and considering oral arguments from each side, it could upset the*

> *balance of that consensus, and could be seen to favour the deputy's views over others'.*
>
> *According to statistics provided by the Ministry of Justice, between 2008-2017 the Court of Protection has received 4724 applications for a personal welfare deputy and 1092 application for a 'hybrid' deputy with both property and affairs and personal welfare powers. It has appointed 2127 personal welfare deputies, and 338 hybrid deputies (a ratio of approximately 21 personal welfare deputyship orders for every 50 applications). By comparison, over the same period, there were 140,026 applications for a deputy for property and affairs to be appointed, and 135,552 property and affairs deputyship orders made."*

39. Dr Series presses her thesis robustly and is forceful in her critique of both the MCA and the case law:

> *"Although s5 MCA codified the common law doctrine of necessity, the reality is that historically most healthcare professionals had regarded the 'next of kin' as the default substitute decision maker, and prior to Re F (Mental Patient: Sterilisation) in 1989 some judges even echoed this view. The MCA may have merely codified the technical common law position, but as a matter of practice the general defence has effected a transfer of power to make personal welfare decisions away from families towards professionals. Research indicates that the majority of people living in the UK believe that if they were to lose capacity their 'next of kin' would be empowered automatically to make substitute decisions on their behalf. It is likely to come as a rude shock to many family members to discover that their role is only 'to be consulted' about best interests decisions made by professionals, rather than to make the decision themselves. This shock may be especially keenly felt by the parents of people with learning disabilities when they lose parental authority overnight on their son or daughters' 18th birthday."*

40. Though the concept of professionals and families *'working together'* is one of the shibboleths of modern safeguarding theory, Dr Series asserts that this appears to have little reality in practice nor indeed, she contends, is it coherently structured in statute or Code:

> *"Consensus based decision making?*
>
> *The rationale that informal decisions are made by consensus does not stand up to legal analysis. There is nothing in the statute or the Code to suggest that informal decision makers must always achieve consensus in making a decision, or else apply to the Court of Protection. Some text in the Code suggests the opposite. In a discussion on 'What happens when there are conflicting concerns?' the Code emphasises that carers or family may disagree with professionals, and that although it might be possible to reach agreement that agreement may not be in the person's best interests.*

> *The Code goes on to say that 'Ultimate responsibility for working out best interests lies with the decision-maker'; it does not imply any restrictions on informal decisions or a duty to apply to court in the case of such disputes."*

41. Whilst it is helpful to have conventional orthodoxies challenged by radical alternatives, it is, in my view, essential, if the dialectic is to be worthwhile, to construct the debate here securely within the fundamental principles of the Act. At its essence, the MCA seeks to empower incapacitous people to make or to participate in making decisions for themselves whilst, equally, protecting them from harm when they are unable to do so. It is an equation in the true sense of the word, i.e. both imperatives are of equal weight. I do not consider that Dr Series engages with this in her witness statement. Moreover, I have found the elision of different concepts in one analytical exercise to be confusing. Thus, in the paragraph above I find myself querying why *'informed decisions*, *made by consensus'* should be required to stand up to *'legal analysis'*. This strikes me as an artificial and formulaic approach to what is ultimately the inevitable raft of usually minor decisions that we all take on a day to day basis.

42. It seems almost trite to set out the statutory background as the principles are not only well known to practitioners but, I am sure, known and understood by the applicants. However, their impact is so significant to our approach to the individual provisions of the Act and its objectives as a whole that they require to be stated. Mr Rees summarised them thus in his position statement:

> ***Statutory Background***
>
> *"(1) Section 1 sets out five general principles which apply for the purposes of the MCA 2005:*
>
> - *A person must be assumed to have capacity unless it is established that he lacks capacity;*
> - *A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success;*
> - *A person is not to be treated as unable to make a decision merely because he makes an unwise decision;*
> - *An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests;*
> - *Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.*
>
> *(2)* ***Sections 2 and 3*** *define mental capacity for the purposes of the MCA 2005. The test of capacity has two elements, both of which must be present before a person can be found to lack capacity. There must be an inability to make a decision, and this must be*

because of *an impairment of, or a disturbance in the functioning of, the mind of brain. The need for this causal nexus was emphasised by the Court of Appeal in* ***PC v City of York Council [2013] EWCA Civ 478; [2013] COPLR 409.***

(3) If a person lacks capacity to make a decision then the Act provides various ways in which decisions can be taken for or in relation to them:
(a) If the person in question has made a lasting or enduring power of attorney, then decisions may be taken for or on behalf of the donor of the power by their attorney;
(b) In relation to matters relating to care and treatment, decisions may be effectively taken on an informal basis under ***section 5 MCA 2005****. Section 5 does not confer a substantive right on any person to take decisions, but prevents civil or criminal liability arising in respects of acts done in connection with the care or treatment of a person who lacks capacity in relation to that matter, provided that the person carrying out the act reasonably believes that it would be in the other person's best interests to carry out the act;*
(c)Alternatively, decisions may be taken for a person who lacks capacity by the court (s16(2)(a));
(d)Alternatively, the court may appoint a deputy (s16(2)(b)). A deputy may only take decisions on behalf of P where he knows or reasonably believes that P lacks capacity in relation to that matter (s 20(1) MCA 2005).

(4) As set out above, any act done, or decision made for or on behalf of a person who lacks capacity must be done or made in their best interests. The MCA 2005 does not contain a specific definition of "best interests". However, section 4 sets out various factors which must be taken into account when determining best interests;

(5) A decision by the court to appoint a deputy under s 16(2)(b) is not itself a decision made "for or on behalf of a person who lacks capacity". However, section 16(3) provides that the powers of the court under the section are subject to the provisions of the MCA 2005 generally, and specifically are subject to the applications of sections 1 and 4.The statutory best interests test accordingly applies to such a decision;

(6) In addition, section 16(4) adds two further principles which the court is required to take into account and weigh when determining whether to appoint a deputy namely:

(a)that a decision by the court is to be preferred to the appointment of a deputy; and
(b)the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances."

43. The efficacy of the MCA is dependent upon getting the balance right between empowering and protecting the incapacitous. This tension, right at the heart of the Act, is a healthy one. In every decision and at every stage it requires to be at the centre of the process. A decade after the implementation of the MCA the courts have developed a much more nuanced understanding of the application of its principles. As the arguments have evolved in this case they have, to my mind, illustrated this clearly.

44. Mr Rees was troubled, as I confess am I, by Dr Series' statement. He suggested that it might be preferable to treat it as an '*academic article being cited in argument by the applicants'* rather than to give it the formal status of witness evidence. Certainly, the statement does not comply with paras 9 – 11 of PD 15A but nor does it seem to me, for the reasons I have alluded to, to impose upon itself the usual rigours of an academic paper. It struck me as polemical in tone. The sincerity and commitment of the author to her argument cannot be doubted and, as I have said, is a useful platform from which to reassess some of the conventional orthodoxies.

45. Mr Rees takes issue with two specific points advanced by the applicants which are rooted in Dr Series' statement. He addresses these as follows:

> *"In her statement, Dr Series seeks to argue that it is wrong to assume that the appointment of a welfare deputy is a more restrictive option than informal decision making under section 5 MCA and may indeed promote the supported decision-making model favoured by the UNCRPD. She also asserts (at D39) that:*
>
> *"deputyship that is based on the 'will and preferences' of the person has more potential than informally made decisions to provide a holistic framework for supporting the exercise of legal capacity based on the person's wishes, feelings, values and beliefs".*
>
> *1.These arguments are relied upon by the Applicants at [41] to [43] and [50] to [54] of their skeleton argument of 18 June 2018.*
>
> *2.The court must adopt a degree of caution when having regard to the* ***[United Nations Convention Rights Persons with Disabilities]****. Although the UK has ratified this Convention, it has not been given direct effect in English law, and there is no immediate proposal (either from the Law Commission or the Government) that the MCA should be amended or replaced to give effect to this Convention. Whilst the court may seek to interpret and apply domestic law in a manner that is consistent with the international obligations undertaken by the UK (see for example Re A (Capacity: Social Media and Internet Use Best Interests [2019] EWCOP 2), there are clear limits to this approach, and the court cannot by a process of statutory construction simply ignore or rewrite the clear provisions of the MCA.*
>
> *3.At D37 Dr Series suggests that decisions made by a deputy may be preferable to informal decision making under section 5 MCA:*
> *"...provided it is based on close consultation with the person and reflects their wishes (or our best guess at what their wishes would*

be).”

46. To my mind and with respect to her, Dr Series conflates two entirely different concepts. Evaluating the “proportionality” of appointing a welfare deputy as potentially less restrictive than informal decision making under s.5 MCA, requires us to discount both the efficacy and desirability of taking decisions collaboratively and informally wherever possible. To disregard the very clear lessons from both research and public enquires, stretching back over thirty years, which emphasise the importance of agencies working together in order most effectively to promote the best interests of the vulnerable, would be irresponsible. Thus, evaluating the proportionality of the two options is misconceived. They are apples and pears. They are essentially different regimes which are triggered by P’s individual circumstances.

47. The second point, which is inextricably connected to the above, is the contention that decisions made by a PWD may, in principle, be preferable to the informal decision making contemplated by Section 5 MCA with the following caveat:

> “*...provided* it is based on close consultation with the person and reflects their wishes (or our best guess at what their wishes would be).”

48. Mr Rees submits this goes too far and subverts the entire hierarchy of decision making, embodied in the MCA. He makes the point that for the argument to have logical integrity it must be predicated on the assumption that the PWD’s decision will be reflective of P’s wishes and feelings as either expressed or interpreted. This simply cannot be reconciled with the best interest test under Section 4 MCA nor should it be. I agree with both these criticisms.

49. The evolution of the Court’s approach to identifying best interests is particularly abundant in the case law of the last five years. In the context of Clinically Assisted Nutrition and Hydration cases the recent guidance by the Royal College of Physicians and the British Medical Association (BMA) plots, with great care, the evolution of the Court’s approach to identifying best interests which is guided by a multifaceted enquiry into P’s circumstances e.g. medical, interpersonal, cultural as well as focusing on expressed or interpreted wishes, feelings and beliefs.

50. The MCA deliberately and, in my judgement properly, avoided straining for a definition of ‘best interests’. Instead, it sets out a process to be followed when taking a decision. In some cases, the process will be reasonably straightforward in others it will be more extensive and formal. It is properly described as an exercise requiring subtlety and nuance and must not be skewed by giving weight to one particular factor, such as P’s wishes and feelings. To my mind this would have the consequence of replacing one perceived ‘presumption’ with another. The magnetic north in the legislation is that every P is an individual and every decision is issue specific. Furthermore, promoting supported decision making is, to my mind, more likely to be achieved by the informal holistic approach contemplated by Section 5 MCA.

Conclusions

51. Having reviewed the case law to the extent that I have, I do not accept the primary submission of the applicants that the current case law is either contradictory or confused. As I have sought to illustrate it has evolved and refined as the Court has been required to address the challenging and diverse issues that have come before it. It is also discernible that the Court is gradually and increasingly understanding its responsibility to draw back from a risk averse instinct to protect P and to keep sight of the fundamental responsibility to empower P and to promote his or her autonomy. This can be seen in every aspect of the work of the Court of Protection and is exemplified in recent case law. See: **Re DE [2013] EWHC 2562 (Fam); LBX v K, L and M [2013] EWHC 3230; A Local Authority v TZ [2013] EWCOP 2322; The Mental Health Trust & Ors. v DD & Anor [2014] EWCOP 13; CH v A Metropolitan Council [2017] EWCOP 12; B (Capacity: Social Media: Care and Contact) [2019] EWCOP 3; London Borough of Tower Hamlets v NB and AU [2019] EWCOP 17**.

52. The Court of Protection Handbook (Ruck-Keene et al – 2nd ed 2017) emphasises that whatever the phraseology of the Code of Practice, each case is to be evaluated on its individual merit. It is expressed, at 3.134, in language which is striking: *'a symmetry emerges from the shadows which is consistent with the ethos of the legislation in enabling a judge to advance the best interests of people who have lost capacity…'* Later the Handbook notes as follows:

> *"The fact that a person who provides routine care is given legal protection by section 5 does not mean that it is not in their best interests to have a personal welfare deputy any more than the fact that a person who provides necessary goods and services is given legal protection by section 7 means that it is not in their best interests to have a financial deputy. Sections 5 and 7 both exist to ensure that people who are incapacitated do not go without what they need.*
>
> *It may be significant that the same sub-section (s6(6)) provides that section 5 does not authorise a person to do an act which conflicts with a decision made by a donee or a deputy, which perhaps points away from a suggestion that the statutory norm is that donees but not deputies will commonly make personal welfare decisions in preference to reliance on section 5.*
>
> *Ultimately, the decision in each case ought to turn on what is in that person's best interests. It would be strange if the statutory framework was that a judge ought not to appoint a personal welfare deputy even if s/he is satisfied that it is in the person's best interests. Where does this leave their wishes and feelings? What of their beliefs and values, and the views expressed by the persons consulted? Section 4 says that the judge must have regard to these considerations. The position of a spouse or partner of 50 years duration or the parent of a brain-damaged child who is having their eighteenth birthday is not the same as a paid carer."*

53. Thus, a number of clear principles emerge:

a) The starting point in evaluating any application for appointment of a PWD is by reference to the clear wording of the MCA 2005. Part 1 of the Act identifies a hierarchy of decision making in which the twin obligations both to protect P and promote his or her personal autonomy remain central throughout;

b) Whilst there is no special alchemy that confers adulthood on a child on his or her 18th birthday, it nevertheless marks a transition to an altered legal status, which carries both rights and responsibilities. It is predicated on respect for autonomy. The young person who may lack capacity in key areas of decision making remains every bit as entitled to this respect as his capacitous coeval. These are fundamental rights which infuse the MCA 2005 and are intrinsic to its philosophy. The extension of parental responsibility beyond the age of eighteen, under the aegis of a PWD, may be driven by a natural and indeed healthy parental instinct but it requires vigilantly to be guarded against. The imposition of a legal framework which is overly protective risks inhibiting personal development and may fail properly to nurture individual potential. The data which I have analysed (paragraph 26 above) may, I suspect, reflect the stress and anxiety experienced in consequence of the transition from child to adult services. As a judge of the Family Division and as a judge of the Court of Protection I have seen from both perspectives the acute distress caused by inadequate transition planning. The remedy for this lies in promoting good professional practice. It is not achieved by avoidably eroding the autonomy of the young incapacitous adult;

c) The structure of the Act and, in particular, the factors which fall to be considered pursuant to Section 4 may well mean that the most likely conclusion in the majority of cases will be that it is not in the best interests of P for the Court to appoint a PWD;

d) The above is not in any way to be interpreted as a statutory bias or presumption against appointment. It is the likely consequence of the application of the relevant factors to the individual circumstances of the case. It requires to be emphasised, unambiguously, that this is not a presumption, nor should it even be regarded as the starting point. There is a parallel here with the analysis of Baroness Hale in **Re W [2010] UKSC 12.** In that case and in a different jurisdiction of law, the Supreme Court was considering the perception that had emerged, in the Family Court, of a presumption against a child giving oral evidence. The reasoning there has analogous application here:

> *22."However tempting it may be to leave the issue until it has received the expert scrutiny of a multi-disciplinary committee, we are satisfied that we cannot do so. The existing law erects a presumption against a child giving evidence which requires to be rebutted by anyone seeking to put questions to the child. That cannot be reconciled with the approach of the European Court of Human Rights, which always aims to strike a fair balance between competing Convention rights. Article 6 requires that the proceedings overall be fair and this normally entails an opportunity to challenge the evidence presented by the other side. But even*

> *in criminal proceedings account must be taken of the article 8 rights of the perceived victim: see* SN v Sweden*, App no 34209/96, 2 July 2002. Striking that balance in care proceedings may well mean that the child should not be called to give evidence in the great majority of cases, but that is a result and not a presumption or even a starting point."*

e) To construct an artificial impediment, in practice, to the appointment of a PWD would be to fail to have proper regard to the 'unvarnished words' of the **MCA 2005** (**PBA v SBC [2011] EWHC 2580) (Fam**). It would compromise a fair balancing of the **Article 6 and Article 8 Convention Rights** which are undoubtedly engaged;

f) The Code of Practice is not a statute, it is an interpretive aid to the statutory framework, no more and no less. It is guidance which, whilst it will require important consideration, will never be determinative. The power remains in the statutory provision;

g) The prevailing ethos of the MCA is to weigh and balance the many competing factors that will illuminate decision making. It is that same rationale that will be applied to the decision to appoint a PWD;

h) There is only one presumption in the MCA, namely that set out at Section 1 (2) i.e. *'a person must be assumed to have capacity unless it is established that he lacks capacity'*. This recognition of the importance of human autonomy is the defining principle of the Act. It casts light in to every corner of this legislation and it illuminates the approach to appointment of PWDs;

i) P's wishes and feelings and those other factors contemplated by Section 4 (6) MCA will, where they can be reasonably ascertained, require to be considered. None is determinative and the weight to be applied will vary from case to case in determining where P's best interests lie (**PW V Chelsea and Westminster Hospital NHS Foundation Trust and Others [2018] EWCA 1067**);

j) It is a distortion of the framework of Sections 4 and 5 MCA 2005 to regard the appointment of a PWD as in any way a less restrictive option than the collaborative and informal decision taking prescribed by Section 5;

k) The wording of the Code of Practice at 8.38 (see para 20 above) is reflective of likely outcome and should not be regarded as the starting point. This paragraph of the Code, in particular, requires to be revisited.

54. These three cases were joined in order to seek to persuade the Court to clarify practice and procedure in the appointment of PWDs in the Court of Protection. In undertaking this challenge, I have received formidable support from leading counsel for both parties. By his tacit recognition of the legitimacy and force of Ms Butler-Cole's criticisms of aspects of the wording of the Code of Practice and by his sensible and proper acknowledgment of the weight to be afforded to them, Mr Rees has enabled submissions on both sides to progress constructively and, where appropriate, collaboratively. The benefit of this is inestimable.

55. Ms Butler-Cole also recognises that the individual applicants should now be afforded the opportunity to reflect on this judgment and to consider how best or indeed whether to pursue their respective applications. If restored these may now be reallocated to either a Tier 1 or Tier 2 judge, the only Tier 2 judge who regularly sits at First Avenue House is HHJ Hilder.