

IMPORTANT NOTICE

This judgment was delivered in private. The judge has given leave 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 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.

Neutral Citation Number: [2014] EWCOP B20

Case No: 12401400

COURT OF PROTECTION
MENTAL CAPACITY ACT 2005

First Avenue House
42-49 High Holborn,
London WC1V 6NP

Date: 20 May 2014

Before:

Senior Judge Lush

Re BM

Between:

JB
- and -
AG

Applicant

Respondent

Jordan Holland (instructed by **Thackray Williams**) for the **applicant**
Amrik Singh Wahiwalla (instructed by **Ross Coates**) for the **respondent**

Hearing date: 1 May 2014

APPROVED JUDGMENT

Senior Judge Lush:

1. This is a case in which there is a dispute as to who should be appointed as BM's deputy for property and affairs.
2. The practice guidance on the publication of judgments, which came into force on 3 February 2014, requires publication in "any case where there is a dispute as to who should act as an attorney or deputy", unless there are compelling reasons why it should not be published. There are no compelling reasons why this decision should not be published.
3. The guidance also provides that "anonymity in the judgment as published should not normally extend beyond protecting the privacy of adults who are the subject of the proceedings and other members of their families, unless there are compelling reasons to do so."
4. Strict adherence to this requirement would present difficulties in this case. The applicant is a close friend, who should normally be named, whereas the respondent is a distant relative, whose privacy should be protected. One of the principal witnesses is BM's next-door neighbour, and naming her could indirectly lead to the disclosure of BM's home address. Accordingly, I have anonymised all of their names.

BM

5. BM was born in 1955 and lives in London SE12.
6. His mother had a son and daughter, whom she gave up for adoption shortly before she married his father, and to all intents he was brought up as an only child.
7. He became acquainted with his half-sister, who lives in South Africa, about twenty years ago, and had no contact at all with his half-brother until very recently.
8. BM lived with his parents all his life until the death of the survivor of them, his mother, in 2009.
9. He suffers from agoraphobia, as a result of which he rarely ever left the house.
10. He has two main interests in life; football and religion.
11. He is an ardent Millwall supporter, but has never been able to attend a match, because of his agoraphobia. He is fascinated by football trivia and statistics and, when he made a will in 1996, which has since been revoked, he bequeathed his collection of football books to the Association of Football Statisticians.
12. In both his 1996 will and in a later will he made in 2008, he left his residuary estate to the World Healing Council ('WHC') in the event that his mother

predeceased him, which of course she did. The WHC is a registered charity based in Blackpool. Its primary object is faith healing.

13. On 30 April 2013 BM suffered brain damage due to a massive intercerebral haemorrhage following a ruptured middle cerebral artery aneurysm. He has been a hospital in-patient ever since, though he is due to be discharged shortly. He requires twenty-four hour care and is eligible for NHS Continuing Healthcare funding.
14. Because of his stroke he lacks the capacity to make decisions regarding his property and financial affairs and it is unlikely that he will ever regain the capacity to do so.
15. His assets are worth £413,000 and consist of his house, which has been valued at roughly £275,000, and a bank account, on which there is a currently balance of about £138,000.

The application

16. JB is a Pentecostal preacher, who runs what she describes as “a ministry for apostolic/prophetic intercessory prayer, healing and deliverance.” She lives in the next street to BM.
17. She was born and brought up in the West Indies and came to England during the 1960s. She qualified as an orthopaedic nurse and spent thirteen years in nursing before becoming a senior social services manager. She obtained an MSc degree in public service management in 1996 and was ordained to the office of pastor in 2002.
18. On 11 October 2013 she applied to the Court of Protection to be appointed as BM’s deputy for property and affairs. She said on the application form:

“Since the death of BM’s mother five years ago he has become part of my family and has been embraced and supported by us ever since. ... Apart from me he has no close friends. He relates to me especially as a mother figure and confidant. Now more than ever BM needs the security and consistency that my children and I offer him.”

19. JB, who uses the majestic plural or royal ‘we’ from time to time, has an unshakable belief that BM will recover from his stroke. In an email dated 1 September 2013 she said:

“I visited BM today and I must say that I am so encouraged by his continuous progress and I thank Almighty God that in spite of all that he has been through he has never lost his faculties. Apart from when he was unconscious in the intensive care unit he has always known and recognised us. As a Prophetess/Apostle God has promised me full restoration for BM and as God has not changed his mind, we have confidence and assurance that his destiny will not be cut short.”

The objection

20. AG was born in 1953 and lives in Ipswich. She is BM's cousin of the half-blood. Their mothers were half sisters. Before her retirement, she was the operational manager of Langley House Trust, which provides resettlement services for ex-offenders. In this role she managed finances and budgets running into six and seven-figure sums.
21. On 2 December 2013 AG completed an acknowledgment of service, in which she opposed JB's application and proposed that she be appointed as BM's deputy, instead. She said:

“It is not in the patient's best interests to appoint the applicant as his deputy for property and financial affairs on the basis that she is not a fit and proper person and may have a conflict of interests.”
22. Both parties were legally represented throughout these proceedings. Thackray Williams Solicitors, Bromley, act for JB, and Ross Coates Solicitors, Ipswich, act for AG.
23. In accordance with a timetable set by the court, both parties filed evidence, which regrettably became increasingly vehement in tone.

The hearing

24. The hearing took place on Thursday 1 May 2014 and lasted three hours. Jordan Holland, counsel of 5 Stone Buildings, appeared on behalf of JB, and Amrik Singh Wahiwalla, counsel of East Anglian Chambers, appeared on behalf of AG.
25. JB was unable to attend the hearing because she was caught up in a traffic jam in Woolwich, but AG attended, and was accompanied by BM's neighbours, Mr and Mrs N, and his close friend and the executrix of his will, EO.
26. Mr Wahiwalla applied what is known as 'the balance sheet approach', in which he assessed the respective strengths and weaknesses of JB and AG against specific criteria, such as:
 - (a) their willingness to act;
 - (b) their ability to act;
 - (c) their qualifications;
 - (d) their place of residence;
 - (e) their conduct before, as well as during, the proceedings;
 - (f) the nature of their relationship with BM;
 - (g) BM's own wishes and feelings, so far as they can be ascertained;
 - (h) the views of others who have an interest in his welfare;
 - (i) the effect of the hostility between them;
 - (j) the nature of any conflict between their interests and BM's interests; and
 - (k) the extent to which they expect to receive remuneration for their services.

27. I shall not summarise Mr Wahiwalla's findings, other than to say that, as is predictable whenever the legal representative of one of the parties carries out this exercise, the outcome was either neutral or weighted heavily in favour of his client, AG.
28. Another approach to best interests decision-making, which can either be free-standing or applied as part of the balance sheet approach, is 'the factor of magnetic importance,' the factor that tips the balance and decides the eventual outcome.
29. According to Mr Holland, the factor of magnetic importance is BM's 'very deep faith'. He said:

"It is clear that his faith is both very deep-rooted and is very personal to the applicant's ministry and the fellowship of her congregation. ... While the respondent may find BM's choice of the applicant's church uncomfortable, it is not for her (or for the court) to seek to make a window into his soul in order to examine the perceived secular wisdom of his choice. The fact is that the court is required by statute to have regard to his religious beliefs, which very clearly point towards the applicant's appointment as his deputy for property and affairs."

30. Mr Wahiwalla, however, sought to prove - and succeeded in proving - that BM was not as slavishly devoted to JB's ministry as she liked to claim. She and BM had first become acquainted when his mother died in March 2009. At that time she conducted her ministry in a Christian bookshop at the end of the street in which BM lives. The bookshop closed and she reconvened her church in BM's back room. The congregation numbered about half a dozen and BM, who is agoraphobic, felt that several of them outstayed their welcome by hanging around at the end of services.
31. A chain of email communications revealed that, for roughly two years, between 2010 and 2012, BM belonged to an entirely different church, which he stopped attending for theological reasons in August 2012, eight or nine months before his stroke.
32. In one of these emails, dated 18 August 2012, BM said to a member of the congregation he was leaving:

"Sadly because of something that happened on Thursday evening [16 August 2012] I will not be coming back to worship at [*place name*] Methodist. I have enjoyed my time with you all so very much and will greatly miss you and all the very dear friends that I have made while being with you. It has been only a short time since I have been with you and I have been shown nothing but kindness and warmth, but I did not realise until Thursday that my own beliefs of a Divine Christ were not shared by someone else. It came as a great shock to learn of this and after spending yesterday praying about the situation I feel I can no longer worship with you."

33. A few days later, on 29 August 2012, BM sent another email to the same person, in which he said:

“I hope that one day I will return to be with you all at the church but perhaps not for the moment. I need to see how it all works out. Another church and bible study group has asked me to come along and, although I do not see this as permanent, I will be attending for this time.”

34. Both counsel commented on the unusual level of acrimony and aggression between the parties.

35. Mr Wahiwalla contended that JB had deliberately set out to isolate BM socially by excluding his friends and neighbours from maintaining an ongoing relationship with him. She had achieved this by:

- (a) claiming to the hospital authorities that she was his next of kin;
- (b) changing the locks at his house;
- (c) deleting various people from his list of friends on Facebook;
- (d) allowing her daughter to occupy his house; and
- (e) preventing friends and neighbours not only from entering his property but also from visiting him in hospital.

36. There was a conflict of evidence as to whether JB’s daughter was living in BM’s house. In a letter dated 18 March 2014 JB’s solicitors, Thackray Williams stated categorically:

“We are instructed that no one is in occupation of BM’s house. JB and her daughter make frequent visits to ensure that the house is aired and that people can see them coming and going while they collect the post and tend plants, etc.”

37. However, BM’s neighbour, EN, kept a diary of the comings and goings next door, which established beyond reasonable doubt that, at precisely the time when Thackray Williams wrote their unequivocal letter, BM’s property was being occupied by at least one person overnight and, whenever the occupant took a bath, water from the overflow pipe poured into EN’s back garden.

38. There was also a difference of opinion between the parties regarding the extent to which it is reasonably practicable to permit and encourage BM to participate, or improve his ability to participate, as fully as possible in any decision affecting him.

39. Mr Holland submitted that, because of her commitment to empowerment, JB was better placed to facilitate supported decision-making, whereas AG simply assumed that, because he had suffered a severe stroke, BM was incapable of making any decision and was dismissive of attempts to engage him in the decision-making process.

40. Fortunately, there is external evidence on BM’s decision-making abilities. According to the minutes of a meeting held on 14 January 2014 attended by the

Clinical Commissioning Group, his IMCA (Independent Mental Capacity Advocate) and family and friends:

“BM consistently responds to social greetings spontaneously and has been observed to say ‘hello’ as well as reach out and touch the visitor’s hand. He has also been observed to say a few other words such as ‘OK’. He is able to respond yes or no to questions, but assessment has shown this to be unreliable; for example with yes to the questions are you in pain and are you OK.”

41. The notes of a further meeting on 27 March 2014 stated:

“There was a discussion about whether he could make any choices at all and, given he cannot respond consistently to questions with yes or no answers, it is doubtful.”

The law

42. Sections 1 to 4 of the Mental Capacity Act 2005 provide that, if a person (who is referred to as ‘P’ throughout the Act) lacks capacity to make a particular decision at a particular time, then any act done or decision made by someone else on his behalf must be done or made in his best interests.

43. There is a checklist in section 4 of the Act which requires any substitute decision-maker, including the court, to “consider all the relevant circumstances” when deciding what is in P’s best interests and, in particular, they must take the following steps:

- (a) to consider whether it is likely that P will have capacity in relation to the matter in question at some time in the future (s 4(3));
- (b) so far as reasonably practicable, to permit and encourage P to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him (s 4(4));
- (c) to consider, so far as is reasonably ascertainable, P’s past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity) (s 4(6)(a));
- (d) to consider, so far as is reasonably ascertainable, the beliefs and values that would be likely to influence P’s decision if he had capacity (s 4(6)(b));
- (e) to consider, so far as is reasonably ascertainable, the other factors that P would be likely to consider if he were able to do so (s 4(6)(c)); and
- (f) to take into account, if it is practicable and appropriate to consult them, the views of anyone engaged in caring for P or interested in his welfare, as to what would be in his best interests and, in particular, as to the matters mentioned in section 4(6): (s 4(7)).

44. Section 16(2) of the Act provides that the Court of Protection may make any decision on P’s behalf itself, or it may appoint a deputy to make decisions on P’s behalf.

45. In the circumstances, it would be more appropriate for the court to delegate the making of everyday decisions about BM’s property and financial affairs to a

deputy, whilst reserving to itself, say, any decision on BM's placement when he is discharged from hospital, in the event of a disagreement between his family and friends and the healthcare and social care professionals.

46. No one has an automatic right to be appointed as deputy. The Court of Protection has a discretion as to whom it appoints and, as I have said before in other judgments, traditionally the court has preferred to appoint a relative or friend as deputy (if it is satisfied that it is in P's best interests to do so), rather than appoint a complete stranger.
47. This is because a relative or friend is usually familiar with P's affairs and aware of their wishes and feelings. Someone with a close personal knowledge of P is also likely to be in a better position to meet the obligation of a deputy to consult with P, and to permit and encourage them to participate, or to improve their ability to participate, as fully as possible in any act or decision affecting them. And, because professionals charge for their services, the appointment of a relative or friend is preferred for reasons of economy.
48. There are, however, cases in which the court wouldn't contemplate appointing a particular family member or friend as deputy. These include situations where:
 - (a) the proposed deputy has physically, psychologically, financially or emotionally abused P;
 - (b) there is a need to investigate dealings with P's assets prior to the matter being brought to the court's attention, and the proposed deputy's conduct is the subject of that investigation;
 - (c) there is real a conflict of interests;
 - (d) the proposed deputy has an unsatisfactory track record in managing his or her own financial affairs; and
 - (e) there is ongoing friction between various family members, which is likely to interfere with the proper administration of P's affairs.
49. For a completely different set of reasons, which need not concern us here, the court generally prefers to appoint an independent, professional deputy, rather than a family member, in cases where P has been awarded substantial compensation for personal injury or clinical negligence.

Decision

50. The court has four options as to whom it could appoint as deputy:
 - (a) JB;
 - (b) AG;
 - (c) both of them; or
 - (d) neither of them.
51. There is no need to consider appointing anyone else, because we have applications from two candidates, both of whom are willing and able to act.
52. I also discard the possibility JB and AG acting jointly, because I do not believe it would work. Usually, when there is a compromise of this kind between people who don't see eye to eye, every decision can become a bone of contention.

53. Although we are left with a straight choice between JB or AG, essentially the polarisation is between two different ‘support networks’ or ‘circles of support’: BM’s church, on the one hand, and his family, friends and neighbours on the other hand.
54. The strengths and weaknesses of the two applicants are fairly evenly matched but, on balance, I believe it is in BM’s best interests to appoint AG as his deputy to manage his property and financial affairs for the following reasons.
55. In my opinion, the factor of magnetic importance is not BM’s very deep faith (though I am sure that his faith is, indeed, very deep), but the fact that AG is the candidate proposed by a support network of friends and neighbours, who represent the *status quo* in terms of being the persons in whom BM had placed trust and confidence immediately before he became incapacitated.
56. This group includes:
- (a) his neighbour, EN, to whom he had entrusted a key so she could gain entry to his house in the event of an emergency. They have been neighbours for 38 years and, when she discovered that BM was in hospital, she and her husband, maintained his garden and installed a timer device so that the lights in the house were switched on and off to give the impression that someone was living there.
 - (b) his friend EO, who has known him since 1999, when she was employed as a community support worker to visit his mother.
57. In his last will dated 23 October 2008, BM appointed EO to be his sole executrix, which suggests that he considered she had the necessary skills, as well as the probity and integrity, to wind up his estate when he died. As an expression of his wishes, this will is still fairly recent, and BM had the capacity to change his mind and appoint JB to be his executrix instead, if that had been his wish, at any time before his debilitating stroke on 30 April 2013.
58. Although it has been said that there is no hierarchy of factors in the checklist in section 4 of the Mental Capacity Act, I attach weight to EO’s views, because section 4(6)(a) refers “in particular” (my emphasis) to “any relevant written statement made by him when he had capacity.” There are few written statements more relevant than a will and EO is adamant that it would be in BM’s best interests to appoint AG to be his deputy.
59. I can understand why AG, EN and EO seemed hostile towards JB. They were BM’s existing support network and when JB turned up, without any formal authorisation, demanding his keys, his financial documents, and his last will and testament, deleting their names as his friends on Facebook and refusing to permit them to visit him in hospital, alarm bells would have resounded.
60. I accept that JB sought to isolate BM from his existing support network for no good reason and I agree that, by allowing her daughter to occupy his property rent-free, there has been a conflict between her interests and BM’s.

61. As regards the requirements of section 4(4) of the Act, I have reservations as to whether JB was genuinely assisting BM in making decisions himself or merely getting him to concur with her own wishes. For example, she asserted that BM had refused to let AG and EO have a copy of the will, in which he had appointed EO to be his executrix. Given the external evidence of his decision-making abilities, I would be surprised if he had the capacity to make a fully informed decision of this kind or, at least, the ability to say 'no' and consistently mean it.
62. Other reasons why I believe it is in BM's best interests for AG to manage his property and financial affairs are her previous managerial and financial experience and the fact that she has now retired and has sufficient time to devote to this task, which is frankly rather onerous. JB, on the other hand, has pressing calls on her time, such as a church to run and a television ministry to present.
63. I am sure that JB wishes to be of service to BM in his current predicament, but her spare time and spiritual gifts would be better deployed by means of continued prayers and intercessions on his behalf than in the mundane task of looking after his property and financial affairs.