

IMPORTANT NOTICE

This judgment is covered by the terms of an order made pursuant to Practice Direction 4C – Transparency. It may be published on condition that the anonymity of the incapacitated person and members of her family must be strictly preserved. Failure to comply with that condition may warrant punishment as a contempt of court.

Neutral Citation Number: [2018] EWCOP 21

Case No: 12888437

COURT OF PROTECTION

MENTAL CAPACITY ACT 2005

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

Date: 17th September 2018

Before :

Her Honour Judge Hilder

IN THE MATTER OF SH

Hearing: 1st March 2018

Mr. Parkhill (instructed by Wilkin Chapman LLP) for the Applicant
Ms. van Overdijk (instructed by The Public Guardian)

The hearing was conducted in public subject to a transparency order made on 29th January 2018. The judgment was handed down to the parties by e-mail on 17th September 2018. It consists of 13 pages, and has been signed and dated by the judge.

The numbers in square brackets and bold typeface refer to pages of the hearing bundle.

JUDGMENT

The issues

1. An application has been made by the current holder of the post for the appointment of “The Head of Business Development & Client Finance” of Focus Independent Adult Social Work C.I.C. as property and affairs deputy for SH. The Public Guardian has not been joined as party to the application but has attended the hearing by representation to provide assistance to the court, for which the court records its appreciation.
2. In an order made on 22nd January 2018 the issues for determination in this hearing were identified as follows:
 - a. Whether the court can, or should, appoint as deputy the holder of a specified office or position (as distinct from a named individual holding such office at the time of the appointment);
 - b. If such appointment is made, the effect of any change to the holder of the office on the deputyship appointment; and
 - c. If the court is minded to appoint the Applicant as property and affairs deputy for SH, whether there should be any specific requirements in the order of appointment in respect of notification to the Court and/or the Office of the Public Guardian of any change to the holder of the office of Head of Business Development and Client Finance at the Applicant company.
3. At the hearing, additional background issues were also addressed as follows:
 - d. Whether acting as property and affairs deputy is within the powers of Focus Independent Adult Social Work C.I.C.;
 - e. The extent of the professional indemnity insurance cover held by Focus Independent Adult Social Work C.I.C., and the court’s approach to the application in the light of any limitations.

The background

4. SH is 71 years old and it is common ground that she lacks capacity to manage her property and affairs because of a persistent delusional disorder. (I accept the evidence in that respect, which is in the form of a COP3 assessment by SH’s ward doctor dated 3rd June 2016 and a report by a Court of Protection Visitor dated 20th October 2017.)
5. SH has a son, MH, who has been notified of these proceedings but has played no part in them. From June 2016 she lived in a residential home on a temporary basis on discharge from a mental health unit. In January 2017 she moved into rented accommodation where she has apparently settled well.

6. SH's assets are modest, made up of small amounts (totalling less than £10 000) in four accounts and a state pension [259]. There is some suggestion of entitlement to a small private pension but none has yet been identified; and there has been an approach from a firm of legal researchers suggesting that SH may have an interest in an unidentified asset [D286], but again no information of substance has been confirmed.
7. By COP1 application dated 6th June 2016 [B39], "Focus IASW Head of Business Development & Client Finance (Miss Sarah Hawker)" applied for appointment as property and affairs deputy for SH. Subsequently, by e-mail dated 24th October 2016, the Applicant confirmed that the appointment sought was 'Head of Business Development and Client Finance not a named person.' [262] The COP4 declaration which accompanied the application [B67] gives details of Sarah Hawker, and is signed by her. (Ms. Hawker is now known as Sarah Savage, which is the name I will use.)
8. By order made on 7th July 2016 [B74], the Applicant was authorised to investigate and report to the court as to SH's assets, income and liabilities; and authorised to sign a tenancy agreement on her behalf.
9. On 24th August 2016 a direction by District Judge Rogers required the Applicant to file a copy of its Memorandum of Association "demonstrating its power/authority to act as deputy"; and various insurance documents [261].
10. By order made on 23rd November 2016 [B75] District Judge Batten recited that:

"4. It appears from the documents filed by the Applicant that

- (i) Focus Independent Adult Social Work is a company limited by guarantee, the limit of each member's liability being £1.
- (ii) The Objects of Focus Independent Adult Social Work cover the provision of social work services but do not cover the provision of financial deputy services.
- (iii) The insurance cover relates to public liability and product liability in respect of accidents. It is not clear that it provides professional indemnity cover in relation to the delivery of financial deputyship services.

5. The court has been informed that Focus Independent Adult Social Work agreed with Deputy Bond Services an arrangement whereby Deputy Bond Services would bond the organisation Focus Independent Adult Social Work rather than an individual working for the organisation in respect of deputyships for property and affairs, notwithstanding that Focus Independent Adult Social Work is not a Trust Corporation within the meaning of the Mental Capacity Act 2005."

The order directed the Public Guardian to file a position statement addressing the following issues:

- (i) Whether Howdens has carried out due diligence to satisfy themselves that Focus Independent Adult Social Work is a suitable organisation to be bonded and whether they have agreed to do so

- (ii) Whether the Memorandum and Articles of Association of Focus Independent Adult Social Work empower Focus Independent Adult Social Work to carry out the functions of a deputy for property and affairs appointed by the Court of Protection or whether such functions are ultra vires
- (iii) Whether the insurance cover obtained by Focus Independent Adult Social Work complies with the requirements set by Deputy Bond Services, Howdens or the Public Guardian and whether it provided appropriate insurance cover in respect of the exercise of the authority of a deputy for property and affairs under an order made by the Court of Protection
- (iv) Whether the aggregate value of the estates subject to deputyship orders held by Focus Independent Adult Social Work falls within the upper limit set by the insurers
- (v) Please provide a full copy of the professional indemnity insurance documentation
- (vi) Any other matter that the Public Guardian considers should be brought to the attention of the Court of Protection concerning the suitability of Focus Independent Adult Social Work to act as a deputy.

11. The position statement which was filed did not satisfy the court. The matter was referred to me. By order made on 21st July 2017 [B77] the Applicant was directed to file a statement, and the Public Guardian to file a further report.

12. A difference of understanding between the Applicant and the Public Guardian as to the effect of an order appointing an office holder as deputy became apparent. In an order dated 30th November 2017 [B83] I identified that:

“If the Public Guardian’s interpretation is correct, there would appear to be

- (i) No advantage to appointment being of the holder of an office, as opposed to the named individual currently holding that office;
- (ii) Disadvantages, in the lack of transparency of who is exercising the functions of the office at the time of appointment and subsequently.

Noting the need to keep costs to a minimum the order recited that “The court is minded either:

- (a) To appoint “Sarah Savage, Head of Business Development and Client Finance, Focus Independent Social Work CIC...” as property and affairs deputy for [SH], with specific requirement that she make application to the Court for further directions in the event that she ceases to hold the office of Head of Business Development and Client Finance of Focus Independent Social Work CIC; or
- (b) To list the matter for attended hearing, at which the identification of the appointment will be considered further.”

The Applicant and the Public Guardian were directed to notify the court whether they agreed to the appointment as set out or sought an attended hearing. Both sought an oral hearing. Consequently, by order made on 22nd January [B85] this hearing was listed, with the issues identified as above.

13. At the end of the hearing I made an order which:

- a. Included a recital recording that the Applicant and the Public Guardian both invited the court to make no order as to costs at the conclusion of the application;
- b. Required the Applicant to file and serve submissions addressing the sufficiency of its professional indemnity insurance to cover the activities of a deputy for property and affairs and, in particular, whether it excluded cover for the deputy's investment of P's funds;
- c. Required the Public Guardian to file and serve submissions addressing the vires issue and the adequacy of the insurance cover;
- d. Provided for the Applicant to file and serve submissions in response to the Public Guardian, including as to any proposal to amend the Articles of Association.

Documents considered

14. I have considered all of the documents collated into the hearing bundle, including the following statements and reports:

On behalf of the Applicant

Sarah Savage, 4th September 2017 [C95]

Sharon Pearson, 14th September 2017 [C99]

Position statements dated 21st February 2018 [32] and 27th February 2018

On behalf of the Public Guardian

Wendy Hill, 20th October 2017 [D274]

Sacha Chauhan & Alan Eccles, 2nd November 2017 [D282]

Position statements dated 21st December 2016 [A3], 30th November 2017 [A28] and 16th January 2018 [A30]

15. Since the hearing, I have further considered Notes by Mr. Parkhill and Ms. van Overdijk, dated 15th and 29th March 2018 respectively.

The parties' positions

16. The Applicant has explained that the deputyship work which Focus manages was previously administered by N.E. Lincolnshire Council, and Sarah Savage herself was previously part of the Council's deputyship team. As a restructuring measure in 2013 the Council department "launched as a separate entity and became a Community Interest Company Limited by Guarantee." [33] That company is Focus Independent Adult Social Work ("Focus").

17. Initially Focus discharged functions of deputyship appointments still held in the name of "The Authorised Officer of N.E. Lincolnshire Council." (I doubt that this was

proper. Seventeen of those deputyships have apparently now been the subject of new orders [34]. I will make further provision to address this point below.) The bond provider then required security bonds to be taken out in the name of “Head of Business Development and Client Finance”, and so Focus began to seek appointment in those terms.

18. As to suitability of the organisation to discharge the functions of deputyship, it is acknowledged that Focus is not a regulated entity, and the holder of the post of Head of Business Development and Client Finance need not be a regulated professional. The Applicant relies on the fact that it is not a new organisation, is not new to acting as deputy, and the Public Guardian has formed a very positive view of it. The Applicant says that Focus complies with the OPG’s professional standards requirements; is audited by N. Lincs Businesses Connect; and is a member of the Association of Public Authority Deputies. Notwithstanding the acknowledged separation from NELC, the Applicant considers that Focus “should be treated as part of the public authority.” [34] It is said that, at one point, Focus was being monitored by the OPG’s public authority supervision team, and it continues to be supervised by the OPG as a public authority in terms of fees that can be charged.
19. In Mr. Parkhill’s position statement he set out Focus’ response to the identified issues as follows:
 - a. Yes – the court can, and should, appoint as deputy the holder of a specified office or position (as distinct from a named individual holding such office at the time of appointment);
 - b. If the holder of a specified office or position is appointed (as distinct from a named individual holding such office), then any change to the holder of the position/office will not affect the deputyship appointment;
 - c. The Applicant appreciates that a change of post holder may affect the Public Guardian’s assessment of risk and has no objection to an order requiring notification of a change of post holder. However, the Applicant considers that any subsequent post holders are likely to have similar qualities and experience to the current holder, such that the court would be likely to be satisfied of suitability. Any requirement to make an application to the court would therefore add cost for the protected person without adding any real benefit. Rather, the Applicant favours a requirement that the Public Guardian be notified;
 - d. Focus’ Articles of Association do not expressly provide for acting as deputy but the Applicant maintains that acting as deputy is *intra vires*.
20. In respect of the insurance issue, in his position statement Mr. Parkhill pointed out that the Public Guardian had confirmed satisfaction with the insurance cover, and confirmed that Focus was willing to undertake to inform the OPG of any change in the level of cover. However, the Note filed by Mr. Parkhill after the hearing states that:

“2. The Applicant’s insurance broker, Bluefin, has advised the Applicant that the policy:

‘does not cover any error or omission in respect of any investment of, or direct advice on the investment of, client funds valuation of physical property operation or administration of any pension or employer benefit scheme or trust fund, or the sale or purchase of or dealing in any stocks, shares or securities liability for any breach of any taxation.’”

21. The Public Guardian’s position on the identified issues was as follows:

- a. He has no objection to the individual appointment of “Sarah Savage, Head of Business Development and Client Finance” but objects to an appointment of “the Head of Business Development & Client Finance” without specifying the name of the individual holding such post at the time of appointment.
- b. The effect of an order appointing as deputy an office holder is that, when the holder of the specified office leaves their post, the new holder of the office is not permitted to take over the deputyship without another order appointing that individual. An order appointing an office holder should be interpreted as *“appoint[ing] an individual as deputy only for the time which they are in the named office. As such when the holder of the office leaves they would no longer be responsible for the management of P’s affairs but the new holder of the office would not take over the deputyship without another order being made.”* [289] This position was based on concerns that *“when appointing a head of office there is an ongoing risk that the person initially selected may leave and his/her replacement may not be suitable”* [A29]; and that, mindful that appointment of a deputy is ‘best interests’ decision, *“By having a generic role, the Court is deprived of the opportunity to make that best interest decision if or when the post holder leaves.”* [321]
- c. A specific requirement to return to court if the office holder at the date of appointment ceases to hold the office *“may diminish [the Public Guardian’s] concern”* but *“will have a financial impact on P.”* After taking specific further instructions, it was confirmed that the Public Guardian was willing to accept as part of his supervisory responsibility the role of receiving reports of a change in the individual holding the office, and referring the matter to the court where appropriate.
- d. Initially, the Public Guardian was unwilling to take a position on the vires issue. However Ms. van Overdijk’s Note filed after the hearing confirmed that the Public Guardian “did not disagree” with the Applicant’s position.
- e. Initially, the Public Guardian was satisfied that Focus’ professional indemnity insurance does provide sufficient coverage for deputyship cases. However Ms. van Overdijk’s Note filed after the hearing:

- i. identifies the effect of the insurance exclusion as being that “any loss suffered by the protected party as a result of investment of their funds by the Company will not be covered by its professional indemnity insurance.... Recoverability of any such losses would be limited to the calling in the security bond;”
- ii. Identifies that existing deputyship appointments may be exposed to a risk which is not adequately safeguarded because the court would not have had in mind the effect of the exclusions when setting security;
- iii. Suggests that, when considering any future application, the court should take into account the limits of the professional indemnity insurance when determining the suitability of the Company to act, and at what level the bond should be set.

The appointment of an officeholder

22. The Mental Capacity Act 2005 s19 provides (so far as is relevant) as follows:

- (1) *A deputy appointed by the court must be –*
 - (a) *an individual who has reached 18, or*
 - (b) *as respects powers in relation to property and affairs, an individual who has reached 18 or a trust corporation.*
- (2) *The court may appoint an individual by appointing the holder for the time being of a specified office or position.*

23. Mr. Parkhill referred to some guidance as to interpretation:

“A section of an Act is the primary indication of the legislature’s meaning and intention, and must be construed, by virtue of the functional construction rule, as a proposition, or series of propositions, consisting of one or more enactments. Historically, judges have said that the division of an Act into sections is arbitrary, and ought not to be treated as furnishing a guide to its construction. This is no longer the cases, as drafters take great care to design a section so that it deals with a single point; and the way the sections are organised and arranged is to be taken as a reliable guide to legislative intention.”

Halsbury’s Laws, Vol 96 para 1099

“It is presumed that the legislature intends that the court, when considering, in relation to the facts of the instant case, which of the opposing constructions of an enactment corresponds to its legal meaning, should find against a construction that produces a futile or pointless result, since this is unlikely to have been the legislature’s intention.”

Halsbury’s Laws, Vol 96 para 1183

and, most importantly, section 12 of the Interpretation Act 1978:

“12 Continuity of powers and duties

- (1) Where an Act confers a power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as occasion requires.*
- (2) Where an Act confers a power or imposes a duty on the holder of an office as such, it is implied, unless the contrary intention appear, that the power may be exercised, or the duty is to be performed, by the holder for the time being of the office.”*

24. In my judgment, s19 of the Mental Capacity Act can be read plainly. Subsection (2) provides for a particular method of meeting the requirement of subsection (1). An order made under subsection (2) should only specify the office or position, and not the individual holding that office at the date of the order. An order which identifies an individual is effectively made under subsection (1). Any requirement to name the individual holding the office at the date of the appointment would render subsection (2) futile.
25. If an appointment under section 19(2) operated only to appoint the holder of the office at the date of appointment, then subsection (2) would offer no advantage over an appointment under subsection (1), and again subsection (2) would be rendered pointless. I agree with Mr. Parkhill’s submission that nothing in the Mental Capacity Act evinces an intention contrary to that set out in s12(2) of the Interpretation Act. In my judgment, the correct interpretation of subsection (2) must be that an order appointing an office holder operates to appoint the holder of the office from time to time, and will remain effective when the office holder at the date of the appointment is replaced.
26. This approach offers advantages of transparency. In any organisation it should be clear at any given time who holds the relevant office, and therefore who discharges the functions of deputyship.
27. However, in my judgment there is also force in the Public Guardian’s concerns about the need to consider the suitability of successive office holders. For the protection of P, it is appropriate that any change in the identity of the office holder is monitored. In my judgment, the proportionate way to do this is as part of the Public Guardian’s on-going supervision of deputyship appointments. An order appointing an office holder as deputy should therefore include a requirement that that the holder at the date of appointment notifies the Public Guardian if they cease to hold that office. The Public Guardian will then be in a position to refer the matter to the court if he considers that appropriate. A single application could be made in respect of one P, and in the light of the conclusion in that application, the court may be invited ‘of its own motion’ to review all other deputyships held by the office in question.
28. Most helpfully, the Public Guardian has expressly agreed to this approach.
29. It follows that, subject to being satisfied as to suitability, the court may appoint as deputy for SH “The Head of Business Development & Client Finance of Focus Independent Adult Social Work C.I.C..”

The vires concerns

30. The Articles of Association of Focus provide as follows [105]:

The objects of the Company are to carry on activities which benefit the community and in particular (without limitation) –

- (a) To provide social work professionals, clinical health professionals and care services that meet the needs of vulnerable members of the community;*
- (b) (b) to engage with service users, carers, partners and the wider community in the design and delivery of health and social care functions;*
- (c) To promote high standards in health and social care, and health and social work practice.*

31. Mr Parkhill acknowledges the absence of any express provision for deputyship within the Articles but relies on Section 31(1) of the Companies Act 2006, which provides that

“Unless a company’s articles specifically restrict the objects of the company, its objects are unrestricted.”

He submits that the Focus Articles are not specifically restricted; that a company with unrestricted objects has an unrestricted capacity; and therefore it is within the vires of Focus to act as deputy.

32. In Ms. van Overdijk’s Note filed after the hearing, she refers additionally to section 39 of the Companies Act 2006, which provides that

“39 A company’s capacity

- (1) The validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company’s constitution.*
- (2) This section has effect subject to section 42 (companies that are charities.)”*

and also to the Government’s Explanatory Notes for section 31 of the 2006 Act, which state that

“This section provides for a new approach to the question of a company’s objects.... Instead of companies being required to specify their objects, companies will have unrestricted objects unless the objects are specifically restricted by the articles (see subsection (1)). This will mean that unless a company makes a deliberate choice to restrict its objects, the objects will have no bearing on what it can do. Some companies will continue to restrict their objects. Companies that are charities will need to restrict their objects

(under charities legislation) and some community interest companies may also choose to do so.”

She also emphasises that the *ultra vires* doctrine, based on a company’s objects, remains fully functional for internal purposes: under section 171 of the 2006 Act directors must observe the constitutional limits on their powers, and are liable to pay compensation if they fail.

33. The Court of Protection is not the appropriate forum for determination of matters of company law. Its interest in the Articles of a company is only to satisfy itself that the organisation whose office holder is proposed as deputy is suitable for such appointment. How is the Court to be satisfied that it is within the vires of a company for its office or post holder to act as deputy? In my judgment, the only feasible and proportionate way for the Court to satisfy itself of this basic requirement is to require self-reporting, with a declaration of truth, in the same way that other kinds of deputy are required to self-report their own appropriateness to act as deputy. (See *Re Various Incapacitated Persons (Appointment of Trust Corporations as Deputies)* [2018] EWCOP 3 paragraphs 32 - 37.)
34. In this matter, Mr. Parkhill has set out the basis on which the Applicant states that deputyship is within its competence. That position has also been set out, with a statement of truth, in the COP24 statement of Sharon Pearson, the Head of Business and Governance at Focus. The Public Guardian does not take issue with it. In my judgment, these factors are sufficient for the court to be satisfied that the Head of Business Development & Client Finance of Focus Independent Adult Social Work C.I.C Focus can properly be appointed as deputy. Where such appointment is made, the order should include a requirement on the office holder forthwith to notify the Public Guardian if there is any change to the vires of the organisation during the period of the appointment.
35. Of course it remains the case that, if anything in future applications leads the Court to require further information on this or any other aspect of suitability for appointment, the court may direct that further information be filed; and such further information may include a report on that issue from the Public Guardian, pursuant to section 49 of the Mental Capacity Act 2005.

The insurance concerns

36. A copy of Focus’ professional indemnity insurance policy has been provided [18]. The policy includes the following section:

<p><i>What is not covered</i></p>	<p>A. <i>We will not make any payment for any claim or part of a claim or loss directly or indirectly due to:</i></p>
<p>Matters specific to your business</p>	<p>1. <i>Any investment of, or direct advice on the investment of, client funds.</i></p> <p>2. <i>...</i></p> <p>3. <i>Any operation or administration of any pension or</i></p>

employee benefit scheme or trust fund, or the sale or purchase of or dealing in any stocks, shares or securities or the misuse of any information relating to them, or any breach of any legislation or regulation related to these activities.

4. *Any liability for any breach of taxation, competition, restraint of trade or anti-trust legislation or regulation.*

5 -

9

37. Given further time to confirm the meaning of these exclusions in relation to deputyship funds, the Applicant has informed the court that its broker has advised that the policy “*does not cover any error or omission in respect of*” those matters set out. The Applicant has not expressed its position in the light of this advice. However, in his oral submissions Mr Parkhill accepted that, if there is not sufficient insurance cover, “the answer is to appoint as a lay deputy” ie the higher risk would suggest a higher security requirement.
38. The Public Guardian concludes that there is “valid concern” about the sufficiency of Focus’ professional indemnity insurance policy in the light of the exclusions; and that “recoverability of any such losses would be limited to the calling in the security bond...”
39. The Court of Protection is no more equipped to determine the meaning of insurance policies than it is to determine issues of company law. Its interest in the insurance cover of a proposed deputy is to inform its assessment of risk to the assets of the protected person. On the information available, I am not satisfied that Focus’ professional indemnity insurance is sufficient to cover the potential loss to protected persons attributable to the exercise of the functions of deputyship by its appointed office holder; and therefore, if such appointment is to be made, it is appropriate for the court to require security on the same basis as other non-insured (lay) deputies. (See *Re H* [2010] 1 WLR 1103, paragraphs 76 -83.)

Conclusions

40. Having regard to all the information filed in this matter, I am satisfied that Focus Independent Adult Social Work C.I.C. is a suitable organisation, and the current holder of the office of The Head of Business Development & Client Finance within that organisation is a suitable person, for the holder of that office to be appointed as property and affairs deputy for SH. Such appointment will include provision for remuneration at the public authority rate.
41. The appointment of an office holder continues with successive holders of the office. Therefore, the deputyship order shall specifically include requirements that the holder of the post of Head of Business Development & Client Finance at the date of the appointment notifies the Public Guardian forthwith if:
- a. she ceases to hold that post; and/or

- b. there is any change to the competence of Focus Independent Adult Social Work C.I.C. to carry out the functions of deputyship, by variation of its Articles of Association or otherwise.
42. I am not presently satisfied that sufficient professional indemnity insurance cover is in place so as to enable the court to regard any potential loss to SH attributable to the exercise of the functions of deputyship as otherwise recoverable. Having regard to the level and form of SH's known assets, the nature of potential risk and the absence of alternative protection, the security requirement will be set at £10 000.
43. The Applicant and the Public Guardian having very constructively agreed that it is appropriate for the court to depart from the usual rule as to costs, and that each will bear their own costs, I will make no order as to costs. (For the avoidance of doubt, SH's estate will bear no costs beyond the fixed costs of the application at the public authority rate.)
44. The Applicant is required to agree with the Public Guardian and file at court by 28th September 2018 a list of all deputyships which Focus Independent Adult Social Work C.I.C. is currently managing. Of its own motion, the court will review those matters (both as to the identification of the appointed person or office holder, and as to the level of security).

HHJ Hilder

17th September 2018