Neutral Citation Number: [2018] EWCOP 8

Case No: 12882165

COURT OF PROTECTION
IN THE MATTER OF THE MENTAL CAPACITY ACT 2005

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 March 2018

Before:

MR JUSTICE CHARLES

VICE PRESIDENT OF THE COURT OF PROTECTION

- -

Re: AR

- -

- -

David Rees QC (instructed by Neil Cawthorn & Associates) for **the Applicant**
Mathew Roper instructed by the **Public Guardian**

Hearing date: 30 January 2018

- -

Judgment Approved

MR JUSTICE CHARLES

This judgment was delivered after an attended hearing to which an order in standard terms restricting the publication of defined information applied. The judge has given leave for this version of the judgment to be published.

Charles J :

Introduction

1. This application relates to the appointment of Neil Cawthorn (Mr Cawthorn) as the property and affairs deputy for AR. It has also been used to address issues relating to his appointment as a property and affairs deputy for others.

2. Mr Cawthorn is a solicitor and the principal of Neil Cawthorn & Associates (NCA). He acts as a deputy through a division of that practice called the Professional Deputy Service (PDS) which has no legal personality of its own. He has been appointed by the Court of Protection (the COP) to act as a property and affairs deputy for patients (Ps). He so acts for over a hundred Ps.

3. The main reason why this application has been transferred to me is that it raises issues relating to the validity of the orders relied on by Mr Cawthorn to enable him to charge remuneration as a deputy.

4. The Public Guardian has accepted the invitation of the court to make submissions and I am grateful for his help.

5. I recognise that there were pragmatic reasons and factors that affected the approach to the way in which the relevant background orders were sought, relied on and made, including the point that in many of the cases the remuneration was cost neutral because the relevant local authority (Suffolk County Council - SCC) treated the Deputy's charges (and still treats them) as disability related expenditure.

6. However, there is no doubt that the COP acting through its then Senior Judge (Judge Lush) and an authorised court officer (Mr Batey) with the concurrence of Judge Lush must carry considerable responsibility for the problems now facing the COP, Mr Cawthorn and most importantly the Ps for whom he acts as a property and affairs deputy. However, the Crown has not been joined to these proceedings because the Public Guardian does not seek any order for his costs and both he and Mr Cawthorn have decided that they do not seek an order for costs to be paid by the court (and so the Crown).

7. Finally, at the outset of this judgment I record that the Public Guardian accepts that Mr Cawthorn provides a good service as a deputy. This acceptance is based on evidence in this case and other contact between him and the Public Guardian. As appears later, I agree.

The relevant background orders and some of the history.

8. I summarise the background orders and make some comments on them in the Schedule hereto.

9. I refer to the orders dated 12 December 2013 and 24 November 2014 as the ACO orders and the later one as the 2014 ACO order. They are relied on directly or indirectly by Mr Cawthorn to charge remuneration as a deputy.

10. It is not clear, and to my mind it does not matter, whether Judge Lush gave specific authority for the ACO orders, as he had for the order dated 15 March 2013, or whether they were made by Mr Batey as an authorised court officer under the general supervision of Judge Lush as the Senior Judge.

The approach at the hearing before me

11. As result of my last order dated 18 January 2018, the Public Guardian filed a witness statement of Carolyn Whayman, who is Head of the Health and Adult Social Care & Deputyship team at Essex County Council, dated 26 January 2018 and the Applicant filed a further witness statement of Mr Cawthorn and one from Sarah Bescoby, who is Business Development Manager & Person-Centred Services Lead of Frantec, which supports individuals in 8 different local or unitary authorities and has given support to AR since April 2014.

12. At the hearing Ms Whayman was not available. This was not surprising given the timetable and I indicated that I was not prepared to take an approach that attached less weight to her statement because she was not cross examined on it and I had envisaged that, if wider oral evidence was required, I would have to adjourn and give directions. I also indicated that I was doubtful that cross examination of any of the witnesses would add value. After considering their positions the parties (by which I mean Mr Cawthorn and the Public Guardian) agreed to proceed on the basis that there would be

no oral evidence, with the caveat that they could invite me to adjourn for oral evidence if they thought that was warranted by the submissions made. In my view correctly, no such application was made and the issues were proportionately and fairly dealt with in argument.

13. As appears from my recital of the orders:

    i) The COP with the assistance of Mr Cawthorn and the Public Guardian has made attempts to define the issues arising out of the ACO orders (see, in particular the order dated 16 May 2017).

    ii) It was envisaged that all of the issues might be determined on the papers.

    iii) The attended hearing was listed to address only the level of remuneration that Mr Cawthorn could charge as AR's deputy and it was thought that it might be possible to vacate this hearing and so deal with all of the issues on the papers.

    iv) The wider issues identified in the order dated 16 May 2017 are relevant background to the "remuneration issue" in AR's and, as originally envisaged, I determine them on the papers, but with the benefit of limited submissions made at the attended hearing.

    I record that I am grateful for the written submissions and position statements on all of the issues provided through the course of the proceedings.

The issues identified in the order dated 16 May 2017

14. I address these first but in a different order.

15. *How are the costs of these proceedings to be met?* This issue has fallen away because the Crown has not been joined and the Public Guardian and Mr Cawthorn have agreed to bear their costs and not to seek an order for costs.

16. In my judgment, if costs are not to be claimed and ordered against the Crown that is the right result in respect of AR, who certainly should not bear any costs of issues created by the ACO orders as to what Mr Cawthorn should be entitled to charge as her deputy.

17. I return to the approach to be taken and so the costs of other cases later.

18. *Should the orders made by ACO James Batey be set aside? (The parties are invited to consider any consequential requirement if the orders are set aside).* In my view the ACO orders should no longer be relied on and every case in which they have been and are being relied on needs to be reviewed to ensure that they are no longer the basis for Mr Cawthorn's authority to charge remuneration.

19. This review will render the ACO orders ineffective and once it has been done on a case by case basis those orders should formally be set aside. This approach should avoid problems arising from a free-standing setting aside of those orders before each case in which they are being relied on is revisited.

20. As appears from paragraph 5 (a) to (g) of the order dated 16 May 2017 a number of procedural issues arise. The informality of the procedure adopted may have been founded on some pragmatic considerations and the historic approach of the old Court of Protection before the MCA. However, in my view the flaws are not confined to issues that can properly be described as procedural flaws that could or should not found the revisiting or setting aside of the ACO orders.

21. To my mind, it is remarkable that the COP made the ACO orders in the manner that it did and in particular that it did so:

    i) without either a schedule identifying the persons to which they applied or evidence relating to each P in receipt of means assessed benefits (including whether the remuneration was cost neutral for that P) to whom they applied, and so in a generic form, and

    ii) in respect of future appointments of Mr Cawthorn as a property and affairs deputy.

    The same can be said of the addition of a number of Ps to the order dated 15 March 2013 if, as appears to be the case, no evidence was put before the COP relating to each of those Ps.

22. As recited in the order dated 16 May 2017 the COP can in this application (and other applications after the ACO orders were made) proceed on the basis that the ACO orders do not bind it. I agree and accept that this could found:

    i) an argument that the ACO orders were not prospective or effectively prospective, and

    ii) a solution for any such appointment after they were made and which refers to or adopts them.

23. However:

    i) this solution is not available in cases in which Mr Cawthorn was appointed before the ACO orders were made and has since been charging in accordance with them, and

    ii) its availability in respect of later appointments would have to be assessed on a case by case basis by reference to the evidence put before the COP and the terms of the order appointing Mr Cawthorn.

24. Senior Judge Hilder points out in *Various Incapacitated Persons and the Appointment of Trust Corporations as Deputies* [2018] EWCOP 3 (see paragraph 9 of her judgment) that s. 16(3) of the Mental Capacity Act 2005 (the MCA) provides that the decision to appoint a deputy is a "best interests" decision and is therefore made by reference to the individual facts of a particular case. This also applies to decisions on remuneration made under ss. 16(5) and 19(7) of the MCA and the COP Rules and Practice Directions.

25. In my judgment, the generic and purported future effect of the ACO orders shows that in making those orders the COP failed to properly address and so have proper regard to the best interests of each P and so contravened a fundamental principle:

    i) of the MCA, and indeed any approach that is founded on the best interests of an individual, and

    ii) more generally, of the fair administration of justice.

    These fundamental flaws cannot be excused by pragmatic considerations and cannot properly be described as procedural. Rather, they are surprising, unfortunate and serious flaws in the substantive approach that was taken.

26. Now that these flaws have been discovered I have concluded that the ACO orders should no longer be relied on.

27. *What is the effect of the sealed orders? (The parties are invited to consider the Privy Council decision in Isaacs v Robertson [1985] 1 AC 97).* I agree, with the common ground before me that the COP has the power to make orders for each of the relevant Ps that enable Mr Cawthorn to charge remuneration in the amounts and at the rates set out in the ACO orders and that applying *Isaacs v Robertson* until orders are made that remove reliance on the ACO orders (or the remuneration provisions in appointment orders and/or the ACO orders are set aside) all such orders can be relied on by Mr Cawthorn and by the Public Guardian in the performance of his regulatory function.

28. The possibility of recoupment of any overcharging was correctly not argued before me.

29. *What is the effect of Practice Direction 19B? (The parties are invited to consider the decision of the Supreme Court in Secretary of State for Communities and Local Government v Bovale Ltd & Hertfordshire District Council [2009] EWCA Civ 171 and paragraphs 89 - 91 of the decision of District Judge Eldergill in The Friendly Trusts Bulk Application [2016] EWCOP 40).*

30. This issue was founded on points raised by DJ Eldergill in his order dated 16 November 2016.

31. The COP Rules 2017 and the new Practice Directions under them came into force on 1 December 2017. What was Rule 167 is now Rule 19.13 and what was Practice Direction 19B is still Practice Direction 19B.

32. Common ground was reached that:

    i) there is no presumption that a deputy should be appointed on the basis that his charges are governed by PD 19B, and that

    ii) the adoption of this course is one of the options open to the COP when appointing a deputy.

    I agree and consider that this is clear from the provisions of Rule 167(1) (a) to (c) (now 19.13 (1)(a) to (c)) which expressly set out alternatives. It is also consistent with the generality of the power conferred by ss. 16(5) and 19(7) of the MCA.

33. As I have already mentioned, Senior Judge Hilder in *Various Incapacitated Persons and the Appointment of Trust Corporations as Deputies* points out that s. 16(3) of the MCA provides that the decision to appoint a property and affairs deputy under s. 16(2)(b) of the MCA is a "best interests" decision and is therefore made by reference to the individual facts of a particular case. This also applies to a decision that enables the deputy to be paid remuneration under ss. 16(5) and 19(7) of the MCA, Rule 167 (now 19.13) and PD 19B.

34. This approach generally involves the COP choosing between practically available options, namely which of the possible deputies should be appointed and on what terms. As appears from my decision in *Watt v ABC* [2016] EWCOP 2532 at paragraph 75 the application of the best interests test for each individual P does not fit with presumptions, starting points or a bias that has to be displaced.

35. This does not mean that the rates fixed by Practice Direction from time to time and the potential impact in other cases of orders allowing higher rates are irrelevant, not least because cross checks on what is available or likely to be available and their respective benefits and costs to P are likely to be relevant factors. But, it does mean that if and in so far as DJ Eldergill was taking a presumptive approach in the *Friendly Trust* case that was inappropriate. However, I add that in my view paragraphs 92 and 93 of his judgment show that he was not taking a presumptive approach.

36. It was also in my view correctly common ground that albeit that the ACO orders were in generic and wide terms they were not and did not purport to have a general effect that applied to other deputies or sought to increase through the back door fixed rates set out in the Practice Direction. This means that points raised as to the application of the *Bovale* case became red herrings and, in any event, I agree with the submissions that (a) that case can readily be distinguished, and (b) the summary of its effect in paragraph 54 of the judgment in the *Friendly Trust* case needs to be treated with caution. By making an order that does not as envisaged by Rule 167(1)(c) (now 19.13 (1)(c)) provide that remuneration is to be determined by reference to the schedule of fees (fixed fees) set out in a Practice Direction the COP is not filling a gap or varying the Rules or Practice Directions. Rather, applying a best interests test, it is exercising its powers under the MCA and Rule 167(1)(a) and/or (b) (now 19.13 (1)(a) and/or (b)).

Disability Related Expenditure

37. The present and past approach of SCC is to treat the remuneration paid to Mr Cawthorn as a deputy as disability related expenditure when calculating contributions to be made by P to his or her care costs. This can have the effect that the deputy's fees cost P nothing because if they were not paid he or she would have to pay the same amount by way of an increased contribution to the local authority towards or for their care costs.

38. As I understand it, the obligation to make such a contribution arises at defined levels of means.

39. In his reports of September 2013 and 2014, Mr Cawthorn refers to this approach of SCC (see paragraphs 3 and 6 of the Schedule hereto). In his statement dated 13 October 2016 in support of his application to be appointed AR's deputy, Mr Cawthorn

states that as his charges are accepted as disability related expenditure in most (my emphasis) cases the net cost to Ps is zero. In his later statement dated 17 December 2016, Mr Cawthorn states that over half of (my emphasis) all the cases in which he is the deputy contributions are payable and so the cost to P is nil. At least potentially these statements leave open the points that in cases where the local authority treat a deputy's remuneration as disability related expenditure (and so in his SCC cases):

i) P does not make a contribution and so a deduction from it cannot be made, or

ii) the size of P's contribution is such that net he or she would be paying a part of the deputy's costs.

40. AR does not live in Suffolk and Essex County Council (ECC) does not take the same approach to disability related expenditure. Mr Cawthorn has challenged the approach taken by ECC. At the date of the hearing, the Ombudsman had circulated a draft decision to the effect that ECC should reconsider its decision not to treat remuneration paid to Mr Cawthorn by AR as disability related expenditure. If that draft becomes the final decision any such reconsideration may not lead to a change of view by ECC and the issue may fall to be decided elsewhere.

41. I have not been asked to and have not considered whether the approach of SCC or ECC is right or whether different local authorities can properly reach different conclusion on the issue. On my reading of the communications concerning the dispute with ECC there are issues relating to alternative services (particularly those that would be provided by ECC) that may have an overlap with issues I have to decide applying the best interests test set by the MCA, and so not in the context of what is a disability related expense. It follows that I am not deciding or purporting to decide those issues in that context in the absence of ECC as a party or at all.

42. In my view sensibly, argument was addressed to me on the basis of the actual positions being taken by the two local authorities on the ground and on the basis that this may change.

General points about the level of remuneration being charged and sought by Mr Cawthorn

43. His position is that if he cannot charge at this level he will not be able to continue to act as AR's deputy and that he will, or it is likely that he will, have to cease to act as a deputy altogether.

The remuneration sought by Mr Cawthorn for acting as AR's deputy

44. Mr Cawthorn applied to be appointed AR's deputy in May 2016 and sought costs (remuneration) "in accordance with the 2014 ACO order".

45. By an order dated 1 December 2016, DJ Eldergill appointed Mr Cawthorn as interim property and affairs deputy for AR until further order. That order was silent on his remuneration. Mr Cawthorn has acted since then without remuneration but on the basis that the COP will authorise some remuneration.

46. His application for remuneration in accordance with the 2014 ACO order prompted the issues identified by DJ Eldergill and Senior Judge Hilder on the ACO orders.

Two heads of remuneration which were not sought in the application because they are not included in the 2014 ACO order but which are now claimed

47. By the application Mr Cawthorn did not seek any uplift for inflation and so far, as I am aware he did not do so when he was appointed as AR's interim deputy on 1 December 2016. He now does so and I will return to this claim after I have addressed whether he should be entitled to remuneration at the rates set out in the 2014 ACO order.

48. He also now seeks pre-appointment remuneration in addition to that specified in the 2014 ACO order (and included in PD 19B as Category 1 - "work up to and including the date of appointment").

49. It was not argued before me at the hearing that the COP did not have power to authorise pre-appointment remuneration. In the written arguments a point had been raised on whether this could be done under s. 19(7) of the MCA and Rule 167 (now 19.13). I do not address this because in my view even if that Rule does not give such a power the COP has it under s. 16(5) and further or alternatively s. 7 of the MCA. The best interests test applies whichever power is exercised.

50. I shall return to this additional pre-appointment remuneration.

Remuneration as an interim deputy

51. No discrete issue arises on Mr Cawthorn's remuneration as an interim deputy because no good reason (apart from any uplift to the 2014 ACO order rates to address inflation) exists for awarding him remuneration at a different rate during the interim period.

52. The essential issue is therefore what remuneration should Mr Cawthorn be entitled to charge as AR's deputy.

Stance of the Public Guardian

53. The Public Guardian has made it clear, and I accept, that the decision on Mr Cawthorn's remuneration is one for the COP to make and that generally he will not take part in any such determination, or in discussions with or applications by prospective deputies about their rates of charge. However, he has helpfully acknowledged that it is appropriate for him to assist the COP in this case and I am grateful for the help he has given.

Relevant common ground and starting points

54. The evidence makes clear that (and as I have stated at the beginning of this judgment the Public Guardian accepts that) Mr Cawthorn is acting in AR's best interests and is doing a good job as her interim deputy.

55. It was effective common ground, and in any event, I agree and conclude that:

    i) as Mr Cawthorn is a solicitor the charging rates in PD 19B relating to a solicitor deputy provide a more appropriate cross check on the reasonableness

of Mr Cawthorn's rates of charge than those therein relating to a local authority,

ii) as a matter of history, generally solicitors have not been appointed as deputies for Ps with low net assets because that level and expense of decision making for such Ps has not been thought necessary to promote their best interests,

iii) rather, as a matter of history, generally local authorities have been appointed when a deputy for a P with low net assets is needed to promote that P's best interests, and

iv) the other available alternative is an appointee (with matters such as the signing of a tenancy agreement) being dealt with by court order.

56. In my view correctly, a return for AR to having an appointee was not advanced as a sensible alternative. Nor is the appointment of a family member as AR's deputy. This was supported by the visitor's report commissioned by Senior Judge Hilder in May 2017 and dated 30 June 2017.

57. Also, it was not argued that an alternative solicitor was available to act as AR's deputy and so the relevant comparison between practically available options is between what AR will be provided with and will be charged by respectively:

i) Mr Cawthorn as her deputy, and

ii) ECC as her deputy.

58. The reasonableness of Mr Cawthorn's charges as a solicitor compared with those of a solicitor under PD 19B is not directly relevant to that comparison. However, it has a part to play because if his charges were in excess of those charges this would be a factor against his appointment and against proceeding on the basis that no other solicitor was available to act at PD 19B or other lower rates.

PD 19B rates and those sought by Mr Cawthorn

59. PD 19B was changed for appointments from 1 April 2017. This adds to the complications of the comparison.

60. In comparison to the PD 19B rates for both a solicitor and a local authority a significant difference relates to the percentage cap on the annual management fee for P's with net assets of less that £16,000 (respectively 4.5 % for solicitors and 3% (increased to 3.5%) for local authorities). AR's net assets have increased since 2016 but, as in argument, I take £8,000 and so charges of £360 for a solicitor and of £240 (now £280) for a local authority. Absent any inflationary increase the rate claimed and set out in the 2014 ACO order is £685 if management of a tenancy and accommodation is involved which it is in AR's case. Also, in her case £110 is claimed as and when the deputy becomes responsible for managing direct payments. This has not yet occurred but may do and would increase the annual fee to £795. VAT has to be added to all the annual fees.

61. So, the difference between the practically available alternatives is now (£685 – 280) £405 with the potential for an increase to £515 per annum.

62. Until April 2017, the local authority annual management fees for Ps with net assets in excess of £16,000 was £700 for the first year and £585 thereafter and is now £775 for the first year and £650 thereafter. This is quite close to the 2014 ACO order and so what Mr Cawthorn claims. The equivalent annual fees for a solicitor under PD 19B are up to April 2017 £1,500 and then £1,185 and from April 2017 £1,670 and then £1,320. This is significantly more than the remuneration sought by Mr Cawthorn and so the 4.5% of net assets cap of £360 for AR points strongly in favour of the conclusion that it is most unlikely that a solicitor (other than one who sets up a service like Mr Cawthorn) would accept appointment as AR's deputy.

63. Excluding additional pre-appointment fees, the sum claimed by Mr Cawthorn for work up to appointment (£850 plus VAT) compares to £670 (now £745) for a local authority and £850 (now £950) for a solicitor.

64. At present so far as AR is concerned the approach of ECC means that no effective set off from contributions for care costs to the local authority arises.

General points on a choice of PD 19B and a different level of fees

65. No general argument was advanced that an order giving Mr Cawthorn the remuneration he seeks would or might cause difficulties in finding appropriate deputies who would be prepared to act in low net asset cases, or additional costs in respect of the appointment or regulation of such deputies, and so cause harm to other Ps with low net assets whose best interests would be served by the appointment of a deputy.

66. It is not easy to fit any such argument to the application of the best interests test for an individual. Its place is in the context of the making of the PD and its review. I understand that such a review is in progress.

67. It is to be noted that for a period from 2013 ECC charged some or all of the Ps for whom it was appointed the deputy at the solicitor rates. ECC has stopped doing this. My understanding is that ECC is not alone in taking such an approach based on the participation of a local authority's legal department in its work as a deputy. This practice and the approach to any overpayments are outside the ambit of this judgment.

68. Other matters that are outside the ambit of this judgment and may be the subject of consideration on the review of the standard rates are issues relating to the actual cost of providing a service as a deputy, the extent to which it should be absorbed as an aspect of duties owed by local authorities, the continuing availability of local authorities to act as a deputy and the prospect that others (who may or may not be solicitors) will offer to act as deputies.

69. Also, in my view the COP will have to address the suitability of any organisation or persons to act as a deputy, their remuneration and the security they should provide as and when they are advanced as a practically available option.

The test and its application in this case

70. I have set out the test in paragraphs 32 to 35 of this judgment.

71. Mr Cawthorn relied on evidence to demonstrate a number of steps that he has taken and which it was asserted a local authority would not be likely to do or do so well. The Public Guardian accepted this is what the deponents believed. But in his final position statement he questioned the impartiality of one of the deponents (Ms Farrar who was at court and willing to be cross examined and had prepared a visitor's report for the Public Guardian in respect of an assurance visit relating to ECC's deputy service in early 2015). However, during the hearing the basis for this assertion disappeared when it was pointed out that contrary to the indication from the Essex postal addresses of some Ps for whom Mr Cawthorn (and so PDS) acted as a deputy at the relevant times the local authority that owed duties to them was Suffolk and none of the Ps for whom Mr Cawthorn acted as a deputy at the relevant times were in the area for which ECC is the relevant local authority. Accordingly, it was not pursued.

72. The Public Guardian's argument was based upon his general regulatory experience and was supported in general terms by the evidence from ECC and the report relating to the assurance visit in 2015 to ECC (the next is due in 2018). The thrust of the regulatory evidence was that a high majority of local authorities (and professional deputies) receive a green rating on the RAG rating system used by the Public Guardian. In broad terms over three business years around 75% were rated green around 20% amber and less than 5% red. A green rating under that system indicates satisfactory (or as I understand it a higher) performance assessed by reference to published deputy standards which reflect compliance with the MCA and in particular its individual best interests approach. To support his disagreement with points advanced by and on behalf of Mr Cawthorn the Public Guardian also took some samples from some green, amber and red assessments.

73. That evidence shows that judged by those standards a high majority of local authorities receive a green and so a satisfactory rating and that I should proceed on the basis that if ECC was appointed to act as AR's deputy it would so perform its duties. Part of those standards and duties refer to ensuring that the Ps are receiving the correct benefits and so maximising that income and arranging appropriate banking facilities including access to cash.

74. I therefore proceed on the basis that it is likely that if ECC had been appointed AR's deputy in December 2016 it would have taken similar steps to those successfully taken by Mr Cawthorn to maximise AR's benefit income and in the re-arrangement of her bank accounts and access to cash. As discussed above this would have been done at a lower cost and so AR's net assets would now be higher.

75. This approach is the least favourable one for Mr Cawthorn because it negates his points that he did things that it is unlikely ECC would have done. It flows from the approach taken to cross examination and leaves the points open in respect of any argument on disability related expenditure.

76. However, on that approach the uncontested evidence clearly establishes, as one would expect, that Mr Cawthorn (through PDS) has provided more regular and consistent contact than ECC would have provided or could reasonably be expected to provide and that this has resulted in the building of a good relationship between AR and her foster mother which the ECC would have been unlikely to achieve.

77. AR's fostering began when she was a baby. Her foster sister, who has similar disabilities to AR, has been brought up with and lives with AR. Mr Cawthorn also acts as her deputy. Their foster mother acted as AR's appointee and she strongly supports the appointment of Mr Cawthorn as the deputy for AR who she says has been her "daughter" for the whole of her 38 years. She has a low opinion of the service provided by social services and believes that the cost of having Mr Cawthorn as AR's (and her foster sister's) deputy is well worth it to provide the best for her future needs and care. AR has no contact with her birth family but sees her foster mother's daughter a few times a year.

78. I say that the regularity and consistency of the contact is outside that which it would be reasonable for ECC to provide because:

    i) ECC has over 1,437 deputyships of which 1,166 are for a P in a care home and as the Public Guardian suggests, and I agree, it is highly unlikely that a local authority with such a large caseload could provide a "personal approach" to their clients.

    ii) The fact that members of the ECC deputy team do not visit all their clients is confirmed by a letter from ECC in response to the assurance visit in 2015 and this accords with the recent evidence from Ms Whayman on the deputyship service provided by ECC through its deputy team. It also reflects the numerous references in the evidence to visits by social workers being reported to and relied on by the deputy team of a local authority.

    iii) It is well known that there are many demands on the social services budget and resources of local authorities and that, amongst other things, this means that it is not uncommon that continuity with social workers or team members is not provided and there are frequent changes.

    iv) When commenting on Ms Farrar's views on how a local authority may or may not act, the Public Guardian expressed the view that the vast difference between the caseloads of ECC and Mr Cawthorn (1,437 as compared to 115) means that it is inappropriate to compare the day to day services provided by Mr Cawthorn (and so PDS) and ECC and that particularly in relation to cost the more accurate comparison is with other solicitor deputies. I agree and add that costs link to the nature and content of the services provided and so this view acknowledges that a smaller organisation, such as PDS, can provide a service that is outside what can be expected of a local authority.

79. None of this means that ECC would not provide a satisfactory service to AR or that it and other local authorities do not provide a satisfactory and much needed deputy service to many Ps. Rather, it means that like a properly motivated and informed family member, a smaller organisation provided by a solicitor can through regular contact and continuity provide a better service to individual Ps. Mr Cawthorn has demonstrated that this is what he has done for AR and he has provided a number of letters that strongly support the view that he has done this for others.

80. So, I do not accept that he is doing no more than could reasonably be expected of ECC and the question becomes whether his additional contact, the relationship he has

built up with AR and her foster mother and the welfare benefits this relationship brings and promotes are worth the financial cost.

81. I agree with AR's foster mother that they are. Taking them into account AR's net cash assets will have increased since Mr Cawthorn became her interim deputy and the evidence shows that this is not at the expense of her day to day comfort. Also, even if the costs were limited to local authority rates AR would not be able to build up significant savings.

82. I add that correctly the Public Guardian recognises that the views of AR's foster mother are important. She had been AR's appointee. The visitor's report commissioned by Senior Judge Hilder dated 30 June 2017 records and confirms that she was then 81, had recently lost her husband and recognised that it was likely that she would die before AR and would not always be in good enough health to ensure that AR was properly looked after and as she had no confidence in Social Services, she thought that the best solution was the appointment of an independent person who is paid to do this. That report also records and confirms that AR's foster parents have been and her foster mother remains the prime influence in AR's life and that AR only has a very limited understanding of the management of her accommodation and money.

83. In my view, given AR's very limited understanding of the issues, her reactions and happiness will be strongly influenced by those of her foster mother who has cared for her all her life and wants the best for her. So, a negative view of her foster mother of the arrangements for AR's care is likely to have a negative effect on AR.

84. There are two other factors that support the same conclusion.

85. The first relates to AR's housing need. The visitor commissioned by Senior Judge Hilder confirm**s** and it is common ground between Mr Cawthorn and the Public Guardian and accepted by ECC that AR needs to move with her foster sister to other accommodation. This common ground is recorded in a note of a best interests meeting attended by ECC (amongst others) on 17 January 2018 at which it was agreed that the PDS should organise AR's short and longer-term accommodation needs.

86. I acknowledge that the need for a change in her accommodation has existed for some time, has not been solved during the interim deputyship and that Mr Cawthorn's appointment as AR's interim deputy can be said to found the conclusion that although he is AR's property and affairs deputy he is best placed to organise this welfare issue that requires a combined approach and effort from him and the relevant local authorities and public services. However, and in line with the approach taken at that best interests meeting, I consider that it is likely that short and longer term housing solutions will be found more quickly with the co-operation of ECC or through a scheme along the lines of a shared housing ownership scheme that Mr Cawthorn has pursued and put into effect for Ps in SCC, if Mr Cawthorn is the deputy. This is because of the focus, flexibility and experience that Mr Cawthorn can and will continue to bring to this problem and the relationship he and his team have with AR and her foster mother.

87. The second is the challenge to ECC's position on disability related expenses. I agree that if ECC had been appointed AR's deputy it is most unlikely that it would have

made this challenge and that its deputy team would be in an awkward position in pursuing it if ECC does not change its mind. However, I have not placed much weight on this factor because, on the papers, I am unclear what the financial benefit to AR would be if ECC changed its approach to accord with that taken by SCC (see the points made elsewhere in this judgment in respect of disability related expenditure).

Rises for inflation

88. The Public Guardian argued that this should not be allowed and its inclusion would introduce problems equivalent to those relating to the expressed future effect of the ACO orders. I do not agree. Fee levels in most aspects of life are reviewed from time to time and unless and until changes relating to bulk applications and their cost are introduced (and this is not something that the COP can do) it is in the best interests of Ps to have a built-in provision to address inflation rather than the expense and inconvenience of regular returns to the COP to address the need for fee increases. The effect of such a provision can be considered from time to time by the Public Guardian as the regulator. I suspect that one based on the CPI as suggested is unlikely to cause inappropriate increases of other problems and will avoid unnecessary expense and time being spent on repeated applications.

89. The increase is sought from November 2015 however in my view as the remuneration sought and explained to AR's foster mother in 2016 was at the 2014 ACO order rates I consider that the increase by reference to the CPI should not start until November 2017.

Additional pre-appointment remuneration

90. This is not covered in either PD 19B or the 2014 ACO order and relates to work done on interim financial matters (rather than in connection with the application to the COP) before appointment as AR's interim deputy and so at a time when Mr Cawthorn was not in a position to make changes to AR's banking arrangements and so, for example, change the position relating to the build-up of an inaccessible surplus in the joint housing account.

91. I accept that the 12 hours of work he relies on was done on interim financial matters. However, I have not found an explanation that satisfies me that it was necessary or appropriate to do this before appointment and thereby warrant this exceptional charge outside the two heads of remuneration sought in his application and covered by the 2014 ACO order and PD 19B.

92. As I accept that the work was done and that it has benefitted AR I am prepared to re-visit this issue when finalising the order if Mr Cawthorn pursues it. If he does, he should explain in more detail why he asserts that he should receive this remuneration and so expand on paragraph 5 of his latest statement (including his reference therein to the approach of the Public Guardian). This explanation should be provided to the Public Guardian for comment. This could be done on paper to found a paper determination but it could also be finalised at a hearing at which the order is also finalised. His invoice for this sum relates to a period ending on 31 October 2016 and he should confirm that this is because it was the date of the hearing which led to the order of DJ Eldergill dated 16 November 2016 and why that invoice seeks a

management fee from that date and so before he was appointed as AR's interim deputy on 1 December 2016.

Other cases

93. In my view the COP needs to review all of the orders it has made appointing Mr Cawthorn to act as a deputy to ensure that his remuneration is dealt with properly in each case. This accords with the individual approach required by the MCA.

94. Its responsibility for flaws in the ACO orders and so the need for this to be done means that the COP should do this of its own motion and without the need for any application or related fee.

95. As mentioned earlier (see paragraphs 22 and 23 hereof) the terms in which those orders have been made may be relevant and prompt arguments that the incorporation of an ACO order has cured the defects in it and in respect of the way it was made. But this has to be checked on a case by case basis and does not apply to appointments made before the ACO orders.

96. When this exercise is completed I consider that the ACO orders should formally be set aside albeit that by then they should have no continuing effect.

97. I invite the parties (by which I again mean Mr Cawthorn and the Public Guardian) to then consider how that exercise should best be carried out. A starting point is likely to be the creation of a schedule and a categorisation of all of the appointments. The categorisation will include appointments before and after the ACO orders were made and perhaps sub-categories (e.g. cases in which the deputyship has ended at a time when reliance could still be placed on the ACO orders). This adopts and adapts the process suggested by Mr Cawthorn and supported by the Public Guardian at the hearing.

98. The impact of the approach of the relevant local authority to disability related expenditure in each case is also likely to be relevant. As appears from paragraphs 38 and 39 hereof, I am not clear whether in every SCC case Mr Cawthorn's remuneration effectively costs the Ps nothing (or how a change to the SCC approach would affect AR). If I have missed something on the papers concerning this I apologise but I am not clear what and how the means test for contributions to local authorities operates for each of the relevant Ps and more generally the impact of that means test for Ps with net assets less than £16,000. Also, as mentioned in paragraph 39 hereof, the evidence leaves open the points that in cases where the local authority treats a deputy's remuneration as disability related expenditure (and so in the SCC cases):

    i) P does not make a contribution and so a deduction from it cannot be made, or

    ii) the size of P's contribution is such that net he or she would be paying a part of the deputy's costs.

99. In my view these points need to be addressed in each case probably by setting out the basis of the liability for and the calculation of the contribution and so its effect on the impact of the deputy's remuneration.

100. Applying the reasoning taken in respect of AR, it seems that in many cases Mr Cawthorn could demonstrate that it is in the best interests of that P for him to remain as the deputy at the level of remuneration he seeks. In cases where the remuneration effectively costs P nothing that fact is likely to be conclusive and the possibility of a change in net cost could, as suggested during the hearing, be addressed by an undertaking to seek a review if that net cost position changes.

101. However, in other cases this approach may not be available because there is a net cost and I invite the parties to consider whether the prospect of a change of position by SCC and the costs of a review for each P if it does change its position, warrant an order that is not based on such an undertaking and permits that level of remuneration even if the P (as in the case of AR) has to pay that level of remuneration.

102. I also invite the parties to consider whether this exercise should also address the proposed replacement of Mr Cawthorn by a trust corporation he has set up and thereby avoid the costs and difficulties relating to individual and bulk applications to address such a change.

103. I acknowledge that this will involve time and expenditure by Mr Cawthorn. Costs of the review will be a matter for the judge carrying it out but I record my view, conveyed to the parties, that it is difficult to see how those costs could be recovered from the relevant Ps who have no responsibility for the causes of the review. That responsibility rests with the COP for making the relevant orders in the manner it did and with Mr Cawthorn for applying for them in the way that he did.

104. Once the background paper work has been completed I suspect that the best way forward would be for there to be a hearing before the Senior Judge or a judge at First Avenue House.

The order

105. After the hearing there was an exchange on the terms of the order. In light of that, and generally, I consider that the better course is for Mr Cawthorn and the Public Guardian to try and agree a draft in this case and perhaps a template for the other cases. If they cannot agree, the rival versions can be put to me for a paper consideration or the order (and the process for the other cases) can be addressed at a hearing.

SCHEDULE

1. On 1 May 2012, Judge Lush made an order which included a schedule containing the names of 31 individuals, as follows:

> UPON the court being satisfied that:
>
> (1) Neil Cawthorn and Associates (NCA) is a properly established legal practice in the process of seeking a legal aid franchise to persons in need of advice and assistance due to their lack of capacity to manage their own property and affairs;
>
> (2) The Professional Deputy Services (PDS), as a division of NCA, has been created with support from Suffolk County Council to carry out the working visit within a legal aid franchise of this kind;
>
> (3) Suffolk County Council have agreed to pay the PDS as follows:
>
> a. £250 for preliminary assessment and discussions with the above-named persons and their families;
>
> b. £500 + VAT + disbursements for applying for a Deputyship order from the Court of Protection in relation to property and affairs;
>
> c. £500 + VAT per annum for ongoing annual charges for advice and assistance to the above named persons in regard to their property and financial affairs;
>
> d. If successful in obtaining a legal aid franchise, the PDS will be able to claim the ongoing annual costs of advice and assistance from the Legal Aid Board, subject to the financial position of the above named persons.
>
> IT IS ORDERED THAT:
>
> 1. NCA, trading as the PDS, is entitled to charge the persons named in the Schedule and receive fixed costs in accordance with the terms agreed with SCC as set out in

recital (3) above. If the deputy would prefer the cost to be assessed, this order is to be treated as authority for the Senior Court Costs Office to carry out a detailed assessment on the standard basis.

2. This order revokes any previous order made in respect of the deputy's costs in any of the matters listed in the Schedule.

2. NCA was unable to obtain the legal aid franchise referred to and before SCC's undertaking to meet the costs expired on 31 March 2013 Mr Cawthorn made an application by correspondence for authority to charge at the same rates for discharging his functions as deputy. An email from Mr Cawthorn to Mr Batey sent on 4 March 2013 indicates that all clients and their families had been notified of the proposed changes. By an email sent on 12 March 2013, Mr Batey stated that he had discussed the matter with Judge Lush and that the judge was in agreement with the proposed order. Mr Batey, as an authorised officer of the court, made an order dated 15 March 2013 (the schedule to which contained a list of 109 people of which 27 were included in the schedule attached to the order 1 May 2012) which provides that:

WHEREAS

---

(4) SCC have agreed to pay the PDS as follows up to 31 March 2013 [*and the amounts set out in the order made by Senior Judge Lush are set out*]

(5) The PDS have, in addition to managing the financial affairs of the people listed in the schedule, also taking on responsibility for the management of the finances of the housing schemes where those people were resident.

IT IS ORDERED that:

1. NCA, trading as the PDS, is entitled to charge the people listed in the schedule hereto and receive fixed costs in accordance with the terms agreed with Suffolk County Council as set out in (4) above. NCA is further entitled to charge the people listed in the schedule a further sum of £2.50 per week for the ongoing management of the house accounts of the housing scheme, which charge can be deemed an administrative expense within the tenancy and rental charges of the particular scheme.

2. If the Deputy would prefer the costs to be assessed, this order is to be treated as authority for the Senior Court Costs Office to carry out a detailed assessment on the standard basis.

3. This order revokes any previous order made in respect of the deputy's costs in any matters listed in the Schedule.

3. In September 2013, Mr Cawthorn prepared a report for the COP in which he explained that PDS was not covering the costs of the services that it was providing its clients and asked for authority to increase his charges. In that report he also stated that he had written to all the clients (the Ps for whom Mr Cawthorn was the deputy) and their families informing them that it was their intention to apply to the COP for authority to bill each client £500 plus VAT a year, that PDS were advised that SCC would treat these fees as a deductible expenditure in the assessment of contribution towards care by an individual (and so P) under the fairer charging regulations, and in such circumstances, their charges are the equivalent of nothing and that no adverse comment to their proposal on charging had been received. Later in that report, Mr Cawthorn asserts that even if his charges are not deducted from care contributions he considers that all his clients can afford them.

4. As I read it, in that report Mr Cawthorn is not asserting that the proposed remuneration would be neutral for all of the relevant Ps and so that they were all making contributions to SCC in amounts that founded that result.

5. Mr Batey made an order dated 12 December 2013 in the following terms:

WHEREAS

(1) Neil Sherwood Cawthorn is the Principal of NCA, a legal practice, of which PDS [address] is a division.

(2) Neil Sherwood Cawthorn has been appointed to act as deputy ("the deputy") for property and affairs in respect of several persons for whom the court is satisfied lacks capacity to make various decisions for themselves in relation to a matter all matters concerning their property and affairs

(3) An application has been made by the said Neil Sherwood Cawthorn for an order that sets out what charges NCA trading as the PDS may charge for acting as deputy for property and affairs.

IT IS ORDERED that:

1. The PDS is authorised to charge the persons in receipt of means assessed benefits for whom Neil Sherwood Cawthorn has been appointed deputy remuneration for work incurred in respect of acting as deputy in accordance with the following terms

   a. **Category 1**: Work up to and including the date upon which the court makes an order appointing a deputy for property and affairs £850 plus VAT.

b. **Category 2**: Annual management fee for acting as deputy payable on the anniversary of the order appointing a deputy £625 plus VAT

c. **Category 3**: Where applicable, an annual fee for managing the persons tenancy and accommodation of £60 plus VAT.

d. **Category 4**: Where applicable an annual fee for managing any direct payments received by Neil Sherwood Cawthorn from the local authority of £104 plus VAT.

2. The amounts allowed in paragraph 1 of this order apply in respect of all matters in which Neil Sherwood Cawthorn has been appointed deputy and in respect of all matters where Neil Sherwood Cawthorn is appointed Deputy subsequent to this order. This order revokes any previous orders for costs made in respect of Neil Sherwood Cawthorn as deputy.

3. The amounts allowed in paragraph 1 of this order supersede the amounts of fixed costs and remuneration allowed to solicitors in respect of work up to and including the date on which the court makes an order appointing a deputy for property and affairs (category 1) and in respect of the annual management fee (category III) set out in practice direction B to part 19 of the Court of Protection Rules 2007, but for the avoidance of doubt, any other categories of work provided for in the said practice direction continue to apply to the extent that they are applicable and to all matters where the person is not in receipt of means assessed benefits. If Neil Sherwood Cawthorn would prefer the cost to be assessed, this order is to be treated as authority to the Senior Courts Costs Office to carry out a detailed assessment on the standard basis.

4. Any person who is affected by this order may apply to the court for reconsideration of the order within 21 days of the order being served by filing an application notice (COP9) in accordance with Part 10 of the Court of Protection Rules 2007.

6. In September 2014, Mr Cawthorn submitted a further report to the COP in which he again sought to increase his remuneration as deputy. In that report he made the assertion that the charges were deductible as disability related expenditure in the assessment of contribution to care costs, which means charges are deducted from any moneys <u>otherwise</u> payable to the local authority as a contribution to care costs (my emphasis).

7. Mr Batey made a further order dated 24 November 2014. This order was in essentially identical terms to the order of 12 December 2013 but made provision for increased remuneration as follows:

    a) Category 1: £850 plus VAT,

    b) Category 2: £650 plus VAT,

    c) Category 3: £65 plus VAT, and

    d) Category 4: £110 plus VAT

8. I shall refer to the orders dated 12 December 2013 and 24 November 2014 as the ACO orders and the later one as the 2014 ACO order.

9. By an order dated 16 November 2016, District Judge Eldergill raised a number of points about the validity of the 2014 ACO order. Following compliance with District Judge Eldergill's order, by an order dated 17 March 2017, the new Senior Judge (Senior Judge Hilder) directed that the matter be set down for an attended public hearing and made an order in standard terms restricting the publication of defined information.

10. At that hearing she made an order dated 16 May 2017 which provided that:

> WHEREAS
>
> 1. The Public Guardian acknowledges his supervisory role and agrees to the instruction of a General Visitor is directed by the Court.
>
> 2. Having regard to the inquisitorial nature of these proceedings, the joinder of the Public Guardian has party, and the overriding objective set out in Rule 3 of the Court of Protection Rules 2007 as amended, the Court is satisfied that AR's interests and position can properly be secured by the direction of a report from a General Visitor in the terms of paragraph 7 below and the separate order.
>
> 3. At the hearing it was confirmed by the Applicant that:
>
>   a. There is no legal partnership between County Council, the Ipswich Building Society, any Housing Association and the Professional Deputy Service; and any use of the word "partnership" in the statements of/NSC is intended to denote "working together";
>
>   b. The order of Senior Judge Lush dated 1 May 2012 was made on the papers, with no attended hearing;

c. The effect of charging arrangements set out in the order made on 1 May 2012 was that no protected person paid any charges deputyship services because of County Council met the cost;

d. No COP 1 Or other application was filed in advance of the orders made by Authorise Court Officer James Batey. The orders were requested "informally" by correspondence (email and occasional letters).

4. The Applicant and the Public Guardian

a. agree that the order of Senior Judge Lush is of no current effect, having been limited to the duration of the agreement with Suffolk County Council (i.e. 31 March 2013);

b. agree that, in its determination of the application before it, the Court is not in any way bound by any reference in the orders made by Authorised Court Officer James Batey on 12 December 2013 and 24 November 2014 ("the ACO orders") to "subsequent" appointments of NSC as deputy ("the "subsequent" provision);

c. do not agree as to the effect of the "subsequent" provision in respect of appointments of NSC as deputy of persons not listed in the schedules to the ACO orders, made after those orders and not currently before the Court.

5. The Court identified the following concerns about procedural irregularity in the making of orders in respect of NSC's costs of deputyship to date:

a. no formal application;

b. "bulk" consideration;

c. no apparent compliance with Rules as to notification:

d. "revocation" of orders;

e. purported prospective provision;

f. specification of categories additional to those set out in Practice Directions;

g. blanket authority for assessment in all cases

6. In order to determine the application, the Court considers that the following questions need to be addressed:

    a. **What is the effect of Practice Direction 19B?** (The parties are invited to consider the decision of the Supreme Court in *Secretary of State for Communities and Local Government v Bovale Ltd & Hertfordshire District Council [2009] EWCA Civ 171* and paragraphs 89 - 91 of the decision of District Judge Eldergill in *The Friendly Trusts Bulk Application [2016] EWCOP 40*);

    b. **What is the effect of the sealed orders?** (The parties are invited to consider the Privy Council decision in *Isaacs v Robertson [1985] 1 AC 97*);

    c. **Should the orders made by ACO James Batey be set aside?** (The parties are invited to consider any consequential requirement if the orders are set aside);

    d. How are the costs of these proceedings to be met?

IT IS ORDERED THAT:

7. By 4pm on 30 June 2017 the Public Guardian shall file at Court and copy to NSC a report by a General Visitor in the terms of a separate order also made today.

8. By 4pm on 30 June 2017 NSC shall file at Court and copied to the Public Guardian a COP24 statement which sets out how it is said to be in the best interests of AR for NSC to be appointed as property and affairs deputy for her, with the costs provision which he seeks. For the avoidance of doubt, the statement should set out

    a. AR's income and outgoings;

    b. An explanation of AR's liability (if any) to pay a contribution to her care costs, how the contribution is calculated, and the impact of the proposed deputyship costs on such calculation;

    c. The additional benefits which are said to accrue to AR by the appointment of a deputy are sought, as opposed to a deputy authorised to charge only in accordance with Practice Direction 19B, or a public authority deputy, or and appointees.:

9. By 4pm on 7 July 2017 the Applicant and the Public Guardian shall file skeleton arguments which address the matters identified at paragraph 6 above stop

10. The matter will be referred to Senior Judge Hilder for further consideration on the papers on 17 July 2017. On that occasion the Court will consider whether any further directions required in respect of attended hearing, or whether the matter can be determined on the papers.

11. Costs reserved.

11. As appears therefrom, the order dated 16 May 2017 helpfully defined the issues to be addressed and this approach has been adopted by the parties and their representatives.

12. The application was transferred to me, and on 20 September 2017, of my own motion, I made an order for a further attended hearing to address the approach to the costs of the proceedings and whether the Crown should be joined and other matters. That hearing took place on 28 November 2017 and I made an order that:

1. By 4pm on 16th January 2018 the Public Guardian do file and serve a further skeleton argument addressing the issues relating to the level of remuneration NSC should be entitled to receive for discharging his functions as AR's property and affairs deputy. This skeleton argument shall state whether the Public Guardian disputes the evidence given by Emma Farrar in her witness statement dated 28th June 2017.

2. By 4pm on 23rd January 2018 NSC do (if so advised) file a further skeleton argument in response.

3. This matter be listed for an attended hearing before Mr Justice Charles at 10.30am on 30th January 2018 with a time estimate of half a day to consider the issues relating to the level of remuneration NSC should be entitled to receive for discharging his functions as AR's property and affairs deputy. Upon receipt of the further skeleton arguments of the Public Guardian and (if so advised) NSC, Mr Justice Charles shall decide whether to vacate the said attended hearing and determine this matter on the papers.

4. If the further skeleton argument of the Public Guardian disputes the evidence given in the aforementioned witness statement dated 28th June 2017, Emma Farrar do attend the said hearing for cross-examination.

5. The costs be reserved.

13. On 18 January 2018, I made a further order of my own motion. It provided:

WHEREAS

(1) The Public Guardian has filed and served a skeleton argument pursuant to the directions made on 28 November 2017. In it he:

a. indicates that he disputes identified parts of the evidence of Ms Emma Farrar and that he will seek to adduce a witness statement as to the experience of his office in supervising local authority deputies and so its experience of the actual level of performance by local authorities (or of Essex CC) of the duties and guidance referred to in that skeleton, and
b. accepts that Ms Farrar is expressing her honest opinion and so by inference that what she is asserting is based on her experience of the way in which local authorities (or Essex CC) actually perform their duties as deputies.

(2) It appears to the Court that these rival conclusions of Ms Farrar and the Public Guardian:
a. are not or arguably are not only statements of opinion or legal submission, but
b. are predictions (opinions / views) based on their respective general experience on how local authorities (or Essex CC) actually perform their duties as a deputy and so that factual base.
Accordingly, it appears to the Court that if it had to choose between those predictions it would (or arguably would) need to consider the rival factual foundations of the two views on the likely actual performance of the relevant local authority. It follows that it is arguable that it could only do so when this factual evidence has been provided and then either on the basis that the underlying factual base is not disputed, or that any disputes about it are treated as such or are resolved.

(3) It appears to the Court that such an approach based on general experience would (or would arguably) primarily be background to the assessment of how Essex CC would perform its duties if it was appointed as deputy for AR. At present there is only very limited evidence on that.

(4) In particular, there is only rival general assertion on the approach that Essex CC would take to AR's housing need (see paragraph 62 of Ms Farrar's statement and paragraph 8(9) of the Public Guardian's skeleton argument)

(5) The need for a review leading to a change of accommodation for AR (referred to in paragraphs 24 and 25 of Ms Farrar's statement and at section 4 of the Visitor's Report) is not disputed and is a factor to be taken into account in determining what is in AR's best interests.

(6) Part of the assessment of that is whether AR (alone or with others) can take part in the HOLD project and if so whether this would be considered and promoted by Essex CC together, more generally, with the respective approaches that would be taken by the rival appointees as deputy to the accommodation issues. For example, if participation in the HOLD project would promote AR's bests interests the prospects of this being achieved by the possible appointees may be a weighty factor.

OF ITS OWN MOTION THE COURT ORDERS THAT:

1. The attended hearing fixed for 30 January 2018 is to proceed and as directed Ms Farrar is to attend (unless the parties agree that this is not necessary).

2. On 26 January 2018 the Public Guardian and NSC are to exchange and file position statements setting out whether and if so what further evidence they respectively wish to file and serve to support their rival contentions in respect of the way in which Essex CC would or would be likely to perform its functions as a deputy for AR.

3. Without prejudice to the generality of paragraph 2 the Public Guardian and NSC are to:
a. set out in those Position Statements their respective positions on the matters mentioned in Recitals (4), (5) and (6), and
b. exchange and file any evidence (including communication with Essex CC) that they wish to rely on in respect of those matters at the hearing on 30 January 2018.

4. The parties and any person affected by this order (including AR) may apply to vary or discharge it.

5. Costs reserved.