



Neutral Citation Number: [2019] EWCOP 6

Case No: 11827907

COURT OF PROTECTION
SITTING AT CARDIFF CIVIL JUSTICE CENTRE

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 8th March 2019

Before :

MR JUSTICE FRANCIS

Between :

PBM
(by his litigation friend, The Official Solicitor)

Applicant

- and -

TGT

1st Respondent

-and-

X Local Authority

2nd Respondent

David Rees QC (instructed by **Clarke Willmott LLP**) for the **Applicant**
Deirdre Fottrell QC and **Jessica Lee** (instructed by **Z Solicitors**) for the **1st Respondent**
David Hughes (instructed by **X Legal Services**) for the **2nd Respondent**

Hearing dates: 15th – 17th January 2019

JUDGMENT

Mr Justice Francis :

Publicity

1. This case concerns a number of applications in respect of PBM who is in his mid-twenties. PBM has been represented in these proceedings by his litigation friend the Official Solicitor who has instructed David Rees QC for this hearing. From the outset, PBM expressed considerable concern about the possibility of members of the public being present at this hearing. Unusually, the decision was taken by me, following consultation with counsel, that I should hear the case in private. I intend to publish this Judgment in an anonymised form which will not only remove reference to names but will also remove geographical references (save for the fact that PBM lives in Wales, as that is relevant to the applicable statutory background). I am of the clear view that the very personal and sensitive nature of the material being considered at the hearing made it inappropriate to conduct the hearing in open court and that hearing the matter in open court would have been likely to cause emotional harm to PBM.

The applications before the court

2. By Court order dated 7 March 2013, TGT of Z Solicitors was appointed as PBM's Deputy for Property and Affairs. By application dated 10 May 2018, the Deputy sought court orders as to the following:
 - a. whether PBM has capacity to marry his fiancée;
 - b. whether PBM has capacity to enter into a prenuptial agreement;
 - c. whether PBM should be informed as to the extent of his assets.

The Deputy has been represented in these proceedings by Deirdre Fottrell QC and her junior Jessica Lee.

3. At a directions hearing on 19 June 2018, by agreement, I ordered that PBM would be the applicant in these proceedings. PBM requested to meet me prior to the final hearing and, with the agreement of all parties, on 10 October 2018 I met with him. I made it clear to him (as did the Deputy and his solicitor) that my meeting with him was not in any sense an evidence gathering exercise. When we met, the Deputy and his solicitor were present throughout. I felt it important to respond positively to PBM's request and he was charming and talkative when we met. There is an agreed note of our conversation which I have ordered should remain on the court file.
4. By order dated 7 December 2018, the relevant local authority for the area in which PBM lives ("the LA") was required to file a position statement in respect of what duties, if any, were owed to PBM by the LA pursuant to the Social Services and Wellbeing (Wales) Act 2014. I excused the need for the LA to attend or to be represented at the hearing, but have received a comprehensive a position statement on behalf of the local authority from their instructed counsel David Hughes, for which the court is grateful.
5. By that same order of the 7 December 2018, I identified the issues that would need to be considered at the final hearing. These were:
 - a. PBM's capacity to:
 - i. marry
 - ii. make a will
 - iii. enter into a prenuptial agreement

- iv. manage his property and affairs (or part thereof)
 - v. make decisions as to the arrangements for his care; and
 - vi. make decisions in relation to contact with others.
 - b. If PBM lacks capacity to manage his property and affairs:
 - i. whether (if he has capacity to enter into an antenuptial agreement and/or make a will) he should be provided with information about the extent of his assets;
 - ii. whether it is in his best interest for the court to direct any changes or further safeguards in relation to the current arrangement for their management;
 - iii. what steps should be taken to assist PBM in developing skills which may assist him in gaining capacity in that regard.
 - c. If PBM lacks capacity as to his care arrangements, whether it is in his best interest for further directions to be given by the court in relation thereto.
6. Both the Official Solicitor and the Deputy had made it clear in their respective Position Statements that they would wish to consider their positions further once they had heard the oral evidence of Dr Layton, the jointly instructed expert. There has now been a considerable narrowing of issues and it is agreed by all that PBM does have the capacity to marry, to make a will and to enter into a prenuptial agreement. Given the unusual circumstances of this case, it is agreed that I should give a Judgment in respect of these agreed issues, albeit that much of this Judgment will be taken up with the issue as to whether PBM has capacity to make a decision as to whether he should be told about the amount of his estate. I am told by Mr Rees on behalf of PBM, and of course accept, that it is PBM's wish that he be told about the extent of his assets. The Deputy does not agree that he should be told. Before I give my Judgment in respect of this discrete, but important issue, I need to set out the background, the legal framework and my concise reasons for agreeing with the decisions that the parties have reached in relation to the other matters.

Background

7. PBM has an acquired brain injury as a result of a deliberate injection of insulin by his father when he was 12 months old. Among PBM's difficulties, he sustained muscular and ligament problems resulting in a number of orthopaedic surgeries. PBM has been in and out of a wheelchair due to the impact of surgery on his lower limbs. PBM received a significant compensation award from the Criminal Injuries Compensation Authority ("CICA") in respect of these injuries and this is managed for him by his Property and Affairs Deputy. PBM is described as having coexisting mild/moderate learning difficulties; he has an autistic spectrum disorder (Asperger's) and epilepsy.
8. In order to substantiate PBM's claim to the CICA, a number of expert medical reports were obtained. The conclusion that was reached was that PBM would, on attaining 18, lack capacity to litigate and to conduct his own affairs. PBM was described as being impulsive in his thoughts and actions which had implications in respect of safety awareness in the management of even small amounts of money. One report found that PBM could be emotional and behaviourally reactive if he did not get his own way. The author felt that PBM lacked any form of inhibitory control.
9. Happily, as appears to be agreed by all, PBM has recovered from his injuries to a greater extent than was anticipated at the time when his award was assessed by the CICA. PBM

lives in a bungalow in Wales with the benefit of a care package run by a case manager.

10. Since about 2016, PBM has been in a relationship with his fiancée MVA. They had originally planned to marry in June 2018. However, on 24 May 2018, following an application by the Deputy, the court made an interim declaration that PBM lacked capacity to marry and consequent thereto a caveat has been entered by the Deputy under section 29(1) of the Marriage Act 1949. This had the consequence of preventing PBM from marrying. I am aware from all that I have read and heard that PBM was upset by this step taken by the Deputy. Whilst I understand and sympathise with PBM in this regard, I am not in any doubt that the Deputy was correct in making the application.
11. PBM did not give evidence at the hearing and nobody suggested that he should. He did, however, prepare a statement dated 15 January 2019 which everyone agrees was prepared by him and is set out in his own words. Although not evidence in a formal sense, the letter is significant in assisting me to understand PBM's wishes and feelings and I direct that a copy of it should remain on the court file. In his statement, PBM describes that he lives in his house with his partner MVA. He says that they have a number of dogs "that bring joy to every day". He says that he and MVA are in a stable relationship, "and all we want to do is to be able to build our future together without anyone having to tell us yes or no. I want to purchase a house with land and be able to build a business of our own, make our own money and to be able to make it a home as a married couple." PBM describes in his letter that MVA is "the one constant support I have every day she is there we support each other". He, not unreasonably, observes, "everyone deserves to be happy and just because I have a brain injury that doesn't make me any less of a person as I deserve to be happy and be able to make the decision to marry the woman I love and want a future with".
12. In his statement, PBM refers to his desire to enter into a prenuptial agreement, "as we both are responsible and believe you enter a marriage with what you have and if for any reason it wasn't meant to be you will leave the marriage with what you entered it with". He also refers to the fact that he has made a will before and should be able to do so again, saying "I am capable to make decision by myself".
13. In his statement, PBM also refers to his desire to take full control of his financial affairs. In fact, by agreement, his Deputy is to remain in place and I shall continue the declaration that PBM lacks capacity to manage his property and affairs. I made it clear in court, and repeat here, that this does not mean that such a declaration is there for all time and in due course PBM may very well make an application to the court for the discharge of his Deputy. I am satisfied, for reasons which I shall expand upon below, that the time has not yet been reached when this should happen.
14. Significantly, PBM says in his statement, "I want to be judged as the person I am yes I have a brain injury but that does not define me. I am a guy in a relationship just wanting independence and to be able to make the choices I want without people telling me I can or I can't. I'm doing something right as my care used to be 24/7 however it has been reduced by loads. I made the choice to purchase a house and dogs and move with my partner. I make day-to-day decisions by myself along with MVA because as a couple there are things to decide together." Movingly, PBM ends his statement with these words: "I just want to be happy and not live like this anymore. I want to be in control

and make my own choices in life whether that's about my relationship, money, property or everyday things. I really hope that you get the understanding of me. I'm the man who just wants to have the opportunity to explore life and to be given the chance to prove that I am able to do anything."

15. The court had the benefit of three witness statements from TGT, PBM's Deputy. Her statement was uncontroversial and therefore she did not need to give oral evidence. The Deputy explained that the package of care for PBM is presently, on average, 40 day hours per week staff are on hand to provide PBM with information so that he can make informed decisions, to prompt him with household tasks, to support and address any concerns with the case manager, to transport him to appointments as required and to carry out various repairs as required.
16. The Deputy reported that, on occasions, PBM has made decisions that disregard the advice that he has been given and the Deputy believes that on occasions he has made rash decisions which then lead him to ask the case manager to sort out the problems that have arisen. The Deputy notes that, although the support plan has not changed much in the past six years, the way that it is delivered has changed since MVA moved in. The Deputy believes that it is now more difficult to engage PBM in the domestic elements of the house work, which PBM now regards as MVA's domain.
17. The Deputy reports worries that PBM's brain injury has led him to having poor concentration and a limited attention span such that whilst he can set goals and plans well, he does not always put these into action. She refers to occasional problems with his memory. She also says that at times PBM can display verbal aggression, mainly when request for money cannot be honoured. There was an episode in about October 2018 when there were increased requests for money. It is clear that there was an occasion when PBM was taken advantage of by another man and lost some money as a consequence. It is understood that this male has criminal convictions and had allegedly acted towards MVA and PBM in a threatening manner.
18. The episode involving money being requested by PBM and passed on to a person that was taking advantage of him demonstrates that the current situation is working, in that it quickly became clear to the Deputy that things were not right. PBM himself says, and I accept, that he has learned from the episode and will be more cautious in the future. I also note that other people have also been conned by this male and, as Dr Layton himself said, it is important to distinguish between people who are vulnerable and people who have a disability. Just because PBM was conned is not necessarily evidence of his inability to manage his affairs. However, as set out above, there is no suggestion currently that the Deputyship should end.
19. The court also had the benefit of a statement from the LA's Adult Safeguarding Service Manager who dealt with social services involvement in PBM's life. Again, her evidence was uncontroversial and so she did not need to give oral evidence.

The applicable law

20. Unsurprisingly, there is no issue as to the applicable law in this case. I have, of course, been referred to the Mental Capacity Act 2005. It is clear that:

- a. a person must be assumed to have capacity until it is established that he lacks capacity;
- b. a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success;
- c. a person is not to be treated as unable to make a decision merely because he makes an unwise decision;
- d. an act done, or decision made, under the MCA 2005 for or on behalf of a person who lacks capacity must be done, or made, in his best interests;
- e. before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

21. The statutory test of capacity is found at sections 2 and 3 MCA 2005:

2 People who lack capacity

- (1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.
- (2) It does not matter whether the impairment or disturbance is permanent or temporary.
- (3) A lack of capacity cannot be established merely by reference to—
 - (a) a person's age or appearance, or
 - (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.
- (4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.

...

3 Inability to make decisions

- (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—
 - (a) to understand the information relevant to the decision,
 - (b) to retain that information,
 - (c) to use or weigh that information as part of the process of making the decision, or
 - (d) to communicate his decision (whether by talking, using sign language or any other means).
- (2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).
- (3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.
- (4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—

- (a) deciding one way or another, or
 - (b) failing to make the decision.
22. The test of capacity therefore has two elements, both of which must be present before a person can be found to lack capacity under the MCA 2005. There must be an inability to make a decision, and this must be *because of* an impairment of, or a disturbance in the functioning of, the mind or brain. The need for this causal nexus was emphasised by the Court of Appeal in *PC v City of York Council* [2013] EWCA Civ 478; [2013] COPLR 409.
23. Capacity under the MCA 2005 is time and issue specific (see for example comments of Munby J in *Sheffield City Council v E* [2004] EWHC 2808 (Fam) at [39] to [49] regarding the difference between “litigation capacity” and “subject matter” capacity). In this regard I have been referred to the decision of Hedley J in *A, B & C v X & Z* [2013] COPLR 1 where he made (qualified) findings that P had testamentary capacity and capacity to marry, but lacked capacity to manage his property and affairs.
24. Where a person lacks capacity to make a decision, then a decision may be made on their behalf by the Court or a Deputy appointed on their behalf (section 16 MCA 2005). In relation to matters relating to care and treatment, decisions may be effectively taken on an informal basis under section 5 MCA 2005². Any decision taken on behalf of a person lacking capacity must be made in their best interests (MCA 2005 ss1(5)). MCA 2005 section 4 sets out a checklist of matters which should be considered when determining where a person’s best interests lie. Among the factors to be considered are the person’s past and present wishes and feelings (s4(6)(a)). The weight to be attached to such wishes and feelings will vary from case to case, but where P is close to the border of capacity greater weight should be attached to those feelings: *Re M; ITW v Z* [2009] EWHC 2525 (Fam) [32] to [35].

The evidence of Dr Layton

25. Dr Michael Layton has been a consultant psychiatrist since 2008. His specialism is psychiatry of learning disability. Furthermore, he has additional specialist training in the diagnosis, assessment and treatment of Autism Spectrum Disorder, including Asperger’s Syndrome and High Functioning Autism. He has considerable experience of assessing individuals under the Mental Capacity Act.
26. Dr Layton has produced reports dated 30 July 2018, 9 September 2018 and 4 December 2018. In addition, he has answered various questions that have been put to him. Dr Layton was instructed to provide an opinion on:
- a. confirmation of PBM’s diagnoses and whether there is an impairment in the

² Section 5 does not confer a substantive right on any person to take decisions, but prevents civil or criminal liability arising in respects of acts done in connection with the care or treatment of a person who lacks capacity in relation to that matter, provided that the person carrying out the act reasonably believes that it would be in the other person’s best interests to carry out the act.

- functioning of his mind or brain;
 - b. PBM's capacity to conduct these proceedings;
 - c. PBM's capacity to enter into a prenuptial agreement;
 - d. PBM's capacity to make the decision to marry;
 - e. PBM's capacity to execute a will;
 - f. any steps that could be taken to assist PBM to regain capacity to make the decisions referred to above in the event that he is assessed as lacking capacity.
27. In his first report, Dr Layton set out the details of PBM's condition and repeated much of the background set out above. Importantly, Dr Layton reported that PBM does not seem to have had any significant deterioration in his day-to-day difficulties since ceasing his ADHD medication.

Capacity to marry

28. The specific matters which a person needs to be capable of understanding in order to have capacity to marry are set out by Munby J in *Sheffield City Council v E* [2004] EWHC 2802 (Fam). Dr Layton correctly recorded the test for capacity to marry enunciated in that case as being "a simple one namely:
- a. marriage is a status specific not person specific decision;
 - b. the wisdom of the marriage is irrelevant;
 - c. the person must understand the broader nature of the marriage contract;
 - d. the person must understand the duties and responsibilities that normally attach to marriage including that there may be financial consequences and the spouses have a particular status in connection with regard to each other;
 - e. the essence of marriage is for two people to live together and to love one another;
 - f. the person must not lack capacity to enter into sexual relations."
29. PBM was clear to Dr Layton that marriage meant "making a commitment to each other, to be loyal and to look after each other the rest of your lives". Dr Layton sets out a series of questions that he asked PBM and it is clear that PBM had a mature and clear understanding of what marriage involves. In his oral evidence, Dr Layton was able to confirm that he had also discussed with PBM the possibility of a marriage ending, the consequences of splitting up and the financial consequences that might ensue.
30. As I have set out above, the Official Solicitor, on behalf of PBM, submits that the court should discharge its interim declaration that PBM lacks capacity to marry and declare that he has the relevant capacity. Everyone is now agreed that PBM does have capacity to marry and I am satisfied, on the basis of everything that I have read and heard, that this is the correct decision. In my judgement, PBM has the capacity to marry. I make it clear, however, that in my judgement the Deputy, having legitimate concerns, had a responsibility to take the actions that she did.
31. The caveat must of course now be removed forthwith.

Capacity to enter into a pre-nuptial agreement

32. All parties are agreed that it would be appropriate for PBM and MVA to enter into a prenuptial agreement and I understand that MVA has agreed to this. Whilst it is not for me to seek in any way to bind or influence a judge who might have to hear an application for financial provision in the unhappy event of the marriage ending, it seems to me that the protection of an award of damages such as that received by PBM is a paradigm case for a successful prenuptial agreement. It is agreed by all that PBM does have the capacity to enter into a prenuptial agreement. Having read Dr Layton's reports and heard his evidence, there can be no doubt that PBM understands the purpose of a prenuptial agreement and that, with the benefit of careful legal advice, he has the capacity to enter into such an agreement.
33. As set out above, the only contentious issue remaining in this case is whether PBM has capacity to decide whether he should be informed about the extent of his assets. I shall deal with that shortly, but it is obviously desirable (from the prenuptial agreement perspective) that he should know. I make it clear that this is not a reason for him to know or not since the test that I have to apply in relation to that issue is the test of capacity already set out above. However, it is hard to envisage how the disclosure consistent with a successful prenuptial agreement could take place without PBM knowing about the extent of his estate.
34. It is axiomatic that it would not be appropriate to tell MVA and not PBM, about the extent of PBM's assets. It is, in my judgement, inevitable that when MVA seeks legal advice, as she must, in respect of the prenuptial agreement, those advising her are going to want to know how much PBM is worth. Whilst I am not saying that would be impossible to have an effective prenuptial agreement without disclosure, it is clear, at least on the present state of the law, that full and frank financial disclosure is regarded as one of the key building blocks of a successful prenuptial agreement. In this regard I do not agree with the statement contained in paragraph 34 of Ms Fottrell's written submissions that "it is common ground and established law that PBM cannot enter into a PNA if he cannot disclose his assets to MVA". I would not go so far as to say that it would be impossible to have a valid prenuptial agreement without disclosure but certainly I agree that disclosure is generally regarded as being necessary. In discussion in court, Ms Fottrell accepted that she may have over stated things, but we are all agreed that, in a perfect world, full disclosure would form part of the negotiations necessary to a binding prenuptial agreement.
35. Dr Layton's evidence strongly supports PBM having capacity to enter into a prenuptial agreement. The Official Solicitor submits, and I accept, that PBM's discussions with Dr Layton clearly evidence his ability to understand, retain, use and weigh the information relevant to this decision, and there is clearly a recognition on PBM's part for a need for professional support in making such a decision. I therefore declare that PBM has capacity to enter into a prenuptial agreement. I accept the Official Solicitor's submission that there is nothing inconsistent in saying that PBM has capacity to make a decision about a prenuptial agreement but yet may lack capacity to manage his property and affairs generally on an ongoing basis. Understanding and negotiating (with advice) and entering in to a pre nuptial agreement is a one off event, albeit that the effect of the contract negotiated is always binding. Managing property and affairs

is not a single event, but a continuum.

Capacity to make a will

36. A statutory will authorised by the Court of Protection dated 1 June 2012 is in place. Marriage will revoke that will. An issue potentially arises in this case as to whether I should apply the MCA 2005 test or the common law principle arising from *Banks v Goodfellow* (1870) LR5 QB 549. However, Dr Layton's report shows that PBM clearly has testamentary capacity, irrespective of the precise test, and it is not therefore necessary for me to resolve the potential conflict between those two tests. The narrative description of PBM's discussions with Dr Layton on this issue clearly demonstrate that PBM has the ability to understand, retain, use and weigh the information relevant to the decision.

Capacity to manage his property and affairs

37. Although PBM makes it clear that he wishes to manage his property and affairs himself, no application is made at this stage to persuade me that PBM has capacity at the present time, to manage and administer his property and affairs. It has been agreed by all that further steps should be taken by the Deputy to assist PBM in developing the skills that he needs to manage his property and affairs. The steps will include:

- a. the provision of assistance from an occupational therapist to work with PBM on these issues;
- b. the provision to PBM of further opportunities to manage a household budget (not just day-to-day living expenses) for a period of time (it being recognised that PBM, in learning how to manage a budget, may make mistakes);
- c. the provision to PBM of information to assist in the task of managing a budget, such as the provision of a running cumulative totals showing how much within a given period has been spent/remains available.

38. The Deputy will work with PBM with a view to identifying a business (or equivalent) in which PBM can play a significant role, if necessary with support. The Official Solicitor asks me to make an order that would permit the Deputy, without having to revert to the court, to purchase freehold or leasehold land in England and Wales in PBM's name, provided of course that the Deputy is satisfied that the proposed purchase is at market value and in PBM's best interests. In the absence of any opposition, and based on all that I have seen and heard, I am happy to endorse the Official Solicitor's view and to make the order sought.

Disclosure of assets

39. The Official Solicitor's primary position is that if PBM has capacity to make a will and/or enter into a prenuptial agreement, he is entitled to sufficient information about his assets in order to make those decisions for himself. The Official Solicitor asks me to declare under section 15(1)(c)MCA 2005 that he has capacity to decide whether he should be told the extent of his assets.

40. Initially, Dr Layton concluded that PBM did not have capacity to enter into a prenuptial agreement but he changed his mind in his second report. Dr Layton addresses the question of whether PBM should know the extent of his assets. Dr Layton is of the view that PBM has capacity in the context of requiring knowledge of his assets in order to conclude a prenuptial agreement. Dr Layton maintained this view when questioned in writing.
41. The Deputy has concerns regarding PBM's welfare in the event that he has knowledge of his assets. The Deputy and the case manager, , have both raised issues as to PBM's financial vulnerability. Given how well they know PBM, and their long experience of working with him, their view is plainly of considerable importance. Dr Layton was keen to point out, however, the difference between lacking capacity and being vulnerable. Vulnerability is not enough to justify the withholding of the information.
42. I have been referred to the case of *EXB v FDZ and others* [2018] EWHC 3456 (QB) where Foskett J concluded that P should not be informed of the amount of a damages award. The judge's approach was to consider first, whether P had capacity to make a decision about whether he should be told the value of his award; and secondly, on the basis that he did not, whether disclosure would be in his best interests. The Official Solicitor, through Mr Rees QC, submits that the approach taken by Foskett J is artificial and should not be followed. Alternatively, says Mr Rees, this case should be distinguished as, in the instant case, disclosure of the information in question is required in order to enable PBM to take a decision which he has the necessary capacity to undertake (i.e. entering into a prenuptial agreement).
43. Mr Rees submits that a decision as to whether a person should be told about the value of his assets is a wholly artificial one. A capacitous person, he submits, does not ask themselves whether they should be made aware of the extent of their assets. If they do not have the relevant knowledge to hand, they have a right to obtain that information should they wish to obtain it.
44. Mr Rees asks me to go further still: he submits that where a person has capacity to take a decision and wishes to make that decision, that person must be entitled to any information belonging to them which they require to make that decision. I am not prepared to go so far as to say that Foskett J was wrong, nor am I prepared to say that I disagree with him. It is not necessary for me to do so for the purposes of this case. I do not accept that a valid prenuptial agreement *cannot* be made without knowledge of the value of one's assets. Accordingly, the premise of Mr Rees's submission falls away. I can readily envisage a situation where the judge could decide that somebody has the capacity to enter into a prenuptial agreement but does not have the capacity to know about the extent of their assets. I have already highlighted, above, the obvious disadvantages in this factual state of affairs which is, I suggest, one that we should strive to avoid if at all possible.
45. Moreover, and in any event, it is perfectly possible, as a matter of law, for me to conclude that PBM does not have the capacity to be informed of the extent of his assets but that, because of the curious exigencies of this case, namely the desire to enter into prenuptial agreement, he should be so informed. However, here we are striving into semantic realms when we do not need to tread.

46. In spite of the properly articulated argument on behalf of the Deputy, I have formed the clear conclusion, based on the evidence of Dr Layton as well as everything that I have read, that PBM does have the capacity to be informed about the extent of his assets. It is unnecessary for me to decide whether the test is whether PBM can decide whether he should ask about the extent of his assets or whether he should be told. To me this is bordering on a semantic absurdity. Plainly, the moment one is entitled to know about the extent of one's assets one is almost bound to make the enquiry. I do not think that the distinction is one which will burden people in the real world.
47. If, contrary to the above, I am incorrect in deciding the semantic issue discussed above, I am, in any event, satisfied that it is in PBM's best interest to be provided with the information. I say this because:
- a. the prenuptial agreement which I find that PBM needs to make will be less effective without the information. There is a risk, therefore, that failure to provide the information would deprive PBM of an opportunity to protect his assets in the event of marital breakdown.
 - b. PBM has expressed the clearest desire to enter into a prenuptial agreement and to make a will. His ability to effect these will be greatly enhanced by knowing about the extent of his assets.
 - c. PBM is already aware that he is worth a substantial amount. "Substantial" is a word that means different things to different people, but, as I suggested in discussion in court, it is possible that PBM thinks that he is worth more, rather than less, than the sum that he is actually worth.
 - d. The existence of the Deputyship has been an effective safeguard against financial abuse.
 - e. Disclosure accords with the principles of the MCA 2005 and with the principles laid down in the UN Convention of the Rights of Persons with Disabilities which include
 - i. respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
 - ii. non-discrimination;
 - iii. full and effective participation and inclusion in society.
48. When PBM is informed of the extent of his assets it is important that he is supported emotionally, as well as assisted to build and develop life skills.

The Social Services and Well-being Wales Act 2014

49. As stated above, I invited the LA to consider what, if any, duties it owes to PBM pursuant to the Social Services and Well-being Wales Act 2014 (henceforth "the Act"). For the chronological analysis that follows I express my sincere thanks to David Hughes, counsel for the LA.
50. S19 of the Act reads as follows:

19 Duty to assess the needs of an adult for care and support
(1) Where it appears to a local authority that an adult may have needs for care and support, the authority must assess—

- (a) whether the adult does have needs for care and support, and*
- (b) if the adult does, what those needs are.*
- (2) The duty under subsection (1) applies in relation to—*
 - (a) an adult who is ordinarily resident in the authority's area, and*
 - (b) any other adult who is within the authority's area.*
- (3) The duty under subsection (1) applies regardless of the local authority's view of—*
 - (a) the level of the adult's needs for care and support, or*
 - (b) the level of the adult's financial resources.*
- (4) In carrying out a needs assessment under this section, the local authority must—*
 - (a) seek to identify the outcomes that the adult wishes to achieve in day to day life,*
 - (b) assess whether, and if so, to what extent, the provision of—*
 - (i) care and support,*
 - (ii) preventative services, or*
 - (iii) information, advice or assistance,**could contribute to the achievement of those outcomes or otherwise meet needs identified by the assessment, and*
 - (c) assess whether, and if so, to what extent, other matters could contribute to the achievement of those outcomes or otherwise meet those needs.*
- (5) A local authority, in carrying out a needs assessment under this section, must involve—*
 - (a) the adult, and*
 - (b) where feasible, any carer that the adult has.*
- (6) The nature of the needs assessment required by this section is one that the local authority considers proportionate in the circumstances, subject to any requirement in regulations under [section 30](#).*

51. S126 reads as follows:

126 Adults at risk

- (1) An “adult at risk”, for the purposes of this Part, is an adult who—*
 - (a) is experiencing or is at risk of abuse or neglect,*
 - (b) has needs for care and support (whether or not the authority is meeting any of those needs), and*
 - (c) as a result of those needs is unable to protect himself or herself against the abuse or neglect or the risk of it.*
- (2) If a local authority has reasonable cause to suspect that a person within its area (whether or not ordinarily resident there) is an adult at risk, it must—*
 - (a) make (or cause to be made) whatever enquiries it thinks necessary to enable it to decide whether any action should be taken (whether under this Act or otherwise) and, if so, what and by whom, and*
 - (b) decide whether any such action should be taken.*
- (3) Regulations made under [section 54\(5\)](#) (care and support plans) must include provision about recording in a care and support plan the conclusions of enquiries made under this section.*

“Sustainable Social Services for Wales: a Framework for Action”

52. The 2014 Act was preceded by a White Paper, “Sustainable Social Services for Wales: a Framework for Action¹”, published in 2011. The White Paper identified a number of principles that would guide it, of which the following are perhaps most relevant to PBM’s position:

• ***A strong voice and real control***

We all expect to make our own decisions and control our own lives. Children and young people have a right to be heard and to have a significant say in matters that affect them. We will support and strengthen people’s ability to contribute as individuals within their own networks and communities. We will provide help to make people’s voices strong and clear. We will actively listen and act on what we have heard.

...

• ***Safety***

We all, whether young or older, have a right to be protected from avoidable harm and from neglect.

...

• ***Recovery and restoration***

When we face a difficulty, whether as children, young people or adults, we very often look for support that enables us to return to living in the way that we choose.

...

• ***Stability***

We all need stability to grow and develop, and this is especially true of children. Any support we provide must therefore maximise this.

• ***Simplicity***

We all need to know how to find out about getting help in the most straightforward way possible.

• ***Professionalism***

We all expect professionals who work with us to be competent, confident and safe.

The Social Services and Well-being (Wales) Bill (as introduced)

53. The Bill that became the Act, when introduced into the Assembly, was accompanied by an Explanatory Memorandum (“EM”). The Bill was said to provide “...*the statutory framework to deliver the Welsh Government’s commitment to integrate social services to support people of all ages, and support people as part of families and communities*”.

54. The purpose and intended effect of the Bill were dealt with in Part 1.3 of the EM:

The purpose of the Social Services and Well-being (Wales) Bill (‘the Bill’) is to specify the core legislative framework for social services and social care in Wales. It gives effect to the policy stated in the White Paper Sustainable Social Services for Wales: A Framework for Action.

55. The EM later states that:

The Welsh Government’s primary policy objectives in relation to the Bill are to:
a. improve the well-being outcomes for people who need care and support and carers who need support; and

¹ <https://gov.wales/docs/dhss/publications/110216frameworken.pdf>

b. to reform social services law.

The Welsh Government intends to achieve these objectives through:

- a. simplifying the web of legislation that currently regulates social care in Wales;*
- b. providing people with a stronger voice and greater control over services they receive;*
- c. ensuring people receive the help they need to live fulfilled lives; and*
- d. stronger national direction with clear local accountability for delivery.*

56. The EM recognises that the Bill would expand the duties of local authorities and health boards, saying:

The Bill affords enhanced duties on local authorities and Local Health Boards to take steps to prevent and reduce the needs for care and support of people in their area. These “preventative” services would be available not only to people who are currently eligible to receive social care services – provided to a cohort of around 150,000 to 200,000 – but also potentially to the population of 3 million in Wales. It also introduces for the first time a statutory framework for the protection of ‘Adults at Risk’ and simplifies the current Safeguarding Board arrangements.In addition, the Bill will strengthen collaboration, provide a framework for integration of key services (to be specified by Welsh Ministers) and place new duties on local authorities, LHBs and other public bodies to improve the well-being of people (at population and individual level) with care and support needs. It also provides for Ministers to prescribe a new national outcomes framework and to intervene in the exercise of social services functions by a local authority following the issue of a warning notice.

57. The EM distinguishes the Bill’s approach – to look at individuals as people and try to align arrangements and processes from that taken by legislation elsewhere – from that taken by legislation elsewhere, which looks at different groups differently:

In contrast to the Department of Health’s draft Care and Support Bill, the Welsh Bill will cover social care services for children, adults and their carers and will, as far as it is possible, integrate and align arrangements so that there is a common set of processes, for people. The Bill will also, with the exception of provisions for portability, provide equivalent rights for carers, putting them on a similar legal footing as the people they care for. All other UK statutes continue to treat these groups of people separately.

58. The EM goes on to identify the Bill as providing for

- (a) An over-arching duty to promote well-being in their areas, on persons exercising functions under the Bill;
- (b) A duty on local authorities to gain a better understanding of the needs of their population that is in need of care and support, and of carers in need of support;
- (c) A duty on local authorities to provide information about the services available locally, how the care and support system works, and how to access services;

- (d) An individual right to assessment for persons appearing to be in need of care and support, and a similar duty re carers;
- (e) A single duty to meet eligible needs;
- (f) A duty to provide, and keep under review, care and support plans.

59. The EM identifies, insofar as safeguarding is concerned, the following;

Although protecting adults from abuse and neglect has been a priority for local authorities for many years, there has never been a legal framework for adult safeguarding. This has led to an unclear picture as to the roles and responsibilities of individuals and organisations working in adult safeguarding. New legislation is needed to provide a clear framework for organisations and to set out their responsibilities for adult safeguarding. 63. The provisions in this part of the Bill will require local authorities to make enquiries, or to ask others to make enquiries, where they reasonably suspect that an adult in their area with care and support needs is at risk of abuse or neglect. The purpose of the enquiry is to establish what, if any, action is required in relation to the case. 64. The Bill also provides for authorised officers of a local authority to apply to the court for an “adult protection and support order”. Such an order will confer a power of entry to facilitate practitioners in speaking to an adult suspected of being at risk in private and enable them to ascertain whether that person is making decisions freely.

60. The EM is relatively brief about clause 10. It says that, where it appears to a local authority that an adult may have needs for care and support, the LA has a duty to assess whether the adult has those needs and, if so, what the needs are. It goes on to say that the assessment is to be focussed on the outcomes the adult wishes to achieve in his or her daily life and the extent to which the provision of care and support contributes to those outcomes.
61. The duty to assess the needs of an adult are found in clause 16 of the amended Bill. There was a revised EM issued, which addressed clause 16 at para 244. It does not materially differ from the earlier EM. Adults at risk are dealt with in clause 116 of the amended Bill. The EM deals with it at paras 441-444.
62. The Local Authority has filed and served a statement by PBM’s allocated social worker, dated 4 January 2019. In her statement, she sets out her involvement on behalf of the Local Authority. She sets out that she considers that, although she is not clear why PBM needs the level of care package that he has, his needs are “*without question*” being met by the current package of care and support.
63. There is also an assessment, completed on 3 January 2019. The assessment records that it is for the purpose of considering what needs for care and support PBM has, and how those can best be met. The assessment records PBM’s apparent resentment of the care package that he currently has, which he views as unnecessary and, it would seem unduly limiting on him. He wants to be able to manage his own finances (despite difficulty sticking to what would appear to be a not ungenerous income for daily expenses), saying that he would engage with support services to help him to do so.

64. The assessment notes that PBM distrusts social services. It is based on the premise that he has been subject to financial abuse. It concludes that PBM is able to recognise some vulnerability, and take some steps to protect himself, but that, were he to have control over all his finances, the risk of exploitation would increase significantly.
65. The assessment records that there is an ongoing safeguarding investigation. It records also that there are no care and support needs to be met by the LA.
66. Considering the above with s19, the LA's position is that it has assessed PBM's needs, as required by s19(1). It has identified the outcomes that PBM wishes to achieve in day-to-day life, and has concluded that there is nothing additional that could be done to contribute to achieving those outcomes (principally control of his own finances, and the ability to take decisions that flow from that) or otherwise meet his needs. Put simply, the LA asserts that his needs are being met (indeed, possibly exceeded) by his current package.
67. The LA has accepted that it owes a duty under s126, and whilst it would say that it has complied with its s126(2)(a) – PBM's allocated social worker has considered whether any action should be taken, and has determined that the deputy arrangement in place is sufficient and should continue – it accepts that its compliance with its s126(2) duty could be more robust². Mr Hughes has assured the court that the need for this to be so will be communicated to the relevant staff, and the LA has apologised to all parties, and the Court, for the lack of robustness in this to date. The LA has agreed to prepare a statement setting out the way in which it will more robustly comply with its s126(2) obligations.
68. The LA has emphasised that it is not seeking to wash its hands of its duties towards PBM. It takes the view that PBM's needs are being met by his current arrangements. I agree. The LA has said that it will review its position in the light of any new information it receives, or any representations made by PBM or his representatives.
69. I end by expressing the sincere hope that PBM's life will continue to improve and that he and MVA will have the successful marriage that they both wish for and deserve.

² And that the consideration should have directly referenced the s126 obligations.