

Neutral Citation No: [2022] NIFam 29	Ref: McF11941
<i>Judgment: approved by the court for handing down (subject to editorial corrections)*</i>	Ref No: 2021 No 1202
	Delivered: 28/09/2022

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

BC

Appellant

-v-

**CARMEL McGILLOWAY
(as Controller of a patient)**

Respondent

and

CD and DE

Intervenors

**The appellant appeared in person
Mr T Warnock BL (instructed by the Brendan Kearney & Co) appeared for the
Respondent
The intervenors appeared in person**

McFARLAND J

Introduction

[1] This is an appeal by BC under Order 109 Rule 49 of the Rules of the Court of Judicature (“the Rules”) against an order of Master Wells of 6 June 2022 whereby she appointed Carmel McGilloway, a solicitor in private practice, as the controller of the affairs of a 77 year old lady. I will refer to Carmel McGilloway as “the Controller” and the 77 year old lady as “the patient.” BC is a daughter of the patient and she desired to be appointed as controller. She contested the matter before Master Wells and has now appealed the order. CD and DE are her siblings and they submitted

skeleton arguments supporting the order and the appointment of the Controller. A fourth sibling, a brother, did not participate in the appeal hearing although he had made submissions before Master Wells in support of BC's application. After the conclusion of the hearing but before I delivered this judgment I received written submissions from this brother which again set out his reasons for supporting his sister. The parties to the appeal and the intervenors have not had an opportunity to see these submissions, but they basically repeat what was submitted before Master Wells, and to avoid delay I decided not to seek any responses from the parties and the intervenors. I have taken this brother's submissions into account in reaching my decision.

[2] At the hearing before me on 22 September 2022, BC appeared with Brenda Harkin, and applied that she be given 'McKenzie Friend' status. There was no objection to this application and notwithstanding a failure to apply before the hearing of the appeal, the application was granted.

[3] I have anonymised this judgment to protect the privacy of the patient.

Background

[4] It is common case that the patient is incapable of managing her affairs by reason of mental disorder. Her income, expenditure and assets are on a relatively modest scale, with an income of approximately £9,200 per annum (state pension and pension credit) and cash assets of about £20,500 (in four bank accounts). There is also a half-interest in the family home. The interest is valued at £70,000. The other half is owned by BC, it having been transferred to her as a gift by her father, the husband of the patient. There is also a potential amount in the region of £10,000 which may be due to the mother by BC being money received by BC but not properly accounted for. This is the subject of significant dispute as far as BC is concerned and I will deal with that in more detail below.

[5] Although the assets exceed the figure of £5,000 referred to in Order 109 Rule 5(1)(a) of the Rules, this case had the potential to be dealt with under the Short Procedure under Rule 5(1)(b) if there had not been the underlying difficulties highlighted by this appeal.

[6] On 4 November 2021 Master Wells exercising her powers under Order 109 Rule 38 of the Rules appointed the Controller as interim controller.

[7] The matter then came on for full hearing before Master Wells on 6 June 2022. BC's solicitors and counsel applied to come off record and this was permitted by Master Wells. The hearing then proceeded with Master Wells hearing submissions from BC, CD and DE as well as from counsel for the Controller. Master Wells also heard from another sibling who supported BC's application.

[8] The order of Master Wells contained her reasoning for rejecting BC's application, and in particular she stated at paragraphs [2] – [6] the following:

"2. In light of the delay and legal costs already incurred, and the Court having made it clear that its task today is not to adjudicate on disputed credibility issues, and the only issue to be determined today is who should be appointed as Controller, the Court shall proceed with determining the appointment of the Controller.

3. The Court is satisfied that [BC] has been given a fair Trial as the matter has been ongoing since July 2021, and the Court has heard from [BC] today.

4. The appointment of Controller is in any event kept under review by the Office of Care and Protection as there is an Annual Review Process; in addition, the Controller's appointment will be reviewed when the outcome of Resolution Discussions or County Court Proceedings in respect of disputed credibility issues are made known to the Office of Care and Protection.

5. [BC]'s application to be appointed as her Mother's (the Patient's) Controller is refused for the following reasons:

- (a) [BC] is holding Social Security Benefit money belonging to the Patient which she has refused to refund or surrender to offset the Patient's nursing charges, despite requests from the Western Health & Social Care Trust and from Carmel McGilloway, Solicitor in her role as Controller;
- (b) There are credibility issues in respect of [BC] which fall outside the jurisdiction of this Court to determine, and until those issues are determined by a suitable Court or resolved by way of resolution so as to avoid further legal costs, it would not be appropriate to appoint [BC] as Controller;
- (c) There is a related Adult Safeguarding issue to be investigated by the Western Health & Social Care Trust.

6. In all of the circumstances of this Case, and to avoid further legal costs being incurred in respect of choice of appointment of Controller, the Court shall appoint Carmel McGilloway as Controller.”

The reference to “adult safeguarding” issues refers to financial safeguarding issues.

The Law

[9] The provisions of Part VIII of the Mental Health (NI) Order 1986 and Order 109 of the Rules deal with how the court should deal with the affairs of patients. A wide discretion is vested in the Master in exercising the High Court’s function. That function includes a power to do such things as appear necessary or expedient to administer a patient’s affairs (Article 98(1) and Article 99) including a power to appoint a controller (Article 101(1)). Article 98(2) provides that in exercising these powers “regard shall be had first of all to the requirements of the patient.”

[10] Some guidance has been given in the case-law from England in respect of similar powers in that jurisdiction. This case-law relates to the provisions of the Mental Capacity Act 2005 and the appointment of “deputies.” A property and financial affairs deputy in England would fulfil a similar role to a controller in Northern Ireland.

[11] Hedley J in *Re P* [2010] EWHC 1592 gave some useful guidance as to how a court should approach its task:

At [7] he stated:

“It is accepted that, whether it be the court or whether it be a deputy, any decision made on behalf of a person lacking capacity, must be made in his best interests.”

And then at [8] and [9]:

“[8] ... [O]rdinarily, the court will appoint deputies where it feels confident that it can. It is perhaps important to take one step further back even than that, and for the court to remind itself that in a society structured as is ours, it is not the State, whether through the agency of an authority or the court, which is primarily responsible for individuals who are subjects or citizens of the State. It is for those who naturally have their care and wellbeing at heart, that is to say, members of the family, where they are willing and able to do so, to take first place in the care and upbringing, not only of children, but of those whose needs, because of disability, extend far into adulthood. It

seems to me at least that the Act ought to be read subject to that overriding policy aim.

[9] Therefore, the court ought to start from the position that, where family members offer themselves as deputies, then, in the absence of family dispute or other evidence that raises queries as to their willingness or capacity to carry out those functions, the court ought to approach such an application with considerable openness and sympathy. Therefore, it is probably helpful to consider what it is that has resulted in the decision of the court being sought.”

[12] Senior Judge Lush sitting in the Court of Protection in *Re AS* [2013] COPLR 29 offered further guidance, referring at [21] to the exercise of the court’s discretion when appointing a deputy which must be exercised judicially and in a patient’s best interests. He acknowledged that there was a general order of preference of persons who might be considered suitable for appointment. Although there was a discretion, traditionally the court preferred relatives to strangers. At [22] Judge Lush set out an order of preference:

“P's spouse or partner;

Any other relative who takes a personal interest in P's affairs

A close friend;

A professional adviser, such as the family's solicitor or accountant;

A local authority's social services department; and finally

A panel deputy, as deputy of last resort.”

[13] Echoing the sentiments of Hedley J in *Re P*, Judge Lush at [24] offered reasons why a family member should be preferred:

“The court prefers to appoint a family member or close friend, if it is possible. This is because a relative or friend will already be familiar with P's affairs, and wishes and methods of communication. Someone who already has a close personal knowledge of P is also likely to be better able to meet the obligation of a deputy to consult with P, and to permit and encourage him to participate, or to improve his ability to participate, as fully as possible in

any act done for him and any decision affecting him. And, because professionals charge for their services, the appointment of a relative or friend is generally preferred for reasons of economy.”

But at [26] he explained why in certain circumstances family members may not be preferred:

“There are, of course, cases in which the court would not countenance appointing a family member as deputy. For example, if there has been financial abuse or some other kind of abuse; if there is a conflict of interests; if the proposed deputy has an unsatisfactory track record in managing his own financial affairs; and if there is ongoing friction between various family members. This list is not exhaustive.”

[14] In summary, this is a “best interests” decision by the Master exercising judicial discretion. The process should take into account all the circumstances of a particular case. The decision is to be made in the best interests of the patient and not the controller. Family members, or in their absence, close friends are to be preferred because of their familiarity with the wishes and needs of the patient and to reduce the costs associated with any controllership. However, certain family members and friends may be unsuitable by reason of their temperament, lack of ability to manage the affairs of the patient, or, in extreme cases, having abused the patient in the past. A conflict of interest would, in most cases, also render a family member or friend unsuitable for appointment. A dispute between family members is also likely to raise significant doubts concerning the appointment of those family members.

Discussion

[15] BC has focussed her appeal on what she considers is an attack on her credibility. She appears to have pursued this appeal in an effort to take steps to ‘clear her name’ as she perceives that she has been wronged. She has accepted that during a period between March 2021 and October 2021 she received on behalf of the patient, the patient’s state pension. This amounted to approximately £4,800. The Controller has considered BC’s explanation as to how she has dealt with that money. BC asserts that it was expended by her for the patient’s benefit, however that assertion has not been tested.

[16] In addition, there is a question of the management of a bank account in the name of the patient and her husband. This is a joint account so, in the absence of evidence to the contrary is owned on a 50:50 basis. BC has been operating this account through the use of her father’s card which she says has been with his full permission. The bank statements reveal that significant cash withdrawals have been made together with debit card payments to various shops. Again, BC asserts that

this was all done with the permission of her father and any withdrawal has been for his benefit. Obviously, the patient would have been unable to give any permission. Again, these assertions have not been tested.

[17] Master Wells, quite correctly, declined to make any ruling on this issue as that would have been beyond her powers. In her judgment she made specific reference to this. She said she was not making a ruling on disputed credibility and that she was regarding the appointment of the Controller as being subject to review once the credibility issue had been resolved (either by a settlement or by a court order). The evidence placed before the court is that there is a sum in the region of £10,000 which is being regarded as not properly accounted for. Counsel had been instructed and advice had been given to the Controller that she should issue proceedings on behalf of the patient against BC for money received. That will be a county court action, and a judge in that court will determine whether all the money received and used by BC has been properly accounted for. If it has not, then it is likely that BC will be ordered to pay that sum to the Controller.

[18] Although Master Wells did not specifically refer to a conflict of interest it was no doubt in her mind as such a conflict is obvious. There is an opinion of counsel that proceedings should be issued by the Controller against BC and those proceedings are imminent. I was told that the only reason for the delay is this appeal. It would be impossible for BC to act as the patient's controller to conduct proceedings against herself for recovery of money. I posed the question to BC at the hearing as to how she would conduct those proceedings against herself and she was unable to give any answer. There is, of course, no answer. It is a classic example of a conflict of interest.

[19] Master Wells also did not specifically refer to the dispute between the siblings but again it would have been clearly obvious to her having heard from all four siblings each of whom had taken the trouble to participate at the hearing. Essentially there is an even split in the sibling group, with BC and one brother against another brother and a sister.

[20] BC's appeal is misconceived. It appears to be an attempt to further her own case in respect of what appear to be deep-seated and ongoing disputes with the Trust and with her brother DE with possible background complaints concerning legal advice that she has received. Whilst the background to these disputes involve the patient, and to an extent the patient's financial affairs, they are not directly related to the issue that was before Master Wells. That issue was to determine who should be appointed as a controller who would serve the best interests of the patient.

[21] This was a discretionary decision. A family member could well have been the preferred appointment. Given the modest nature of the patient's cash assets and income, the appointment of a professional person was always going to require close scrutiny given the obvious burden of costs that would be placed on the assets. However, it would have been inconceivable to appoint BC as she is about to sue

based on allegations that she was not accounting for money received on behalf of the patient. In addition to this obvious conflict of interest which precluded any serious consideration of BC as a controller, the family split would have rendered none of the children as suitable for appointment. The stark reality facing Master Wells was a situation requiring reasonably urgent attention to bring the financial affairs of the patient under control and resolve a debt owing for nursing home fees but with no obvious family member or friend that could be considered for appointment. No issue is taken with the suitability, competence and independence of the Controller, and in the absence of a family member or friend, this was an appointment well within the discretion of the Master.

[22] In the circumstances BC's appeal is dismissed.

[23] I will hear the parties on the issue of the costs of this appeal.